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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No. : 1337/1/12/19

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9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

Monday 5 October 2020

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15 Before:  
16 **THE HONOURABLE MR JUSTIC MORGAN**  
17 (Chairman)  
18 **EAMONN DORAN**  
19 **SIR IAIN MCMILLAN CBE FRSE DL**  
20 (Sitting as a Tribunal in England and Wales)

21  
22  
23 **BETWEEN:**

24  
25 **FP McCANN LIMITED**

Appellant

26  
27 v

28  
29 **COMPETITION AND MARKETS AUTHORITY**

Respondent

30  
31 and

32  
33  
34 **(1) EOIN McCANN**  
35 **(2) FRANCIS McCANN**

Interveners

36  
37  
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40 **A P P E A R A N C E S**

41  
42 Mr Robert O'Donoghue QC and Mr Richard Howell (On behalf of FP McCann)  
43 Mr Rob Williams QC and Mr Tristan Jones (On behalf of the CMA)

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(11.30 am)

(Housekeeping)

**MR JUSTICE MORGAN:** It is 11.30. The Panel are in the hearing room virtually and can I see Mr O'Donoghue and Mr Williams. Can I just confirm that everyone who wishes to participate insofar as we can tell is able to do so, so that we will be able to get under way? Can I start with Mr O'Donoghue, just to confirm, you are able to participate and as far as you are aware, your side of the case is able to participate? Can you help me on that?

**MR O'DONOGHUE:** My Lord, good morning. I think the answer is yes. Mr Howell is right here with me here in my room so I can certainly vouch for him and the Pinsent Masons team and a representative of the client are also attending the hearing, as I understand it.

**MR JUSTICE MORGAN:** Before I go to Mr Williams, can I just say, Mr O'Donoghue, that I can see you and I am sure everyone can see you. I find your microphone slightly muffled. Whether that is distance of the microphone or something else, could you just say something again a bit nearer the microphone?

**MR O'DONOGHUE:** My Lord, is that better?

**MR JUSTICE MORGAN:** Yes, yes. You are a bit of a way down a tunnel in terms of sound effect, but we will see how we go, Mr O'Donoghue. Perhaps since I have raised that point, can you confirm you can hear me?

**MR O'DONOGHUE:** My Lord, yes, loud and clear.

**MR JUSTICE MORGAN:** Right. Turning to Mr Williams: I can see you, Mr Williams, and you can confirm first that you are able to participate and insofar as you

1 are aware, everyone on your side of the case is able to participate. Can you  
2 just confirm that?

3 **MR WILLIAMS:** Yes, Sir. I can participate. I am here with my junior, Mr Jones, and  
4 my instructing solicitor, and various other CMA representatives participating  
5 remotely. If I can add, I am also finding it quite difficult to make out what  
6 Mr O'Donoghue is saying. I can hear what he is saying, but it is quite difficult  
7 to make out.

8 **MR JUSTICE MORGAN:** Yes. Mr O'Donoghue has heard that.

9 **MR O'DONOGHUE:** My Lord, I am in the process of trying to replace my camera  
10 and mic to see if that helps.

11 **MR JUSTICE MORGAN:** Actually, your sound quality has got worse, if anything.

12 **MR O'DONOGHUE:** Yes.

13 **MR JUSTICE MORGAN:** Obviously the video of you is just a small part of the  
14 screen. If one maximises your video, does that give us an improved sound  
15 quality? Let me try that. I am going to click on you to see if I can -- all I have  
16 done is remove you.

17 When we get under way listening to opening submissions, we will see if we have  
18 a continuing problem.

19 Before we go to the next stage, can I just say something about the disruption there  
20 has been to the first day of the hearing. I have already given my apologies to  
21 my fellow Panel members. It is not something I have done for which I am to  
22 blame but it is, I am afraid, the consequence of the self-isolation rules that  
23 I have been constrained to stay away from the Tribunal building and indeed  
24 from a train journey to London.

25 Today, I hoped the message got through to you that a judicial colleague of mine with  
26 whom I was in contact on Wednesday has had Covid symptoms and has had

1 a test. We are hoping to hear the result of the test this morning. If the test is  
2 negative -- I make no predictions, but I am hopeful it will be -- there is no need  
3 for me to self-isolate and cause any further problem. If the test is positive,  
4 then I will have to self-isolate, as I understand it, and we will have to discuss  
5 the next days of the hearing. I won't discuss them yet, it is premature and  
6 I hope unnecessary.

7 But I do regret very much that everyone had this dumped upon them on a Sunday  
8 evening and you have had to make alternative arrangements this morning and  
9 we have lost an hour of the hearing. That is my personal statement, if you  
10 like, about where we find ourselves.

11 Subject to that, I do not think there is very much for me to say before I hear the  
12 Parties. I have the documents and the authorities virtually and indeed I have  
13 what I think are the important documents in hard copy as well. We also all  
14 three members have skeletons and we have read those, and so we are aware  
15 of the points which are being taken and the detailed arguments, although we  
16 will plainly visit those detailed arguments in the course of the hearing.

17 I think unless someone wants to suggest another course, I will invite Mr O'Donoghue  
18 to open the appeal and no doubt he will want to raise the question of  
19 housekeeping and timetable for today's hearing at the beginning of his  
20 remarks.

21 I will now not say anything and invite Mr O'Donoghue to open his appeal.

22 **MR O'DONOGHUE:** My Lord, before I do that, I think there was some  
23 correspondence this morning from the CMA on David Williams. Perhaps we  
24 could hear from Mr Williams on that.

25 **MR WILLIAMS:** Sir, yes. Yesterday afternoon/early evening, Mr Williams was in  
26 contact with the CMA, although the CMA did not actually see the

1 correspondence until very late last night. Mr Williams has been feeling unwell  
2 over the weekend and I infer had symptoms which he identified as potentially  
3 Covid symptoms. He has taken a test and is waiting for the result of that test,  
4 which he is anticipating getting on Wednesday.

5 As things stand, he thinks he will be in a position to give his evidence remotely  
6 tomorrow, although I understand he is not very well and the CMA does think  
7 that the position needs to be kept under review during the course of today and  
8 we will try to find out more towards the end of the day so we can let  
9 the Tribunal know what the position is and whether there is any change.

10 As soon as I became aware of this, this morning, I told Mr O'Donoghue, and I think  
11 there was also a parallel communication between the CMA and Pinsent  
12 Masons. We did think about contacting the Tribunal straight away, I am not  
13 sure whether we did that, but my own view was that actually rather than fire  
14 correspondence off and try and raise it remotely with you --

15 **MR JUSTICE MORGAN:** I was told there might be a difficulty of this kind, so you  
16 must have told the Tribunal who then passed the information to me.

17 **MR WILLIAMS:** That is the position as far as Mr Williams is concerned.  
18 The Tribunal will recall that Mr Mulholland is due to give his evidence  
19 tomorrow and he intends to travel from Northern Ireland later in the day,  
20 I understand.

21 I indicated to Mr O'Donoghue this morning that given there is some uncertainty about  
22 whether the hearing tomorrow will be a physical hearing or a remote hearing,  
23 we would be content for our part to cross-examine Mr Mulholland remotely  
24 rather than have him wait for a further indication during the course of the day,  
25 but that is of course subject to the Tribunal's view on that issue.

26 We put it in that way because at an earlier stage, we indicated our preference was to

1 cross-examine him in person, and in an ideal world, that would still be our  
2 position. But we recognise it is a developing picture, he does have to travel  
3 some distance, and we don't expect it would be a lengthy cross-examination.  
4 That is our position on Mr Mulholland as things stand, but as I say, it is of  
5 course subject to what the Tribunal thinks about that issue.

6 **MR JUSTICE MORGAN:** Right. Well, so far as Mr David Williams is concerned,  
7 I think we can only wait and see, and I think you are saying he is expecting to  
8 give evidence remotely tomorrow, and I do not have any reasons of my own  
9 and I will hear my colleagues' views in a moment, but we simply will live with  
10 whatever that situation is tomorrow.

11 As for Mr Mulholland, you have summarised the attitude of the CMA previously and  
12 you have told us the up-to-date position. Again, subject to my colleagues'  
13 views, I think I am minded to accept that and not require anything further to be  
14 done. I do not think the Panel needs to retire to discuss this. Let me see if  
15 Mr Doran or Sir Iain want to do anything other than go with the suggestions  
16 you are making about first Mr Williams and second Mr Mulholland.

17 Can I ask Mr Doran and Sir Iain to indicate if they have concerns about that, which  
18 the Panel needs to discuss, or whether we will simply continue in the hearing  
19 room?

20 **MR DORAN:** I have no concerns at all.

21 **SIR IAIN:** I have no concerns either.

22 **MR JUSTICE MORGAN:** Right, there you are. Mr Williams, you have told us about  
23 your witnesses and we will watch this space and make as much progress as  
24 we are able in the way you describe.

25 **MR WILLIAMS:** For completeness, I should say if the hearing tomorrow is a  
26 physical hearing, then Dr Grenfell is ready to attend the Tribunal in person.

1 **MR JUSTICE MORGAN:** Right. I am still hoping that we will be having a hearing in  
2 person, a hybrid hearing with others viewing it but not attending, but the main  
3 participants attending.

4 I have just checked my e-mails to see if I had had any information about my  
5 colleague's test and there is no information yet that I have seen. Does that  
6 allow us to then return to Mr O'Donoghue?

7 **MR O'DONOGHUE:** My Lord, I have changed camera, I don't know if that helps or  
8 makes it worse or is just as bad.

9 **MR JUSTICE MORGAN:** No, it is a help. In fact, I have lost your picture for some  
10 reason but I can hear you and I can hear you more clearly. I will just see if  
11 I can go on more options. (Pause).

12 **MR O'DONOGHUE:** Can you see me now?

13 **MR JUSTICE MORGAN:** I hope I am now back. I think in twiddling with  
14 Mr O'Donoghue's picture, I may have paused my own. Mr O'Donoghue, I do  
15 not have you on video but I can hear you and I could hear you better than  
16 before, so let us continue.

17 **MR O'DONOGHUE:** My Lord, if you could bear with me for one minute, I think if I  
18 restart my computer, everything should function. If I could do that and I'll be  
19 back in one minute, if that's okay.

20 **MR JUSTICE MORGAN:** Yes, it is. (Pause).

21 **MR O'DONOGHUE:** My Lord, I hope that is better.

22 **MR JUSTICE MORGAN:** Yes, I can see and hear you and the sound quality  
23 appears to be satisfactory.

24 Right, it has taken a bit of time, but I think we are now ready to hear what you wish to  
25 tell us in support of the appeal, thank you.

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

1 My Lord, in relation to Mr Mulholland, I am very grateful for Mr Williams's intervention  
2 because Mr Mulholland has not left Northern Ireland yet so the indication is of  
3 practical assistance. In relation to Mr David Williams, obviously from our  
4 perspective he is an important witness because he is the CMA's only witness  
5 on implementation, so it is obviously an evolving situation. If we are in person  
6 tomorrow, we would ideally have liked to, of course, cross-examine him in  
7 person.

8 One possibility which I have not discussed with Mr Williams, the indication in  
9 Mr David Williams's e-mail is that he had the test on Sunday and should have  
10 results back not later than Wednesday. So one possibility which perhaps we  
11 can park for now is we would bring back Mr Williams only on Thursday if his  
12 evidence is to be in person. Because, my Lord, one of the practical difficulties  
13 is that Mr David Williams, as I understand it, lives in Wrexham and in terms of  
14 his access to the trial bundle, obviously this was meant to be a hybrid hearing  
15 so we had assumed he could be given a hard copy. I don't know what  
16 arrangements have been made or can be made in relation to him having  
17 a copy of the trial bundle, I have not spoken to Mr Williams about that.

18 So there are some practical issues that are not trivial that may need to be  
19 addressed, if I can put it that way.

20 **MR JUSTICE MORGAN:** I think all I need to say on behalf of the Tribunal is that the  
21 Parties should discuss this and come to an arrangement with which they are  
22 both prepared to adopt. If the Parties agree something, I don't foresee that  
23 the Tribunal will cause any difficulties of its own. In other words, the Tribunal  
24 will want to facilitate giving effect to that agreement, so I will not give  
25 directions as to what is to happen. Too much is unknown, but we will fall in,  
26 I expect, with whatever the Parties ask us to do.



1 **MR O'DONOGHUE:** My Lord, I am very grateful. We will deal with that as it  
2 evolves.

3 **MR JUSTICE MORGAN:** Thank you.

4 **MR O'DONOGHUE:** My Lord, I suppose I had better introduce the cast for the  
5 record. I appear with Mr Howell for FP McCann, instructed by Pinsent  
6 Masons; Mr Rob Williams and Tristan Jones for CMA, instructed by CMA  
7 Legal.

8 **MR JUSTICE MORGAN:** Yes.

9 **MR O'DONOGHUE:** My Lord, in terms of the trajectory, obviously we have lost the  
10 guts of an hour and a half this morning, partially on my account, I might add.  
11 I haven't discussed this with Mr Williams, but I apprehend that there will be  
12 some spillover effect into tomorrow in that the period allocated for opening  
13 submissions may to some extent need to spill in to the morning. I don't know  
14 if the Tribunal has any particular difficulties with that, but I said I would raise it.

15 **MR JUSTICE MORGAN:** We have to hear what both of you want to say and we are  
16 not going to think about guillotining at this stage and we would be very  
17 concerned that each side had equality in terms of time available. If we spend  
18 some time tomorrow finishing these opening remarks before we have the  
19 evidence, it is not the end of the world. There is no imperative that we have  
20 the end of the submissions today.

21 In terms of timing overall, maybe we can discuss the timetable today, but we might at  
22 some point discuss the timetable for the following days and whether we  
23 should begin at 10.00 and sit until 5.00 each day, just to give us a little bit  
24 more space. Something will depend on what you and Mr Williams think about  
25 the current time estimate, particularly with a delayed start today.

26 But we don't have to resolve that immediately. Perhaps all we need to talk about is

1 the timetable for today and then crack on, making as much progress as we  
2 can today? Can I just ask: Is this a case where we will need to have  
3 a five-minute break or a ten minute break for a shorthand writer?

4 **MR O'DONOGHUE:** My Lord, we are in their hands. I assume so.

5 **MR JUSTICE MORGAN:** I suppose the question is: Is there a transcript being  
6 taken, an overnight transcript being taken? It sounds like yes, in which case  
7 the routine response is to give the shorthand writer/transcriber, whatever  
8 methods used, at least a five-minute break during a normal hearing session.  
9 We won't have one this morning because we are delayed, but we would have  
10 a five-minute break mid-afternoon, and mid-afternoon will depend on what  
11 time we finish at. I think I am inclined to sit to 5.00 today to see if that helps,  
12 in which case mid-afternoon would be 3.30 pm.

13 What I am proposing, but I will hear what people say, is we sit now till 1.00, we have  
14 the usual one-hour break for lunch; we resume at 2.00, we have a five to  
15 ten-minute break at 3.30, and we aim to finish at 5.00. Does anyone have  
16 a difficulty of any kind working to that timetable?

17 **MR O'DONOGHUE:** My Lord, no.

18 **MR JUSTICE MORGAN:** I did not consult my colleagues on the Tribunal, but unless  
19 they have a point they want to make, that is what we will do.

20 You continue, Mr O'Donoghue, with anything you want to tell us.

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

22

23 Opening submissions by MR O'DONOGHUE

24 **MR O'DONOGHUE:** Roughly speaking, I propose to take just over a couple of hours  
25 today and then Mr Williams will make his openings, which may take us slightly  
26 into tomorrow but the extension until 5.00 will allow us to catch up to some

1 extent so I am very grateful for that, my Lord.

2 In terms of the trajectory of what I am going to say today, I was not proposing to take  
3 a sort of linear approach ground by ground today essentially for two reasons.  
4 First of all, some of what I would like to say will depend of course on the  
5 evidence which we will hear tomorrow possibly, possibly Wednesday, or  
6 possibly even some of Thursday; and second because of the time constraints  
7 in openings, it simply will not be possible to get through each and every one of  
8 the grounds even in outline fashion.

9 What I propose to do, subject of course to the Tribunal, was focus at this stage on  
10 a handful of issues and then to reconvene or continue as we move through  
11 the submissions.

12 **MR JUSTICE MORGAN:** Right. I expected you to say that and please take that  
13 course.

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

15 My Lord, by way of introduction, this appeal is mainly but not only concerned with  
16 aspects of penalty. On a global level, the fine imposed on FPM in the present  
17 case is the highest individual fine imposed by the CMA to date. Now, I put to  
18 one side fines which were annulled on appeal and pending appeals.

19 Second of all, it is the fourth highest ever individual fine imposed by either the CMA  
20 or the OFT, and indeed one could argue it is the third highest fine because the  
21 second highest fine imposed on Gallaher, the decision in that case was  
22 annulled for everybody apart from Gallaher, they decided not to appeal and it  
23 turned out to be tough luck. So the fine in the present case is strikingly high  
24 and requires particularly careful consideration in this appeal.

25 Can I start by reminding ourselves of the main elements of the fine in the present  
26 case, and this will also serve the function of allowing the Tribunal to

1 geo-locate our grounds of appeal within the penalty? If we can go to the  
2 Decision, which is volume 1, tab 1, and it is the table at page 247. My Lord,  
3 the Tribunal has seen the first row of the table in bold the relevant turnover  
4 figures for each of the defendants, and by relevant turnover, I mean turnover  
5 in relation to the products affected by the infringement as opposed to total  
6 turnover.

7 One thing which is immediately striking is that CPM's turnover on the left-hand side  
8 was actually higher than FPM's in the second column and yet, as we see over  
9 the page, the final penalty imposed on CPM was roughly one sixth of FPM's,  
10 even though CPM benefitted from no leniency. As you will see in the  
11 penultimate row, there was a relatively small reduction for settlement. So at  
12 first blush, there is a very, very striking difference in treatment between these  
13 two defendants who, on the face of it, looked rather similar.

14 Then we see steps 1 to 3 underneath and over the page. The Tribunal will see  
15 under step 1, all of the defendants get the 30 per cent multiplier, a point I will  
16 come back to. Then under step 2, over the page, there is the 6.75 multiplier  
17 for duration, a point which touches on at least one of our grounds. If the  
18 Tribunal can jump back to paragraph 6.37 of the Decision, there you will see  
19 the total penalty at the end of step 2. You can see that even after just two  
20 steps out of potentially 7, FPM's fine was nearly double the 10 per cent  
21 maximum statutory penalty.

22 Then if we go back to the table under step 3, you will see there are common  
23 increases for intentionality, plus 10 per cent; and director involvement,  
24 15 per cent. Then you will see there is a co-operation discount for each of  
25 CPM and FPM. SBC did not receive a discount on this basis since  
26 co-operation was a condition of its leniency application. That is

1 paragraph 6.48 of the Decision for the Tribunal's reference.

2 Then you will see under mitigating factor – compliance, both SBC and CPM got  
3 a 10 per cent discount for their compliance programmes under competition  
4 law, but FPM got nothing, which is one of our grounds of appeal.

5 If the Tribunal could then go back to 6.60 of the Decision, there you will see the  
6 totals at the end of step 3, which again in FPM's case is well over double the  
7 statutory maximum penalty, so effectively there was an increase of £10 million  
8 under step 3. Then step 4 involves the most significant, at least in monetary  
9 terms, alterations to the fine. You will see on the left-hand side, the CPM fine  
10 is reduced by over £50 million to £5 million, so effectively a 90 per cent  
11 reduction, and the FPM fine was reduced by over £31 million to £28 million  
12 and the SBC fine was left unchanged.

13 Then under step 5, you see the 10 per cent maximum. Only FPM was affected by  
14 this step and it led to the penalty being reduced by just over £2.5 million.  
15 Then at step 6, you will see that the leniency and settlement discounts, unlike  
16 other mitigating factors, come after the application of the 10 per cent  
17 maximum and essentially the bulk of SBC's fine was wiped for leniency  
18 reductions, £21 million, and CPM had its by now relatively modest fine  
19 reduced by a further 20 per cent to the tune of £1 million. So that is the  
20 archaeology of the penalty.

21 These fines, in our respectful submission, raise a series of concerning issues. A first  
22 issue is: How is it that CPM, which, as I have just indicated, had a higher  
23 turnover of the relevant products than FPM, ended up with a fine that is  
24 one-sixth of FPM's? In this context as we saw under the last step, the fact of  
25 settlement was a relatively minor consideration.

26 Second, how is it that despite receiving a reduction in fine on mitigation grounds, the

1 co-operation discount, FPM still ended up with the maximum possible fine  
2 permitted by statute?

3 Third, how is the CMA able to conclude at step 4 that a fine representing 11 per cent  
4 of FPM's worldwide turnover was not excessive but was proportionate,  
5 although it exceeded the 10 per cent maximum? We can very quickly look at  
6 this, we can pick this up at 6.74 and 6.76 of the Decision.

7 The Tribunal will see at 6.74, the CMA makes reductions under step 4 ostensibly on  
8 the basis to ensure that the penalty is not disproportionate or excessive. Yet  
9 if we look at 6.76(a), they nonetheless directed themselves bizarrely, in our  
10 submission, that a penalty which equates to 11 per cent of worldwide  
11 turnover; in other words above the statutory maximum is not excessive and is  
12 proportionate. We say that is upside down, contradictory, and is a legal error,  
13 which is one of the grounds I will develop.

14 The fourth question is how does or can the CMA explain on what rational and  
15 proportionate basis it reduced CPM's fine by 90 per cent to £5 million and  
16 applied only a 50 per cent reduction to FPM's, leaving it with a fine that was  
17 still materially above the statutory maximum?

18 Finally, how can a fine imposed on FPM that at all stages after step 1 substantially  
19 exceeds the 10 per cent statutory maximum be considered lawful?

20 FPM's case in a nutshell is that the CMA's approach on these and other issues is  
21 punctuated by a series of legal and other errors set out in our grounds to  
22 which I now turn. But before doing so, I want to address one overarching  
23 point. The CMA is keen in its skeleton and elsewhere to emphasise its  
24 margin of appreciation. It is important, in my submission, to be precise about  
25 what exactly this means. If we can first go to the *Kier* case which is in  
26 Authorities 4.

1 **MR JUSTICE MORGAN:** I will take that from an electronic version, so you will have  
2 to give me a moment to get the page, but I can do that.

3 **MR O'DONOGHUE:** My Lord, Authorities 4, tab 49 and it is page 3034.

4 My Lord, while you are looking for that, a couple of things on *Kier*. First of all, it is  
5 a judgment of a former President of the Tribunal, Mr Justice Barling; and  
6 second, it is part of a series of appeals in the construction industry  
7 infringements. We would respectfully submit that these appeals are the most  
8 comprehensive series of judgments by the Tribunal in respect of penalties for  
9 Competition Act cases. So these are not just any old cases, these are among  
10 the most important authorities for the Tribunal on the question of penalty.

11 **MR JUSTICE MORGAN:** I can indicate I have page 3034, if that is the one you want  
12 me to be on.

13 **MR O'DONOGHUE:** My Lord, yes. It is the end of paragraphs 75, 76 and 77.

14 **MR JUSTICE MORGAN:** Yes. Do you want us to read that to ourselves?

15 **MR O'DONOGHUE:** My Lord, yes, that would be extremely useful, and then I will  
16 make a couple of short points.

17 **MR JUSTICE MORGAN:** We will do that, thank you. (Pause).

18 **MR O'DONOGHUE:** My Lord, if the Tribunal is ready ...

19 **MR JUSTICE MORGAN:** I have read those paragraphs. If my colleagues are  
20 happy for you to continue, they can indicate.

21 **SIR IAIN:** Yes, please do.

22 **MR JUSTICE MORGAN:** What you can help us with, Mr O'Donoghue, is the  
23 application of those remarks to this appeal. I mean, I think we can all  
24 understand the words, but there is still this question of the process, how one  
25 goes about it. It cannot be simply a case of saying, "Here is the final penalty  
26 figure, do we think that is appropriate," because we have to ourselves think

1 about a large number of points on the way to settling an appropriate final  
2 figure.

3 Secondly, we know what the CMA did when it carried out the same exercise, and  
4 you are criticising the individual steps on the journey and to reflect your  
5 argument, we have to consider what we make of those arguments and are the  
6 criticisms justified or not justified?

7 Do you want to say anything about how this applies in practice in this case?

8 **MR O'DONOGHUE:** My Lord, I will be developing this in some detail. At this stage,  
9 if I could make a handful of points.

10 **MR JUSTICE MORGAN:** Yes, thank you.

11 **MR O'DONOGHUE:** First of all, obviously in relation to a number of grounds, we  
12 raise points of law, and either those points of law are right or they are wrong  
13 and the question of margin doesn't really come into those. So that stands  
14 apart as a general matter.

15 Second, to pick up your Lordship's point about looking at the fine globally, this does  
16 touch to some extent on the *vires* point under ground 2 because the gist of  
17 what we say under ground 2 is the statutory maximum is not some sort of  
18 tail-end Charlie which comes into the reckoning just at the very end, it is the  
19 alpha and omega of penalties and it must be borne in mind at all stages. As  
20 I have shown the Tribunal, we have an extraordinary case where even after  
21 step 2, the maximum penalty has been grossly exceeded. So that is  
22 a specific point.

23 **MR JUSTICE MORGAN:** Yes.

24 **MR O'DONOGHUE:** Third, there has of course been a subtle change in the  
25 legislative position since *Kier* because if the Tribunal wishes to depart from  
26 the guidance, it obviously has to give reasons.



1 **MR JUSTICE MORGAN:** The change is that previously the Tribunal was not  
2 mandated to have regard to the guidance, although in practice it did so. But  
3 today, the legislation says we must have regard to the guidance. Is that the  
4 subtle change?

5 **MR O'DONOGHUE:** My Lord, in my submission, it is very subtle because if you  
6 look, for example, at paragraph 76 of *Kier*, even before this legislative change,  
7 the Tribunal, in my submission was, effectively saying the same thing anyway.

8 **MR JUSTICE MORGAN:** Yes.

9 **MR O'DONOGHUE:** So I point that out for the sake of good order, but in my  
10 submission, it is a very subtle change indeed.

11 **MR JUSTICE MORGAN:** But we are now told in the statute that we must have  
12 regard to the guidance if it is valid guidance, *intra vires* guidance.

13 **MR O'DONOGHUE:** My Lord, yes, indeed. And as I will develop and as you have  
14 seen in the skeletons, in multiple respects, we also rely on the guidance  
15 against the CMA.

16 **MR JUSTICE MORGAN:** Yes.

17 **MR O'DONOGHUE:** But I think the answer to your Lordship's question is yes. But  
18 in practical terms, what that requires is that if you take a different approach,  
19 you obviously have to give reasons.

20 But finally, this is of course an appeal on the merits in relation to a species of  
21 criminal law. I will just give the Tribunal the references, the recent *Phenytoin*  
22 judgment in the Court of Appeal, Authorities 6, tab 69.

23 **MR JUSTICE MORGAN:** Yes.

24 **MR DORAN:** Paragraphs 136 and 138, Lord Justice Green said in relation to the  
25 appeal on the merits:

26 "The CAT is not bound to defer to the judgment call of the competition authority and

1 can substitute its own appraisal."

2 In fairness to the CMA, I should make clear that was a point made more in the  
3 context of a substantive appeal, but it was addressing the consequences of  
4 the appeal before the Tribunal being an appeal on the merits and the basic  
5 point is: Your hands are not tied, you are entitled to form your own view,  
6 including in particular on penalty.

7 **MR JUSTICE MORGAN:** Yes. While we are on this point, it did strike me that you  
8 have one point, amongst many, that if you are right about it, it really  
9 fundamentally changes what we will do in this case, and your point is the  
10 10 per cent -- can we call it a cap without prejudice to how it operates,  
11 a 10 per cent cap -- if you are right about that, you say we should remit the  
12 matter to the CMA to adopt your approach about the significance of this  
13 10 per cent.

14 And I think one of the reasons you say we should remit it is that if we agree with you  
15 on the 10 per cent, then we have quashed the guidance and before there is  
16 another penalty decision, there should be a new guidance; is that right?  
17 Whereas Mr Williams says if we quash the guidance and agree with you on  
18 the 10 per cent cap, we should still, perhaps without any guidance, we should  
19 still reach our conclusion about the penalty.

20 So that is a big difference, isn't it and it all turns on whether you are right about the  
21 function of the 10 per cent cap, and it has nothing to do with margin of  
22 appreciation or anything like that, it turns on these quite different  
23 considerations. Have I understood that correctly?

24 **MR O'DONOGHUE:** My Lord, that is right. That is the second point I made, which is  
25 on a question of *vires*, it is binary; we are either right or we are wrong. If  
26 I succeed in persuading the Tribunal that this guidance is *ultra vires*, then it

1 does not exist in law and this will have to be remitted because the CMA has  
2 a statutory obligation to publish guidance and it has to be *intra vires* guidance  
3 and they would have to set a penalty in line with *intra vires* guidance.

4 **MR JUSTICE MORGAN:** The first thing they have to do is get some new guidance.

5 **MR O'DONOGHUE:** Yes, consult. They have public law obligations in relation to  
6 guidance and they will have to consult on and elaborate *intra vires* guidance.

7 I will have quite a bit to say, my Lord, on the question of relief, but the punchline is  
8 that Mr Williams is not correct to say that if the guidance is *ultra vires*, the  
9 penalty then becomes a sort of roving commission for the Tribunal, it will have  
10 to be remitted.

11 **MR JUSTICE MORGAN:** I saw that was a point in play. But that is nothing to do  
12 with the usual type of appeal that is considered in *Kier* and the other cases.  
13 If, on the other hand, we came to the conclusion that the guidance is *intra*  
14 *vires* and your explanation of the 10 per cent cap is not the right one, well  
15 then we do what is a more typical exercise on an appeal against penalty: we  
16 decide whether the final figure is appropriate, but we have to engage with the  
17 individual criticisms you make and react to those.

18 As you say, if there are errors of law committed by the CMA, we will not repeat those  
19 errors of law, we will be free of them and we will decide accordingly.

20 I think finally, you say the idea of deference is either limited or even non-existent in  
21 this case.

22 **MR O'DONOGHUE:** My Lord, yes, I do say that.

23 **MR JUSTICE MORGAN:** I think you were answering my questions, you may have  
24 been saying those things independently. But thank you for answering the  
25 question, and please take it from there.

26 **MR O'DONOGHUE:** Before I move on to some of the individual grounds, there is

1 one final point. The CMA has at different times in its pleadings and skeleton  
2 attempted to do what I would call pulling rank on what the guidance means.  
3 But the meaning of the guidance, given that it is published pursuant to statute,  
4 is a question of law for the Tribunal. The CMA can of course make its  
5 submissions on what it thinks it means and it can tell the Tribunal in practice  
6 what it is doing, but it doesn't have any superior rank in terms of telling the  
7 Tribunal what it means. That is a matter for the Tribunal.

8 We have given an authority for this in the skeleton, it is the *Gedling* case Authorities  
9 5, tab 63, paragraph 20.

10 **MR JUSTICE MORGAN:** I have an index, I will look at that and see where it is.

11 **MR O'DONOGHUE:** 4047 in the electronic numbering.

12 **MR JUSTICE MORGAN:** Speaking to myself, I am receptive to your proposition and  
13 I do not think I need authority for it, but you say there is authority. Do we  
14 need to go to it or are you content to pass on?

15 **MR O'DONOGHUE:** My Lord, I will see what Mr Williams says, but there is an  
16 element of reading their skeleton that they think they get to pull themselves up  
17 by their bootstraps by telling us what the guidance means. What I am saying  
18 at this stage as a matter of law, that is not how it works.

19 **MR JUSTICE MORGAN:** Right. Are you saying you will take us to the authority if  
20 Mr Williams disagrees with your proposition? I mean, I think we can make  
21 progress. Do not take us to the authority, you have given us the reference,  
22 and we will hear Mr Williams in due course.

23 **MR O'DONOGHUE:** My Lord, yes, I have set out my stall. I apprehend he doesn't  
24 disagree with the principle, but there may be an element of trying to bring this  
25 in by the backdoor in terms of the CMA telling us what it really thinks the  
26 guidance means. But we can respond to that in a more specific way.

1 **MR JUSTICE MORGAN:** Let me have a very brief exchange with Mr Williams.  
2 Mr Williams, if there is a difference between the Parties as to what the guidance  
3 means, we have to interpret it and reach our conclusion. The CMA and you  
4 are free to make persuasive submissions, of course, but we are free to reject  
5 them, and you don't have any special status, pulling rank as it is put, do you?  
6 **MR WILLIAMS:** No, and we actually don't really recognise the submission  
7 Mr O'Donoghue is making. But it is up --  
8 **MR JUSTICE MORGAN:** No, I have not understood that you were making that  
9 point, but I think we don't need to go to authorities on it if there is no real  
10 contention. Right, carry on from there, Mr O'Donoghue.  
11 **MR O'DONOGHUE:** My Lord, I am grateful.  
12 I am going to jump around a bit as I averted to earlier. I am going to try and deal  
13 with a handful of grounds which are reasonably self-contained, or retractable  
14 over the next hour and a half or so, and I may need to come back to some  
15 specific points.  
16 **MR JUSTICE MORGAN:** Yes, please do that.  
17 **MR O'DONOGHUE:** With the Tribunal's permission, I am going to start with ground  
18 4, which has two components. The first is the relevant turnover component in  
19 step 1, and the second is the duration component under step 2.  
20 **MR JUSTICE MORGAN:** Yes.  
21 **MR O'DONOGHUE:** The starting point is that the CMA used the year ending 2013  
22 as the basis for the relevant turnover in step 1, and that is in Decision 6.24(c).  
23 **MR JUSTICE MORGAN:** Yes.  
24 **MR O'DONOGHUE:** The figure used, £24.45 million, is substantially higher than the  
25 average turnover for the relevant products for the period 2008-2013, which  
26 was £20.39 million.

1 **MR JUSTICE MORGAN:** Right. I was turning up the -- the figure they used is  
2 £24.452 million. What was the average, you say?

3 **MR O'DONOGHUE:** It is £20,390,564, and that is in paragraph 88 of our Notice of  
4 Appeal.

5 **MR JUSTICE MORGAN:** Did you say 2006 or 2008?

6 **MR O'DONOGHUE:** 2008.

7 **MR JUSTICE MORGAN:** And that is not the whole period, is it?

8 **MR O'DONOGHUE:** Well, the period is 2008-2013. That is the average for that  
9 period.

10 **MR JUSTICE MORGAN:** Right, okay.

11 **MR O'DONOGHUE:** Obviously it is an average, but just to take two years by way of  
12 comparison, the 2013 figure is almost £10 million higher than the 2009 figure.  
13 There is a very considerable disparity even in this relatively short period. The  
14 underlying point is a simple one: the objective underpinning the relevant  
15 turnover calculation in step 1 is to ensure that the figure selected is  
16 a representative figure. We can pick this up again in *Kier*, paragraph 138.

17 **MR JUSTICE MORGAN:** Let me hope I have still *Kier* ... I do. Paragraph 138, give  
18 me a moment.

19 **MR O'DONOGHUE:** Yes, my Lord. It is page 3055 in the electronic bundle, so  
20 Authorities 4, tab 49, page 3055.

21 **MR JUSTICE MORGAN:** I am getting there, but I just have to scroll down to it, there  
22 are no quicker ways.

23 **MR DORAN:** What was the paragraph number again?

24 **MR O'DONOGHUE:** It is 138, Mr Doran.

25 **MR JUSTICE MORGAN:** I can now say I have got to 138.

26 **MR O'DONOGHUE:** It is the quotation in the middle:

1 "The importance of taking into account turnover which reflects the undertaking's real  
2 economic situation during the period in which the infringement was  
3 committed."

4 From the CMA skeleton, we apprehend that it doesn't fundamentally dispute what  
5 the purpose of steps 1 and 2 of the guidance is, which is to identify a turnover  
6 and duration which reflects FPM's real economic situation during the period of  
7 infringement.

8 Just to give the Tribunal a handful of further references, the European Commission  
9 in a number of cases has selected for the purposes of relevant turnover  
10 a year other than the last year of the infringement. Two of these are in the  
11 bundle, the first is the *LCD cartel*, Authorities 6, tab 81, paragraph 384.

12 **MR JUSTICE MORGAN:** Do you want to tell us what the decision or the opinion  
13 was, or do you want us to go to the document, the *LCD cartel*?

14 **MR O'DONOGHUE:** I think we can take these pretty briskly because I do not think  
15 they are controversial at least as far as they go. The controversy seems to be  
16 applying them to the present case.

17 *LCD* was a cartel case, which I think your Lordship may well remember from the  
18 *iiyama* case.

19 **MR JUSTICE MORGAN:** Yes, I think I do, although I remember certain things and  
20 I have no recollection of other things. This might be one of the other things,  
21 right.

22 **MR O'DONOGHUE:** My wife often accuses me of the same thing!

23 But it is a very simple point: the turnover of these LCD displays was volatile for the  
24 period of the infringement; and then at 384, the Commission recognising this  
25 jumpiness in the figures. It didn't take the last year, it took an average I think  
26 of three years or the period of the infringement.

1 **MR JUSTICE MORGAN:** Yes.

2 **MR O'DONOGHUE:** The second decision is *Thermal Systems*, Authorities 7, tab 82,  
3 this time paragraphs 119 and 121. It is essentially the same point that instead  
4 of taking the last year of the infringement for purposes of turnover, they  
5 looked at an average over the period of the infringement. There are a couple  
6 of more references, my Lord, these were e-mailed to the CMA and Tribunal  
7 this morning. I don't know if they have made their way directly to the  
8 Members of the Tribunal yet, but I can give you the references quickly and  
9 then if --

10 **MR JUSTICE MORGAN:** Yes, please do that.

11 **MR O'DONOGHUE:** My Lord, two more cartel cases. The first is *Marine Hoses*, we  
12 have sent you a copy of the cover sheet and the relevant paragraph, this time  
13 paragraph 422. There the Commission used the average of the last three  
14 years of involvement in the infringement, and the second decision is called  
15 *Candle Waxes*, paragraph 634. In that case, the Commission disregarded  
16 2004 because that was the year of accession of new member states to the  
17 European Union and it said that that 2004 figure was not representative.

18 **MR JUSTICE MORGAN:** I am sure the CMA agree that sometimes you can depart  
19 from what the guidance says, which is the last year. So you can sometimes  
20 take last year, the guidance suggests that is normal. But it is not universal;  
21 you can depart from it.

22 I am not saying you must do this at this stage, but at some stage I need to get my  
23 head around the relevance of turnover at the different stages in this penalty  
24 process. At the moment, we have references to turnover at three different  
25 stages, taking the guidance. You may say the guidance is unhelpful, but  
26 starting with it: step 1 you have relevant turnover, normally I think in the last



1 year. Then at a later stage, in assessing proportionality, the CMA again refer  
2 to turnover, but they refer to lots of other things like profitability and asset  
3 position. Then at step 5, the statutory cap, again you have turnover, but this  
4 is now worldwide turnover.

5 These references to turnover are plainly there for purposes and in order to judge this  
6 current submission, I think we need to have clarity in our minds as to what is  
7 the purpose of step 1. Turnover in theory could be relevant for all sorts of  
8 reasons.

9 One, turnover tells you the size of the market or the size of the infringer's share of  
10 that market, and that helps you assess gravity of the infringement. Another  
11 way of looking at it would be to say: well, how much has the infringer profited  
12 by its infringement, and although turnover wouldn't normally be the measure,  
13 it would be profit, but turnover might be a proxy for that.

14 And then turnover obviously has some part to play in terms of affordability. We are  
15 going to hear about affordability in this case. Affordability seems to be part of  
16 step 4 on proportionality. One side, if not both of you, say affordability is  
17 relevant at the statutory cap stage. There is a separate hardship provision,  
18 but that might be explained by different considerations.

19 Do you want to tell us straight away why turnover of an individual infringer is relevant  
20 at step 1? It is not the turnover of the whole market occupied by the cartel, it  
21 is just one infringer. So what do you say is the thinking there, and do you  
22 agree with that as a matter of principle, as correct thinking?

23 **MR O'DONOGHUE:** My Lord, there are a number of points. Your Lordship is  
24 entirely right that in relation to steps 4 and 5 in particular, there are other  
25 turnovers which come into play, and I will be addressing those separately in  
26 some detail.

1 **MR JUSTICE MORGAN:** Right.

2 **MR O'DONOGHUE:** That is one point.

3 Second, at this stage, we are concerned with something relatively self-contained,  
4 which is what is the representative figure for a turnover under step 1.  
5 Your Lordship is right that the guidance indicates that you start with the last  
6 year of the infringement. The point under step 1 is a very simple one, which is  
7 in this case, given the volatility, a difference of £10 million between the first  
8 year and the last year, simply selecting the last year is deeply  
9 unrepresentative of the true picture for the full period.

10 To answer your Lordship's question directly, as I understand it, what the step 1  
11 relevant turnover is intended to achieve is that it provides some form of proxy  
12 for, first of all, the size of the market affected by the infringement and, second,  
13 some form of proxy of its possible economic significance or impact.

14 It seems as a starting point to be grounded in that and our point is it is deeply  
15 unrepresentative to look at 2013 and that the correct approach in this case  
16 should have been some form of averaging because the differences between  
17 years, they are not *de minimis*, they are significant; and therefore the last year  
18 is simply not representative.

19 **MR JUSTICE MORGAN:** Are you saying, putting it in my words, that the turnover at  
20 step 1 helps you decide the seriousness of the infringement? Is that the point,  
21 or is it something else?

22 **MR O'DONOGHUE:** My Lord, I am not sure I would go that far. All I would concede  
23 at this stage, is these things are interlocking as between the different steps  
24 and of course the statutory maximum.

25 But to put this in the clearest possible terms within the four walls of step 1 of the  
26 guidance, it appears, rightly or wrongly at this stage -- I don't need to take

1 a position on this -- that the relevant turnover is intended to achieve  
2 a representative figure of the size of the undertaking's turnover and the  
3 affected products to provide some proxy, and it may be a very rough proxy,  
4 for the potential economic significance or impact.

5 **MR JUSTICE MORGAN:** All right. I think you are accepting that it is not wrong to  
6 take the last year in some cases, and I think you are accepting it is not wrong  
7 to take it as a kind of starting point. With an infringement which lasts for some  
8 years, the guidance seems to say: well, generally speaking you don't average,  
9 you take the last year. Do you say there is an error of principle in that, or do  
10 you accept that as a starting point?

11 **MR O'DONOGHUE:** My Lord, I would put it slightly differently. I would say that the  
12 objective is to arrive at a figure which is representative, the starting point is to  
13 look at the last year. But there is no automatic assumption or even  
14 presumption that that is necessarily representative. It depends on the facts of  
15 each case.

16 One can certainly start there, but I mean to put it another way: if the differences  
17 between years are *de minimis*, well, it is no skin of anyone's nose to look at  
18 the last year. If the last year is not actually very representative, then the  
19 starting point should be displaced to arrive at a representative figure.

20 So the critical thing, in my submission, is that it is representative.

21 **MR JUSTICE MORGAN:** It might be that the last year is entirely out of step; it is  
22 either significantly higher than anything that went before or significantly lower.  
23 I mean, in the last year, perhaps the infringers were aware that they might be  
24 rumbled and they started to be much more modest in their infringement. But  
25 for five years earlier, they had been really going for it and generating very  
26 healthy turnovers as a result of their infringement.

1 So you would say you can abandon the last year if it is much too high or much too  
2 low and take an earlier year. If you take an earlier year, you don't have to  
3 take an average, you could take the preceding year. You could say that is far  
4 more typical of the situation and an average isn't needed. Is that wrong?

5 **MR O'DONOGHUE:** My Lord, yes. If the objective --

6 **MR JUSTICE MORGAN:** I think you are saying it is not wrong, it is right.

7 **MR O'DONOGHUE:** It has to be representative. It may be that the penultimate year  
8 is representative, it may be in other cases the average is more representative.  
9 Your Lordship is quite right, there are --

10 **MR JUSTICE MORGAN:** There is some reason for staying away from an average in  
11 the guidance. Two reasons occur to me: one is that it is more trouble to do an  
12 average, because you have to look at probably audited accounts for three  
13 years, not just one, so that is more trouble. The other is of course inflation. In  
14 a time of significant inflation, the turnover is going to be inflated year-on-year,  
15 but you might find the most recent year is a better base point for the  
16 calculation than an earlier year where the figures were lower by reason of less  
17 inflation.

18 I mean, we are very used to low inflation at the moment but in times of high inflation,  
19 an average would depress the base figure you take.

20 **MR O'DONOGHUE:** Yes. There may be an issue with time value of money, but  
21 certainly --

22 **MR JUSTICE MORGAN:** Well, yes, that is one way of putting it, but it is really just  
23 that --

24 **MR O'DONOGHUE:** Inflation, yes. Look, my Lord, in this case, the delta between  
25 2009 and 2013 is 250 per cent and I do not think even the CMA suggests that  
26 that is somehow linked with inflation. But your Lordship is quite right, this

1 point cuts both ways. If we can pick up the *Balmoral Tanks* case in  
2 Authorities 5, tab 62, please?

3 **MR JUSTICE MORGAN:** All right. If you give me time, I can find the page number,  
4 but perhaps it is useful to give it to me. Tab 62 begins at 3970, so I will go to  
5 that.

6 **MR O'DONOGHUE:** My Lord, it is 4028.

7 **MR JUSTICE MORGAN:** At 4028, I will go to that.

8 **MR O'DONOGHUE:** This is the cuts both ways point. You will see that Balmoral's  
9 relevant turnover in the two-month period from February to 31 March was only  
10 £19,200.

11 **MR JUSTICE MORGAN:** Right, just give me a moment. I am listening but I do not  
12 have the page in front of me. It is a very slow business.

13 **MR O'DONOGHUE:** My Lord it is 4028.

14 **MR JUSTICE MORGAN:** Yes, I am walking towards it, but it is a long journey. I am  
15 at 4028.

16 **MR O'DONOGHUE:** The bottom of the page, 138 --

17 **MR JUSTICE MORGAN:** Would you like us to read that to ourselves?

18 **MR O'DONOGHUE:** It starts in the second sentence.

19 **MR JUSTICE MORGAN:** Right. (Pause).

20 **MR O'DONOGHUE:** And also 141, which is the finding.

21 **MR JUSTICE MORGAN:** Yes:

22 "We want to get a representative figure for the period to use for the purpose of being  
23 multiplied and it cuts both ways. The representative figure may be lower or  
24 higher than the last year figure."

25 **MR O'DONOGHUE:** Yes, and this was a case where the CMA advocated for  
26 a different figure and its argument was accepted on the basis that the higher

1 figure was more representative than the last year.

2 **MR JUSTICE MORGAN:** Right.

3 **MR O'DONOGHUE:** My Lord, the effective difference between the CMA and FPM  
4 on this point is we say that the legal tests, as I have shown you in *Kier* and  
5 *Balmoral* and other cases, is to come up with a figure which is representative  
6 in the circumstances; whereas the CMA by contrast puts forward essentially  
7 a test of exceptional circumstances.

8 Just to give you the reference, it's in footnote 1076 of the Decision, they say:

9 "The CMA does not consider the circumstances to be exceptional such as to warrant  
10 a departure from the approach set out in the penalty guidance."

11 So that is their position on how step 1 should function. We say this is incorrect for  
12 three reasons.

13 First of all, it is common ground that the CMA can depart from its policy where there  
14 are good reasons to do so. We say as a matter of administrative law, by  
15 directing itself by reference to the exceptional circumstances test, the CMA  
16 has unduly fettered its discretion. The CMA says in its skeleton that this is  
17 semantics.

18 First of all, that is what the Decision says, it uses the words "exceptional  
19 circumstances". But in reality, the CMA doesn't appear to have any good  
20 answer on this point. Second, as I have just shown the Tribunal, the  
21 exceptional circumstances test is not the test being applied by the Tribunal in  
22 *Kier/Balmoral* and, in my submission, it is not the test to be applied either in  
23 the four or five Commission decisions which I referred the Tribunal to.

24 Finally on this point before I move on to a different ground, the guidance itself does  
25 of course use the words "exceptional circumstances" but in a different context.

26 **MR JUSTICE MORGAN:** Right.

1 **MR O'DONOGHUE:** The guidance says that the exceptional circumstances test  
2 only applies to the use of turnover other than turnover recorded in audited  
3 accounts. That is paragraphs 2.12 to 2.13 of the guidance.

4 **MR JUSTICE MORGAN:** Right.

5 **MR O'DONOGHUE:** The inference is that the CMA thought this applied to the  
6 choice of the relevant turnover in step 1. On the basis of guidance, it doesn't,  
7 it applies to a different point, which is audited accounts versus something  
8 else. That does seem to us to be a further misdirection.

9 **MR JUSTICE MORGAN:** Just help us on this point a little. I mean, I am aware of  
10 cases where judges have said it is wrong for a decision maker to say that  
11 exceptional circumstances must be shown before a discretion is exercised;  
12 and those judges have said that where a decision maker is given a discretion,  
13 it should decide what is the appropriate response to all the circumstances.

14 I think that is not different from what you are saying. You are stressing the  
15 exceptional circumstances means something different from the quest for the  
16 representative figure.

17 **MR O'DONOGHUE:** Yes, representative is a neutral term. Exceptional  
18 circumstances by definition sets the bar very high indeed and it is  
19 a self-imposed restraint which does not appear in the guidance in relation to  
20 step 1.

21 **MR JUSTICE MORGAN:** Exceptional circumstances has been defined in a number  
22 of cases, I think. I know I have applied a decision of the House of Lords,  
23 I think it is called *R v Kelly* in which Lord Bingham said exceptional  
24 circumstances means out of the ordinary and exceptional.

25 If there is something out of the ordinary about the last year, the last year shouldn't be  
26 taken because it is an exceptional year and therefore you should take a more

1 representative year. Put that way, it is not such a huge difference between  
2 your test for representative year or representative figure and the CMA saying  
3 we reject the last year where it is not representative and is an exception.

4 That is the territory we are in, isn't it? We have to take a view on this. Indeed, at the  
5 end of the day perhaps, given our function on appeal, what we have to do is  
6 we have to say: applying *Kier*, what is the representative value or figure? Will  
7 we take the last year? Will we take another year? Will we take an average  
8 and, if so, an average of how many years? Is that not really ultimately what  
9 we have to do?

10 **MR O'DONOGHUE:** My Lord, I entirely agree. The only qualification I would make  
11 is that in our submission, the exceptional circumstances test is not as the  
12 CMA suggests simply a question of semantics. There is a point of substance  
13 behind this, and I made the point already.

14 In my submission, if the last year is not representative because there is a material  
15 difference compared to the other years, that is sufficient. By contrast, if there  
16 is a *de minimis* difference between the last year and other years, so be it. But  
17 in this case, we have a delta of 250 per cent between 2009 and 2013 and it is  
18 not suggested, for example, that inflation or something exogenous explains  
19 that.

20 So we would say it is not a representative figure and that is the test.

21 **MR JUSTICE MORGAN:** Right.

22 **MR O'DONOGHUE:** My Lord, I am about to move on to a different ground, I see the  
23 time. I am in your Lordship's hands, would it make more sense for me to  
24 resume at 1.55, or shall I --

25 **MR JUSTICE MORGAN:** Well, if it is convenient to break at this point, we will break  
26 at this point and sit again at 1.55. Let me just however check my e-mails to



1 see if I can give you any information about my colleague's test results.  
2 (Pause).

3 No, there is no information there. I rather thought the rumour we would have a test  
4 answered by 10.30 was greatly exaggerated, so it has proved. I will report to  
5 you again at 1.55 whether I have heard anything. I will make inquiries in case  
6 I can say something.

7 Right then, Mr O'Donoghue, you are inviting us to adjourn until 1.55, that is what we  
8 will do. What the three members of the Tribunal will do is we will go into  
9 a retiring room and leave the hearing room. What the rest of you do, I leave  
10 up to you.

11 I will leave, thank you.

12 **(12.57 pm)**

13 **(The short adjournment)**

14 **(2.06 pm)**

15 **MR JUSTICE MORGAN:** I think Mr O'Donoghue, Mr Williams, we are reconstituted.

16 I am told there were technical problems about starting, I am sorry for the  
17 delay.

18 The other thing to say is that I have unfortunately no more information about this  
19 awaited test result. I did telephone my colleague direct to try and get some  
20 more insight into the problem, but I fear all I am able to say is we don't know  
21 the result of the test. We will have to keep the matter under review in the  
22 course of the afternoon. This is very unsatisfactory, but it is where we are,  
23 I am not able to change it.

24 Mr O'Donoghue, I think then we are able to resume with your submissions, please.

25 **MR O'DONOGHUE:** My Lord, I am grateful. I am moving now to the second  
26 component of ground 4, which concerns step 2, the infringement's duration.

1 This is a short but important point. The guidance makes clear that the  
2 duration multiplier requires consideration of at least two separate issues of  
3 discretion. If we can just turn to that, it is in Authorities 1/21.

4 **MR JUSTICE MORGAN:** Yes.

5 **MR O'DONOGHUE:** 2.16, which is on page 322. It says:

6 "The starting point may be increased in particular circumstances decreased to take  
7 account of the duration of the infringement. Penalties for infringements which  
8 last for more than one year may be multiplied by not more than the number of  
9 years the infringement. Part years may be treated as full years."

10 In our submission, it is plain on the face of the guidance that there are two separate  
11 discretions which must be exercised and therefore reasoned. The first is  
12 whether to impose a duration multiplier at all and, second, by what amount the  
13 multiplier should be increased by. We say in particular the use of the word  
14 "may" in the first and second sentence and the language "not more than"  
15 makes that clear beyond question.

16 By contrast, if one looks at the Decision at paragraph 6.37, again the same volume,  
17 tab 1, page 231, what the CMA has done, starting at 6.35, is essentially in our  
18 submission not exercised the discretions I indicated, but applied essentially  
19 a reflexive approach. In particular, 6.36:

20 "The duration of the infringement was therefore six years, eight months and eight  
21 days rounded up."

22 6.37:

23 "The CMA has therefore applied a multiplier of 6.75 to the figure at which the end of  
24 step 1."

25 So we say no reasons at all were given by the CMA as to why it proceeded to  
26 multiply the starting point by the duration or choose the figure of 6.75. The

1 obvious inference we say in the light of the guidance, these two discretions, is  
2 that the CMA misdirected itself as to what the guidance in fact provided. We  
3 say this is an error in its own right which lies squarely within the four walls of  
4 the second step, but it also ties in a practical sense with the first point I made  
5 in relation to the relevant turnover in that if a duration multiplier of no more  
6 than 5.63 years is used, that is the same in practical terms as averaging the  
7 relevant turnover figures for 2009 to 2013.

8 But I do want to emphasise at this point that pragmatism shouldn't obscure the  
9 separateness of this legal error.

10 **MR JUSTICE MORGAN:** Just repeat it, will you? Repeat the point about  
11 pragmatism.

12 **MR O'DONOGHUE:** My Lord, in relation to the first component of ground 4, our  
13 primary case is that the CMA should have used an average of years 2009 to  
14 2013. Another way practically of getting to the same result would be to  
15 truncate the duration under step 2 to no more than 5.63 years compared to  
16 the 6.75 the CMA found.

17 **MR JUSTICE MORGAN:** Can you help me on this: your first point is about the last  
18 year of the period as compared with the average. If we became happy with  
19 some figure or other as a representative annual turnover, maybe adopting an  
20 average, maybe not, but if we come up with a representative turnover and we  
21 satisfy *Kier* and *Balmoral*, and so on, do you have any separate point about  
22 6.75 being wrong?

23 **MR O'DONOGHUE:** Well, my Lord, it is separate in the sense that there is  
24 a separate legal error.

25 **MR JUSTICE MORGAN:** I know. But unless you avoid a penalty altogether, there  
26 is going to be a penalty, and if we get a representative annual turnover,

1 I haven't seen anywhere in your submissions saying it shouldn't be 6.75, it  
2 should be 1 or 3.

3 I mean, if there is a representative turnover, as I understand you, you don't have  
4 a separate case about a different figure from 6.75.

5 **MR O'DONOGHUE:** My Lord, in practical terms, yes, that is right.

6 **MR JUSTICE MORGAN:** Right. And after all, this is not judicial review, this is not  
7 an appeal on a point of law only. It is whether we think the fine is appropriate.  
8 You are not arguing that 6.75 is not appropriate if you have the right starting  
9 point of a representative annual turnover.

10 **MR O'DONOGHUE:** My Lord, that is right. Another way of putting this is that the  
11 way I get to 5.63 concerns two separate errors which lead to the same  
12 outcome.

13 **MR JUSTICE MORGAN:** I understand, yes. Right, I think you have answered my  
14 question, thank you.

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

16 It is clear, in my submission, from the CMA skeleton at paragraph 111 that it doesn't  
17 really have any good answer to the criticisms we make in relation to what it  
18 did under step 2. The CMA skeleton suggests that it is for FPM to provide  
19 a reason not to make the obvious adjustment at step 2. That is the reverse of  
20 the position as we have seen in the guidance.

21 **MR JUSTICE MORGAN:** Yes, but the short point is you don't have a case that there  
22 is another figure if you start with the right representative annual turnover. You  
23 have just told me that.

24 **MR O'DONOGHUE:** My Lord, in practical terms, yes. If I succeed on ground 4(a),  
25 the first part, then in practical terms I have achieved what I could achieve  
26 under the second part.

1 **MR JUSTICE MORGAN:** Yes. Your 5.63 is not the right multiplier unless you start  
2 with the wrong figure to be multiplied, and then you correct the wrong figure to  
3 be multiplied by taking the wrong multiplier to get a mathematically  
4 appropriate result. But if we start with the right figure to be multiplied, there  
5 doesn't appear to be any dispute about duration and 6.75.

6 **MR O'DONOGHUE:** My Lord, in that composite sense, yes, the --

7 **MR JUSTICE MORGAN:** Yes, I think I understand your position, which is all you  
8 need to do.

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

10 I am going to move on to something different, my Lord, which is the question of the  
11 reductions made for compliance programmes, which is ground 5(d).

12 **MR JUSTICE MORGAN:** Yes.

13 **MR O'DONOGHUE:** Can I start with the Decision, just to remind yourselves of what  
14 exactly was done here. We start at 6.51.

15 **MR JUSTICE MORGAN:** Yes.

16 **MR O'DONOGHUE:** That is volume 1, tab 1, page 235.

17 **MR JUSTICE MORGAN:** Yes.

18 **MR O'DONOGHUE:** We start with SBC and if you see over the page at 6.51(a), it is  
19 clear that SBC already had a compliance programme during the infringement,  
20 but it nonetheless still committed the infringement. The Tribunal may well  
21 think in some ways that is worse, but that doesn't really matter for present  
22 purposes.

23 Then at paragraph 6.52 you will see in relation to CPM. In this context, the CMA did  
24 something quite striking. It relies on the compliance programme not of CPM  
25 but of Marshalls, which was its parent company after the infringement had  
26 ended. I will come back to this in some detail on a separate issue, but at this

1 stage, all I wish to note is two points: one, it relies on the compliance  
2 programme of Marshalls and not CPM and, second, the Decision is not  
3 addressed to Marshalls, it is addressed only to CPM.

4 Then at 6.54 over the page, the Decision sets out the FPM compliance programme  
5 which was set up over the course of 2013 and beyond. Then you see at 6.59,  
6 FPM received zero discount in relation to its compliance; and then at 6.53 by  
7 contrast, both CPM and SBC received a 10 per cent discount for compliance.  
8 So there is a substantial difference in treatment.

9 **MR JUSTICE MORGAN:** Yes.

10 **MR O'DONOGHUE:** In terms of our submissions, we want to develop a handful of  
11 points under this ground. First of all, it is striking at paragraph 6.55 of the  
12 Decision that the CMA does not suggest that the content of FPM's compliance  
13 policy is materially different to that of CPM or SBC. We say the CMA is  
14 clearly right to accept this because the FPM compliance policy is a substantial  
15 and serious one. We can just quickly look at this in volume 3, tab 87, we can  
16 start at 1647, which is a very lengthy series of slides.

17 **MR JUSTICE MORGAN:** I am nearly there, just give me a moment until I find it on  
18 screen.

19 Yes, I have it, thank you.

20 **MR O'DONOGHUE:** So there are almost 50 pages of slides, so this is the initial  
21 training provided by Pinsent Masons, one of the most respected competition  
22 law firms in the City, to FPM in June 2013. I would invite the Tribunal in its  
23 own time to peruse this material. It is a detailed practical and substantial  
24 exercise, there is no doubt about that, and this was coupled, as I will come to,  
25 with regular training of a large number of individuals, including particularly  
26 directors within the company. So there is no question that the content of this

1 compliance policy is of the highest order and is beyond reproach at least from  
2 that perspective.

3 Second, the CMA's core reason, which it sets out on page 238 of the Decision, 6.58:

4 "CMA does not consider that FPM has shown a genuine commitment to compliance  
5 beyond a paper-based activity and in particular has not provided convincing  
6 evidence of a genuine cultural shift which is at the heart of compliance."

7 We say that is wrong, first of all, and it is also somewhat vague. The first point to  
8 note is that the CMA in its pleadings and now in its skeleton has effectively  
9 withdrawn the suggestion made in the Decision that this compliance by FPM  
10 was merely a paper exercise and the CMA was right effectively to concede  
11 that. If I can just show the Tribunal some examples of this working in  
12 real-time: in the same volume, volume 3, tab 85 at 1612, this is effectively the  
13 cover letter or sheet which goes with the compliance policy itself. As the  
14 Tribunal will see in 1612 -- does your Lordship have that?

15 **MR JUSTICE MORGAN:** I do, yes.

16 **MR O'DONOGHUE:** This is signed by Eoin McCann, the managing director, and it  
17 sets out in terms how important this is to the company, this is deadly serious.  
18 It talks, for example, about criminal prosecution, and so on. So this comes  
19 straight from the top. Then if we can go back to Volume I, Mr Mulholland's  
20 evidence, tab 4, page 408.

21 **MR JUSTICE MORGAN:** Yes.

22 **MR O'DONOGHUE:** Mr Mulholland sets out in his evidence that one of the  
23 innovations introduced with his compliance programme was to make it  
24 incumbent on employees and directors to proactively raise instances of  
25 contact with actual or potential competitors and to self-report those and the  
26 content of those discussions. There are a number of examples of this. One

1 example here at 408 comes actually from Eoin McCann himself, the  
2 managing director, and he talks of a social occasion in a business context.

3 **MR JUSTICE MORGAN:** You are calling him Eoin McCann?

4 **MR O'DONOGHUE:** My Lord, I have been round the houses on this. To me it is  
5 "Eoin".

6 **MR JUSTICE MORGAN:** To me it is Eoin as well.

7 **MR O'DONOGHUE:** But I have it on high authority that it is Eoin.

8 **MR JUSTICE MORGAN:** Right.

9 **MR O'DONOGHUE:** I was just as bemused as you were, but there we are.

10 **MR JUSTICE MORGAN:** Okay.

11 **MR O'DONOGHUE:** So that is an example of active or proactive reporting by the  
12 managing director. There is another example two pages on at 410.

13 **MR JUSTICE MORGAN:** Yes.

14 **MR O'DONOGHUE:** This time it is Andy Cooper doing the same thing, proactively  
15 raising these potential sensitivities. The reason of course I highlight these  
16 examples in particular is that these are two of the individuals mentioned in the  
17 Decision.

18 **MR JUSTICE MORGAN:** Yes.

19 **MR O'DONOGHUE:** The gist of the CMA's point on this is, "Well, these guys  
20 basically don't get it." In my submission, it is clear from the documents I have  
21 shown you that they manifestly do: they are proactively in a practical sense  
22 and real-time engaged in reporting these potential sensitivities and there is no  
23 doubt about that.

24 It is not even clear to me what a cultural shift actually means. The fact is that in the  
25 context of the Decision, the other defendants in terms of seniority had exactly  
26 the same level of attendees -- these were all reasonably senior people -- and



1 of course all defendants received an uplift in fine for an intentional  
2 infringement and for director involvement.

3 **MR JUSTICE MORGAN:** Yes.

4 **MR O'DONOGHUE:** In particular, we say it is very difficult to see how the CMA can  
5 fairly distinguish the position of FPM in this regard from CPM because if we  
6 look at what CPM said in its submissions, this time volume 2, tab 61,  
7 page 986. These were representations made by CPM in relation to penalty,  
8 and if the Tribunal can look under step 1, they start off by making a point  
9 about the 30 per cent and they say, "This is not the most serious offending  
10 that could be envisaged," and we agree with that and I will come back to this  
11 under ground 2. It is the second half, they say:

12 "Extensive competition between the parties remained despite the agreement  
13 reached. There was no punishment regime for cheating in the agreement.  
14 Unlike other cases, the risk of significant harm to end consumers is not  
15 present."

16 So that is what they were saying at the time.

17 If we then compare what they were saying with the castigation of FPM in  
18 paragraph 254 of the Defence, Volume 1, tab 5/495, I can just give you the  
19 quote? CMA says:

20 "FPM's position was wholly misguided and failed to recognise that its conduct  
21 distorted competition whether or not it took steps to implement the  
22 infringement."

23 But we make the point that CPM was saying essentially the same thing.

24 **MR JUSTICE MORGAN:** Yes. There is a difference between some reactions to the  
25 statement of objections and others. For example, if the company accused of  
26 infringements says, "I did not go to the meeting, it was not me," that might be

1 untrue and rejected, but it doesn't perhaps tell you about their compliance  
2 policy which they introduced after 2013.

3 Another type of reaction from the alleged infringer would be to say "Well, we did  
4 have discussions but we did not cross the line into infringement." And that  
5 might be rejected, but again it might not detract from compliance introduced  
6 after 2013.

7 A third type of reaction might be more troublesome, where the infringer says, "Yes,  
8 we did have an agreement and we did have the object of restricting  
9 competition but we don't see anything wrong with that. We think that is  
10 a perfectly fair way to do business." That would cast doubt on paper-based  
11 compliance generating documents which say the right words like compliance  
12 after 2013.

13 There are distinctions to be made, aren't there, between different kinds of response  
14 to the statement of objections?

15 **MR O'DONOGHUE:** Yes, there are a number of points which follow from that.  
16 I mean, first of all, just to complete the picture, can I just show you what SBC  
17 was saying in response to the CMA?

18 **MR JUSTICE MORGAN:** Yes.

19 **MR O'DONOGHUE:** If we go to volume 4, tab 144 --

20 **MR JUSTICE MORGAN:** What page is that?

21 **MR O'DONOGHUE:** My Lord, it starts at 2487.

22 **MR JUSTICE MORGAN:** Right. I am getting there. All right, I have arrived.

23 **MR O'DONOGHUE:** There is a reference at the bottom, my Lord. This is an  
24 interview with Michael Stacey of SBC, who is a very senior person within  
25 SBC. Start at the bottom of the page, he says -- so this is in 2018, well after  
26 he received the draft statement of objection. This is 11 September 2018, SBC

1 received the draft statement of objections in July 2018, so it is after that. He  
2 is saying at the bottom of the page:  
3 "... was essential for the survival of the business ..."  
4 Then over the page:  
5 "You've seen the transcript, an awful lot of -- "  
6 Sorry, 2495, forgive me.  
7 **MR JUSTICE MORGAN:** 2495, right.  
8 **MR O'DONOGHUE:** Top of the page:  
9 "You've seen the transcript, there was an awful lot of blooming banter and rubbish  
10 really."  
11 Then two more references, 2528, "Just general banter as well," and 2545 --  
12 **MR JUSTICE MORGAN:** Did you go to 2528?  
13 **MR O'DONOGHUE:** My Lord, yes.  
14 **MR JUSTICE MORGAN:** I had better go there. Yes, I am on 2528.  
15 **MR O'DONOGHUE:** About a third of the way down, "Just general banter as well."  
16 Then finally, 2545:  
17 "A lot of them, the meetings, were a complete waste of time because, you know,  
18 there were a lot of things, a lot of banter about various things."  
19 **MR JUSTICE MORGAN:** Yes, thank you.  
20 **MR O'DONOGHUE:** My Lord, Mr Stacey is of CPM, not SBC. I should correct that.  
21 **MR JUSTICE MORGAN:** Yes.  
22 **MR O'DONOGHUE:** But essentially, these comments made after the statement of  
23 objections are similar to the criticisms made in relation to certain individuals of  
24 my client.  
25 **MR JUSTICE MORGAN:** Yes.  
26 **MR O'DONOGHUE:** The second point, my Lord, in response to the distinctions you

1 raised is this has to be set against the backdrop of what the statement of  
2 objections said. For the first and maybe last time, if we could turn to this  
3 skeleton on this point at paragraph 85.

4 **MR JUSTICE MORGAN:** Right, I have it.

5 **MR O'DONOGHUE:** If I can invite the Tribunal to read the whole of that and in  
6 particular sub-paragraph 3.

7 **MR JUSTICE MORGAN:** Yes.

8 **MR O'DONOGHUE:** The attitude of FPM in response to the statement of objections  
9 has to be set against the backdrop of what the statement of objections said.  
10 As we have set out in paragraph 85, the statement of objections had  
11 a complete section on implementation which has now been jettisoned in the  
12 Decision, and a key part of FPM's response was to say: well, the  
13 implementation -- and it is a ground of appeal in this appeal as well -- the  
14 implementation simply is not made out. That was a direct response to the  
15 object infringement of which it was part and parcel.

16 My Lord, in response to what you put to me, we would make two points. First of all,  
17 FPM was not really in a different boat to the others, particularly CPM, and,  
18 second, the context of its position on the SO has to be seen in relation to the  
19 fundamental lack of clarity and what CMA now accepts as ambiguity in the SO  
20 on the question of implementation, which has now been jettisoned. So that is  
21 the explanation for that.

22 As your Lordship says, the critical question under this ground is: on  
23 a forward-looking basis, because we are talking about post infringement  
24 compliance programmes, is there any reason to think as the Decision says  
25 that this compliance programme is going through the motions and is simply  
26 paper-based?

1 **MR JUSTICE MORGAN:** Yes.

2 **MR O'DONOGHUE:** There is no pleaded basis for that and there is in fact no good  
3 basis for it. The CMA has had another attempt at putting a gloss on this in the  
4 skeleton at paragraph 170. It now says for the first time, "One can have no  
5 comfort that the infringement will not be repeated."

6 I put to one side the CMA's omniscience in now predicting the future, but the critical  
7 point is that that is the whole point of the compliance programme. The  
8 compliance programme contains a series of checks to prevent a repeat  
9 infringement, including in particular where directors are not sure of the  
10 position. In particular, there is a duty on staff under paragraph 4.10 of the  
11 programme -- your reference volume 3, tab 85/1627 -- to report any contact  
12 with competitors; and we have seen that a number of individuals, including  
13 crucially two of the participants in the infringement found in the Decision, are  
14 actively making use of this proactive possibility.

15 **MR JUSTICE MORGAN:** Yes.

16 **MR O'DONOGHUE:** The policy is being applied in practice, as you have seen in the  
17 contact reports, and we can look briefly at paragraph 10 of Mr Mulholland's  
18 statement, volume 1, tab 4. The further reason this is not paper-based is not  
19 just that there is the compliance programme itself, the iterative and ongoing  
20 training, the contact reports -- I mean, Mr Mulholland is at the fulcrum of this  
21 and he makes clear in paragraph 10 that if having received these contact  
22 reports or any other information he is in any doubt, he has a liaison function  
23 as a compliance officer with external specialist legal advice. So he assesses  
24 each report by reference to the manual and his training and seeks legal  
25 advice if necessary.

26 **MR JUSTICE MORGAN:** Right.

1 **MR O'DONOGHUE:** The CMA has not suggested and, with respect, cannot suggest  
2 that the policy is not being implemented properly. There is ample evidence of  
3 it being implemented properly in practice, through the documents I have  
4 shown you and the other measures referred to by Mr Mulholland.

5 In other words, the policy is designed to ensure that a repeat infringement cannot  
6 occur even where directors in the first instance might mistake the legality of  
7 contacts with competitors. There is a process hardwired within the  
8 compliance programme to ensure that this does not start and end with the  
9 director's say so.

10 **MR JUSTICE MORGAN:** Yes. Just on what we will do with this point: if you,  
11 Mr O'Donoghue, go to the Decision, starting at 6.54 on page 237 of bundle 1,  
12 just analysing the reasoning -- and it will be for the CMA to make good this  
13 reasoning at this appeal -- 6.54 is not a criticism of FPM, it is a statement of  
14 what it has done, so the CMA was aware of what FPM had done. This is not  
15 a case where the CMA has said, "We have seen Pinsent Masons' document  
16 and it has all these deficiencies," that is not what is said --

17 **MR O'DONOGHUE:** Which is significant.

18 **MR JUSTICE MORGAN:** But it doesn't sound as if it is going to be necessary for us  
19 to examine the document to see if there are deficiencies. It is not that type of  
20 case.

21 6.55 says:

22 "CMA does not consider FPM has demonstrated adequate steps have been taken to  
23 achieve a clear and unambiguous commitment ... from top down."

24 You might have thought that was saying that the steps referred to at 6.54 were  
25 inadequate because they missed out various things. But if you read on, it  
26 doesn't sound like they are saying that, it is not saying they should have had

1 training six times a year and not twice a year and they should have had  
2 another document dealing with this subject matter. It is not that.

3 6.55 is an introduction to what follows and what follows is that the culture of the  
4 FPM, in particular of the senior management, does not acknowledge the  
5 importance of compliance. That is what is being alleged. I mean, it could be  
6 put different ways, but I think that is what is being said. At 6.56, it is said, if  
7 we read the representations, you will see that FPM does not accept  
8 competition law principles.

9 Now, it will be for the CMA at this hearing to show us which statements in the  
10 representations substantiate that finding, won't it?

11 **MR O'DONOGHUE:** My Lord, yes, at the very least.

12 **MR JUSTICE MORGAN:** When we see what they say, we can evaluate it. You say  
13 that FPM was entitled to say 101 things challenging the SO, which does not  
14 mean it is failing to accept the underlying principles. For my part, I will  
15 postpone any view on this until I see which bits of the representations are  
16 relied on to show not only is there a challenge to the statement of objections,  
17 but that the form of the challenge was a lack of understanding of basic  
18 principles.

19 Then 6.57, the first sentence refers to interviews, footnote 1104. Again, we have to  
20 be shown where in the interviews does the interviewee show they didn't  
21 understand or accept the basic principles.

22 If they said, "We do accept the principles, of course we accept the principles, but we  
23 did not infringe them," or, "This is a very minor case or something." We will  
24 have to judge whether that is a failure to accept the principles.

25 So it comes down to that, does it not? There are really two things we have to look  
26 at: firstly the representations, secondly the interviews, to see if we are

1 persuaded that it was appropriate to form the view that all of the compliance  
2 steps were undermined because senior management did not accept the basic  
3 principles. That is the point, isn't it, and that is all there is to it?

4 **MR O'DONOGHUE:** My Lord, it is one of the points, I accept that. But I think one  
5 needs to be precise.

6 **MR JUSTICE MORGAN:** Yes.

7 **MR O'DONOGHUE:** The first point, we do not accept that the compliance  
8 programme is as the Decision says a paper-based activity because as  
9 I showed your Lordship, there is a structural component to the compliance  
10 programme which requires the compliance officer to act as a fulcrum and  
11 liaison within the company and externally to deal with potential issues.

12 **MR JUSTICE MORGAN:** Yes, I have got that. That is a separate point, at 6.58,  
13 yes, I have that.

14 **MR O'DONOGHUE:** Yes, it is an important point.

15 **MR JUSTICE MORGAN:** Yes.

16 **MR O'DONOGHUE:** The second point is the point I made and set out in  
17 paragraph 85 of our skeleton which is when the CMA says at 6.56 in relation  
18 to the representations on the statement of objections on implementation, that  
19 has in fairness to be seen in the light of what the statement of objections said  
20 and the fact that the implementation case has now been effectively jettisoned.

21 In a sense, one could view FPM's representations on this point as having been  
22 implicitly accepted by the CMA by the dropping of the section, or at the very  
23 least to suggest that having raised the problems with the CMA's case on  
24 implementation and the CMA have effectively accepted that, that is a point  
25 against FPM. That goes much too far, in my view.

26 The third point: we have seen what CPM said in relation to banter,



1 non-implementation, lack of effect, and so on, and we say that in substance  
2 other defendants made similar points to what FPM is now being criticised for.  
3 That is also a relevant point.

4 We do think in the circumstances, we see it applies (Inaudible) the MD himself has  
5 a pretty stern letter on the cover page. We have seen he is actually engaged  
6 in self-reporting and the finding that this is all paper-based really is not  
7 sustainable if one looks at the totality of the relevant evidence.

8 **MR JUSTICE MORGAN:** Understood. Can I have your help on this about CPM: if  
9 we listen to the CMA submissions and they show us that the representations  
10 made by FPM and the evidence given in interviews by senior management,  
11 CMA persuade us that FPM in truth did not accept the underlying competition  
12 law principles, say we reach that view, then that would be a case for saying  
13 they should not get 10 per cent discount, possibly they should get no discount  
14 for compliance. That would be right, would it not?

15 **MR O'DONOGHUE:** Well --

16 **MR JUSTICE MORGAN:** If the compliance procedures are procedural but are not  
17 going to be observed in substance because of the attitudes of senior  
18 management, the CMA and this Tribunal would be entitled to say, "We are not  
19 impressed by the case on compliance" and we could act upon that, couldn't  
20 we?

21 Where I am going is -- let us assume I am right, we could act on that -- you say,  
22 "Well CPM were pretty bad, too. They said the same words which this  
23 Tribunal finds shows a failure to accept competition law principles." Well,  
24 CPM got away with it. You are not saying we should say that FPM did not  
25 accept competition law principles, but because CPM did not accept them  
26 either, equality of treatment means we have to give them both minus

1 10 per cent, a discount of 10 per cent.

2 **MR O'DONOGHUE:** My Lord, I am making two separate points. One is -- the  
3 infringement is not a unitary thing and there will be aspects of it that individual  
4 defendants say, "Well, I do not think this particular aspect is made out or  
5 occurred." You see for example the CPM comments where, look, a lot of this  
6 stuff was banter, some of it was not implemented, and so on. One has to look  
7 at the totality of the picture and it cannot simply be the case that if someone  
8 says, correctly in my view, that there was lots of cheating, things were not  
9 implemented, that disqualifies them. That may be entirely justified on the  
10 facts of the case, notwithstanding the existence of the infringement. Where in  
11 my submission there is a particular unfairness is where somebody makes  
12 essentially a contextual point in relation to the infringement in the case of  
13 CPM, and then if FPM says something similar, that becomes a decisive point  
14 against FPM but is looked at in the round in relation to CPM.

15 **MR JUSTICE MORGAN:** All right. I think our primary focus will be on the case  
16 which CMA wish to make at this hearing against FPM. It seems to be  
17 confined to the representations and the interviews. We're not concerned with  
18 challenges to the statement of objections on (Inaudible) challenges to a failure  
19 based in legal principle.

20 Take the example I gave earlier where FPM says, "Yes, we did make an agreement  
21 to restrict competition, but we don't see what is wrong with that." If they say  
22 they didn't make an agreement to restrict competition, even though that is not  
23 true, that is not a failure to accept principles.

24 All right, that has clarified it. Where do we go from there?

25 **MR O'DONOGHUE:** My Lord, just one final point on compliance and then I will  
26 move on to something else.

1 **MR JUSTICE MORGAN:** Yes.

2 **MR O'DONOGHUE:** If we can go to volume 2, tab 60, please.

3 **MR JUSTICE MORGAN:** What page?

4 **MR O'DONOGHUE:** 981.

5 **MR JUSTICE MORGAN:** Yes.

6 **MR O'DONOGHUE:** This is CPM's response to the draft statement of objections.

7 **MR JUSTICE MORGAN:** Yes.

8 **MR O'DONOGHUE:** You see at the bottom of the page, penultimate paragraph,  
9 they say an incomplete summary of the factual matrix was presented.

10 **MR JUSTICE MORGAN:** Yes.

11 **MR O'DONOGHUE:** At the bottom of the page:  
12 "There is cogent evidence that adherence to the agreed minimum prices ... was not  
13 enforced or adhered to, at all times. Indeed, Barry Cooper's account in  
14 interviews under caution suggested that minimum prices ... were 'aspirational'  
15 targets and rarely ever achieved in practice. ... CPM's own analysis supports  
16 that very contention and it is anticipated that the non-settling party will be able  
17 to do similar evidence backed assertions."

18 Then he refers to aspirational prices and says:  
19 "In our respectful opinion, the meaning of aspirational, if the CMA wishes to stand by  
20 that term, in the context of the arrangement, is not fully examined, without  
21 reference more fully to Barry Cooper's remarks in interview."

22 Then you will see in the subsequent paragraphs, there is quite detailed evidence  
23 about non-adherence to the agreement, and so on. It says in the penultimate  
24 paragraph:  
25 "These are not exhaustive examples. Barry Cooper was consistent in his assertions  
26 that minimum prices were rarely adhered to."

1 **MR JUSTICE MORGAN:** Yes.

2 **MR O'DONOGHUE:** That dovetails with my point in relation to paragraph 85 of our  
3 skeleton, which is in circumstances where implementation was part of the  
4 case in the SO, the defendants were perfectly entitled to point out: well, in fact  
5 it was not implemented, or it was not implemented as much as you think.  
6 That doesn't amount to a denial of the undeniable, that is responding to  
7 a case which they say is not fairly made out.

8 **MR JUSTICE MORGAN:** Yes.

9 **MR O'DONOGHUE:** If I could turn to finally one point on SBC and compliance, if we  
10 could turn to volume 2, tab 56, please.

11 **MR JUSTICE MORGAN:** What page?

12 **MR O'DONOGHUE:** Page 956, my Lord.

13 **MR JUSTICE MORGAN:** Thank you.

14 **MR O'DONOGHUE:** You will see in the table under annex 2 in relation to SBC,  
15 initially the CMA when calculating the penalty said SBC was only entitled to  
16 a 5 per cent discount for compliance. Then if we move on, 979 in the same  
17 bundle, tab 59.

18 **MR JUSTICE MORGAN:** 979, right. Right, getting there.

19 **MR O'DONOGHUE:** Paragraph 3, SBC said there are no written representations of  
20 the draft penalty calculation.

21 **MR JUSTICE MORGAN:** Which part of 979?

22 **MR O'DONOGHUE:** It is paragraph 3, my Lord.

23 **MR JUSTICE MORGAN:** Right, thank you.

24 **MR O'DONOGHUE:** Then there was a request for further information at 1051. Then  
25 at 1066, in the middle of the page, you will see that the compliance discount  
26 increase was doubled, it went from 5 per cent to 10 per cent.

1 In effect, my Lord, what we see is an element of a double standard: SBC are  
2 effectively being coached in terms of what are the good things to do in terms  
3 of pushing the CMA's buttons on compliance and their compliance discount is  
4 doubled on that basis despite making no representations at all on the draft  
5 penalty statement.

6 **MR JUSTICE MORGAN:** Just let me catch up, I need to get to 1066. Right, I am on  
7 1066.

8 **MR O'DONOGHUE:** My Lord, it is about a third of the way down --

9 **MR JUSTICE MORGAN:** I see it.

10 **MR O'DONOGHUE:** You see it was doubled to 10 per cent. They set out the  
11 reasoning and effectively they are told what would be desirable.

12 **MR JUSTICE MORGAN:** Yes.

13 **MR O'DONOGHUE:** By contrast, in the follow-up questions my client received,  
14 volume 3, tab 86/1641 --

15 **MR JUSTICE MORGAN:** Yes.

16 **MR O'DONOGHUE:** -- there is no indication of the reasons why the CMA would say  
17 it was not entitled to a discount for compliance. So there does seem to be an  
18 element of coaching the settling parties and not extending the same courtesy  
19 to my client.

20 **MR JUSTICE MORGAN:** What you get from 1641 is that there is no suggestion  
21 there about doing more and getting a discount, is that it?

22 **MR O'DONOGHUE:** My Lord, yes, and when one puts that side by side with what  
23 they told SBC they needed to do after it had already declined to make  
24 representations on the draft penalty statement, there does seem to be an  
25 element of a double standard.

26 **MR JUSTICE MORGAN:** Right.

1 **MR O'DONOGHUE:** My Lord, I am moving on now to a different point, ground 6(b),  
2 which concerns acquisitions. It is important, in my submission, to be precise  
3 about the legal basis for this ground. The issue under this ground is whether  
4 the CMA's assessment of proportionality under step 4 of the guidance could  
5 be lawfully conducted without having regard to the fact that a large part of  
6 FPM's 2018 turnover consisted of turnover derived from acquisitions by FPM  
7 of unrelated assets after the end of the relevant period.

8 We have consistently made this argument to the CMA; see, for example, footnote  
9 1138 of the Decision. So contrary to what the CMA seems to have  
10 understood, this argument is not concerned with the 10 per cent statutory  
11 cap -- we have other arguments in relation to that ground -- it is a separate  
12 proportionality point located within step 4 to deal with acquisitions in  
13 particular.

14 Can we just remind ourselves of the basic factual matrix underpinning this ground.  
15 The CMA used the total FPM turnover for the year ending 2018 to calculate  
16 the statutory cap on fines. That is paragraph 6.86 of the Decision.

17 **MR JUSTICE MORGAN:** Yes.

18 **MR O'DONOGHUE:** If the Tribunal could then go to table 4 of FPM's response to  
19 the draft penalty statement, it is volume 3, tab 85.

20 **MR JUSTICE MORGAN:** Yes.

21 **MR O'DONOGHUE:** At 1606, you will see that the company's total turnover  
22 effectively trebled between the end of the infringement in 2013 and 2018,  
23 which was the year taken into account under step 4.

24 **MR JUSTICE MORGAN:** Yes.

25 **MR O'DONOGHUE:** There were two overarching clear trends during this  
26 post-infringement period: first, the percentage of turnover derived from the

1 drainage products subject to the Decision steadily decreased, and the  
2 percentage of relevant turnover attributable to acquisitions substantially  
3 increased after 2013.

4 If we look at the same document at 6.8 and 6.9, you will there see fleshed out those  
5 two headline points, if I can ask the Tribunal quickly to look at that? It is 1607,  
6 bottom of the page, and over the page to 1608.

7 **MR JUSTICE MORGAN:** Yes, we will do that. Yes.

8 **MR O'DONOGHUE:** My Lord, the headline point is that something like 60 per cent  
9 of the increase in total turnover between 2013 and 2018 was due to FPM  
10 acquiring the assets of other undertakings in sectors other than precast  
11 concrete drainage. Just to put some numbers on this: of the £169 million  
12 increase in turnover between 2013 and 2018, almost £92 million was  
13 attributable to post-Decision acquisition of precast plants which produce  
14 products other than those with which the Decision is concerned.

15 So in relation to this aspect of step 4, we have two essential points.

16 **MR JUSTICE MORGAN:** Well, just help me on why (break in transmission) in  
17 connection with step 4 and step 5 what you are showing me. Page 1606 is  
18 about step 5, it is about the statutory cap, and the statutory cap is about  
19 worldwide turnover. You have a point that if the cap had been applied at an  
20 earlier date, if this been given at an earlier date, it would have worked(?) up  
21 that point.

22 But we are now going to step 4, which is not being discussed in these pages at all.

23 In step 4, they reduced the notional penalty by about £31 million to reflect  
24 deterrence and proportionality, and their guidance said that when considering  
25 proportionality, they had regard to turnover, profits, and assets.

26 Do we know when they had regard to those things, what years they were taking as

1 relevant for step 4?

2 **MR O'DONOGHUE:** My Lord, yes. We can pick this up at 6.59 of the Decision.

3 **MR JUSTICE MORGAN:** Right, I will go there.

4 **MR O'DONOGHUE:** My Lord, effectively they took the same figures into account  
5 under step 5 and step 4.

6 **MR JUSTICE MORGAN:** I see.

7 **MR O'DONOGHUE:** You see, for example --

8 **MR JUSTICE MORGAN:** Let me see that.

9 **MR O'DONOGHUE:** 6.69(a) is CPM, so you will see its annual worldwide turnover,  
10 in that case 2017, which I will come back to. Then for FPM --

11 **MR JUSTICE MORGAN:** Can I be clear the date of FPM first.

12 **MR O'DONOGHUE:** Yes. It's at 6.73(a).

13 **MR JUSTICE MORGAN:** And they are taking the figures for December 2018, right?

14 **MR O'DONOGHUE:** Yes, yes.

15 **MR JUSTICE MORGAN:** Thank you, right.

16 **MR O'DONOGHUE:** This is a step which is concerned with proportionality and our  
17 essential point is if one looks at the figures for the end of 2018 in the case of  
18 FPM, they are mainly made up with turnover that is the product of  
19 post-Decision acquisitions of unrelated businesses.

20 **MR JUSTICE MORGAN:** I understand. But before we get to your criticism, what is  
21 the right approach to proportionality as regards the relevance, if any, of  
22 turnover?

23 **MR O'DONOGHUE:** My Lord, it is a question of proportion.

24 **MR JUSTICE MORGAN:** What should they have done? They had a company, they  
25 assessed the seriousness and scale -- that is step 1 -- and they multiplied  
26 a historic year's turnover by a factor which they thought something over



1 £50 million, as I remember, £58 million or something of that sort, and then  
2 they said, "Now we need to think is a fine at that level proportionate?"

3 Should they have said proportionality is based on the historic size of the company, or  
4 should they have said based on the current size of the company? What is the  
5 correct approach?

6 **MR O'DONOGHUE:** My Lord, what I am saying is that we are concerned with the  
7 post-Decision period. This is five years after --

8 **MR JUSTICE MORGAN:** We are concerned with the time at which the penalty is  
9 being imposed.

10 **MR O'DONOGHUE:** Yes, which is five years after the infringement ended. And  
11 we --

12 **MR JUSTICE MORGAN:** Forget the statutory framework here and think of  
13 somebody else being fined for wrongdoing. How do you assess the  
14 proportionality of a fine for wrongdoing, and do you take account of the  
15 position of the defendant at the time of the wrongdoing or at the time of the  
16 fining?

17 **MR O'DONOGHUE:** My Lord, under step 4 --

18 **MR JUSTICE MORGAN:** I know you are going to say that something else  
19 happened with CPM, but before we do a comparison exercise, do we not  
20 need to have some concept defined as to what you are trying to do? What is  
21 the purpose of this?

22 I mean, let's assume the CMA got it wrong, what are we going to do? Why should  
23 we take the size of the defendant's business several years earlier rather than  
24 at the time of the finding? I am not saying I have any opinion on this, I just  
25 need to know what you say.

26 **MR O'DONOGHUE:** Our submission is clear and simple, my Lord, which is: where

1 at the time the penalty is being imposed, which is many years after the  
2 infringement ended, most of the worldwide turnover is made up with recent  
3 acquisitions of unrelated businesses and that has to be taken into account.  
4 Just to give your Lordship a simple example: suppose you had a company  
5 with a turnover of £10 million and in the year before the decision was  
6 rendered, it did a reverse takeover of a business that had a £90 million of  
7 turnover -- so the total turnover had gone from £10 million to £100 million -- it  
8 cannot be proportionate that because of that happenstance, the proportionate  
9 penalty goes up by 1,000 per cent.

10 You have to take account of the fact that at the time the decision is rendered -- and  
11 we have other points on delay which I will come to later in the week -- but you  
12 have to take account of the point the decision has rendered that the unrelated  
13 turnover you are looking at is concerned with lawful acquisitions made many  
14 years after the infringement of products that have nothing to do with the  
15 products subject to the infringement decision.

16 **MR JUSTICE MORGAN:** Well, my problem here is that -- it may be something you  
17 complain about, that what is meant by proportionality? Proportionate to what  
18 and why?

19 Take a driver who is going to be fined for a serious driving offence -- he is not going  
20 to be sent to prison, he is going to be fined -- at the time of his conviction and  
21 sentence, he is a rich man. It so happens he is rich because he had an  
22 inheritance between the offence and the conviction. The judge sentencing  
23 him says, "I am now going to consider the amount of the fine, what fine am  
24 I going to give a rich man?" And the rich man says, "Well, I am a rich man  
25 and if you fine me £1,000, I spend that on champagne on a typical evening,  
26 so ha ha, £1,000 is no impact. But I want you to give me a £1,000 fine

1 because when I committed this offence, I was on social security and £1,000  
2 fine would have been a very serious matter."

3 What is the right answer? Do you say, "I will treat you like a poor man because you  
4 were poor at the time of the offence," but you say, "No, I am fining you today,  
5 I am going to punish you today, today you are a rich man." Does any other  
6 Tribunal case discuss this, does the European Court discuss this? It is not  
7 good enough to make an assertion that you obviously disregard growth in the  
8 finances of the infringer prior to the day when the penalty is being imposed.  
9 We have to have some principle. We have to have some principle to apply,  
10 do we not?

11 **MR O'DONOGHUE:** I agree, and we can pick up the principle in *Kier*. It is  
12 Authorities 4, tab 49.

13 **MR JUSTICE MORGAN:** Right. Let me tidy up and then go to *Kier*.

14 **MR O'DONOGHUE:** Authorities 4, tab 49.

15 **MR JUSTICE MORGAN:** What page? I have to do it on pages.

16 **MR O'DONOGHUE:** Page 3066.

17 **MR JUSTICE MORGAN:** Page 3066, tab 49, hold on. I am in *Kier* indeed.

18 **MR O'DONOGHUE:** My Lord, it starts at 169.

19 **MR JUSTICE MORGAN:** Yes, I have 169. Just remind me what MDT is.

20 **MR O'DONOGHUE:** It is the multi-deterrent threshold. This was a feature of the  
21 previous guidance which was struck down in this case.

22 **MR JUSTICE MORGAN:** Okay, so I can stay above the detail of that, can I, I don't  
23 need to go into that. Okay. Do you want us to read 169 to ourselves?

24 **MR O'DONOGHUE:** Yes. It is really the second half of that paragraph, and also  
25 177.

26 **MR JUSTICE MORGAN:** Okay, we will do that. (Pause).

1 I need to deconstruct that with your help, Mr O'Donoghue. It seems to be discussing  
2 an approach whereby you take a percentage of a turnover and the MDT  
3 allows you to take the turnover of a group company where the infringement  
4 was by a subsidiary operating in one of the many businesses of the group  
5 company. Is that what it is saying?

6 **MR O'DONOGHUE:** My Lord --

7 **MR JUSTICE MORGAN:** I think I probably need to read before this passage to see  
8 what the point was.

9 **MR O'DONOGHUE:** My Lord, that is a narrow point but the principle I wish to  
10 extract from that is that the mere fact a company is big or is a conglomerate  
11 and has unrelated turnover is not itself a reason in principle why it should  
12 have a higher fine, and the analogy I made between that situation concerns  
13 the question of acquisitions in this case.

14 Just to give your Lordship two further references, the point in 177 --

15 **MR JUSTICE MORGAN:** Just stay with this because if you move on, we lose the  
16 point. What is being said is if you have a company you are fining, which is  
17 a very large company, and it has a large number of different businesses which  
18 it operates -- whether through subsidiaries or not doesn't matter -- it is very  
19 profitable, some of its lines of business are extremely profitable, so it has  
20 a large annual turnover.

21 But the infringement you are focusing upon lay in a relatively narrow business range  
22 of activity, was much more modest in extent, and you are fining the company  
23 for committing the infringement. What is being said is that the turnover of the  
24 large conglomerate is not a very safe guide to the type of fine you should  
25 impose. What you would instead be looking at would be the turnover of the  
26 business activity in which the infringement occurred, is that the point?

1 **MR O'DONOGHUE:** Well, there has to be some balance or relationship between  
2 them. What one cannot have is the tail wagging the dog and we see very  
3 clearly in this case you have post-infringement turnover which is primarily  
4 unrelated and the function of lawful acquisitions and that is being used as  
5 a figure under step 4 effectively to hammer FPM.

6 What we say needs to be done is some account needs to be taken of the fact that  
7 most of that revenue is unrelated because the advantage a firm derives from  
8 infringing competition law has nothing to do with unrelated turnover, still less  
9 with turnover associated with post-infringement business acquisitions from  
10 third parties.

11 In fact, this point is expressly picked up in the guidance, so there is clearly a principle  
12 basis. It is in Authorities 1, tab 21.

13 **MR JUSTICE MORGAN:** Are you taking me to the guidance?

14 **MR O'DONOGHUE:** My Lord, yes.

15 **MR JUSTICE MORGAN:** Yes, I have that.

16 **MR O'DONOGHUE:** It starts at 3.25, the last sentence. This is step 4, my Lord:

17 "The CMA may also consider indicators of size and financial position from the time of  
18 the infringement."

19 **MR JUSTICE MORGAN:** Yes.

20 **MR O'DONOGHUE:** Then 2.21, the penultimate sentence:

21 "Where relevant, CMA would account for any gain which might accrue to the  
22 undertaking in other product or geographic markets as well as the relevant  
23 market under consideration."

24 They give a rather obscure example in footnote 36.

25 But in a case such as the present where all of the turnover I am concerned with is  
26 post-infringement, unrelated and primarily acquisition-related, the same

1 cannot possibly be said.

2 **MR JUSTICE MORGAN:** All right.

3 **MR O'DONOGHUE:** Just to be clear, I am not --

4 **MR JUSTICE MORGAN:** You tell us when we come to impose a penalty, what is it  
5 we should be looking for at step 4? What should guide us on step 4? You will  
6 have to put a positive case on that.

7 To say that the CMA got it wrong does not help us decide what we should do as  
8 appropriate. It seems to me that you are -- one of which is what did the  
9 infringer gain from the infringement? Secondly, what is (break in  
10 transmission). Thirdly, are there any other things that come into it? I mean,  
11 these are not easy matters to quantify and --

12 **MR O'DONOGHUE:** My Lord, we do have some metrics in this case because I have  
13 shown you the breakdown of the post-Decision figures, and about 60 per cent  
14 of the turnover is unrelated to the products comprising the infringement and is  
15 primarily the product of recent acquisitions of businesses from third parties.  
16 So there is a number there one can work with.

17 **MR JUSTICE MORGAN:** If you are dealing with what did the infringer gain from the  
18 infringement, plainly turnover and profits from other activity not tainted by  
19 infringement would not be brought into account. On the other hand, if you are  
20 (transmission break) what do I have to fine a large profitable business to  
21 make it stop infringing and respect competition law?

22 Now, if it has a turnover of £100 million but the relevant turnover from the relevant  
23 area is £1 million, do you say, "Well, if I fine it £100,000 that is 10 per cent of  
24 £1 million and that will do," or do you say, "Well, £100,000 to this company is  
25 just derisory. It will treat this as a flea bite. It will appear in its accounts as an  
26 item too small to mention"?

1 The points can work differently depending on what question you ask yourself, surely.  
2 On general deterrence, if it is seen by others that a massive company pays  
3 a fine of £100,000 for flagrant anti-competitive behaviour, how will it be  
4 deterred? I am not saying I know the answer. I can tell you I do not know the  
5 answer. But you are asking us to take a view as to what is appropriate, you  
6 will have to justify your -- and I can see that if you are asking us to assess the  
7 gain which the infringer made from the infringement, then the turnover of other  
8 businesses, other subsidiaries which have nothing to do with the infringement,  
9 could be put on one side.

10 **MR O'DONOGHUE:** My Lord, that is certainly clear. I also say very clearly that  
11 essentially it is a matter of happenstance as to whether FPM acquired these  
12 unrelated businesses relatively recently; and to load 100 per cent of those  
13 acquisitions which are recent and are post-infringement in terms of turnover  
14 which is 100 per cent relevant under step 4, in my view is plainly  
15 disproportionate because it is simply a matter of happenstance.

16 These are unrelated businesses that were lawfully acquired and some account has  
17 to be taken of that factor as a matter of proportionality. What I am not saying,  
18 and we have never said, is that one must entirely exclude all unrelated  
19 turnover.

20 **MR JUSTICE MORGAN:** You do not say that there is a rule at all that you exclude  
21 all unrelated turnover.

22 **MR O'DONOGHUE:** No, we have never said that.

23 **MR JUSTICE MORGAN:** Yes.

24 **MR O'DONOGHUE:** Because one of the points made by way of response by the  
25 CMA to *Kier* is to say, "Well, FPM is arguing all of this turnover is irrelevant  
26 completely." We are not saying that it should be excluded, we have never

1 said that. We are simply saying the fact this is essentially unrelated  
2 post-infringement turnover has to be factored into proportionality.

3 **MR JUSTICE MORGAN:** We see what the guidance says about it, do we not? I am  
4 looking for it ... yes, 2.20 of the guidance, and remember, this is dealing with  
5 specific deterrence and proportionality:

6 "It will have regard to the undertaking, size and financial position at the time the  
7 penalty is imposed."

8 Is that wrong in principle or permissible providing one acts in a proportionate way?

9 **MR O'DONOGHUE:** My Lord, there has to be some proportionate balance between  
10 those two things. What you cannot have --

11 **MR JUSTICE MORGAN:** What they are saying is they will use these as indicators.  
12 Are you challenging that statement, or do you accept that it is not wrong in  
13 law, providing the result is a proportionate result?

14 **MR O'DONOGHUE:** My Lord, in a sense, paragraph 2.20 encapsulates much of my  
15 submission because what I am saying is they have to take into account the  
16 turnover at the time of the infringement under step 4 and they have to apply  
17 that in some proportionate manner in the context of total turnover.

18 **MR JUSTICE MORGAN:** The sentence I just read is the position at the time the  
19 penalty is being imposed.

20 **MR O'DONOGHUE:** Yes, my Lord. I am focusing on the last sentence. You have  
21 to look at both.

22 **MR JUSTICE MORGAN:** So they may also consider from the time -- that means  
23 from or at the time of the infringement, does it not?

24 **MR O'DONOGHUE:** Yes, it does.

25 **MR JUSTICE MORGAN:** Then they can have regard to total turnover, profitability,  
26 net assets, liquidity, industry margins. They seem to be doing the business of



1 calculating specific deterrence, maybe affordability, and maybe some concept  
2 of proportionality. All of those things, do they not?

3 **MR O'DONOGHUE:** Yes.

4 **MR JUSTICE MORGAN:** Right. As far as deterrence goes, do you accept that you  
5 might be more interested in the size of the company at the time you are fining  
6 it as compared with the size of the company at the time of the wrongdoing?

7 **MR O'DONOGHUE:** My Lord, it is a factor. My point is you cannot attach  
8 disproportionate weight to that factor to the exclusion of its lack of connection  
9 with the turnover at the time of the infringement, first of all. Second, you must  
10 take account on some level of the fact that most of the post-infringement  
11 turnover in question is a) unrelated and b) stems from acquisitions of  
12 unrelated businesses.

13 **MR JUSTICE MORGAN:** You will address us on what we should do, but you will  
14 also address us on what the CMA did wrong. We have step 4 beginning at  
15 paragraph 6.61 and there was a general comment about how step 4 operates  
16 at 6.63 and 6.64. Then at 6.73, they say £59 million is too large, you would  
17 agree; then it gives certain figures. Then it says at 6.75 it is £28 million and  
18 then they say:

19 "We are looking at worldwide turnover, net assets, profits, and profit for one year."

20 **MR O'DONOGHUE:** My Lord, the --

21 **MR JUSTICE MORGAN:** If you are thinking about deterrence, there seems to be  
22 a case for deterring on the basis of what size the company is at the time you  
23 are trying to deter it.

24 **MR O'DONOGHUE:** My Lord, it is a factor, but it is not the only factor. My Lord,  
25 perhaps the most effective way --

26 **MR JUSTICE MORGAN:** They have not -- deterrence is one of the factors.

1 All right, we have gone past 3.30 which I think we had intended to have a five-minute  
2 break. Do you want to round off a point or shall we have our five-minute  
3 break and then resume?

4 **MR O'DONOGHUE:** I think, my Lord, we might break. I see the time and  
5 Mr Williams is obviously keen to start. If I could have another 10 or  
6 15 minutes just to round off one aspect of this point and then I will hand over  
7 to Mr Williams.

8 **MR JUSTICE MORGAN:** Right. Let us do that. We will leave the hearing room and  
9 go into the retiring room. Let me just get the right material before us.

10 **(3.36 pm)**

11 **(A short break)**

12 **(3.50 pm)**

13 **MR JUSTICE MORGAN:** Before we resume, I have had an e-mail communication  
14 from the Chancellor who tells me that my colleague has not had his test result  
15 and that in the circumstances, I am to continue with the remote hearing  
16 tomorrow. I wish it were not the case, but I do not feel I am in a position to do  
17 otherwise than comply with that direction, so I fear we will have to continue  
18 remotely tomorrow.

19 Is there an alternative anyone can think of? If we were to take the evidence  
20 tomorrow, and I think Dr Grenfell is to be cross-examined tomorrow, is there  
21 an alternative to hearing all the evidence to Wednesday, something like that,  
22 continue with the submissions tomorrow, or is that just too inconvenient and  
23 awkward?

24 **MR O'DONOGHUE:** My Lord, from our perspective, if we can have at least some of  
25 the evidence live, we would very much prefer that.

26 **MR JUSTICE MORGAN:** Well, how do we do that?

1 **MR O'DONOGHUE:** My Lord, as you indicated --

2 **MR JUSTICE MORGAN:** We can postpone it to Wednesday in the hope -- I am  
3 pretty optimistic that this test business will go away as a problem, but we  
4 won't know that until late tonight or tomorrow by the sound of it. It is not what  
5 you planned to have the evidence on Wednesday.

6 **MR O'DONOGHUE:** There was a possibility it would spill into Wednesday.

7 **MR JUSTICE MORGAN:** I see that. Dr Grenfell, he is the longest witness, is he  
8 not?

9 **MR O'DONOGHUE:** Yes, he is.

10 **MR JUSTICE MORGAN:** Well, tomorrow we are going to take time to finish  
11 submissions. We could have Mr Mulholland and Mr David Williams, we could  
12 see how much is left of Tuesday when we have done that.

13 Mr O'Donoghue, I think at one time you indicated you might be the best part of a day  
14 with Dr Grenfell. Do you have a revised estimate for cross-examining  
15 Dr Grenfell, or do you wish to keep that to yourself for the moment?

16 **MR O'DONOGHUE:** No, there is no great secret. I apprehend it may be less than  
17 a day, but how much less, I can't really say at this stage. But probably more  
18 than half a day, if I can put it that way.

19 **MR JUSTICE MORGAN:** If we postpone Dr Grenfell to Wednesday and then had  
20 closing submissions, part of Wednesday possibly, but certainly all of Thursday  
21 and all of Friday, would that be possible in giving you a fair hearing, or is that  
22 too short for final submissions?

23 **MR O'DONOGHUE:** From my perspective, that would be adequate. We have had  
24 very, very detailed skeletons and other written documents.

25 **MR JUSTICE MORGAN:** Yes.

26 **MR O'DONOGHUE:** The Tribunal has clearly done some pre-reading. In a normal

1 trial of this kind, even longer trials, two days for closings for two parties would  
2 be reasonably languid. So from my perspective, I have no problem in  
3 principle with that, but obviously Mr Williams may have other ideas.

4 **MR JUSTICE MORGAN:** Speaking for myself, I think my colleagues are likely to  
5 take the same view. The skeletons are very thorough indeed and when we  
6 come to our decision, we will address all of the points which are made in  
7 writing. We will not overlook them and we will -- they are well put, we will  
8 understand them and we will see the force of the points being made and we  
9 will assess them.

10 If the parties were not unhappy about this, I think we could have a day each for the  
11 two sides, the Thursday and Friday, maybe we could even begin on  
12 Wednesday after Dr Grenfell, so we have Dr Grenfell live on Wednesday.  
13 This could all be frustrated by an adverse test result, but predicting the future,  
14 which I must not do, I think we will not get an adverse test result.

15 Mr Williams, do you have any comments on what we have just been ventilating?

16 **MR WILLIAMS:** We can see the sense in trying to achieve a position where  
17 Dr Grenfell gives his evidence in person if that is possible and today has run  
18 quite long. I am conscious it is 4.00 and I have not started.

19 **MR JUSTICE MORGAN:** Yes.

20 **MR WILLIAMS:** If we were to revise the timetable in the way you have described,  
21 Sir, one advantage would be that I could start fresh tomorrow rather than pick  
22 it up at 4.30 or so today.

23 **MR JUSTICE MORGAN:** Yes, and Mr O'Donoghue could have the rest of today if  
24 he wants it, to say what he wants to say.

25 What would then happen tomorrow, Mr Williams? We would have your submissions  
26 and we would also be able to have Mr David Williams and Mr Mulholland,

1 would we?

2 **MR WILLIAMS:** We would certainly be able to have Mr Mulholland. The indication  
3 I had from my team earlier on is that we think we can get documents to  
4 Mr Williams to facilitate cross-examination. Whether that has to be the whole  
5 bundle or whether it would be a subset of documents, I am not sure, and  
6 perhaps I would need to speak to Mr O'Donoghue about that. But we are  
7 confident we can make a remote cross-examination of Mr Williams work.

8 And I think given where we are, combined with my opening, that will take up a good  
9 chunk of tomorrow, and certainly --

10 **MR JUSTICE MORGAN:** And then finally, Mr Williams, what about Thursday and  
11 Friday? If we have a day for each side, Thursday and Friday, will that be fair  
12 to the parties, a hearing of that kind?

13 **MR WILLIAMS:** I think originally your estimate for submissions following the  
14 evidence was that it would be sensible to allow more than a day, but things  
15 move on. I might have a bit longer tomorrow than I was expecting in opening.  
16 We think we can make that work. It will require a bit of jiggling around, but  
17 there is still quite a lot of time left in the week to cover the ground which needs  
18 to be covered.

19 **MR JUSTICE MORGAN:** I have not involved Sir Iain and Eamonn Doran in this  
20 discussion. If they have comments or concerns, then please raise them  
21 before we decide now what to do.

22 **MR DORAN:** No concerns from me.

23 **SIR IAIN:** I have no concerns at all. I am down here in London until Friday  
24 afternoon. I can give as much time to this as you and learned counsel would  
25 require. I think the only thing is I need to be away from here by 4.45 on Friday  
26 afternoon without fail or I won't get back home.

1 **MR JUSTICE MORGAN:** That is a fair point and we will ensure that that happens.  
2 The whistle will blow at 4.45. Whoever is speaking at 4.45 will not get  
3 a bonus point, they will be asked to stop.  
4 Thank you all for your contributions, I think we will proceed on that basis. I will not  
5 reiterate it, I think we have identified our expectations for the hearing  
6 tomorrow. It will be a remote hearing and I remain optimistic we will be in the  
7 Tribunal building Wednesday, Thursday and Friday, but I am afraid we have  
8 lost -- do it remotely tomorrow.  
9 We very much interrupted you, Mr O'Donoghue, but we have made some progress.  
10 Do you want to then pick up your thread from where we had been, thank you.  
11 **MR O'DONOGHUE:** My Lord, yes. Just to clarify: my understanding is we will have  
12 Mr Williams for cross-examination tomorrow; is that correct?  
13 **MR JUSTICE MORGAN:** You will have to ask Mr Williams, counsel. Mr Williams  
14 QC, do you want to answer that question?  
15 **MR WILLIAMS:** Yes. Subject to his health, we will make him available  
16 electronically tomorrow, we will make sure he has the bundle. I will speak to  
17 my solicitors after the hearing is finished and, to the extent I need to, I will  
18 speak to Mr O'Donoghue about what material he has. But we think we can  
19 make sure he has the material. That is obviously subject to his health and  
20 how he is feeling tomorrow.  
21 **MR JUSTICE MORGAN:** Right. In terms of material, what are you proposing to  
22 give him? This is not something for him to read, it is simply for him to have  
23 available when he is asked questions.  
24 **MR WILLIAMS:** Yes.  
25 **MR JUSTICE MORGAN:** Right. I don't want to make suggestions about how that  
26 should be done, but are both of you clear about what he will need as

1 a cross-examination bundle?

2 **MR WILLIAMS:** I think at the outer limits, we would make available to him the five  
3 volumes of hearing bundle, obviously not the authorities, and if we can make  
4 that bundle available to them, we will. If that is difficult, and the material  
5 needs to be made available to him in a different form for any reason, then it  
6 might need to be a subset of that material. But I will take instructions and to  
7 the extent necessary I will confer with Mr O'Donoghue.

8 **MR JUSTICE MORGAN:** Right, Mr O'Donoghue, that is the answer to the question.

9 **MR O'DONOGHUE:** I am grateful, my Lord.

10 **MR JUSTICE MORGAN:** Okay, right. We return to you, Mr O'Donoghue. You are  
11 continuing your submissions, please.

12 **MR O'DONOGHUE:** Yes, we were on the point relating to acquisitions. Can I now  
13 show the Tribunal what the CMA did in relation to CPM on this issue.  
14 My Lord, the starting point, and we can pick this up in the Decision at 2.38,  
15 please, volume 1, tab 1, page 17.

16 **MR JUSTICE MORGAN:** Yes.

17 **MR O'DONOGHUE:** You will see that Marshalls acquired CPM in 2017, so from that  
18 date forward they comprised a single undertaking for the purposes of  
19 competition law. You will also see that CPM ceased to exist for economic  
20 purposes 18 months before the Decision was rendered. You see CPM  
21 became non-trading on 1 July 2018 following the transfer of all trade and  
22 assets of CPM to Marshalls.

23 **MR JUSTICE MORGAN:** I must be on the wrong page. I thought you said 70.  
24 What page?

25 **MR O'DONOGHUE:** 17, my Lord.

26 **MR JUSTICE MORGAN:** That is my fault.

1 **MR O'DONOGHUE:** 1-7.

2 **MR JUSTICE MORGAN:** I am on 17. I have got where you were, thank you.

3 **MR O'DONOGHUE:** You see the point acquisition in 2017 and non-trading in 2018.

4 **MR JUSTICE MORGAN:** Yes.

5 **MR O'DONOGHUE:** From that point forward, it is clear that Marshalls and CPM  
6 were a single undertaking.

7 **MR JUSTICE MORGAN:** Yes.

8 **MR O'DONOGHUE:** And we have just seen this, just for the sake of good order let  
9 me look at it again, it is the penalty guidance, paragraph 2.20.

10 **MR JUSTICE MORGAN:** Yes, Authorities 1, tab 21, page 325.

11 **MR O'DONOGHUE:** It says:

12 "In considering whether any adjustments should be made, specifically deterrence of  
13 proportionality, the CMA will consider ... undertakings, size and financial  
14 position at the time the penalty is being imposed."

15 There is the qualification to that, which we also saw at the end of that paragraph.  
16 Based on the guidance the turnover of Marshalls was, in principle, relevant at  
17 the stage of imposing the penalty.

18 Now just to tease out what exactly the CMA did. The CMA initially followed its own  
19 guidance on this point since it proposed to calculate step 4 of the guidance  
20 based on Marshalls' turnover, which led to a step 4 penalty in excess of  
21 £56 million and we can see this in volume 2, tab 57, page 965. The Tribunal  
22 will see under step 4 that at that stage the CMA was proposing a 10 per cent  
23 discount leading to a penalty in excess of £56 million.

24 **MR JUSTICE MORGAN:** Yes.

25 **MR O'DONOGHUE:** On this basis, the penalty that should have been imposed on  
26 the Marshalls CPM undertaking should have been in the region of £30 to



1 £40 million, which is ten times the figure actually imposed on CPM in the  
2 Decision.

3 **MR JUSTICE MORGAN:** Yes.

4 **MR O'DONOGHUE:** My Lord, I am not sure this is in the bundle, but we will give  
5 you the extract. Marshalls' total annual turnover, based on the  
6 Companies House accounts at the end of 2018, was in excess of £490 million  
7 so that the statutory cap as applied to the Marshalls' undertaking at  
8 10 per cent would have been of the order of £49 million. And even if one  
9 includes some discounts for settlement, it is clear that the penalty on this  
10 basis would have been £30 to £40 million as opposed to the £4 million which  
11 was actually made.

12 If we can then go to tab 69 in the same bundle. This is a letter from CPM's solicitors  
13 to the CMA. If one goes over the page at 10 --

14 **MR JUSTICE MORGAN:** What page?

15 **MR O'DONOGHUE:** My Lord, it is 1021 and it is over the page at 1022, the middle  
16 paragraph starting, "You stated ..." You will see there confirmation of what we  
17 have just seen, which is in the penalty calculation deterrence in proportionality  
18 was calculated on the basis of Marshalls' financials and so on.

19 **MR JUSTICE MORGAN:** Yes.

20 **MR O'DONOGHUE:** If we then go to tab 77.

21 **MR JUSTICE MORGAN:** Let me just mark up that page, I am still on my way to it,  
22 right, and then the next reference.

23 **MR O'DONOGHUE:** It is the same bundle, tab 77, page 1062.

24 **MR JUSTICE MORGAN:** Right. Nearly there. Yes, I am there.

25 **MR O'DONOGHUE:** You will see at the top of the page, second paragraph in the  
26 third column:

1 "We have revisited step 4 and have considered the size and financial position of  
2 CPM at this step rather than the wider Marshalls Group ..."

3 And so on.

4 **MR JUSTICE MORGAN:** Right.

5 **MR O'DONOGHUE:** Following the revisitation of the penalty on this basis, you will  
6 see then in tab 70, the same tab over the page, under step 4. So previously  
7 under step 4 we had a figure in excess of £56 million.

8 **MR JUSTICE MORGAN:** Yes.

9 **MR O'DONOGHUE:** We now see in step 4 it has been reduced to £5 million, so  
10 £50 million lower than the Marshalls figure.

11 **MR JUSTICE MORGAN:** Yes.

12 **MR O'DONOGHUE:** And that is because of the switch from Marshalls turnover to  
13 CPM's turnover.

14 **MR JUSTICE MORGAN:** Yes.

15 **MR O'DONOGHUE:** I am sorry to jump around, but if we then go back to the  
16 Decision footnote 1138.

17 **MR JUSTICE MORGAN:** Yes.

18 **MR O'DONOGHUE:** You will see FPM noted what the CMA had done. It had taken  
19 into account CPM's accounts and not those of Marshalls and so on. Then you  
20 will see about half-way down:

21 "However, in the circumstances of this case the CMA considers that step 4  
22 calculation should be assessed by reference to the accounts of the  
23 undertaking to whom the decision is addressed. The CMA has addressed its  
24 decision to CPM ..."

25 And so on. However, we now see in the CMA skeleton, paragraph 204, that they  
26 have conceded that Marshalls "... formed part of the same undertaking as

1 CPM at the time of the decision." And it doesn't seem that the CMA has  
2 accepted this until now.

3 **MR JUSTICE MORGAN:** Let me mark up that passage. I am going to the CMA  
4 skeleton, give me the paragraph again.

5 **MR O'DONOGHUE:** My Lord, it is 204.

6 **MR JUSTICE MORGAN:** Thank you. Right, you are saying that the CMA now  
7 doesn't challenge the assertion of fact that CPM and Marshalls were in the  
8 same undertaking at the time of the Decision?

9 **MR O'DONOGHUE:** Yes, my Lord.

10 **MR JUSTICE MORGAN:** But they weren't in the same undertaking at the time of the  
11 infringement?

12 **MR O'DONOGHUE:** Well, my Lord, under step 4 what has to be considered is the  
13 turnover of the undertaking --

14 **MR JUSTICE MORGAN:** I know. But as I understand the CMA's case, they said:  
15 Who is the infringer? Answer: CPM. Was Marshalls the infringer? No. Who  
16 do we penalise? Only CPM.

17 First of all, is that their case as you understand it?

18 **MR O'DONOGHUE:** Well, my Lord, it was their case but they now conceded that  
19 the undertaking in question is Marshalls.

20 **MR JUSTICE MORGAN:** Not at the time of the infringement.

21 **MR O'DONOGHUE:** Well, my Lord, one has to be precise. The question under step  
22 4 or one of the questions under step 4 is what is the turnover of the  
23 undertaking at the time the penalty is being levied? And at the time the  
24 penalty is being levied the undertaking plainly is Marshalls CPM.

25 **MR JUSTICE MORGAN:** That undertaking didn't commit the infringement.

26 **MR O'DONOGHUE:** My Lord, I have to move on, there is two points I want to make

1 in relation to that. The first is a legal point.

2 Your Lordship is right that at 206 of its skeleton the CMA says that the only

3 circumstance in which Marshalls could have been held liable is if CPM ceased

4 to exist as a legal entity.

5 **MR JUSTICE MORGAN:** Right.

6 **MR O'DONOGHUE:** And that is incorrect as a matter of law. If we can quickly turn

7 to Authorities 7.

8 **MR JUSTICE MORGAN:** I am just marking up the passage in the skeleton. You

9 said 206, did you mean 206?

10 **MR O'DONOGHUE:** My Lord, let me double check that.

11 **MR JUSTICE MORGAN:** I think it is not 206, is it? It is 203.

12 **MR O'DONOGHUE:** My Lord, yes.

13 **MR JUSTICE MORGAN:** Yes, okay.

14 **MR O'DONOGHUE:** My Lord, now turning to Authorities 7, tab 92.

15 **MR JUSTICE MORGAN:** What page?

16 **MR O'DONOGHUE:** My Lord, you will see on the cover page this is a judgment of

17 the Grand Chamber of the Court of Justice.

18 **MR JUSTICE MORGAN:** At what page?

19 **MR O'DONOGHUE:** My Lord, it starts at 5573.

20 **MR JUSTICE MORGAN:** 5573, I will go there.

21 **MR O'DONOGHUE:** My Lord, you will see from the header it is a Grand Chamber

22 judgment.

23 **MR JUSTICE MORGAN:** Right.

24 **MR O'DONOGHUE:** Then the passage I want to show the Tribunal is at 5614.

25 **MR JUSTICE MORGAN:** Okay, I am getting there.

26 **MR O'DONOGHUE:** The Court says that:

1 "The circumstances...that is not responsible for an infringement can nevertheless be  
2 penalised for that infringement. It must be held that this situation arises if the  
3 entity that has committed the infringement has ceased to exist either in law or  
4 economically. With regard to the latter it is worth noting that the penalty  
5 imposed on an undertaking that continues to exist in law but has ceased  
6 economic activity is likely to have no deterrent effect."

7 As we saw from the Decision CPM continued to exist in law but had, in economic  
8 terms, ceased trading.

9 **MR JUSTICE MORGAN:** Yes.

10 **MR O'DONOGHUE:** In my submission, it is therefore clear that the relevant  
11 undertaking for the purpose of step 4 was Marshalls and that its turnover  
12 should have been considered.

13 **MR JUSTICE MORGAN:** This means that the CMA was wrong in law, you say,  
14 when it approached the penalty to be imposed on CPM?

15 **MR O'DONOGHUE:** Well, my Lord, yes. The other point the CMA -- so first of all  
16 your Lordship is right. Our submission is the CMA has misunderstood the  
17 principle of personal responsibility for infringements of competition law and  
18 you can see this from paragraph 203, my Lord, of their skeleton, where it says  
19 it fined the infringing persons, but of course it can only fine the infringing  
20 undertakings.

21 **MR JUSTICE MORGAN:** Yes.

22 **MR O'DONOGHUE:** But your Lordship is right, the CMA then at 205 makes the  
23 point that your Lordship averted to, which is even if the CMA should have  
24 treated Marshalls as responsible that doesn't matter because a different error  
25 was made in relation to CPM, so it is the two wrongs don't make a right sort of  
26 point.

1 **MR JUSTICE MORGAN:** Well, I mean *prima facie* what the Tribunal has to do is to  
2 consider FPM's position and there is no difficulty. We know FPM is the  
3 infringer, we know a great deal about its financial position during the  
4 infringement, at the end of the infringement, and at the date of the penalty  
5 decision. We have to decide what is appropriate in terms of treating FPM,  
6 what weight to give to its position at the time of the penalty decision and  
7 whether one should move away from that to a financial position at earlier date.  
8 There are answers to those questions and it will be determined by the  
9 Tribunal what is the appropriate penalty. It may be identical to the CMA's  
10 decisions but it need not be.

11 Having decided what is the appropriate penalty we will then have to consider the way  
12 in which CPM were treated and there is no doubt from the material you have  
13 shown us that the CMA directed itself as to the legal position and it did not  
14 have regard to Marshalls' turnover because of its self direction in law.

15 **MR O'DONOGHUE:** Yes, which was a mistake --

16 **MR JUSTICE MORGAN:** You say that was wrong.

17 **MR O'DONOGHUE:** Yes.

18 **MR JUSTICE MORGAN:** CPM could have been fined much more heavily. But  
19 there is no issue before us between CPM and the CMA. CPM do not  
20 challenge the Decision, nor does CMA. There seems at the moment great  
21 force in what is said that even if they under-fined CPM because of  
22 circumstances there, which are not the same as your circumstances, it doesn't  
23 mean we should under-fine you. Why should the Tribunal go below what it  
24 thinks is appropriate because it detects that the CMA imposed an inadequate  
25 fine on CPM?

26 **MR O'DONOGHUE:** My Lord, a few points if I may. First of all, we see in footnote

1 17 of the penalty guidance, I do not think we need to turn this up.

2 **MR JUSTICE MORGAN:** I have it.

3 **MR O'DONOGHUE:** The CMA says in applying the steps to individual undertakings  
4 in multi-party cases the CMA will observe the principle of equal treatment. So  
5 there is a public commitment in the guidance to the principle of equal  
6 treatment.

7 **MR JUSTICE MORGAN:** Yes.

8 **MR O'DONOGHUE:** We do say the CMA did not respect this principle in this case.  
9 It ignored as we saw entirely the Marshalls' turnover when it came to fines.  
10 But by contrast in the case of FPM it took account of the parent company. If  
11 I can give your Lordship two references.

12 In footnote 1130 of the Decision --

13 **MR JUSTICE MORGAN:** Yes.

14 **MR O'DONOGHUE:** I invite your Lordship to read that.

15 **MR JUSTICE MORGAN:** Right.

16 **MR O'DONOGHUE:** It did take account of the parent, we can see that at 1130.

17 **MR JUSTICE MORGAN:** In what way? It is looking at FPM's position. Yes, I will  
18 have to reflect on what is being said there, but --

19 **MR O'DONOGHUE:** Well, essentially --

20 **MR JUSTICE MORGAN:** -- this is a footnote to FPM's assets.

21 **MR O'DONOGHUE:** Its penalty calculation.

22 **MR JUSTICE MORGAN:** And it says that the fine is 45 per cent of its net assets  
23 and 40 per cent of its adjusted net assets and it then explains what it means  
24 by adjusted net assets.

25 **MR O'DONOGHUE:** My Lord --

26 **MR JUSTICE MORGAN:** One of the adjustments appears to be paying dividends

1 and corporate restructuring, but it is taking account of both adjusted and  
2 non-adjusted.

3 **MR O'DONOGHUE:** My Lord, it is taking account of the assets of FPM Group  
4 Limited as part of the FPM undertaking. In other words it is using FPM's  
5 parent company as a means to increase the penalty.

6 **MR JUSTICE MORGAN:** How does it do that? This is talking about the £59 million  
7 penalty which it chooses not to impose.

8 **MR O'DONOGHUE:** But it does the same at 6.76(b).

9 **MR JUSTICE MORGAN:** Does it? It has adjusted net assets there as well?

10 **MR O'DONOGHUE:** Yes.

11 **MR JUSTICE MORGAN:** So it is the same point?

12 **MR O'DONOGHUE:** Yes. By contrast, if one then looks at CPM at 6.72 and 6.69,  
13 the circumstances of the parent of the undertaking are left entirely out of  
14 account.

15 **MR JUSTICE MORGAN:** Yes. Just help me on this point about equal treatment,  
16 Mr O'Donoghue. You have drawn attention to footnote 17 and when I read  
17 your skeleton, I understood you to be saying that there was no rule of law that  
18 the CMA had to observe the principle of equal treatment but it chose to do so  
19 and therefore it has to be judged accordingly. Have I understood that  
20 correctly?

21 **MR O'DONOGHUE:** That is in a slightly different context, my Lord.

22 **MR JUSTICE MORGAN:** What I am leading to is this question. This is the Tribunal,  
23 we have to determine the appropriate fine for FPM. Are we bound by some  
24 principle of equal treatment?

25 **MR O'DONOGHUE:** Insofar as the guidance sets out in footnote 17, a clear  
26 commitment to equal treatment, if there has been a breach of that principle



1 then the Tribunal is perfectly entitled to make a reduction on that basis.

2 **MR JUSTICE MORGAN:** The guidance says the CMA will do it even though they  
3 don't have to. Is there a principle of law that we have to?

4 **MR O'DONOGHUE:** My Lord, there is a reference in our skeleton to the *Argos* case  
5 in the Court of Appeal. I will give you the reference in a second. It is  
6 Authorities 3, tab 41.

7 **MR JUSTICE MORGAN:** What does it say? Tell me what the principle establishes  
8 before we --

9 **MR O'DONOGHUE:** It essentially says if there has been unequal treatment which in  
10 this case benefitted CPM, but this benefitted FPM, then the lawful course of  
11 action is to extend the same favourable treatment to FPM.

12 **MR JUSTICE MORGAN:** Yes. All right. In short, the answer to my question you  
13 say is that we are obliged, as a matter of law, to observe the principle of equal  
14 treatment?

15 **MR O'DONOGHUE:** My Lord, yes.

16 **MR JUSTICE MORGAN:** And equal treatment, it has been put in many times, you  
17 treat like cases in the same way and you treat unlike cases differently?

18 **MR O'DONOGHUE:** My Lord, yes.

19 **MR JUSTICE MORGAN:** Yes, right.

20 **MR O'DONOGHUE:** In this case --

21 **MR JUSTICE MORGAN:** I think the point that is being made against you is that the  
22 particular point of law which you say the CMA got wrong in relation to CPM,  
23 that point of law did not arise in relation to their penalty. So there was no  
24 occasion for the CMA to make the same legal error in the two cases; the point  
25 of law didn't arise with FPM.

26 **MR O'DONOGHUE:** That clearly isn't right because if one looks at what they are

1 doing under step 4 in the case of FPM as we saw in footnote 1130 they are  
2 taking account of the assets of the parent company, whereas in the case of  
3 CPM --

4 **MR JUSTICE MORGAN:** Let's look at 1130 and in particular 6.76.

5 **MR O'DONOGHUE:** Yes.

6 **MR JUSTICE MORGAN:** 6.76(b) is the relevant line, isn't it? 21 per cent of the net  
7 assets, 19 per cent of the adjusted net assets and the adjusted net assets are  
8 because two things happened, is this right; the first thing was that FPM paid  
9 a dividend to shareholders and reduced its assets, right?

10 **MR O'DONOGHUE:** Yes.

11 **MR JUSTICE MORGAN:** And the second thing was that FPM transferred assets to  
12 FPM Group.

13 **MR O'DONOGHUE:** The parent company.

14 **MR JUSTICE MORGAN:** Yes. So that happened in the year 2016.

15 **MR O'DONOGHUE:** Yes.

16 **MR JUSTICE MORGAN:** Is this what is happening, that the CMA is taking the  
17 assets for 2018 and adding back dividends and the transfer?

18 **MR O'DONOGHUE:** Yes, they are effectively counting transfer as contributions to  
19 shareholders of the parent company as if they were part of the FPM  
20 undertaking.

21 **MR JUSTICE MORGAN:** Yes.

22 **MR O'DONOGHUE:** Whereas by contrast in the case of CPM the circumstances of  
23 Marshalls are completely disregarded. Of course it gives rise to a different  
24 point --

25 **MR JUSTICE MORGAN:** But I mean it is not clear cut taking account of the assets  
26 of the parent company. It is only referring to £58 million, which was

1 transferred from FPM to the parent, and the adjustment is of £17 million, isn't  
2 it? It is from £131 million to £148 million?

3 **MR O'DONOGHUE:** Yes, but, my Lord, I --

4 **MR JUSTICE MORGAN:** So they haven't even added in the whole £58 million?

5 **MR O'DONOGHUE:** My Lord, what I am responding to is the point that there is no  
6 relevant difference in treatment because in both cases they say they  
7 disregarded entirely the circumstances of the parent companies.

8 **MR JUSTICE MORGAN:** Yes, but look at what you say they got wrong with CPM.  
9 They made a mistake in CPM's favour and now look at what we are doing with  
10 FPM. If I take 6.76(b) and I ignore the transfer of assets to the parent  
11 company, what would the figures be in 6.76(b)? It must be at least 19  
12 per cent. No. What would it be if you ignore the transfer of £58.3 million? It  
13 sounds like it is 21 per cent of FPM's net assets, isn't it, because that is  
14 without adjustment.

15 **MR O'DONOGHUE:** Yes. We will check that overnight.

16 **MR JUSTICE MORGAN:** If you complain about the adjustment, what I will do is  
17 I will strike out 19 per cent of the adjusted net assets and then I would get the  
18 figure where you just look at the net assets, you don't take account of  
19 anything that happened in relation to the parent. That is not going to bring  
20 your penalty downwards, is it?

21 **MR O'DONOGHUE:** My Lord, what it does is it makes good the point in principle  
22 which is they did take into account to some extent I accept it is a relation to --

23 **MR JUSTICE MORGAN:** It is not equality. It is not treating like cases alike. If the  
24 facts of FPM were the same as the facts of CPM, if FPM ceased to exist and it  
25 had been taken over by a bigger undertaking, like Marshalls, and then the  
26 CMA had fined FPM by reference to the bigger undertakings turnover, but yet

1 when it came to CPM it declined to do so, then you would have correct  
2 treatment of FPM and legally erroneous treatment of CPM and then you could  
3 say FPM should have the benefit of the same legal error. It wouldn't be an  
4 attractive argument but at least it would be about equality, but this is not about  
5 equality.

6 **MR O'DONOGHUE:** My Lord, what I am responding to is the point -- so that the  
7 CMA's argument is: Well, we disregarded both parent companies, therefore  
8 there is no difference in treatment.

9 **MR JUSTICE MORGAN:** Well, their real argument is that they did the right thing for  
10 FPM. We will have to decide what was appropriate for FPM and when we  
11 have done so, *prima facie* that is that. The fact that a different legal point  
12 arose, true it is it involved groups of companies, but not every point about  
13 a group of companies is the same point.

14 **MR O'DONOGHUE:** My Lord, then we are back to *Argos* which is if there has been  
15 a difference in treatment --

16 **MR JUSTICE MORGAN:** If there has been.

17 **MR O'DONOGHUE:** If there has been then the same favourable treatment should  
18 be extended to the disfavoured party.

19 **MR JUSTICE MORGAN:** If they are like cases they should be treated equally. If  
20 they are unlike cases, as these appear to be, they should be treated  
21 differently. Do we need to see the statement in *Argos*? Do you want to show  
22 us where it is in *Argos*? You said tab 41. Can you give me a reference to the  
23 page?

24 **MR O'DONOGHUE:** I will get you a reference. It is in our skeleton. Give me  
25 a second, please.

26 **MR JUSTICE MORGAN:** Of course.

1 **MR O'DONOGHUE:** Paragraph 88, 2154.

2 **MR JUSTICE MORGAN:** My paragraph 88 doesn't seem to refer to *Argos*. In 88,  
3 you are dealing with the discount for compliance.

4 **MR O'DONOGHUE:** My Lord, we are in the authorities bundle, Authorities 3.

5 **MR JUSTICE MORGAN:** Yes, tab 41.

6 **MR O'DONOGHUE:** Yes.

7 **MR JUSTICE MORGAN:** Page?

8 **MR O'DONOGHUE:** 2154.

9 **MR JUSTICE MORGAN:** Thank you, I will go there.

10 **MR O'DONOGHUE:** 280, my Lord, it is the last sentence in particular.

11 **MR JUSTICE MORGAN:** 2154, right, I am on my way. Thank you, I have got there.  
12 I will just read that to myself. Thank you.

13 **MR O'DONOGHUE:** My Lord, just to round off this point, if we can then go to  
14 volume 2.

15 **MR JUSTICE MORGAN:** Of the hearing bundle?

16 **MR O'DONOGHUE:** My Lord, yes. Tab 73.

17 **MR JUSTICE MORGAN:** What page is 73?

18 **MR O'DONOGHUE:** It is 1033.

19 **MR JUSTICE MORGAN:** Thank you.

20 **MR O'DONOGHUE:** My Lord, these are submissions by CPM on penalty as you can  
21 see from the heading.

22 **MR JUSTICE MORGAN:** Yes.

23 **MR O'DONOGHUE:** If I can go first of all to paragraph 9, 1035. CPM says:  
24 "The only circumstance in which a parent who acquires an infringing entity after the  
25 infringement may become liable to pay a fine is where...between the  
26 commission of the infringement and the time when the undertaking in question

1 was...person responsible for the operation that undertaking has ceased to  
2 exist in law."

3 As we saw in paragraph 40 of the NE judgment, which I showed your Lordship, that  
4 is not correct because the circumstance in which an entity continues to exist  
5 in law but ceases to exist economically as a trading entity, that is the correct  
6 articulation of the legal position. So that is not right, which may explain some  
7 of the confusion in CMA's Decision.

8 But you then see in 14(b) they say the Marshalls Group is not a part of the  
9 undertaking which has been fined and the CMA has now conceded that that is  
10 not correct. It is part of the undertaking which has been fined and it was part  
11 of the undertaking which was being fined at the time of the Decision.

12 **MR JUSTICE MORGAN:** Yes.

13 **MR O'DONOGHUE:** Then at paragraph 16 they say:

14 "It would make ... to a larger acquiring entity given that the effect of the acquisition  
15 would be to expose...much larger penalty than would otherwise be the case."

16 But precisely the same thing can be said in FPM's case about turnover, which is  
17 unrelated to precast concrete drainage products and turnover that relates to  
18 post-infringement acquisitions which again is most of FPM's post-Decision  
19 turnover. That too would penalise FPM as an acquiring entity since it would  
20 mean that the price paid for the business would need to reflect the penalising  
21 effect of the extra revenue on its fine.

22 **MR JUSTICE MORGAN:** I see.

23 **MR O'DONOGHUE:** We say in substance that there has been a difference to  
24 treatment that the CMA has fundamentally misunderstood, perhaps based on  
25 CPM's submissions, the correct legal position in relation to who is the  
26 undertaking to be fined at the time of the Decision and it has applied

1 a different approach in the case of FPM. And the correct way in my  
2 submission to remedy that difference in treatment is to come back to where  
3 we started, which is some account must be taken as a matter of  
4 proportionality of the fact that most of FPM's post-Decision turnover is a)  
5 unrelated and b) concerns acquisitions of businesses with third parties.

6 **MR JUSTICE MORGAN:** Right.

7 **MR O'DONOGHUE:** My Lord, just to wrap up on this point, which is my last point for  
8 today, if we can go back to the penalty guidance, please, at footnote 17.

9 **MR JUSTICE MORGAN:** Yes.

10 **MR O'DONOGHUE:** You will see there, my Lord, that the CMA endorses  
11 paragraph 177 of *Kier* and it effectively encapsulates the submission I was  
12 making to your Lordship before the short break, which is we are not saying  
13 that turnover that relates to the company's size is completely irrelevant, but  
14 what we are saying is that some account must be taken, at step 4, of the fact  
15 that the turnover under consideration, in this case FPM's 2018 turnover, is  
16 mainly comprised of unrelated and third-party acquisition turnover. So some  
17 account has to be taken of that.

18 We make that point as a standalone point based on proportionality. We also make  
19 that point based on a different approach taken in the case of CPM. The final  
20 point we make under step 4 which is the last point I will make today, if one  
21 goes back to paragraph 6.76 of the Decision.

22 **MR JUSTICE MORGAN:** Yes.

23 **MR O'DONOGHUE:** There, my Lord, you have CMA's explanation of what it did and  
24 why. Now, I preface these remarks by saying at this stage under step 4 the  
25 reduction in CPM's penalty was staggering; it was 90 per cent, a £50 million  
26 reduction and in FPM's case there was also a significant reduction but much,

1 much less so. So we are talking about very, very big sums of money. These  
2 are the critical steps in the CMA's penalty calculation and this is the extent of  
3 the reasoning.

4 Our submission is if one looks at the Decision, if one looks at 6.76 and compares  
5 that to the corresponding paragraph for CPM over the page at 6.72 --

6 **MR JUSTICE MORGAN:** Yes.

7 **MR O'DONOGHUE:** -- no real reasons are given. These things like worldwide  
8 turnover, net assets and profits after tax and operating profit they are listed in  
9 a clerical way but there is no explanation of the purpose for which one is  
10 looking at these, how these percentages affected the calculation, which ones  
11 are important, why and what weighting. It is difficult, with respect, to make  
12 head nor tail of the Decision.

13 It is very difficult, in my submission, for the Tribunal based on this clerical listing to  
14 conduct a judicial review function and appeal on the merits based on this  
15 reasoning. For example, how does a comparison of a minus 2,000 per cent of  
16 CPM's profits after tax, which is 6.72(c), compare with plus 171 per cent for  
17 the same figure for FPM? There is no idea given in the Decision as to how  
18 one is meant to rationalise these two things.

19 Likewise, if one looks at 6.76 compared to 6.73(a) CMA says that a penalty  
20 representing 23 per cent of FPM's worldwide turnover would be  
21 disproportionate, but a penalty representing 11 per cent of its annual turnover  
22 would be proportionate. There is no explanation as to the basis for this  
23 adjustment or why a penalty representing for example 15 per cent of FPM's  
24 turnover would not have been proportionate. The reader of the Decision is  
25 simply left to guess and I don't make this submission lightly but it does seem  
26 to be finger-in-the-air stuff.



1 **MR JUSTICE MORGAN:** Just on that. Taking stock of what we have to do and  
2 what you are asking us to do, you say that the 10 per cent statutory cap is the  
3 starting point, so that using the figures in this case the 10 per cent figure is  
4 £25.5 million. As far as I know, nobody says that is the wrong figure. Am  
5 I right about that?

6 **MR O'DONOGHUE:** My Lord, based on FPM's accounts, yes.

7 **MR JUSTICE MORGAN:** Because the statutory formula is worldwide turnover of  
8 FPM in the year before the Decision and that is a mechanical thing. You look  
9 at the turnover and you take the 10 per cent and all your arguments about  
10 acquisitions and growth do not affect that point, am I right about that?

11 **MR O'DONOGHUE:** That is a step 5 point. We are now on step 4.

12 **MR JUSTICE MORGAN:** Yes, but your case is, and I understand the case, your  
13 case is that you really have to begin with step 5, you really have to begin with  
14 the 10 per cent statutory cap.

15 **MR O'DONOGHUE:** Yes --

16 **MR JUSTICE MORGAN:** That is for the worst case where the gravity of the offence,  
17 the need for deterrence is greatest?

18 **MR O'DONOGHUE:** Yes. My Lord, one can test this in the following ways: how can  
19 the CMA say with a straight face in 6.76(a) that 11 per cent of FPM's  
20 worldwide turnover is not excessive and is proportionate?

21 **MR JUSTICE MORGAN:** I am not arguing the case and I am not at the moment  
22 advising you to explain this, but just to -- your starting point is £25.5 million  
23 and then there will be reasons to come down from that.

24 **MR O'DONOGHUE:** Yes, we received a mitigation discount, which counted for  
25 nothing.

26 **MR JUSTICE MORGAN:** First of all, you have to consider how serious the case is.

1 **MR O'DONOGHUE:** Yes.

2 **MR JUSTICE MORGAN:** Secondly, you have to consider the impact of the  
3 infringement --

4 **MR O'DONOGHUE:** Yes.

5 **MR JUSTICE MORGAN:** -- over and above it being an infringement by object.  
6 Then you have to consider the mitigation that exists here. There was  
7 co-operation for which you got 5 per cent. You say you should have  
8 10 per cent for compliance.

9 **MR O'DONOGHUE:** Yes.

10 **MR JUSTICE MORGAN:** So we have to move downwards and downwards for that.  
11 Then if we start at £25.5 million we might find we are some other figure below  
12 £25 million and then you have to consider deterrence and proportionality, is  
13 this really the right penalty, the appropriate penalty if you consider deterrence  
14 and proportionality and you will say you come down further still. So that is the  
15 way you would wish to do it.

16 If you are going to make a submission to us that we should impose an appropriate  
17 penalty, I suppose we would need help but your answer to that is we cannot.  
18 If we decide for you on the statutory cap we cannot go any further because  
19 the CMA has to publish guidance and only then could it determine the penalty;  
20 is that right?

21 **MR O'DONOGHUE:** My Lord, yes, if the guidance is *ultra vires* --

22 **MR JUSTICE MORGAN:** I follow that. No guidance and the statute requires  
23 guidance, therefore we cannot do the exercise.

24 Assume, Mr O'Donoghue, you are wrong about the statutory cap and the guidance is  
25 *intra vires*, then what you have done with fairly persuasive submissions is you  
26 have said that the CMA was wrong at several stages in the exercise it

1 conducted, that is right, isn't it?

2 **MR O'DONOGHUE:** Yes.

3 **MR JUSTICE MORGAN:** If we agree with you and we say the CMA was wrong that  
4 doesn't determine the case because, I think you are agreeing, if you are  
5 wrong about the statutory cap then we will determine the penalty.

6 **MR O'DONOGHUE:** My Lord, yes, if it is *intra vires* --

7 **MR JUSTICE MORGAN:** Yes, if the guidance is *intra vires* we will determine the  
8 penalty.

9 **MR O'DONOGHUE:** My Lord, yes.

10 **MR JUSTICE MORGAN:** Well, we need to know from you what you say the penalty  
11 should be, or at least you have the opportunity to tell us what the penalty  
12 should be because if you don't tell us what the penalty should be then we will  
13 have Mr Williams tell us what the penalty should be. We will not have the  
14 competing arguments.

15 **MR O'DONOGHUE:** My Lord, I have --

16 **MR JUSTICE MORGAN:** For example, say on step 1 we adjusted the starting figure  
17 of £24.45 million and we made that £20 million and then we multiplied it by  
18 6.75 and then we increased the mitigation for compliance to give you  
19 10 per cent, we would end up with a figure, it would probably be above  
20 £25 million. It would probably be something in the 40s, right, and then you will  
21 have a case on proportionality, won't you?

22 **MR O'DONOGHUE:** My Lord, yes.

23 **MR JUSTICE MORGAN:** We better hear from you what that case is. And I do not  
24 mean to be difficult but you have made submissions that paragraph 6.76 of  
25 the Decision is really no good at all as regards reasons on deterrence and  
26 proportionality.

1 **MR O'DONOGHUE:** Yes.

2 **MR JUSTICE MORGAN:** So you will have to give us in your submissions  
3 a formulation that we could adopt if we agreed with it as to how we would  
4 explain why we reduced our figure of whatever it is, £40 million, to another  
5 figure. Indeed it would be a very interesting exercise because what  
6 Mr Williams of counsel is saying is that it is actually jolly difficult to articulate  
7 and put in the form of reasoned propositions why you reduce a figure which is  
8 £40 or £50 million to a figure which is about £25 million because these are  
9 matters of feel and judgment, and ultimately you can say what you have  
10 regard to and then you can say having regard to the competing forces of  
11 those considerations, the answer is so and so.

12 So I think we would like to examine how you put it when you get a figure of, say,  
13 £40-odd million how do you get down to whatever your figure is. Of course,  
14 you only win this case if you get it down below £25.5 million. So we have  
15 looked carefully at why you moved from £40 million to £24, £23, £15,  
16 whatever figure you come up with, but we do need to have that,  
17 Mr O'Donoghue.

18 **MR O'DONOGHUE:** My Lord, yes, I haven't been shying away from this. Many of  
19 the steps we are arguing involve mechanical reductions.

20 **MR JUSTICE MORGAN:** Yes.

21 **MR O'DONOGHUE:** The 10 per cent we should have had for compliance we say we  
22 should have had a further co-operation discount, the average turnover; these  
23 are relatively mechanical.

24 **MR JUSTICE MORGAN:** I agree and I think your task would be an easy one to  
25 translate your submissions into numbers. You haven't got a point about the  
26 30 per cent, as I understand it, but you have a point about the £24.45 million.

1 You haven't got a separate point about 6.75 if we reduced £24 million to an  
2 average. I have your point on compliance. You say nought per cent should  
3 be minus 10 so that bit of it is fairly easy and you are still going to end up well  
4 above £25.5 million. Then comes the critical stage.

5 **MR O'DONOGHUE:** Which is step 4.

6 **MR JUSTICE MORGAN:** What do you say and for what reasons do you give and  
7 how do you express them to get from £40-something million to a figure below  
8 £25.5 million?

9 **MR O'DONOGHUE:** My Lord, we will certainly address that. I am not shirking from  
10 that point.

11 **MR JUSTICE MORGAN:** No. Right. I think you were indicating to us,  
12 Mr O'Donoghue, that you had reached a convenient break in your  
13 submissions. Was that the last point you wanted to make before we hear  
14 from Mr Williams?

15 **MR O'DONOGHUE:** My Lord, can I give you one final reference?

16 **MR JUSTICE MORGAN:** Please do.

17 **MR O'DONOGHUE:** If we can go back to volume 2, tab 57.

18 **MR JUSTICE MORGAN:** Tab 57?

19 **MR O'DONOGHUE:** My Lord, yes.

20 **MR JUSTICE MORGAN:** Of the hearing bundle?

21 **MR O'DONOGHUE:** My Lord, yes.

22 **MR JUSTICE MORGAN:** Yes.

23 **MR O'DONOGHUE:** We saw this a bit earlier. This was the initial set of calculations  
24 under step 4 for CPM and as we saw the penalty proposed at that stage,  
25 having made the step 4 adjustment of only 10 per cent, was in excess of  
26 £56 million.

1 We know when the final decision in relation to CPM, a reduction of 90 per cent was  
2 made leading to a penalty at step 4 of £5 million. In my submission it is an  
3 instructive exercise to look at what the CMA has done here to come up with  
4 a 10 per cent reduction and then map that on to what they did in relation to  
5 CPM in the Decision.

6 The swing from 10 per cent to 90 per cent, seemingly based on similar reasoning  
7 albeit different numbers, it seems completely inexplicable and that goes to my  
8 finger-in-the-air point. Your Lordship fairly put to me, well, if you don't put  
9 your finger in the air, what do you suggest? We will address that, but the  
10 thought I leave your Lordship with today is that essentially anything is better  
11 than finger in the air and I will address this point. This is an interesting insight  
12 into the level and quality of reasoning.

13 **MR JUSTICE MORGAN:** Just while I am reflecting on that, I understand the 90  
14 per cent figure. Are we talking about the step 4 reduction?

15 **MR O'DONOGHUE:** Yes.

16 **MR JUSTICE MORGAN:** You are saying it was a 10 per cent step 4 reduction for  
17 FPM?

18 **MR O'DONOGHUE:** No, my Lord. The table we see in volume 2 this is for CPM,  
19 this was the initial calculation and we see it is 10 per cent of £56 million. We  
20 are now seeing in the Decision, albeit based on different turnover figures, that  
21 the reduction is 90 per cent leading to £5 million and this is the CMA's  
22 reasoning on the same point in the space of about six months and --

23 **MR JUSTICE MORGAN:** Just help me. Is the reason, when I look into it, is the  
24 reason the way they changed their position on Marshalls?

25 **MR O'DONOGHUE:** Well, who knows, my Lord? That is obviously part of the  
26 matrix.

1 **MR JUSTICE MORGAN:** Is that the overwhelmingly most likely reason why they  
2 moved from one figure to a dramatically smaller figure?

3 **MR O'DONOGHUE:** The point is, my Lord, one doesn't know because there are no  
4 reasons.

5 **MR JUSTICE MORGAN:** I see. But we do know there was a change, don't we,  
6 from including Marshalls' turnover to then excluding Marshalls' turnover?

7 **MR O'DONOGHUE:** My Lord, yes.

8 **MR JUSTICE MORGAN:** All right, okay. I understand. Well, you have covered a lot  
9 of territory and you are going to yield the floor to Mr Williams tomorrow and  
10 then we will have evidence tomorrow, continuing on Wednesday.

11 **MR O'DONOGHUE:** My Lord, yes.

12 **MR JUSTICE MORGAN:** Let me see if my colleagues have any questions to raise  
13 before we conclude today's hearing. Mr Doran and Sir Iain, do you have  
14 anything to ask Mr O'Donoghue before we release him?

15 **SIR IAIN:** I think just one question if I may, Chairman. I believe this has been  
16 answered but I just want to be absolutely certain of this.

17 Mr O'Donoghue, it seems that your case is that the maximum 10 per cent penalty  
18 should be the top of a range denoting a degree of seriousness, which then  
19 stops at the 10 per cent of worldwide turnover, and that that should not be  
20 a final adjustment down in the form of a cap. Do I understand you correctly?

21 **MR O'DONOGHUE:** Sir Iain, yes, that is correct. The 10 per cent is the alpha and  
22 omega, it is not some tail-end Charlie that you do a slice off the top. It tells  
23 you the maximum penalty at any stage for the most serious imaginable  
24 offence. And it is extraordinary in this case that having received a mitigation  
25 discount FPM still ends up with the maximum penalty.

26 **SIR IAIN:** Right.

1 **MR JUSTICE MORGAN:** Mr O'Donoghue, you have argued your case very, very  
2 fully and clearly in your written submissions. Will you be coming back to that  
3 then on Thursday and Friday?

4 **MR O'DONOGHUE:** My Lord, I will have to. Ground 2 is extremely important in this  
5 appeal and we have only touched the edges of it, so I will need to come back  
6 to it.

7 **MR JUSTICE MORGAN:** So far as I can see, this is not a defect in the argument  
8 but it is a new point that has not been considered by the Tribunal before, is  
9 that right?

10 **MR O'DONOGHUE:** The guidance is relatively new, my Lord, so to that extent it has  
11 not arisen previously. But your Lordship is right, this is the first case where it  
12 is front and centre. But as you will have picked up in the skeleton, this point  
13 has been argued all over Europe. Many courts agree with me, the  
14 European Court for reasons that are unsatisfactory and unexplained, appears  
15 to disagree. This is a fairly well-trodden path but there are at least some  
16 people who agree with me.

17 **MR JUSTICE MORGAN:** Just on how new the guidance is. The statute is 1998,  
18 there was guidance given by the OFT initially and then there was guidance  
19 given by the CMA before the 2018 version, wasn't there?

20 **MR O'DONOGHUE:** My Lord, they released two iterations and --

21 **MR JUSTICE MORGAN:** I have not looked at the earlier guidance. I rather  
22 assumed but you must correct me. I assumed the same point arose  
23 throughout, am I wrong about that?

24 **MR O'DONOGHUE:** My Lord, perhaps. I mean it is a submission sometimes made  
25 by counsel that this is the first time someone has argued this. But my  
26 response is it is a point of law, it is being argued.



1 **MR JUSTICE MORGAN:** No, I am not -- I was really making the opposite point that  
2 it is the first time it has been argued. We don't have an earlier decision of the  
3 Tribunal which decides it. It may assume it. We have to decide it and it is  
4 a fundamental point. If you are right about it, then the case changes its  
5 complexion completely.

6 **MR O'DONOGHUE:** My Lord, yes.

7 **MR JUSTICE MORGAN:** I may be wrong but that is the way it strikes me at the  
8 moment. You, like the Germans, the Austrians and the Spanish --

9 **MR O'DONOGHUE:** Yes. Serious courts in serious countries agree with me.

10 **MR JUSTICE MORGAN:** I am sure they are and we will pay full attention to it.

11 I think I will release everyone for today from the Tribunal hearing. We did not finally  
12 decide on a start time tomorrow. I suggested 10 o'clock. Do we need 10?  
13 We may run out of witnesses anyway if we start at 10.30, might we?

14 **MR WILLIAMS:** For my part, Sir, I would favour starting at 10. Mr O'Donoghue has  
15 had a bit more than four hours today.

16 **MR JUSTICE MORGAN:** I am happy with 10 o'clock, so it is an open door. Does  
17 anyone want to close that door or shall we go through it at 10 o'clock?

18 **MR O'DONOGHUE:** That is fine.

19 **MR JUSTICE MORGAN:** That is settled. I look forward, very much, to seeing  
20 everyone at 10 o'clock tomorrow morning and I will leave this hearing and go  
21 into the retirement room and discuss matters. Thank you.

22 **MR WILLIAMS:** Thank you, my Lord.

23 **MR O'DONOGHUE:** Thank you very much.

24

25 **(The hearing was adjourned until Tuesday, 6 October 2020 at 10 o'clock)**

26