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4 record.

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

Case No. : 1337/1/12/19

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

13 Wednesday 7 October 2020

14
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:

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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
38
39 **A P P E A R A N C E S**

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

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(10.29 am)

MR JUSTICE MORGAN: It is a pleasure to see everyone in person, it makes one feel slightly more normal. Thank you for co-operating and for attending in person, it is appreciated.

Right, Mr O'Donoghue.

MR O'DONOGHUE: My Lord, one question I have been asked to raise: is it the Tribunal's understanding that those who are not speaking should remain masked?

MR JUSTICE MORGAN: I have not given that any thought. I think it is consistent with the climate to do that, yes. Plainly those who are speaking can't be masked but those who can be, we would prefer them to be. Thank you for raising it.

MR O'DONOGHUE: Bad news for those with glasses.

MR JUSTICE MORGAN: Yes, it is, I have that problem.

MR O'DONOGHUE: Mr Williams asked me to raise the point that he is keen we get on to closings today. I echo that but we will have it see how we go.

MR JUSTICE MORGAN: That is good to hear but as you say, we will see what progress we make. Good.

MR O'DONOGHUE: My Lord, Dr Grenfell.

MR JUSTICE MORGAN: Are you giving your evidence under oath or under affirmation?

DR GRENFELL: Under oath.

MR JUSTICE MORGAN: Has provision been made for a holy book? I take it it is the Bible.

1 **DR GRENFELL:** Yes.

2 **MR JUSTICE MORGAN:** Is there a Bible?

3 **DR GRENFELL:** Yes.

4 **MR JUSTICE MORGAN:** Let me just get the words of the oath. Dr Grenfell, can
5 you give your full name?

6 **A.** Michael Paul Grenfell.

7

8 **DR MICHAEL PAUL GRENFELL (sworn)**

9 **MR JUSTICE MORGAN:** Thank you, Dr Grenfell.

10 Yes, Mr Williams.

11 **Examination-in-chief by MR WILLIAMS**

12 **MR WILLIAMS:** If you go to the hearing bundle volume 1 tab 7, is this your first
13 witness statement?

14 **A.** Yes, it is.

15 **Q.** Could you go to page 528. Can you confirm this is your signature

16 **A.** Yes, it is.

17 **Q.** The next page there is an exhibit, is that your signature as well?

18 **A.** Yes, it is.

19 **Q.** If you could then turn on to tab 9. Is this your second witness statement?

20 **A.** Yes, it is.

21 **Q.** If you could turn on to page 3 at bundle page 567, is that your signature again?

22 **A.** Yes.

23 **Q.** And again over the page?

24 **A.** Yes.

25 **MR WILLIAMS:** Thank you. If you wait there, Mr O'Donoghue will have some
26 questions.

1 A. Thank you.

2 **Cross-examination by MR O'DONOGHUE**

3 **MR O'DONOGHUE:** Dr Grenfell, good morning.

4 A. Good morning.

5 Q. You were the SRO for the criminal investigation, weren't you?

6 A. I was from around the summer to autumn of 2015, not from the beginning.

7 Q. You joined the CMA in 2014?

8 A. Joined the CMA in January 2014 when it was a shadow CMA. It took up its
9 functions in April 2014, but I only took up the post of executive director for
10 enforcement in July 2015.

11 Q. You say in your first witness statement at paragraph 11 that criminal cartel
12 investigations are by their nature lengthy. It is correct in this case, the
13 criminal investigation took four years and four months from its formal opening
14 until the decision to close it.

15 A. Yes.

16 Q. In fact, the length of this cartel investigation was longer than any other conducted
17 by the OFT or CMA, wasn't it?

18 A. When you say this cartel investigation, you mean both the criminal, investigation
19 and the Competition Act investigation combined?

20 Q. Mmm mm.

21 A. The criminal investigation? Well, there had been very few. I honestly don't know
22 whether you are right or not, but that may well be the case. The team tells me
23 that it was the largest and most complex criminal investigation they had
24 conducted with around at one point up to nine individuals under investigation.

25 Q. We will see about that. So the next longest investigation was in *Steel Tanks*,
26 wasn't it?

1 A. I defer to you on that, that may well be the case. I don't know for sure.

2 Q. That took two years and two months from being opened until the last charge?

3 A. Which was a much shorter investigation where there were only three suspects.

4 Q. That was a case unlike this case where there was a completed criminal trial. In

5 under three years, there was a criminal conviction following a jury trial?

6 A. There was one criminal conviction and two acquittals following a jury trial, yes.

7 Q. The next longest investigation took half as long as this one?

8 A. Was that a question, sorry?

9 Q. Yes.

10 A. Yes.

11 Q. Can we have a look at *Galvanised Steel Tanks*. The point I want to put to you is

12 that *Galvanised Steel Tanks* was if anything a more complex investigation. If

13 you can turn to the second authorities bundle, please. Do you have that?

14 **(Handed).**

15 It is tab 26, Dr Grenfell.

16 A. Unfortunately I only have tab 25 in this one. Do we have one with tab 26?

17 **(Handed).**

18 Q. *Galvanised Steel Tanks*, 19 December 2016.

19 A. Yes.

20 Q. You will see if you turn to page 34, paragraph 2.110 -- are you there, Dr Grenfell?

21 A. 2.110, yes.

22 Q. This was a case in which there was a single recorded meeting of which you have

23 a transcript; correct?

24 A. That's correct.

25 Q. Whereas in this case by contrast, you had four recorded meetings?

26 A. Correct.

1 Q. In the present case, this was a case in which you had by far the greatest amount
2 of contemporaneous recorded meetings?

3 **A.** We are talking about -- you are now talking about the concrete drainage cartel.
4 We had four recorded meetings over a period of under a year in relation to
5 a cartel which has been found to have lasted seven years. So those four
6 recorded meetings were a snapshot of what was going on, they weren't
7 evidence or contemporaneous evidence of the entire cartel.

8 Q. *Galvanised Steel Tanks* was an infringement which lasted 7.75 years and there
9 you had a single meeting. That is the point I am putting to you.

10 **A.** I understand that, yes.

11 Q. I saw the last couple of days you were in attendance remotely from time to time;
12 is that correct?

13 **A.** It is, yes.

14 Q. Yesterday, Mr Williams -- I wonder if the witness could be given a copy of
15 yesterday's transcript, please. My Lord, I think we do have a copy, yes.

16 **(Handed).**

17 These are Mr Williams's submissions yesterday. If I can ask you, Dr Grenfell, to turn
18 to page 61, please. You see at the bottom of the page, 24/25, he describes --

19 **A.** Lines 24, 25?

20 Q. Yes, doctor. He describes this case as a barn door breach of competition law, do
21 you see that?

22 **A.** Yes.

23 Q. Then if you go back to page 12, at the bottom the page, he says:

24 "Very often the Tribunal will be in doubt about what happened, but obviously in this
25 case one does have video recordings of four key meetings and verbatim
26 transcripts, more or less verbatim transcripts of those meetings. So the doubt

1 is narrower."

2 Then finally at page 53, starting at line 21, it says:

3 "FPM resisted an infringement finding in the face of what was frankly overwhelming
4 evidence party to a cartel four recorded meetings."

5 You obviously agree with everything he said, do you not?

6 **A.** I absolutely do and those four meetings are strong evidence of an unlawful cartel,
7 we felt that all the time. They are not in themselves evidence of a cartel
8 lasting seven years and I mean, I -- one of the things that I find interesting,
9 and Mr O'Donoghue has made a similar point in his skeleton argument, is on
10 the one hand we are being told that this was slam-dunk and obvious; on the
11 other hand, the entire period of both the criminal and the Competition Act
12 investigation, FP McCann and its owners denied there was any illegality long
13 after the other two parties had settled and right up to the issuing of the
14 Decision and indeed right up to making this appeal when they decided not to
15 contest what they now say was obviously the case.

16 Q. Thank you for your mini speech, but the point I am putting to you, which I think
17 you agree with, is you agree with what Mr Williams said yesterday?

18 **A.** I agree that that is very strong evidence of there having been a cartel. It is not --
19 as I said a moment ago, it is not evidence that it lasted seven years.

20 Q. But it is an important difference with *Steel Tanks*, do you agree with that?

21 **A.** In *Steel Tanks*, there was a -- there were four -- we had very strong evidence
22 through four meetings over a period of about nine months of the existence of
23 a cartel. What our subsequent work established was that it was even more
24 serious than that snapshot showed and all the evidence we gathered showed
25 it was something that had lasted seven years.

26 **MR WILLIAMS:** I am sorry, he started that sentence by saying in *Steel Tanks*, but

1 I am not sure --

2 **A.** Sorry, I apologise. Thank you very much.

3 **MR JUSTICE MORGAN:** You did. You said in *Steel Tanks* because you were
4 asked about *Steel Tanks*, but then when you went on to describe four
5 meetings in seven years, you were referring to this case?

6 **A.** Yes, I'm sorry.

7 **MR JUSTICE MORGAN:** Don't be, I think it was clear and we understand it.

8 **MR O'DONOGHUE:** If it helps, I was not confused. Sticking with *Steel Tanks*, if we
9 go back to the decision --

10 **A.** Yes.

11 **Q.** -- internal page 4, sequential numbering 1379, this is the introduction to --

12 **A.** This is internal page 4, yes.

13 **Q.** 1.1, it is a short point. In *Steel Tanks*, there were four defendants; in precast
14 concrete there were three. Do you agree with that?

15 **A.** That is correct, yes.

16 **Q.** That is a second difference with *Steel Tanks*.

17 **A.** It is.

18 **Q.** Then at 1.2 is a point I have adverted to already, but let me put it to you very
19 clearly: the duration of the infringement in *Steel Tanks* was 7.75 years,
20 compared to 6.75 years in the present case; do you agree with that?

21 **A.** I do.

22 **Q.** You would accept, would you not, the length of this criminal investigation cannot
23 be explained simply because criminal investigations are by their nature
24 lengthy or complex. The length of this investigation was on any view far out of
25 the ordinary, even for a supposedly complex case?

26 **A.** The handful of criminal investigations that the CMA and its predecessor body

1 have undertaken, which is a small handful, it happens to have been the
2 longest. They are all complex. You have -- Mr O'Donoghue has just asked
3 me about the number of defendants, but he is talking about the undertakings
4 who were the defendants in the Competition Act case. In the criminal
5 investigation, which I think is the subject matter of Mr O'Donoghue's
6 questioning, there were only three suspects in *Galvanised Steel Tanks*, there
7 were up to nine in concrete drainage pipes.

8 So concrete drainage pipes as a criminal investigation was a bigger and more
9 complex investigation, I am told by the criminal team.

10 Q. You are certainly not saying for one second that *Steel Tanks* was not a complex
11 case?

12 **A.** I think these things are relatively -- I am not a criminal specialist so from my
13 perspective, they all seem very complex. But the specialists at the CMA who
14 do run these criminal investigations tell me that concrete drainage pipes was
15 a particularly complex and large investigation.

16 Q. You personally cannot speak directly to that, is that what you are saying?

17 **A.** Yes.

18 Q. The formal investigations in this case began in February 2013, but we know the
19 OFT had covertly recorded a meeting in August 2012. So the investigation in
20 reality had actually been up and running for around five months by the time it
21 was formally opened, you obviously agree with that?

22 **A.** I honestly do not know the answer to that. I mean, Mr O'Donoghue's last
23 comment was that I cannot speak to it directly. I can speak even less directly
24 to something that was before I entered the CMA, or indeed even before the
25 CMA existed.

26 The point was made in FPM's skeleton argument, so I have discussed this with the

1 criminal team. What I am told is that, you know, they do not know because
2 the people who do the intelligence don't talk to them about these things. But
3 clearly preparatory intelligence needs to take place, it needs to meet difficult
4 legal standards under statutes such as the RIPA, the Regulation of
5 Investigatory Powers Act. And in order to get the arrest warrants, very strong
6 evidence needed to be provided to the High Court. So that is what I am told.
7 I cannot speak to that directly.

8 Q. Let's take this in stages. It is a matter of public record that the first recorded
9 meeting was in August 2012; do you agree with that?

10 A. I do, yes.

11 Q. It is a matter of public record that the criminal investigation formally opened in
12 February 2013; Do you agree with that question?

13 A. Yes, I agree on that.

14 Q. So we agree on that?

15 A. Yes.

16 Q. Because this recording took place in August 2012, it is unavoidable, isn't it, that
17 there was some period before then when some investigation had
18 commenced, albeit informally?

19 A. I think it is reasonable to conclude and I have no greater expertise than you do
20 on this. But I think it is reasonable to conclude that prior to an undercover
21 filming, there must have been some preparation; yes, I agree.

22 Q. The camera didn't walk into the room itself, did it?

23 A. I assume so.

24 Q. The CMA has refused to say when it actually began, has it not?

25 A. I do not think there has been a direct refusal and I have made my own inquiries,
26 as I said a moment ago. People I can talk to don't know and the answers

1 I was given were along the lines that I've just said about the high standard.
2 There is a period, but the actual timing I haven't been told. I do not think CMA
3 corporately has refused.

4 Q. It is not in your two statements, is it?

5 **A.** No, because as I said, I don't know.

6 Q. It is in (Inaudible) statement?

7 **A.** That's correct. As I have said, I don't know.

8 Q. But you would at least accept because of the high threshold you mentioned, the
9 investigation must have been up and running informally for a matter of weeks,
10 if not months?

11 **A.** Well -- and I apologise for what's pedantic or semantic points, but at the CMA,
12 a distinction is drawn between intelligence and investigation and I think they
13 would say that the investigation only really began in February. There clearly
14 must have been -- I completely agree with Mr O'Donoghue, there must have
15 been some preparation before that first undercover filming.

16 Q. This wasn't your first rodeo. You know from the other criminal cases that that
17 pre-investigation period by definition, I would suggest to you, will be of the
18 order of weeks and months. It must be.

19 **A.** That is your supposition. I am not in a position to agree or disagree with you.
20 But clearly there must have been a period of preparation, that is absolutely
21 right, Mr O'Donoghue makes a very fair point.

22 Q. Thank, you. We have seen that there are four recorded meetings.

23 **A.** Yes.

24 Q. It is pretty unusual, I would suggest, for an authority to have four recorded
25 meetings by way of evidence. Indeed, apart from *Galvanised Steel Tanks*,
26 I am not aware of any other case in which the CMA has had recorded meeting

1 evidence. Would you agree with that?

2 **A.** Well, I think there were two propositions in the question. As to whether it is
3 unusual for an authority, I can't -- I just don't have the expertise --

4 Q. Let's stick to the CMA.

5 **A.** Let's stick to the CMA. As we have said, there is only a small handful of criminal
6 investigations that have ever taken place. In this case, the CMA had four
7 recordings. It was a reason why, right from the beginning -- or rather the OFT
8 had four recordings that were passed to the CMA -- it is a reason that from the
9 very beginning, the criminal team and then subsequently the Competition Act
10 team and the leadership at the CMA thought that this was potentially a strong
11 case that was worth investigating properly and thoroughly.

12 Q. Well, let's be concrete, forgive the pun. You are not aware of any other CMA
13 case in which they had four recorded meetings, are you?

14 **A.** That is correct.

15 Q. The only other case I am aware of where there was any recorded meetings is
16 steel tanks, where there was a single recording?

17 **A.** Right.

18 Q. This is a case in which uniquely, the CMA had the largest volume of
19 contemporaneous evidence by way of recorded meetings?

20 **A.** Of recorded meetings showing the existence of a cartel, though not, as we have
21 said earlier, of the existence of a seven-year cartel.

22 Q. Would you accept it showed the existence of a cartel, that is your position?

23 **A.** I absolutely do, and that is the finding the CMA made in October of last year.

24 Q. Therefore, by 2013, which was the last of the recorded meetings, you knew there
25 was a cartel?

26 **A.** By 2013, we had reasonable grounds to believe that there was a criminal cartel.

1 Q. It wasn't just the meeting recordings, of course. There were also a series of
2 dawn raids in 2013; do you agree with that?

3 **A.** Yes.

4 Q. At which substantial documentary evidence in the form of e-mails, handwritten
5 notes, and so on, were seized?

6 **A.** Yes.

7 Q. In the same year, 13 November 2013, you had received a leniency application
8 from Stanton Bonna?

9 **A.** A proffer, yes, a leniency proffer.

10 Q. This was a type B leniency application, was it not?

11 **A.** An investigation had already started so it had to be, yes.

12 Q. You are aware that as a condition for obtaining type B leniency, the undertaking
13 has to give an unequivocal acceptance that it has been engaged in an
14 infringement of the Competition Act, there has to be a corporate admission --

15 **A.** Yes.

16 Q. -- of cartel activity; correct?

17 **A.** Yes.

18 Q. A further condition of type B leniency is they would have to maintain continuous
19 co-operation with the CMA?

20 **A.** Yes.

21 Q. A further condition is that they would have to agree to provide all non-legally
22 privileged information, documents and evidence regarding the existence of
23 a cartel; correct?

24 **A.** Yes.

25 Q. The final condition of type B leniency is that the material they provide must add
26 significant value relative to what the CMA -- or OFT in this case -- already had

1 in its possession?

2 **A.** Yes.

3 **Q.** You would accept that this application was a material upgrade, if I can call it that,
4 on the evidence in your possession?

5 **A.** The leniency agreement was not agreed until much later.

6 **Q.** Yes, that is fair, that is fair.

7 **A.** What I am told is it was reasonably high level, but it is absolutely true to say that
8 it strengthened our confidence that we were -- our investigation was not
9 barking up the wrong tree, that we were -- that we were right to suspect the
10 existence of a cartel and it strengthened our confidence in pursuing the
11 criminal investigation.

12 **Q.** You made the point very fairly that the actual leniency agreement was concluded
13 a bit later, but I want to be precise as to what this means in forensic terms.

14 The date of the leniency application or marker is the date of submission of the
15 application of documents in question; correct? Because otherwise you may
16 miss your place in the queue, that is the whole point; isn't it?

17 **A.** I don't know the answer to that. I should, but I don't know the answer to that. It
18 certainly is a marker to give you your place in the queue. What is actually
19 provided and when it is provided, I am not sure.

20 **Q.** But it must be the case that to get type B at the time the application is made,
21 significant added value evidence is provided at that stage. I mean, fine, there
22 is an ongoing co-operation obligation, but in terms of timing, let's suppose
23 they are competing with the applications, you would have to determine who
24 was first in the queue?

25 **A.** What I am told is the information provided was fairly high level. It certainly did
26 not obviate the need to investigate considerably further.

1 Q. But it was of significant value, you accept that?

2 **A.** I accept that in order to benefit from type B, it needs to add significant value.

3 Q. In the criminal case, the first round of interviews conducted with the suspects
4 took place in March 2013 following their arrests?

5 **A.** Yes.

6 Q. The second round of interviews did not begin until February 2015; correct?

7 **A.** Yes.

8 Q. So a gap of two years between these two sets of interviews. You would agree
9 that that is on any view a long period?

10 **A.** No, I don't think I would agree with that.

11 Q. Well, by way of comparison, we understand from the CMA's own numbers that
12 a cartel investigation in a civil case takes on average 16 months/16 to 19
13 months. Surely a gap of two years simply to conduct a second round of
14 interviews is a significant gap?

15 **A.** So I think that the comparison is misplaced, with respect. In a criminal
16 investigation, the standard is much higher. It is not just the obvious point that
17 the burden of proof is much higher in a criminal trial, but in order to bring
18 charges, you need to satisfy the test that you have exhausted all reasonable
19 lines of inquiry and that you have a reasonable prospect of conviction and that
20 it is in the public interest to prosecute.

21 So therefore, it is much higher and the evidential standards are higher and the rules
22 as to what you may or may not ask in the investigation are much higher.

23 There was, I am -- I gather in the immediate aftermath of the arrests, there
24 were some 100 or more, or 130 or more officials were interviewed -- 120 or
25 more officials were interviewed, 100 potential witnesses were interviewed.

26 So as well as understanding the texts and the transcripts of the four video recordings

1 and understanding the interviews and the documentary evidence and the
2 electronic evidence and all the dozens of witness statements, these needed to
3 be looked at and the evidence that had been received needed to be, as it has
4 been put to me, stress tested in order to ask meaningful questions in the
5 second round of interviews.

6 So although I am not a criminal investigator and I am to some extent a bit out of my
7 depth, my understanding is it is not the case, as Mr O'Donoghue put it, that on
8 any measure that is a long period.

9 Q. Let's stress test that, as you say. Can we look first at volume 2, please?

10 A. Yes. This is volume 2 of the hearing bundle?

11 Q. Yes. Tab 18, Dr Grenfell.

12 A. Yes, thank you.

13 Q. If you could read that letter, please. It is a short letter. **(Pause)**.

14 A. Thank you. Yes, I have.

15 Q. At this stage -- what we have here is Mr Barry Cooper's bail being extended from
16 17 September 2013 to 4 February 2014. You see in the penultimate
17 paragraph, the extension was justified on the basis there was a large-scale
18 investigation.

19 **MR JUSTICE MORGAN:** You said Barry Cooper. I think it is Andrew Cooper. If
20 I misheard you, I am sorry I have interrupted, my fault.

21 **MR O'DONOGHUE:** My mistake, thank you.

22 Q. You then see at the end of the penultimate paragraph, the process will not be
23 complete by 17 September?

24 A. Yes.

25 Q. This is the point you picked up on. The letter refers to analysing documentary
26 and electronic material and contacting any potential witnesses; yes?

1 **A.** Yes.

2 Q. That would have involved the analysis of material extracted from electronic
3 devices at the time of arrest, analysis of telephone records, IT searches, and
4 of course interviews. That is essentially the point you were making?

5 **A.** Indeed.

6 Q. It is reasonable to infer that at this stage, the OFT thought, in light of the
7 complexity of the case, that those investigative steps were required before an
8 interview with Andrew Cooper could be completed on 4 February 2014;
9 correct?

10 **A.** I agree.

11 Q. If we now go to the next tab, please.

12 **A.** Exactly the next tab, sorry.

13 Q. Yes, forgive me.

14 **A.** Yes.

15 **MR O'DONOGHUE:** My Lord, 753.

16 Dr Grenfell, if you could quickly read that. Take your time.

17 **A. (Pause).** Yes.

18 Q. The target we have seen in February 2014 was missed and extended for over
19 a year. Do you see that?

20 **A.** Yes.

21 Q. It is quite striking, isn't it, for bail to be extended on a second occasion when on
22 the first occasion, the OFT thought that six months would be sufficient?

23 **A.** I am really in no position to comment on how striking or otherwise it is or how
24 unusual it is. I note that in both cases, the custody sergeant agreed to the
25 application. I do not know whether it is unusual or striking, but it is clearly
26 what happened as the criminal team ensured that it investigated thoroughly

1 and that it was in a position to meet the obligation to exhaust all reasonable
2 lines of inquiry.

3 Q. You mentioned the custody sergeant. If you could turn to page 760 in the same
4 bundle.

5 **A.** Page 760, yes.

6 Q. There it actually sets out the further steps. These are the points I just put to you,
7 all pretty obvious stuff.

8 But these were all the steps that the OFT knew it would have to undertake at the
9 time of the first extensions. We saw those a minute ago.

10 **A.** Yes.

11 Q. If you look in particular at step 5?

12 **A.** I mean, at the risk of stating the obvious, we saw that it needed to undertake
13 those steps. It didn't know and possibly couldn't have known what was
14 involved in undertaking those steps or the extent of work involved in
15 undertaking those steps and what further leads each step might entail. So it
16 is, as you say, the OFT had an idea of what its first further lines of inquiry are;
17 yes, that is right.

18 Q. If you look at step 5, "Interviewing of significant witnesses, following a review of
19 all relevant evidence"?

20 **A.** Yes.

21 Q. The OFT envisaged that all of the evidence could be put to the suspects in
22 interview again; right?

23 **A.** I think that's right, yes. I think that's right, yes.

24 Q. This could be expected to happen immediately before a charging decision.

25 **A.** "In order to reach the stage at which further constructive interviews can be held
26 with the suspects a large number of lines of enquiry need to be completed."

1 Presumably, yes, before charging.

2 Q. This is in 2014. We know that the charging decisions were not in fact made
3 shortly after the second round of interviews, don't we?

4 **A.** We do.

5 Q. Can we now look at one of the interviews? This is in February 2015,
6 Mr Barry Cooper.

7 **A.** Yes.

8 Q. This time -- Dr Grenfell, if you can keep the second bundle somewhere
9 convenient, I may come back to that.

10 **A.** Sure.

11 Q. Turn to bundle 4, please, tab 126.

12 **A.** Thanks.

13 Q. This is an interview with Barry Cooper conducted on 5th to 11 February 2015.
14 Do you see that on the cover sheet?

15 **A.** Mmm mm.

16 Q. If we can quickly look at the Decision 2.86 in volume 1.

17 **A.** Sorry, I apologise.

18 **MR JUSTICE MORGAN:** You were asked to keep file 2 available, I think. It may be
19 better to put it away because you are now running three files on the desk.

20 **A.** Four.

21 **MR JUSTICE MORGAN:** Four, well.

22 **A.** Making a complete mess, I am afraid.

23 **MR JUSTICE MORGAN:** We have a rule of six in the country, I believe. My rule is
24 a rule of two, no more than two files open.

25 **A.** Shall I replace them or --

26 **MR JUSTICE MORGAN:** I think put it back where you know it is where you have no

1 difficulty finding it. I am not being critical, I hope I am being helpful. Just to
2 have two files open is more than enough.

3 **A.** I am conscious I have borrowed one of these files from Mr Doran, so I could
4 probably return it.

5 **MR JUSTICE MORGAN:** Maybe it is one you could return, yes. That will be a start.

6 **A.** There is authorities.

7 **MR JUSTICE MORGAN:** Mr O'Donoghue, Dr Grenfell should hearing bundle 1 and
8 hearing bundle 4.

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

10 **MR JUSTICE MORGAN:** Right. We are currently in hearing bundle 1, the Decision.
11 Did you give the witness a page reference?

12 **MR O'DONOGHUE:** Yes. Dr Grenfell, it is paragraph 2.86, internal page 24,
13 sequential numbering 2.86.

14 **A.** Thank you. 2 point?

15 **Q.** 2.86.

16 **A.** Of the Competition Act Decision?

17 **Q.** Yes. This is talking about Barry Cooper's interview. CMA says:
18 "He gave the CMA a full account of the workings of the cartel and his --"

19 **A.** I apologise --

20 **Q.** 2.86 of the CMA's Decision.

21 **A.** 2.86 of the Decision is redacted. Either I am looking at the wrong page or this is
22 page 24 of the Decision.

23 **Q.** Yes, 24; internal numbering 26, sequential numbering.

24 **A.** Yes, 2.86, there is a series of scissors. **(Handed)**. Thank you. Right.

25 **MR WILLIAMS:** Perhaps then he should read it to himself.

26 **A.** I will read it.

1 **MR JUSTICE MORGAN:** The Tribunal has the full un-redacted version, but there
2 was also a redacted version which was made available to others, is that the
3 position? So it is thought that 2.86 is confidential.

4 Dr Grenfell, there is no difficulty you reading it to yourself. We will leave it to
5 Mr O'Donoghue as to how much he investigates it and what we should do.

6 **MR O'DONOGHUE:** Do you have that, Dr Grenfell?

7 **A.** I am reading it now, thank you.

8 Q. You obviously agree with it, do you not?

9 **A.** I am still reading it, sorry.

10 Right.

11 Q. If you go back to the statement itself, I just want to show you a few extracts.

12 **A.** Yes.

13 Q. The first point, what we have in tab 126 are selected extracts from that interview.

14 So these extracts alone are 100 pages.

15 **A.** Yes.

16 Q. And therefore it is fair to assume the entire interview would have been many
17 hundred pages; correct?

18 **A.** I know no more than you do. But I think it is not an unreasonable conclusion to
19 draw.

20 Q. Just to pick up a few points, at 2197, middle of the page, can you quickly read
21 that to yourself.

22 **A.** So right here? Okay.

23 Q. Yes. **(Pause)**.

24 **A.** Yes.

25 Q. So a simple point: at this stage in February 2015, he was in a position to describe
26 the three essential elements of the cartel?

1 **A.** Well, I think what I take from it is a slightly less extravagant conclusion than that.
2 I take on it he described what he regarded as three tenets of the cartel. As
3 we now know, those three tenets were indeed present in the cartel.

4 Q. Go to 2216.

5 **A.** Yes.

6 Q. About halfway down starting with, "There was ..."

7 **A.** Yes.

8 Q. Quickly read that.

9 **A.** Yes, of course. **(Pause)**.

10 Yes.

11 Q. So he is giving reasonably detailed evidence on cheating within the cartel; do you
12 agree with that?

13 **A.** He is giving an item of evidence of cheating in the cartel, yes.

14 Q. Yes. Then 2229, please.

15 **A.** Yes.

16 Q. The top of the page, starting with "Malone ...".

17 **MR WILLIAMS:** Take him back to 2216. I just want Dr Grenfell to read the whole
18 page because he was asked to read from, "There was ...", but I think it would
19 be helpful to read the whole page.

20 **MR O'DONOGHUE:** Yes, absolutely.

21 **A.** From "Right, okay ..."?
22 Yes. **(Pause)**.

23 **MR WILLIAMS:** It may or may not be relevant to Dr Grenfell's evidence if he picks
24 up the discussion halfway through, that is all.

25 **MR O'DONOGHUE:** My Lord, obviously there can be re-examination.
26 Go to 2229.

1 **A.** You would like me to read Mr Malone's --

2 Q. Yes, particularly the first half.

3 **A.** Yes. **(Pause).**

4 Yes.

5 Q. One of the points you make is we had recorded meetings in 2012 and 2013,

6 there was a longer period and the point I want to put to you here is that Barry

7 Cooper is testifying to the entire period; do you agree with that?

8 **A.** Yes, yes. This is in February 2015, yes. (Inaudible) it is the entire period.

9 Q. Just to recapitulate: by February 2015, you have four recorded meetings and

10 transcripts; correct?

11 **A.** **(Witness nods).**

12 Q. A leniency confession and supported documents, two sets of interviews with

13 multiple suspects?

14 **A.** Mmm mm.

15 Q. Detailed documentation from the dawn raid conducted on the company's

16 premises, and a full account of the workings of the cartel in Barry Cooper's

17 evidence?

18 **A.** So indeed we do, and I think you may be suggesting that we had a very great

19 deal of evidence in support of the suspicions that led to the criminal

20 investigation, and I think that is absolutely a good point to make.

21 What my criminal team has said to me that although that was very good, it did need

22 to be checked, it needed to be corroborated that in order to meet the standard

23 for the Code for Crown prosecutors to bring a prosecution and, moreover,

24 quite apart from meeting that standard in order to have a good enough case

25 to put to a court and the jury, more work needed to be done.

26 I mean, if I may: from the point of view of an executive director of the CMA, it is very

1 much in my interest -- and those who work with me in the organisation will
2 know that -- that I am obviously keen that these cases be done as quickly as
3 they possibly can; that there is public money at stake so we don't want to
4 spend more than we need to.

5 On the other hand, if we are spending that money, we need to do the case properly,
6 we need to investigate it properly and meet the required tests in order that --
7 that there be an outcome that made it worthwhile. And I am told by all those
8 involved in the criminal team that further work needed to be done in order to
9 meet those tests.

10 Q. Well, let's look at that.

11 **A.** Yes.

12 Q. Thank you for your intervention.

13 Can we look at tab 21 of volume 2, please?

14 **A.** Yes.

15 **MR JUSTICE MORGAN:** Can we put away volume 1 or volume 4?

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

17 **MR JUSTICE MORGAN:** Do you have a preference as to which we keep and which
18 we don't?

19 **MR O'DONOGHUE:** Let's hang on to volume 2 for the time being.

20 **MR JUSTICE MORGAN:** We will get 2 out.

21 **A.** I must say, this is very good for my Fitbit. Right, yes.

22 **MR O'DONOGHUE:** This letter refers to a conversation between Ray Clark, one of
23 the interviewing officers -- sorry.

24 **A.** Sorry, what --

25 Q. Go to tab 21.

26 **A.** Sorry, yes.

1 Q. You see in the second paragraph, it refers to a conversation with Ray Clark, one
2 of the interviewing officers, and the solicitors for Eoin McCann on February on
3 19 February 2015?

4 **A.** Yes.

5 Q. This conversation obviously took place after Mr Cooper's admissions under
6 caution in the interview we have just seen.

7 **A.** Yes.

8 Q. Then four lines from the bottom, they are informed by Ray Clark that any
9 conclusion of the investigation is some months away.

10 Do you see that?

11 **A.** Yes.

12 Q. So it was still envisaged in February 2015 that the investigation would be
13 concluded a few months away, perhaps by summer or autumn 2015; do you
14 agree with that?

15 **A.** It was envisaged that it was some months away.

16 Q. Yes, as opposed to years.

17 **A.** It was envisaged that it was some months away is what we can draw from that.

18 Q. If we go to tab 22, please, the next one. This is 2 April 2015.

19 **A.** Yes.

20 Q. Bottom of the page, do you see that? Read the last sentence.

21 **A.** "There are a number of further lines of inquiry to be pursued and our present best
22 estimate is that we should ..."

23 Yes, yes.

24 Q. Okay, early 2016?

25 **A.** Yes.

26 Q. But the estimate had slipped again by about a year; correct?

1 **A.** (Break in transmission). I think it is open to a number of interpretation. And here
2 saying that (Several inaudible words) at some point in the first half of the
3 following year, an individual was charged and pleaded guilty.

4 Q. Let's turn to the charging decision, which is back in volume 2, tab 26.

5 **A.** Right, yes.

6 Q. As you say, Barry Cooper was charged on 3 March 2016, which is over a year
7 after his admissions under caution; correct?

8 **A.** It is.

9 Q. Yes. There was no need, was there, to charge him the at the same time as the
10 other defendants, was there?

11 **A.** Well, he wasn't charged. None of the defendants were charged, but it is
12 absolutely true to say that after he was charged, the investigation continued
13 with a view to possibly charging other individuals. So I think it must be the
14 case, as you say, that it is not necessary for them all to be charged
15 simultaneously.

16 Q. If you turn over the page and look at the final paragraph, if you could read that,
17 please.

18 **A.** Yes.

19 Q. You see the charging decision had slipped again from the first half of 2016 to the
20 autumn of 2016, do you see that?

21 **A.** Yes. Well, one individual was charged in the first half of 2016, only one individual
22 was charged. They estimated -- currently estimated that a decision on
23 charging one other individual would be taken in the autumn of that year. Yes,
24 that is true.

25 Q. No reasons given at least in this letter for that delay?

26 **A.** No reason is given for the estimated timing.

1 Q. In setting out these targets, the CMA, I would suggest, would have been very
2 mindful of external counsel's advice of the decision to proceed and therefore
3 timing; would you agree with that?

4 **A.** Forgive me, I don't want to be obtuse, but I don't quite understand the question.

5 Q. Well if, you are setting out in these letters timings on charging decisions, that
6 must be done in the cognisance of input from external counsel. You wouldn't
7 go and say, "Well, we will maybe charge you" --

8 **A.** So we are now at the stage when I had some sight of what is going on, and
9 maybe it will help shortcut some of this if I explain a little bit to the Tribunal
10 what was going on.

11 There remained a mass of evidence, documents, the number of documents was
12 rising exponentially. There were further lines of inquiry, points needed to be
13 checked at the same time -- and I can't give an exact date, but external
14 counsel was instructed to look at the vast mass of documents and start to
15 form a view. It was hoped, as was said in this letter, that by the autumn of
16 2016, a charging decision could be made.

17 I know one thing that was causing delay and caused some significant delay is that
18 there was -- there was a dispute about whether legal privilege by one
19 individual over some documents, the extent of the waiver of that legal
20 privilege, there was talk of going to independent counsel. I will be -- let me tell
21 you that I was concerned that we risked getting into a quagmire.

22 It was absolutely -- I do not think anyone was doing the wrong thing, they had to get
23 all the evidence to test and there was a danger that if we went down this route
24 of independent counsel adjudicating, it would take even longer and we
25 resolved that one way or another, we would reach a decision by the following
26 summer.

1 Now I cannot tell you what the exact date when that was happening. It was the
2 latter, the end of 2016 when these matters were happening and there was
3 resolve on the part of the CMA that although this was a very strong
4 investigation, although one person had already pleaded guilty suggesting that
5 our suspicion was right, really there was a danger of it prolonging really
6 disproportionately and we resolved to take a view roughly by the time we did
7 in the summer of 20 --

8 Q. Can I put it this way: when it says here, "We anticipate this decision will be taken
9 in the autumn of this year," that would have been done, fully factoring into
10 account the need for any external advice if necessary?

11 A. Well, what it did not factor into account was the point I have made to you about
12 the dispute about waiver of legal privilege, which seemed to prolong things
13 and prolonged access to key bits of evidence. And of course it made
14 assumptions about the time in which counsel could get to grips with it, and
15 this is not in any way a criticism, but assumptions which the reality proved to
16 be otherwise just as we -- so it is not a criticism in any way -- just as we found
17 that some of our initial estimates were perhaps over optimistic, so they did.

18 But I must say, you know, I apologise if this is a mini speech or whatever, but I think
19 it is very worth explaining this to the Tribunal. Yes, it is absolutely important
20 that we pursue cases as expeditiously as possible, but we do need to get
21 them right and we do need to meet the statutory tests and we do need to give
22 everyone -- respect the procedural rights of everyone concerned. And if they
23 take a little -- if they take longer than the indicative estimates, well, I would
24 rather that weren't the case, but it is better to get it right and do it properly
25 than not.

26 **MR JUSTICE MORGAN:** I wonder if I could have some clarification, Dr Grenfell.

1 A. Yes.

2 **MR JUSTICE MORGAN:** You were taken to the charging decision in relation to
3 Barry Cooper in March 2016.

4 A. Yes. I was, yes.

5 **MR JUSTICE MORGAN:** You were taken to it because there was an anticipation
6 that other decisions on charging would be made in the autumn of 2016.

7 A. Yes.

8 **MR JUSTICE MORGAN:** We know when those decisions were actually made,
9 which was later still.

10 A. Yes.

11 **MR JUSTICE MORGAN:** You said there was a difficulty arising in that period from
12 March 2016 to the later time of 2017, and it was to do with an issue about
13 legal professional privilege.

14 A. Yes, the waiver of legal privilege and the extent of that, yes.

15 **MR JUSTICE MORGAN:** I got the impression you were saying that that difficulty or
16 the full implications of that difficulty had not been seen in March, but they
17 became apparent later.

18 A. That is very much my understanding, yes.

19 **MR JUSTICE MORGAN:** And they contributed to or caused the taking of time. First
20 of all, is that right, is that what you are explaining to us?

21 A. This is very much my understanding, yes.

22 **MR JUSTICE MORGAN:** Right. One is familiar with issues about privilege and
23 about waiver and one might have even have some expectation as to what
24 time it will take to deal with such an issue. I don't know I can form any view
25 about that without understanding more about what this issue was and why it
26 was difficult and why it was time-consuming.

1 Are you happy -- are you prepared to give us more information, are you in a position
2 to give us more information?

3 **A.** There is no reason or principle why I would refuse to give you more information
4 that I am aware of. But my ability to give you more information is a bit more
5 limited simply because I don't recall that much or not wholly on top of the
6 detail.

7 What I know is there was a dispute between one of the witnesses and us about how
8 much we should be allowed to see, and that dispute -- I mean, we are now
9 talking about quite a considerable amount of evidence and quite granular
10 detail; this bit, that bit or the next bit, and it was decided that the only way that
11 that dispute could be resolved would be by a referral to independent counsel.

12 **MR JUSTICE MORGAN:** All right. You said one of the witnesses or one of the
13 suspects.

14 **A.** One of the suspects.

15 **MR JUSTICE MORGAN:** Right.

16 **A.** Sorry, I am -- yes, one of the suspects.

17 **MR JUSTICE MORGAN:** You believe so.

18 **A.** I believe so.

19 **MR JUSTICE MORGAN:** Doing the best you can, you believe it was one of the
20 suspects?

21 **A.** Yes.

22 **MR JUSTICE MORGAN:** Was it one of the suspects connected with FP McCann or
23 was it another company?

24 **A.** I am not being difficult in saying I honestly don't --

25 **MR JUSTICE MORGAN:** You don't remember?

26 **A.** No.

1 **MR JUSTICE MORGAN:** One of the suspects raised the question about his
2 entitlement to legal professional privilege.

3 **A.** No, the extent to which it had been waived.

4 **MR JUSTICE MORGAN:** Right. So you had had seen some material, some
5 documents?

6 **A.** The CMA had, yes.

7 **MR JUSTICE MORGAN:** The CMA had but the suspect said: although you have
8 seen it and although I may be taken to have waived it for some purposes,
9 I can assert privilege to prevent you using it more widely. Is that the type of
10 point?

11 **A.** Sorry, I am not going to be very helpful, I am afraid.

12 **MR JUSTICE MORGAN:** Right.

13 **A.** It was either that or that we were simply not being able to get access to those
14 documents until the dispute had been resolved. And I should remember, but
15 I am afraid I don't.

16 **MR JUSTICE MORGAN:** Right. You have told us, I think, this was seen to be
17 potentially important material so you had a desire to have access to it
18 generally. Is that a correct understanding?

19 **A.** I think it is an overstatement to say it was something on which everything
20 depended, but I think it was an important element of the investigation.

21 **MR JUSTICE MORGAN:** All right. So there were potentially two sides to the
22 argument: the suspect whose privilege it was was putting forward a restrictive
23 approach and the CMA wished to argue for a wider, more expansive
24 approach.

25 **A.** Yes.

26 **MR JUSTICE MORGAN:** Was the argument between those two sides, the CMA on

1 the one side and the suspect on the other?

2 **A.** I believe so.

3 **MR JUSTICE MORGAN:** So the other suspects were not engaged in this?

4 **A.** I believe that is right.

5 **MR JUSTICE MORGAN:** Whether they knew about it, you don't know --

6 **A.** I believe that is right.

7 **MR JUSTICE MORGAN:** -- but they were not combatants in the battle.

8 **A.** No, other than they were not combatants in the battle other than that the

9 evidence had implications for them.

10 **MR JUSTICE MORGAN:** Right. Here is an issue of law, possibly mixed law in fact,

11 it had to be resolved and the way you would do that would be to -- you say

12 refer to external counsel.

13 **A.** Independent counsel, as I understand it.

14 **MR JUSTICE MORGAN:** I see. The parties --

15 **A.** (Overspeaking) capital C.

16 **MR JUSTICE MORGAN:** So the two sides would have agreed that this would be

17 determined in a binding way by counsel to whom it was referred for decision?

18 **A.** Yes.

19 **MR JUSTICE MORGAN:** Right. Did that happen, was it referred to counsel for

20 a decision?

21 **A.** I am really, really sorry but I don't remember.

22 **MR JUSTICE MORGAN:** Right. Do you remember what ultimately happened,

23 whether the material became available to the CMA for general use or not so?

24 **A.** I don't, I am afraid. I apologise.

25 **MR JUSTICE MORGAN:** Right. Can you put dates on when this problem became

26 a serious problem and when it stopped being a problem?

1 **A.** I became aware of it around the autumn to winter of 2016.

2 **MR JUSTICE MORGAN:** Right.

3 **A.** As to whether or when it ceased to be a problem, I am very sorry but I am not
4 able to assist. So the --

5 **MR JUSTICE MORGAN:** I interrupted you, it is my fault. Continue with your
6 answer.

7 **A.** The reason I bring it up in response to Mr O'Donoghue's question which is -- was
8 the question why was there this delay. My recollection is that that was
9 a factor in a delay point -- was a material factor in our not being able to meet
10 the timing that was as the phrase as in Mr Brown's letter, currently -- and then
11 we currently anticipated.

12 **MR JUSTICE MORGAN:** I understand you cannot give a date when it started or
13 when it finished, but can you give an order of magnitude? Was this
14 something that took a month, three months, or some other period?

15 **A.** I remember asking about how long it was taking and being rather alarmed that it
16 was a matter of months, it was likely to be a matter of months.

17 **MR JUSTICE MORGAN:** I think you said you didn't recall how it was resolved.

18 **A.** I am sorry, no.

19 **MR JUSTICE MORGAN:** So when the decisions were made in June 2017 not to
20 charge other suspects, you do not know whether you were using the material
21 or if it was not available.

22 **A.** I apologise, but I don't -- I completely agree. It is a very pertinent question, but
23 I don't know the answer.

24 **MR JUSTICE MORGAN:** All right. I have probed that fairly, I hope.
25 I will let Mr O'Donoghue resume, thank you.

26 **MR O'DONOGHUE:** Dr Grenfell, can we look at what the McCanns were saying at

1 this stage?

2 **A.** Yes.

3 Q. Turn to tab 32 of bundle 2.

4 **A.** Yes.

5 Q. It's a letter from Kingsley Napley.

6 **A.** May I check. In my tab 32, I have what is really only part of a letter. I have got

7 page 793.

8 Q. Yes, I have the same.

9 **A.** Right, okay. Sorry, yes.

10 Q. Can you have a look at the first paragraph, please.

11 **A.** Yes. **(Pause)**. Yes.

12 Q. The first point being made is a complaint about even further delay; do you agree

13 with that?

14 **A.** I do not see that it is -- on the face of that paragraph, it states when we have said

15 we are likely to make a charging decision. I do not see complaint in that first

16 paragraph.

17 Q. Go back to tab 29.

18 **A.** Yes.

19 Q. We have seen that initially there was a suggestion this would take place in the

20 autumn; correct?

21 **A.** Yes.

22 Q. We now see the latest deadline is 2017.

23 **A.** Yes. I am sorry, I feel slightly ridiculous making an issue of this, but simply on its

24 facts, I do not see complaint in that paragraph. I just see noting(?) --

25 Q. Can you read the second paragraph?

26 **A.** Yes. **(Pause)**.

1 Yes, I do see complaint in that second paragraph, you are quite right.

2 Q. We can agree that there is a complaint?

3 **A.** We can.

4 Q. That paragraph contains a serious charge against the CMA, does it not? It says:

5 "It is hard to conceive that there could be any conceivable justification for the delay."

6 Yes?

7 **A.** I mean, you are absolutely right that that is a complaint. It is not dissimilar to the

8 complaints which you have been making on behalf of the company of which

9 Mr McCann forms a part. So yes, I notice that.

10 Q. That is a charge which if not accurate, you, as the director of enforcement, would

11 have wanted to set the record straight on straight away; isn't it?

12 **A.** Let me just give a -- and maybe we should have done this a little bit earlier for the

13 benefit of the Tribunal, my role.

14 I kind of had two roles that are relevant to these proceedings. One is that I am an

15 executive director, I am on the board of the organisation. Like the other

16 executive directors, I have a role in the overall running of the organisation,

17 both in policy terms and in administrative management terms.

18 I also have overall responsibility for all our enforcement activity, which means

19 enforcing Competition Act prohibitions, enforcing the criminal cartel offence,

20 enforcing certain consumer protection legislation, and one or two affiliated

21 responsibilities. So that is one capacity.

22 I also had, as Mr O'Donoghue said right at the beginning, the role of senior

23 responsible officer for the criminal investigation from around the summer of

24 2015 and senior responsible officer for the Competition Act investigation when

25 it started.

26 Now as -- I can tell you that our investigation guidance also sets out the role of the

1 senior responsible officer, and it is to take big decisions on whether to open
2 an investigation, whether to issue a statement of objections and, as the
3 guidance says, it is not to be involved in the day-to-day running of the case.

4 So unless this issue had been escalated to us, to me -- which I do not think it was
5 and I do not see any reason particularly it should have been -- this wouldn't
6 have been dealt with personally by me, it would have been dealt with by the
7 case team, and that is perfectly proper and right.

8 Q. Let's be precise.

9 **A.** Yes.

10 Q. First of all, I think you accept this is an extremely serious charge, correct, the
11 extraordinary length of the criminal investigation?

12 **A.** It is the language which a lawyer acting on behalf of an individual would want to
13 use. It is suggesting, as you have suggested, that the investigation has taken
14 a long time and too long. For the reasons that we are going through,
15 I personally don't form the view it was too long. It was a long time, there were
16 a number of reasons that quite properly made it take that time in order that the
17 investigation should be conducted both in accordance with statutory and the
18 Code for Crown Prosecutors requirement and with our duties of fairness and
19 to conduct the --

20 Q. Dr Grenfell, I don't like to interrupt you.

21 **A.** Sorry.

22 Q. These mini speeches are not helpful. If you listen to the questions, please
23 respond.

24 **A.** Yes.

25 Q. I understand your perspective. All I am putting to you is that the charge
26 mentioned in this letter is a serious charge; do you agree with that?

1 **A.** I don't think I do and that is what my mini speech was an attempt to respond to,
2 was to put it in context. I completely understand why a lawyer acting for
3 a party under suspicion would make a representation like that. For the
4 reasons I have said, I do not think it is a well-founded charge.

5 **Q.** Dr Grenfell, please listen to the question. You disagree with what is being said.

6 **A.** Yes.

7 **Q.** What I am putting to you is that the charge set out in this letter was an extremely
8 serious one. If you don't agree with it, but you must accept this is a serious
9 charge --

10 **A.** With respect, the language of charge is inappropriate. It is a complaint by
11 a solicitor acting for a party. It is the kind of complaint that such a solicitor
12 would typically make. Of course it is to be taken seriously, I don't for
13 a moment --

14 **Q.** You didn't respond?

15 **A.** Well, I did not personally respond to it.

16 **Q.** The CMA didn't respond, did they?

17 **A.** I don't know that.

18 **MR JUSTICE MORGAN:** There is no response in the bundle, but then the next
19 document is March 2017. One doesn't know if the full sequence is with us or
20 whether there naturally is a selection from the chronology. But you are saying
21 to Dr Grenfell that the CMA did not respond to this letter?

22 **MR O'DONOGHUE:** Yes, that is my understanding.

23 **MR JUSTICE MORGAN:** Right. You didn't respond personally, you know that --

24 **A.** I did not personally respond.

25 **MR JUSTICE MORGAN:** -- but you don't know what the file shows.

26 **A.** That is correct.

1 **MR O'DONOGHUE:** My Lord, is that a convenient moment?

2 **MR JUSTICE MORGAN:** Yes. Is the transcript being taken ...

3 Would you like five minutes or ten minutes? I will say five, unless I hear an
4 application for ten. Does anyone say it should be ten? No, we will have
5 a five-minute break. According to my watch, six minutes will take us to 12
6 noon, so we will sit again at 12 noon. Thank you.

7 **(11.54 am)**

8 **(A short break)**

9 **(12.03 pm)**

10 **MR O'DONOGHUE:** So we saw at 26 that in March 2016, the anticipation was the
11 charging decision would be taken in the autumn. Do you remember that?

12 **A.** Yes.

13 Q. We have now seen in this letter that the target date has slipped into the
14 New Year of 2017; correct?

15 **A.** Into the following year, yes.

16 Q. We know that in fact the final disposal wasn't made until June 2017?

17 **A.** That is correct.

18 Q. Further slippage; correct?

19 **A.** That is exactly what you say. It wasn't made until June 2017.

20 Q. This is one of a number of deadlines I have shown you which slipped; correct?

21 **A.** I am going to say no, I do not agree with that. I do not think they were deadlines.
22 They were indicative estimates and we took as long as we needed to take.

23 Q. Whatever they were, they were missed; correct? We have been through all this.

24 **A.** We have seen that a couple of indicative estimates were over-optimistic, yes.

25 Q. You were quick to point out that in your view, an explanation or the explanation
26 for this is this privilege point.

1 **A.** Can I just clarify: it was an explanation.

2 **Q.** An explanation.

3 **A.** Yes, or -- sorry, I have phrased this badly. It was a factor, which in my
4 recollection was a reasonably significant factor. But I can't in all honesty sort
5 of give a sense of the relative magnitude of it, but it was a reasonably
6 significant factor.

7 **Q.** But the CMA has not disclosed any documents in these proceedings on that
8 issue, has it?

9 **A.** Not as far as I know.

10 **Q.** Thank you. One final question before we move to the civil side of the case.

11 **A.** Yes.

12 **Q.** Has there been any other case as director of enforcement where it has taken two
13 years to reach a charging decision after the final round of interviews?

14 **A.** Well, as the Tribunal and Mr O'Donoghue might know, following that charging
15 decision, we have not publicly launched to date any criminal investigations.
16 So in the period where I was executive director of enforcement, that is the
17 only criminal investigation that was in process.

18 **Q.** You are not aware of any previous cases that took such a long period?

19 **A.** I think -- forgive me, you pointed that out to me and I had no reason to disagree
20 with you earlier.

21 **Q.** You said you joined the CMA in January 2014?

22 **A.** Yes, yes.

23 **Q.** As I know from personal experience, you have been a highly respected
24 practitioner in private practice, a leading partner in a leading firm in the City.

25 **A.** I don't know whether that is a question, but thank you very much.

26 **Q.** I think you have more than hinted at this: one of the many things which attracted

1 you to the CMA, I would suggest, was the ability to bring more private sector
2 ethos and efficiency to investigations; correct?

3 **A.** I think probably incorrect. May I -- I don't want to make a mini speech, but may
4 I expand on that?

5 **Q.** You didn't join to make them slower, did you?

6 **A.** I don't think it is binary that you join it to make it quicker or you join to make it
7 slower.

8 **Q.** I think you said earlier that one of your personal priorities was to try and expedite
9 investigations?

10 **A.** That is correct, and it is not just my priority but the entire leadership team at the
11 CMA has been committed to and indeed has been successful in ensuring that
12 Competition Act investigations are a very great deal quicker than they were
13 previously, as indeed is shown by the government document that is cited in
14 Mr O'Donoghue's skeleton.

15 **Q.** On that point, can we turn up a couple of documents.

16 **A.** Yes.

17 **Q.** I am afraid this is in the authorities bundle.

18 **A.** Which number?

19 **Q.** 1, tab 24.

20 **A.** A1?

21 **Q.** Yes.

22 **A.** Yes.

23 If I may say so to the Tribunal, the document that Mr O'Donoghue is directing us to
24 now is exactly what I was referring to a moment ago.

25 **MR JUSTICE MORGAN:** Yes.

26 **MR O'DONOGHUE:** I think we can take this quickly. One of the aims of the

1 Enterprise and Regulatory Reform Act was to improve the speed of the
2 process of enforcement under the Competition Act; correct?

3 **A.** Correct, yes.

4 Q. If we look at page 589 of the document in front of you, you will see at the top of
5 that page on the left-hand side, these are CA 98 investigations. So the OFT
6 had a period of 36.7 months, do you see that, and the CMA gives at that
7 stage 16.9 months.

8 **A.** Can we just be a bit more precise about that because that includes so-called
9 phase III, which is the competition -- the appeal to the CAT. So really if you
10 are talking about the process in the OFT or in the CMA, it is phase I added to
11 phase II.

12 Q. Yes, so it is slightly shorter.

13 **A.** Yes, it was -- it was about just over 30 months in the seven years before the
14 CMA took place --

15 Q. 16 months CMA?

16 **A.** Yes, yes.

17 Q. Then just back a tab, tab 23.

18 **A.** Yes.

19 Q. 447 this time.

20 **A.** Yes.

21 Q. Do you see the table on enforcement?

22 **A.** Yes.

23 Q. At that stage in 2019, the rolling three-year average benchmark was 18 months
24 for the preceding three-year period and at that stage 17 months; do you see
25 that?

26 **A.** Yes, I do.

1 Q. On the left-hand side, the CMA's objective was to decrease the time taken to
2 conclude competition enforcement investigations against that rule or
3 benchmark.

4 **A.** Yes, yes.

5 Q. The CMA does not suggest in this case that FPM was in any way responsible for
6 the length of a civil investigation, does it?

7 **A.** Certainly we don't regard FPM as blameworthy.

8 Q. In fact, FPM speeded up the civil investigation by waiving its right to an oral
9 hearing, didn't it?

10 **A.** I think it is an overstatement to say it speeded up the investigation. A non-trivial
11 saving resulted from that.

12 Q. Well, organising, conducting and reviewing an oral hearing can take weeks and
13 months; correct?

14 **A.** No. I mean, weeks at most. Look, I completely agree with Mr O'Donoghue, it is
15 non-trivial. But it is not a very significant factor in the length of an
16 investigation whether an oral hearing takes place or not.

17 Q. You would agree that it saved you six to eight weeks?

18 **A.** I am not sure of that. It may be that -- I mean, it is not ... it saved a non-trivial
19 amount. I am not disagreeing, but I am not --

20 Q. Can we agree on weeks, then?

21 **A.** Yes.

22 Q. FPM voluntarily made witnesses available to you, didn't it?

23 **A.** Yes.

24 Q. It agreed streamline access to files, didn't it?

25 **A.** It did.

26 Q. That step in particular is a significant saving in CMA time?

1 **A.** Yes, indeed, and as the Tribunal knows, that was recognised in the penalty.

2 **Q.** You say in your first statement at paragraph 22 that:

3 "There were good grounds for considering that it would not have been sensible or

4 efficient to run a civil case in parallel with a criminal case."

5 **A.** We've -- is it helpful if I get that in front of me?

6 **Q.** As you wish.

7 **MR JUSTICE MORGAN:** Put away a bundle is my recommendation and get out the

8 statement.

9 **A.** This is my February statement, is it?

10 **MR O'DONOGHUE:** Your first statement.

11 **A.** Yes, yes.

12 **Q.** It is the last sentence, do you see that?

13 **A.** I am sorry, I don't --

14 **Q.** Paragraph 22.

15 **A.** Paragraph 22. Yes.

16 **Q.** You obviously agree that it is possible for civil and criminal investigations to be

17 conducted in parallel?

18 **A.** Yes.

19 **Q.** That has in fact happened in other cases, such as *Steel Tanks*?

20 **A.** Yes. I am not sure in many other cases, but it did happen. So there was some

21 overlap in *Steel Tanks*, yes.

22 **Q.** In the same tab, if you could turn to page 540, please.

23 **A.** Yes.

24 **Q.** For the Tribunal's information, this is the document sent to the CMA's Pipeline

25 Steering Group on 9 March 2016.

26 **A.** Yes.

1 Q. This is attached to your statement.

2 **A.** Yes.

3 Q. If you can go to paragraph 31, it says:

4 "As a matter of policy, there are compelling reasons for conducting civil and criminal
5 cartel cases in parallel."

6 You obviously agree with that?

7 **A.** Well, I have certainly read it and I personally can see very good arguments for
8 doing so.

9 Q. In fact, in this case, the whole point of this document in March 2016 was that was
10 exactly what the CMA decided to do here; to run them in parallel?

11 **A.** I think that requires a slightly qualified answer.

12 Q. Well, let's take it in stages. First of all, you agree that was what in fact was
13 decided?

14 **A.** As I said, I think that requires a slightly qualified answer because what was
15 decided was that a Competition Act case be opened even though the criminal
16 case was carrying on with a recognition that there was a pretty limited degree
17 to which they could be conducted at the same time -- some degree. You
18 asked me a "yes" or "no" question, I do not think it quite admitted --

19 Q. Can I rephrase the question?

20 **A.** Yes.

21 Q. Do you at least agree that in March 2016, it was decided to start these
22 investigations on a parallel track?

23 **A.** It was decided to open an investigation while a the -- a Competition Act
24 investigation while the criminal investigation was carrying on.

25 Q. The only reason to do that logically is because it was efficient to do so?

26 **A.** I don't -- I do not agree that that was the only reason.

1 Q. It would be the main reason?

2 **A.** Can we just say whether it was the only reason and then give me a moment to
3 think about whether it was the main reason. It wasn't the only reason.

4 There was a feeling that we ought to signal -- well, the first question was whether
5 one opens a Competition Act investigation at all if there is no need to. You
6 can see good grounds for saying, well, this cartel is taken care of by a criminal
7 investigation and, you know, we use our Competition Act powers to deal with
8 a cartel in another sector or elsewhere. In this case, it was decided that we
9 should open a Competition Act investigation.

10 A reason for doing so was to signal that whatever the outcome, the final outcome of
11 the criminal case, we would still be pursuing this cartel, and also out of
12 a sense of duty to the companies and the individuals concerned to put them
13 on notice of that. Now, some efficiency was at the time of the submissions to
14 the Pipeline Steering Group was thought to be a part of that. But as you
15 know, we all know, in that paper it is a very limited degree of efficiency.

16 Q. We will come to that.

17 **A.** Yes, yes.

18 Q. You will have a chance to deal with that.

19 **A.** I am sorry, that is a rather rambling answer to the question, but I do not agree it
20 was the reason or the only reason, but it was part of the reasons.

21 Q. Can we at least agree it was an important reason?

22 **A.** I don't really want to quibble on words. It was a reason, I don't deny it.

23 Q. If there were good reasons to start parallel investigations in March 2016, any
24 responsible director of enforcement at the OFT would at least have
25 considered that possibility of parallel investigations in February 2013; do you
26 agree with that?

1 **A.** I do not think it is proper for me to comment on what people at the OFT might or
2 should have done, I don't know whether it was considered. I think it -- there
3 are arguments for having done so, there are also arguments, such as the
4 ones I just mentioned, for not doing so; that the OFT, like the CMA, like any
5 enforcement agency, has finite resources and it might not want to throw --
6 throw both a criminal and a Competition Act investigation into the same
7 mischief. So there are arguments both ways.

8 I don't know whether it was considered and I think it would be presumptuous of me to
9 say whether it ought to have been considered.

10 Q. There is no evidence it was considered, is there?

11 **A.** I don't know whether it was considered or not, as I just said.

12 Q. Well, you have given a witness statement. Can we look at the CMA's Defence to
13 this point? It is at tab 5.

14 **A.** Yes.

15 Q. The Defence is signed by Jessica Radke, who is the director of litigation; right?

16 **A.** Yes.

17 Q. Turn to paragraph 220.

18 **A.** Yes.

19 Q. It talks about the CMA's decision to progress its criminal investigation to
20 a conclusion before taking material steps in relation to a civil case?

21 **A.** Yes.

22 Q. Do you see that?

23 **A.** Yes, I do.

24 Q. That is not quite accurate, is it, because there is no evidence that the CMA or the
25 OFT at any stage before March 2016 actually considered running these
26 investigations in parallel. There was no decision is the point I am putting to

1 you.

2 **A.** I might well be missing the point here, but I do not think --

3 **Q.** Let me simplify. A decision was made in March 2016 to at least start these two
4 investigations on a parallel track. What I am putting to you is that at no stage
5 before this period did the CMA when you were there, or the OFT, consider
6 a parallel investigation track.

7 **A.** I have no evidence that they did, but I don't know whether they did or not. What
8 I do know is that in my tenure as executive director of enforcement, I did not
9 consider it, or enforcement considered, before March 2016. But whether the
10 OFT considered it and decided against or didn't consider it, I am in no position
11 to say.

12 **Q.** Hang on, you have put in two witness statements.

13 **A.** Yes.

14 **Q.** You could have addressed this possibility if you wanted to and you didn't. So
15 again, just to be clear, there is no evidence you are aware of that at any stage
16 prior to March 2016 did the CMA or the OFT consider parallel investigations in
17 this case?

18 **A.** That is correct, and I think that is consistent with what I said. There is no
19 evidence and I don't know whether they did or not.

20 **MR JUSTICE MORGAN:** What happened when CMA (mic on mute).

21 **A.** Yes.

22 **MR JUSTICE MORGAN:** The OFT ceased to exist. The CMA was created.

23 **A.** Yes.

24 **MR JUSTICE MORGAN:** Did the staff of the OFT dealing with competition
25 automatically in every case become the staff of the CMA or did something
26 different from that occur?

1 **A.** Something different occurred. So the OFT ceased to exist and the functions of
2 the OFT were largely transferred with one or two minor -- with the exception of
3 one or two minor consumer protection functions. The functions were largely
4 transferred to the new CMA.

5 As I understand it, either all or most staff, or certainly the more senior staff, had to
6 apply -- or if they were OFT staff, re-apply for posts in the new CMA. The
7 chief executive of the CMA was not the chief executive of the OFT, the
8 executive director for markets and mergers was not the same, the general
9 counsel wasn't the same. So there were changes made but there was some
10 continuity.

11 **MR JUSTICE MORGAN:** Right. You personally haven't been at the OFT.

12 **A.** No.

13 **MR JUSTICE MORGAN:** You were not there from Day 1 of the CMA.

14 **A.** Yes, I was.

15 **MR JUSTICE MORGAN:** You were there from Day 1 of the CMA, right.

16 **A.** But not in this role, I was in a different role.

17 **MR JUSTICE MORGAN:** That is why I am saying that, right. In terms of the
18 documentary record, all the paperwork of the OFT dealing with current cases,
19 did that pass to the CMA?

20 **A.** Gosh, I really ought to know that. I think it did, but I -- I am on oath and I don't
21 know.

22 **MR JUSTICE MORGAN:** We think it ought to have done --

23 **A.** I think it did, yes.

24 **MR JUSTICE MORGAN:** -- so probably it did.

25 **A.** I think it did.

26 **MR JUSTICE MORGAN:** Right, that is all I need for the moment, thank you.

1 **MR O'DONOGHUE:** Dr Grenfell, just a footnote on that point: the key staff working
2 on this investigation didn't change as between the OFT and CMA; is that
3 correct?

4 **A.** On the criminal investigation, I think that is right, yes.

5 **Q.** If we go back to the Pipeline Steering Group paper, tab 7, and again
6 paragraph 31.

7 **A.** Tab 7, yes. Paragraph?

8 **Q.** 31, the first sentence.

9 I put to you there is no evidence before this Tribunal that at any stage before
10 March 2016 did the CMA or OFT even consider running these investigations
11 in parallel. The other point I want to put to you is: given as it is set out here,
12 there are compelling reasons for parallel investigations, does it not strike you
13 as extraordinary that no-one apparently even considered this for the
14 three-year period in question?

15 **A.** So there are two questions there. The first question was there is no evidence
16 that the OFT or the CMA considered it before then and as I have said, I agree,
17 there is no evidence. I don't know whether they did or not, but we haven't
18 found any evidence to that effect.

19 On the second question about whether it is extraordinary I thought I had answered it
20 earlier. I think it would be presumptuous of me to say that and I think we
21 ought to be a bit careful or precise about when we say there are compelling
22 reasons. There are compelling reasons for doing so, there are good reasons
23 for not doing so and -- and I mean, that is exactly why the issue went up to the
24 Pipeline Steering Group for discussion and consideration.

25 **Q.** But just to be crystal clear and precise, there is no evidence before this Tribunal
26 this was in fact considered at any stage before March 2016?

1 **A.** I think we have all agreed.

2 **MR WILLIAMS:** He has asked this question probably about four times now.

3 Mr O'Donoghue can carry on, but I do not think Dr Grenfell could be accused
4 of not answering this question. I leave it with the Tribunal.

5 **A.** For the avoidance of doubt, yes, again.

6 **MR JUSTICE MORGAN:** It has been stated in a way you are minded to accept and
7 not contradict that if we review all of the evidence which we have, we do not
8 find a piece of evidence indicating an earlier consideration, so you don't have
9 to establish something that you have established.

10 Now, whether it ought to have been considered is a different question. If you want to
11 explore that, then I daresay that would be a relevant matter. But you do not
12 have to ask the same question, "Is there evidence?" There is none.

13 **MR O'DONOGHUE:** Just to put the point to you in fairness: there is no explanation
14 in your evidence or in any other document for why this was not considered
15 sooner, is there?

16 **A.** No.

17 **Q.** And this was done in other cases?

18 **A.** Some cases yes, and in some cases no. I think there are only two where they
19 have been run in parallel.

20 **MR JUSTICE MORGAN:** While we are having this exchange, can you just help me
21 with what was the Pipeline Steering Group? I think I can draw certain
22 inferences, but it is better if you tell me what the Pipeline Steering Group did:
23 what its functions were and what its purpose was, how often it met, that sort of
24 thing.

25 **A.** Let me do that, it will take a few minutes. There is a very brief explanation in one
26 of my witness statements, but let me give you a more helpful explanation.

1 **MR JUSTICE MORGAN:** Right.

2 **A.** It is a committee of our executive committee, I think. Its function is to decide on
3 those -- in respect of those functions where we have a discretion on whether
4 to open a case or not, whether we should open a case. So for the control of
5 mergers, we have no discretion, we have to look at it and when another body
6 refers a market investigation to us, we have to look at it; when a regulatory
7 appeal is sent to us, we have to look at it.

8 But whether we do a market study or a consumer protection law investigation or
9 a Competition Act investigation, we have discretion as to whether to open one
10 or not. Lots of potential cases come up to the CMA's attention and in the case
11 of the Competition Act, they may come through complaints made by victims of
12 a suspected anti-competitive practice or by competitors of the parties,
13 disgruntled former employees who want to blow the whistle, or people who
14 have drawn to our attention through a leniency application -- that is a policy
15 where we allow a company or an individual to get some leniency from the
16 penalty they would otherwise suffer by coming forward and saying, "Yes, I
17 was party to this cartel."

18 We meet about once a month. All the most senior executive members of the CMA
19 attend pretty much each one, so the chief executive, the executive director of
20 markets and mergers, myself, general counsel, the chief economist, and
21 a number of people, as it were, the level down who are responsible for areas
22 like cartels or anti-trust or markets.

23 We review -- we will have been sent papers talking about potential cases, such as
24 the paper that is in tab 7, and we debate whether to open them or not. Now
25 technically, I think it is an advisory function and in the case of
26 a Competition Act investigation, it is technically the senior responsible officer

1 who makes the decision. But in practice, given the seniority of the people on
2 the Pipeline Steering Group, that is the real kind of decision-making body,
3 even though it is technically advisory.

4 **MR JUSTICE MORGAN:** It is a Pipeline Steering Group but it decides what work
5 should be in the pipeline, work to be done.

6 **A.** It is very interesting. I suppose in my mental picture, I can see it slightly
7 differently. I see the pipeline as the potential cases that come before us and
8 we pick of those which one we will actualise as cases that we open.

9 **MR JUSTICE MORGAN:** Presumably the group when it meets has an agenda, and
10 the agenda will refer to cases, actual or potential cases.

11 **A.** Potential cases, yes.

12 **MR JUSTICE MORGAN:** And someone has to put a potential case on the agenda,
13 and that would be some member of staff at a senior level in the CMA would
14 say, "I want the Pipeline Steering Group to give its view and advise on this",
15 and these meetings are minuted, we have a minute --

16 **A.** Yes.

17 **MR JUSTICE MORGAN:** So every month there is a meeting, approximately, and
18 there will be a minute of that meeting every month.

19 **A.** (Witness nods).

20 **MR JUSTICE MORGAN:** And that was the CMA's practice during its existence.

21 **A.** Yes.

22 **MR JUSTICE MORGAN:** Do you know anything about the OFT, whether it had
23 a similar procedure?

24 **A.** I am straying on to uncertain territory. I suspect it did, but I don't know that for
25 sure.

26 **MR JUSTICE MORGAN:** So if it did and if one looked at the minutes, one would

1 see the concrete pipe subject coming up for discussion; whether to open
2 a criminal investigation, for example, and there would be a debate about that
3 and plainly a decision was taken to open a criminal investigation. That might
4 or might not have said, "We will only do a criminal investigation at this stage,"
5 or it might simply have assumed, "It is the criminal investigation we are
6 discussing, we are not thinking about anything else, we just don't have that
7 material."

8 Is that right?

9 **A.** So look, I am now in the realms of speculation.

10 **MR JUSTICE MORGAN:** I pushed you into the OFT -- yes.

11 **A.** So if it is the case, as I suspect it probably is, that the OFT had a similar
12 procedure, I agree that is how it is likely to have worked, yes.

13 **MR JUSTICE MORGAN:** Right. So in theory, whether this should have been done
14 or not -- and I am not suggesting either way -- but in theory if one had looked
15 at the minutes of the OFT, one could have tracked any discussion about the
16 concrete pipes matter and one would have seen: was the possibility of the
17 civil investigation simply ignored or was it raised and dealt with? Not
18 proceeded with at that stage with or without reasons? We are not aware of
19 those things.

20 Is that right?

21 **A.** So I think that is right. And what I know is that we looked to see whether there
22 was any documentary evidence on whether a civil Competition Act
23 investigation was considered and we could not find any.

24 Now, I think I have been invited to say several times that they didn't consider it.

25 I don't know that for sure, but I certainly have no evidence that they did.

26 **MR JUSTICE MORGAN:** There have been comparatively few criminal

1 investigations.

2 **A.** Yes.

3 **MR JUSTICE MORGAN:** There have been many more civil investigations.

4 **A.** Yes.

5 **MR JUSTICE MORGAN:** Criminal investigation is for cases that merit criminal
6 investigation, which are fewer. Is there an expectation that if you go to the
7 length of opening a criminal investigation, you are taking the more serious
8 step for the graver case, and if you take the more serious step, you somehow
9 won't for the time being take the less serious step of a civil investigation? Is
10 there a ranking which works something like that?

11 **A.** It is a really, really good question and I do not think it has been thought through.
12 I mean, there has been such a small set of cases that I do not think it has
13 been thought through as thoroughly as that and as perhaps it should have
14 been. So I think the Tribunal will know -- and I apologise, stop me if you know
15 already -- I mean, they are quite different. So a criminal investigation looks at
16 individuals, the Competition Act at businesses; and a criminal investigation
17 looks at only most serious types of cartel and actually --

18 **MR JUSTICE MORGAN:** Yes.

19 **A.** -- the categories that happened to be in this one; so bid rigging, market sharing
20 price co-ordination, rather than other kinds of anti-competitive agreements.

21 So that is the difference and at the time that this criminal investigation took place, the
22 law required that you needed to establish dishonesty on the part of
23 individuals, which for future ones the law no longer requires.

24 I do not think I can say very much more that is helpful other than this: it seems to me,
25 as Mr O'Donoghue says and the Pipeline Steering Group says, there are very
26 good reasons, compelling reasons to do them, to do both, but there are also

1 good reasons not to. You have, as I think I said earlier, finite resources.
2 There are loads of cartels, you know, going on or possibly that you might
3 investigate, and whether you would throw all your eggs into one basket or
4 throw two investigations in respect of the same cartel, there are reasons not
5 to as well as reasons to.

6 **MR JUSTICE MORGAN:** Just finally before I terminate my intervention into the
7 cross-examination: you stress that when the decision was made based on the
8 advice of the Pipeline Steering Group, it was to open a civil investigation
9 where reasons were given for opening an investigation and you did open it
10 and you did notify the undertakings and you did, I think, publicise your
11 decision to do so. Those were important matters which were desired by the
12 CMA.

13 There is rather less in the advice and the discussion about what you would do in
14 detail after you had opened it, after you had taken the step you wanted to
15 take. Is that a right response?

16 **A.** There is a -- there is a bit. I think it would be misleading of me to say that the
17 only thing that was decided at the Pipeline Steering Group was to open the
18 case. There was also although, and I think it was secondary, the question of
19 whether we should work on them in parallel or wait for the criminal
20 investigation to be disposed of. So that was, as it were, a secondary part of
21 what was decided; and it was hoped, as I think I said in my witness
22 statements, that we might have some efficiencies (Inaudible) by running them
23 in parallel.

24 I think we recognised there was a limit to what we could do, we couldn't do further
25 investigations. I think we say in paragraph 47, in tab 7, that the existence of
26 parallel criminal proceedings will necessarily lead to the delayed progress of

1 the Competition Act investigation. The main trial in the criminal investigation
2 is likely to start in either April 2018 or early September 2018 after the summer
3 holidays.

4 So the thought was that we wouldn't really progress the Competition Act
5 investigation much before mid-2018. As it happens, we disposed of the
6 criminal a year earlier, but we thought, as it turned out wrongly, that we might
7 be able to do some things, such as begin drafting on a statement of
8 objections.

9 **MR JUSTICE MORGAN:** That is very helpful, thank you. Those are my questions
10 at this point, thank you.

11 **MR O'DONOGHUE:** Can we look now in more detail at the paper itself, starting at
12 page 531.

13 **A.** Yes.

14 **Q.** You see in paragraph 1, there was a clear recommendation to open a parallel
15 investigation?

16 **A.** Yes.

17 **Q.** Then under 2 you see -- over the page -- 3, the key reasons. Then (b), "Case is
18 evidentially strong", do you see that?

19 **A.** Yes.

20 **Q.** Just to jump around a bit, paragraph 39 of the same document.

21 **A.** Yes.

22 **Q.** Do you see:

23 "Overall the evidence for a CA98 case in relation to the suspected conduct appears
24 to be good and, unless significant new exculpatory evidence is uncovered, it
25 is likely that we would achieve a successful outcome."

26 **A.** Mmm mm.

1 Q. Paragraph 40 talks about significant documentary evidence.

2 **A.** Yes.

3 Q. Leniency application, leniency applicant's co-operation, and so on. Then at 46 --

4 **A.** Yes. I think it is really 46 that I was alluding to in the comments I just made.

5 Q. We will come to that.

6 **A.** Yes.

7 Q. Then at 550, which is the minutes of the meeting --

8 **A.** Sorry, page 550, yes.

9 Q. At the bottom of the page: "We have strong evidence of a cartel."

10 **A.** Yes.

11 Q. If you go back to the key reasons again, you will see C:

12 "The case can be opened with relatively little resource given the work already

13 undertaken in relation to the criminal proceedings."

14 Do you see that?

15 **A.** That is page?

16 Q. Page 532.

17 **A.** Yes, I do.

18 Q. You obviously agree with that?

19 **A.** Well, I --

20 Q. You agreed with that at the time may be a fairer way to put it?

21 **A.** I think even that is an overstatement. That was one of the reasons put to the

22 Pipeline Steering Group before --

23 Q. It is a key reason, to be fair.

24 **A.** It was one of the -- one of the nine key reasons listed. And in the light of the

25 paper and discussion of it, it was decided to open the Competition Act case.

26 So I -- you know, again I don't want to be difficult, but I can't honestly recall

1 whether I agreed with that point, but that was a point that was made sincerely
2 and by the team putting the paper to us.

3 Q. Can we put it this way: you didn't disagree because in fact you decided to open
4 the civil case?

5 **A.** Well, the fact that I decided to open the civil case doesn't mean that I agreed with
6 every single reason for doing so. But I did -- I was -- the Pipeline Steering
7 Group and I were persuaded that we should open the Competition Act case
8 and we did.

9 Q. If you go back to 530, Deborah Wilkie's e-mail to you --

10 **A.** Yes.

11 Q. -- she is setting out the recommendations.

12 **A.** Yes.

13 Q. When you responded, you didn't disagree with any of her reasons, did you?

14 **A.** Let me re-read what she gives as her reasons there. **(Pause).**

15 Q. We see a response in 553.

16 **A.** Yes.

17 Q. Do you agree --

18 **A.** Forgive me, but I -- you asked me a moment ago whether I agreed that the case
19 can be opened with relatively little resource and I gave an answer to that.
20 You are now asking me to say whether by virtue of my agreeing to Deborah
21 Wilkie's e-mail recommending that I open the case and opening the case, that
22 shows that I agreed with that particular reason. I mean, the Tribunal will want
23 to form a view, but I do not think that that follows.

24 I did agree that we should open the case. I was persuaded that we should open the
25 case and I had no hesitation in doing so.

26 Q. You didn't disagree with any of the reasons put forward.

1 **A.** That is a rather convoluted way of putting it. I didn't --I do not think I expressed
2 a disagreement with any of the reasons put forward, but that is a bit of a gulf
3 between that and saying that I agreed with all of them.

4 **MR JUSTICE MORGAN:** Looking at that statement today, do you think it is an
5 overstatement or some phrase like that?

6 **A.** Yes.

7 **MR JUSTICE MORGAN:** You wouldn't go as far as the statement. How far would
8 you go? What way would you describe it? What are the resource
9 implications which are relevant?

10 **A.** The statement that, "It can be opened with relatively little resource given the work
11 already undertaken."

12 I think that reflected -- and again I am speculating, I am getting into the minds of the
13 people who drafted this paper -- but I think their belief, which is at first glance
14 an intuitively plausible belief, was that because we had done a lot of digging
15 and we had a lot of evidence, really it wouldn't take much more to progress
16 a Competition Act case.

17 I think -- and I am sure Mr O'Donoghue will want to probe me on this in the coming
18 minutes and hours -- but as it turned out, broadly speaking there was such an
19 abundance of evidence that making it from a criminal case, some of which
20 was relevant and some of which was not, and some of which -- not all of
21 which was sufficient to meet the tests for a Competition Act case, that more
22 work -- a considerable amount more work was required than was believed at
23 the time that paragraph 3(c) was drafted.

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

25 **MR O'DONOGHUE:** Can we move on to (e):

26 "A case of strategic significance would enable the CMA to develop expertise in

1 parallel investigations."

2 Then footnote 2 again, "Policy reasons for running parallel."

3 **A.** Yes.

4 Q. You agree with that?

5 **A.** I agree it says that. Is that your question, or do I agree with the substance of
6 what is being said?

7 Q. Do you disagree with what is said there?

8 **A.** Forgive me, but I think I have answered similar questions a few times in the last
9 half hour.

10 I think I agree there are good reasons for running them in parallel, there are reasons
11 for not doing so. I would -- let me say a little bit more, although I am sure we
12 will come to it but I have said it in my witness statement: I think we were a bit
13 overambitious in what we -- at least as regards this case -- in what we thought
14 we could achieve, and we realised fairly quickly that that was the case.

15 Q. If you look at (g):

16 "The main risks including evidence transfer and use of evidence can be managed
17 effectively."

18 Do you see that?

19 **A.** Mmm mm.

20 Q. You obviously agree with that?

21 **A.** I think that is right, yes, and I think that -- I think -- again, I think we remained of
22 that view even after encountering some practical difficulties after this.

23 Q. We will come to those, don't worry.

24 **A.** Yes, but you were asking me whether --

25 Q. You will have your chance, you will have your chance.

26 Now can we go to one point in your first statement. You say in paragraph 19,

1 page 527 --

2 **A.** Thank you.

3 Q. You say:

4 "At the time the investigation was opened, the CMA envisaged that we might reach
5 the point where there were efficiencies in running a criminal
6 investigation/Competition Act investigation in parallel."

7 So that is the efficiency point alluded to earlier?

8 **A.** Do you want -- sorry.

9 Q. Can I ask you a question.

10 **A.** Sorry.

11 Q. You say "we might". But we see from paragraph 1 of the Pipeline Steering
12 Group report that there was no "might" about it. You had decided, the clear
13 recommendation was to open these investigations in parallel. It was not that it
14 might be efficient to do so, it was that it would be efficient to do so.

15 **A.** I think that is a fair point. I accept that.

16 Q. Go back to the document, (h) and (i).

17 **A.** Yes. Sorry, I should be keeping my fingers on it. Can you remind me which tab?

18 Q. It is the same tab page 533.

19 **A.** Sorry, yes.

20 Q. If you can read (h) and (i).

21 **A.** H and I. **(Pause)**. Yes.

22 Q. You say:

23 "Opening the case now [which is March 2016] enables us to take enforcement action
24 as quickly and as efficiently as possible following the conclusion of the
25 criminal case."

26 Then the second point in (i) is:

1 "Doing that would reduce the risk that the parties would argue that such a case was
2 improperly delayed to the detriment of their right of defence."

3 I put to you an obvious point which is: if at this stage you were concerned that further
4 delay would lead to complaints about creditors from the parties, it must follow
5 that if in fact the investigation was delayed say by up to a year, there almost
6 certainly would be complaints about unjustified delay. You are telegraphing
7 this point here.

8 **A.** That is right. I think -- I think although some of the forecasts in this list turned out
9 to be overambitious, overoptimistic --

10 Q. We will come to that.

11 **A.** But -- sure.

12 To answer your particular question about I, I think that turned out to be a very
13 prescient forecast; that if it took a long time, there might be complaints. It
14 doesn't say whether those complaints would be justified or not, but there
15 might be complaints, and so it has turned out.

16 Q. With respect, it is more than that. Look at (h).

17 **A.** Yes.

18 Q. "If we open the civil case now, enables us to taken enforcement action as quickly
19 and efficiently as possible following the conclusion of the criminal case."

20 **A.** Yes. Forgive me, I thought your question was about (i).

21 Q. Well, it is in both.

22 **A.** They are not the same point.

23 Q. That is the point of it.

24 **A.** H was an aspect of overambition or over-optimism that it was quickly realised,
25 although I would and do argue, and did in my witness statement, contend that
26 it was concluded as expeditiously as possible.

1 I think that whether doing it in parallel, which is what was thought at the time, would
2 speed things up turned out to be overoptimistic and overambitious and that
3 was quickly realised.

4 Q. Well, what you are saying here, clearly in my respectful submission, is that it is
5 important to run these in parallel now so we can then conclude matters as
6 quickly and efficiently as possible following the criminal investigation.

7 **A.** That is what the pipeline actually knew, that is what the pipeline -- the paper that
8 was put up to the Pipeline Steering Group suggests and that was their belief
9 at the time.

10 Q. At this stage, you completely agreed with this?

11 **A.** I think that is going a bit far. At that stage, we accepted the recommendation to
12 open the case. I am certainly not saying I am disagreeing with it, but I think it
13 is a bit of an illogical leap to say from the fact that I opened the case that
14 I agreed with every one of the nine points in it.

15 But it was -- let me put it in a way that I hope is helpful and I think is probably in line
16 with your thinking. Certainly it is the case that we didn't contest the
17 suggestion in (h) and the Pipeline Steering Group. Presumably we thought it
18 was plausible. We also noted in that paper that there were serious limitations
19 to what progress could be made. But we thought it was -- we must have
20 thought it was plausible that some kind of efficiency gain could have been
21 achieved.

22 Q. You had perfectly understood at this stage that if there was further slippage, it
23 was highly likely that the defendants would complain about unjustified delay?
24 That's what it says.

25 **A.** What it says is that there was a risk that the parties would argue such a thing.
26 Now there is absolutely no acceptance here that they would be right to argue

1 such a thing, but there was a risk that there should be and if we can avoid it,
2 we would prefer not to run those risks. But they are not the paramount
3 consideration, the paramount consideration is to do an investigation properly
4 and do it well and do it as expeditiously as possible.

5 Q. The point I am putting to you is you had self-identified at this stage that if there
6 was further slippage, this was a risk?

7 **A.** Yes.

8 **MR O'DONOGHUE:** My Lord, I am about to move on to something different, if that
9 is a convenient moment.

10 **MR JUSTICE MORGAN:** In a moment. Before we do, Dr Grenfell: at the top of that
11 page at the end of (g), there is a reference to Fryer/Portland. Can you tell us
12 what case that was?

13 **A.** Yes. Fryer was the criminal investigation into galvanised steel water tanks and
14 Portland was the Competition Act investigation.

15 **MR JUSTICE MORGAN:** So that had happened or was happening and you had
16 some experience is what this is telling us.

17 **A.** Yes. So at the time this was written, the criminal case had ended. It had ended
18 the previous summer with a trial in which one person had pleaded guilty and
19 the two who pleaded not guilty were acquitted in a jury trial, and there was
20 a Competition Act case that at this stage was still in progress.

21 **MR O'DONOGHUE:** Just for the Tribunal's clarity, the experience in galvanised
22 steel tanks was a case fully run in parallel.

23 **A.** Well, there was overlap, but the Competition Act case continued after the -- after
24 the criminal case had been disposed of. And if I might add, and I hope it
25 gives a slightly fuller answer to your question: people in the context of
26 preparing for today whom I have spoken to who worked on that say that it

1 wasn't until after the end of the trial that real progress could be made.

2 **MR JUSTICE MORGAN:** Right, that is a convenient moment. We will sit again at

3 2.00. Thank you, everyone.

4 **(1.01 pm)**

5 **(The short adjournment)**

6 **(2.00 pm)**

7 **MR O'DONOGHUE:** Dr Grenfell, good afternoon.

8 **A.** Good afternoon.

9 Q. One of the points you make in your first statement, which I think you adverted to

10 this morning, is that there were limits to the steps that could be taken in the

11 civil case while the criminal investigation was in progress. I want to be clear

12 about what this means precisely. First of all, you had very detailed

13 documentary evidence from the criminal case, didn't you, by this stage,

14 by March 2016?

15 **A.** It was detailed, but it wasn't complete.

16 Q. Can we look at the CMA's Defence?

17 **A.** Yes.

18 Q. It is in bundle 1, tab 5 at page 487. We see there were 8,000 documents in the

19 civil case, and then 625 referred to in the SO. Do you see that?

20 **A.** Yes.

21 Q. If we then go back to the Pipeline Steering Group paper, it is on page 546,

22 paragraph 60.

23 **A.** Yes.

24 Q. You see the criminal documentation was 21,000 and the civil was 8,625, which

25 featured in the SO; okay?

26 **A.** Yes. May I add in case it is helpful: my understanding is that the criminal file

1 continued to grow after that Pipeline Steering Group meeting.

2 Q. That is fair.

3 **A.** Yes.

4 Q. If we go back to paragraph 46 of the same document.

5 **A.** In the Pipeline Steering Group document?

6 Q. Yes. You see there are limits to the amount of the external engagement; right?

7 **A.** Mmm mm.

8 Q. "Thus it is not proposed that the Project South team ..."

9 Which is the civil team, correct?

10 **A.** That is correct.

11 Q. "... will undertake any further investigatory work at this stage, rather they will
12 simply commence drafting of an SO, relying on the evidence transferred from
13 the Project Cross team."

14 Then over the page at page 51, the same point:

15 "The resourcing of Project South should be minimised at this stage."

16 Page 52:

17 "We do not propose that the south team will conduct any further investigation while
18 the criminal proceedings are ongoing but they rely on the evidence obtained
19 from the Project Cross team for the purposes of commencing drafting the SO.
20 The work undertaken in relation to the criminal proceedings represents
21 a significant resource saving for the CA 98 investigation, particularly in
22 respect of witness interviewing, gathering and processing electronic material
23 from undertakings and detailed analysis of the conduct."

24 You don't disagree with any of that, do you?

25 **A.** Sorry, I don't disagree that it is there and I -- it was certainly in the minds of those
26 who prepared the paper and not -- as we have said earlier, not challenged by

1 those on the Pipeline Steering Group who read the paper, or indeed by me
2 when I agreed to open the Competition Act case.

3 Q. Then we see the conclusion at 65:

4 "Limits the amount of external engagement as opposed to internal."

5 **A.** Yes.

6 Q. "Analyse the evidence already been obtained and commence drafting the SO."

7 If you now go back to paragraph 53, you will see it identifies two points on which on
8 the civil side you would need some information. One is on relevant products
9 and penalty calculation; do you see that?

10 **A.** I do.

11 Q. Then at 53, you see at the end:

12 "Good opportunity to leverage the resources used in Project Cross ..."

13 Which was the criminal case.

14 **A.** The criminal case, yes.

15 Q. "... deterrence in the form of financial penalties in relation to any individual
16 sanctions."

17 So we see then in paragraph 49:

18 "They also view reputational risk associated with any delay in progressing the CA 98
19 investigation. The CMA may attract criticism if it is not able to issue an SO
20 shortly after the conclusion of any criminal proceedings. Noting that the
21 criminal case has been overt since early 2013."

22 Then the next paragraph, paragraph 50, you see in the middle:

23 "Civil team to issue an SO as soon as possible following the conclusion of the
24 criminal proceedings."

25 We see clearly in these documents that the limit you referred to was on external
26 engagement, and certainly at this stage the CMA was proposing to crack on

1 with drafting the SO relying on the criminal material and not, apart from the
2 two points I mentioned, undertake investigative steps of its own. Do you
3 agree with that?

4 **A.** That is exactly right, yes.

5 Q. So there was no reason on this basis, certainly at this stage, why the SO could
6 not have been drafted internally so that it was good to go once the criminal
7 case had concluded?

8 **A.** That was the view taken by the authors of this paper. That doesn't mean that it
9 was objectively correct, but it was the view taken by the authors of this paper.

10 Q. It was the view you accepted --

11 **A.** I did not challenge.

12 Q. -- in opening the investigation on this basis.

13 **A.** I didn't challenge it, indeed.

14 Q. Now in terms of timing, if you turn to page 550, please. This is a report of the
15 board meeting.

16 **A.** Yes.

17 Q. Do you have that?

18 **A.** Yes. Just to be very clear, and I agree the heading isn't worded very felicitously,
19 but it is a report of the Pipeline Steering Group meeting that was submitted to
20 the board.

21 Q. Thank you. We see then at the bottom of this page:

22 "The statement of objections will not be issued until after the criminal trial, but work
23 on drafting it can proceed before the trial. It is estimated that an SO could be
24 issued within two to six months of the end of the trial."

25 I would suggest to you that the short period, two months, assumed either no trial
26 took place, that there were guilty pleas, or perhaps the criminal evidence at

1 trial didn't really affect the civil case, so that would explain the short period.

2 Do you agree with that?

3 **A.** I don't know, I mean it is an interesting suggestion that you make. It doesn't say
4 that it is a band(?) of an estimate, an estimate we now know and knew shortly
5 after was impressively ambitious but overoptimistic.

6 I have no idea what was the basis for the two to six months -- sorry, that is an
7 overstatement. I can't say with the kind of precision of your assessment of
8 what was meant. Whether that was meant or not, I don't know.

9 Q. Thinking about this logically: if the criminal case had no impact on the civil case,
10 the SO could be drafted quickly. That is logical.

11 **A.** It is a perfectly rational view, yes.

12 Q. We know in fact the criminal case ended on 13 June 2017.

13 **A.** Yes.

14 Q. It is likely that the CMA had effectively formed their view for some period before
15 then -- this was the formal announcement, if I can call it that?

16 **A.** I am trying to remember precise dates and I can't. But it was a little while, I do
17 not think. I think we thought it important not to tarry in informing the suspects
18 and the world of this, but I can't put a precise number of days or weeks on it.

19 Q. So based on what we see here in the two to six months, the SO should have
20 been issued either by mid-August 2017 or at the latest mid-December 2017?

21 **A.** Are you inviting me to comment on that?

22 Q. On the basis of the timing set out here, if the criminal investigation concluded on
23 13 June, two to six months after that takes you to mid-August or
24 mid-December in the case of six months. Do you agree with that?

25 **A.** I think "should" is a curious verb in this context. It was the estimation of initially
26 the authors of the Pipeline Steering Group and then -- of the paper and then

1 of the Pipeline Steering Group that that was likely to be. As I have said
2 several times, we now know that that was, and we knew very shortly
3 afterwards, that that was impressively ambitious but over-optimistic.

4 Q. But we saw it wasn't just an estimate. It was considered important because if
5 you delayed it any longer, there would be complaints from the parties about
6 unjustified delay.

7 A. Forgive me, I do not think that is what we saw. As I have said earlier, but I will
8 say it again, the primary purpose of the Pipeline Steering Group paper and
9 the decisions taken at that meeting and by me was to open a Competition Act
10 case. Secondly, there was a hope, an expectation even, that by doing
11 some of the work in parallel, though recognising that a lot would have to wait
12 the end of the criminal case which was then thought to be mid-2018, there
13 could be some efficiencies.

14 But sorry, I have lost my train of thought. Can you repeat the last --

15 Q. Go back to paragraphs 49 and 50 of the Pipeline Steering Group.

16 A. Yes.

17 Q. The point you have put to me is: oh well, it is just an estimate. If you look at 49
18 and 50 which I have already shown you, it is not just an estimate, it was
19 considered that there would be reputational damage associated with delay if
20 the SO was not issued quickly following the criminal investigation's
21 conclusion.

22 A. Thank you, that was precisely the point I wanted to address in my remarks.
23 I mean, I think we have covered this ground before lunch I think the -- so
24 whenever people at the CMA embark on anything, they do an estimate of the
25 benefits and the risks and there was an apprehension that there would be
26 a risk of complaints if it took longer. That apprehension, as we see right now,

1 turned out to be very prescient.

2 But to say that there was a -- we foresaw or they foresaw the risk of complaints is not
3 the same as saying that those complaints were well-founded -- would be
4 well-founded.

5 Q. Well, let's stick to what 49 and 50 are saying.

6 A. Yes, that is what I am doing.

7 Q. You saw the report at the end that the estimate was two to six months?

8 A. After the end of the criminal trial in mid-2018, yes.

9 Q. You see in 49 that it was not just the parties would make complaints, it is noting
10 here at the end that the criminal case has already been running for more than
11 three years.

12 A. Yes. I mean, it was -- I think it is a very good characterisation of the risk of the
13 kind of complaint that you might attract. But as I said a moment ago, it
14 doesn't mean such complaint is well-founded. And for reasons I have said
15 before and may have an opportunity to say again, I do not think it is
16 well-founded. I think the approach to the case was right, it was done as
17 expeditiously as possible in the circumstances. But, but, there was an
18 ambitious estimate of how quickly it could be done and an apprehension that
19 there was a risk of complaint if it were done more slowly than that.

20 Q. Well, I would suggest to you it is more than that. If you look at 46 again.

21 A. Yes.

22 Q. The point is made repeatedly in this paper: we have all the evidence, we can
23 leverage the work from the criminal case. Apart from two topics we will not be
24 doing further investigative work. This can and should be done quickly which,
25 as we see in the report, means two to six months following the conclusion of
26 the criminal investigation.

1 That was the clear expectation at the time, not for reasons that the parties might
2 complain, but because in the circumstances that was the reasonable thing to
3 do.

4 **A.** No. It was the -- it was the hope and expectation that it could be done that
5 quickly. And I am becoming a broken record on this and I apologise, but we
6 know and we recognised quite quickly afterwards that that was ambitious and
7 overoptimistic.

8 **Q.** In fact, the SO was issued 18 months later on 13 December 2018.

9 **A.** Yes.

10 **Q.** Quite a long way off being from the two to six-month period identified in
11 page 550; correct?

12 **A.** Obviously correct, yes.

13 **Q.** Your witness statements offer no explanation for this extraordinary delay.

14 **A.** Okay.

15 **MR JUSTICE MORGAN:** (Mic on mute) so if there had been drafting prior to the
16 end of the trial, then the end of the trial, then another two to six months, the
17 prediction would be by December 2017 and it came in December 2018. But
18 one thing we know is that the SO was not being drafted before the end of the
19 trial. I thought that was the explanation or an explanation.

20 It is not that there was a prediction of two to six months and it took 18, it was two to
21 six months if there was drafting; not two to six months if there was no drafting.
22 This two to six months is based on the premise that there is drafting before
23 the end of the trial and that did not happen.

24 **A.** That is correct.

25 **MR O'DONOGHUE:** Dr Grenfell, that is why I put to you very specifically that the
26 limitation at this stage was simply external engagement.

1 **A.** On the investigation -- on further investigation, yes, which is external. Yes, you
2 are right: interviewing witnesses, getting new documents, getting the answers
3 to information requests, and so on, yes.

4 **Q.** So you couldn't necessarily send the SO to the defendants, but there was
5 absolutely no good reason why internally the SO could not have been drafted
6 to a state of readiness. That is the point I am putting to you.

7 **A.** That is a point I don't accept. That was the belief at the time and that was -- it
8 became fairly soon after apparent that there was not much progress that
9 could be made.

10 **Q.** What was stopping the case team in April 2016 from commencing drafting the
11 SO?

12 **A.** I would like very much -- I am in a slightly difficult position and I would be grateful
13 for the Tribunal's guidance on this. I would like to hazard an answer to
14 Mr O'Donoghue's very important crucial question.

15 **Q.** I don't want you hazarding, I want you to testify to things you know.

16 **MR JUSTICE MORGAN:** You carry on. You were about to ask the Tribunal for
17 guidance. Please continue and ask us what point is it --

18 **A.** There are two points that constraint --

19 **MR O'DONOGHUE:** Can I put the question very precisely so there is no ambiguity.

20 **MR JUSTICE MORGAN:** Right, we will do it that way. Mr O'Donoghue will ask his
21 question, you take a moment to reflect. If you want to ask for guidance, do it
22 at that point.

23 **MR O'DONOGHUE:** We know that in late March/early April 2016, a decision was
24 made to commence the civil investigation in parallel. And we know, for want
25 of a better phrase, that that would piggyback on the evidence in the criminal
26 case. There is absolutely no good reason whatsoever that during April, May

1 and June until the investigation was then effectively shut down why the CMA
2 internally couldn't have cracked on with drafting the statement of objections.

3 **A.** I don't accept that.

4 **Q.** Why not?

5 **A.** Well, this is the point at which I would seek some guidance.

6 **MR JUSTICE MORGAN:** We will listen to the point you want to tell us about.

7 **A.** I would like to answer it, but there are two kind of constraining facts.

8 Mr O'Donoghue said he wasn't very keen on me hazarding a view. The truth
9 is I don't know it first-hand. I have spoken to people in the criminal and the
10 Competition Act teams with, you know, as is often the case, memories about it
11 don't wholly cohere, but I have been able to discern a rough idea that is my
12 best guess for reasons. So that is point 1.

13 Point 2 is more of a policy constraint for the CMA and for the importance of
14 competition law in this country -- and I think it is a point that was recognised
15 by the Tribunal in its ruling on the Case Management Conference -- that there
16 is an interest in our preserving the confidentiality of our internal processes. It
17 is, you know, not -- our decisions are reasoned and we make them public, but
18 our internal processes aren't. And just as one wouldn't --

19 **MR O'DONOGHUE:** You say (Inaudible) in the public interest, does it?

20 **MR JUSTICE MORGAN:** Let Dr Grenfell finish his description of his difficulty and
21 we may invite comment from both sides, including references to public
22 interest immunity or its absence.

23 I have two points, Dr Grenfell. The first is you cannot give the evidence first-hand
24 and whilst you can give hearsay evidence, you can't pretend that the hearsay
25 evidence is entirely consistent, to put it in my own words.

26 **A.** I can -- in my own mind, I have digested what the most plausible explanation is.

1 **MR JUSTICE MORGAN:** If we were to go into it, you could say something.

2 **A.** Yes.

3 **MR JUSTICE MORGAN:** But you have caveats.

4 **A.** Yes.

5 **MR JUSTICE MORGAN:** The second is that we are going into an area as to the
6 internal workings of the CMA, why it did something or why it didn't do
7 something. That may take us into a question of policy rather than just
8 a statement that, "Mr Jones was given this job but he went sick for three
9 months and had open heart surgery," it is taking us into policy rather than to
10 fact. It is the desire of the CMA, expressed by you, that these matters are
11 confidential to it and not to be disclosed to the appellant and the Tribunal.
12 I am putting it in my own words --

13 **A.** I can't have explained myself well on the second point.

14 **MR JUSTICE MORGAN:** This is your chance. It may be my fault, so have another
15 go.

16 **A.** Just to be fair, I'm not making the point that there's public interest immunity, so
17 let's --

18 **MR JUSTICE MORGAN:** I follow that, yes.

19 **A.** I am not saying that policy was discussed, I am saying simply it was a matter of
20 public policy. It seems to me and to the CMA that it is not good and it is not in
21 the public interest for effective enforcement of competition law if all the inner
22 workings and inner discussions of how we run cases are in the -- are exposed
23 to public light.

24 It would very, very much constrain and inhibit the way we discussed and talked
25 about and thought about work and I think that would be bad for effective
26 competition enforcement. Therefore, I would prefer, although I can hazard

1 a guess in answer to Mr O'Donoghue's question, which I recognise is a very
2 reasonable thing to ask as part of his -- to support his pleadings. But I think
3 as a matter of policy, I would prefer not to do so.

4 **MR JUSTICE MORGAN:** Right. You have heard that, Mr O'Donoghue, and I will
5 ask you for your position and then I think I will probably ask Mr Williams for his
6 position. But taking the two answers, the first one is that it would be hearsay
7 evidence and whilst Dr Grenfell can tell us some of the things he has been
8 told, it may be a collection of reasons, not all of which fit together or are
9 entirely coherent, something of that sort.

10 My immediate reaction, I have not discussed this with my colleagues, is that if you
11 want him to give hearsay evidence about this, you would be entitled to ask
12 him and live with the consequences and make your submissions later as to
13 what weight we give the evidence.

14 So I do not think the hearsay nature and the unreliability possibly is a reason to stop
15 you asking the question and guiding the witness to answering it.

16 **MR O'DONOGHUE:** My Lord, I understood this was a composite point. If
17 Dr Grenfell is also unwilling to get into the hearsay reasons of policy, why
18 people might or might not have done certain things, it may be a composite
19 point.

20 **MR JUSTICE MORGAN:** What are you calling it? A competent point, a composite
21 point?

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

23 **MR JUSTICE MORGAN:** Competent in that he is not competent?

24 **MR O'DONOGHUE:** Composite.

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

26 **MR O'DONOGHUE:** The reason for the policy why he would refuse to answer the

1 second issue would apply to the first.

2 **MR JUSTICE MORGAN:** I was taking hearsay as a self-contained point which may

3 be wrong because if it is a self-contained point, it is relatively easy to deal

4 with. So let us take the second point or as you put it a composite of 1 and 2.

5 His second point -- I won't paraphrase it, he has explained it -- he says that the CMA

6 which he represents would prefer not to give this evidence, and not only in

7 this case but it would prefer that this type of investigation couldn't take place

8 in other cases. He is concerned, no doubt, that if it happens here and if there

9 is a discussion of it in the decision we make, others will see that this type of

10 inquiry can be undertaken and there will be an investigation, and so on, in

11 other cases possibly also.

12 What is your position? You have asked the question. If you don't get an answer,

13 then we can hear submissions as to what we are to decide. We will have

14 a proven passage of time, a proven gap in time between one date and

15 another date, and we have no explanation as to what caused that or brought

16 that about, so you have that.

17 But do you want to submit to us that we ought to direct the witness to give this

18 evidence? We might just discuss, if you do ask that, what are the

19 consequences of him not complying with that direction? Then when you have

20 had your say, I will hear Mr Williams, then the Tribunal will probably have to

21 rise to consider what we will do in response.

22 **MR O'DONOGHUE:** Yes. My Lord, can I make a number of points.

23 **MR JUSTICE MORGAN:** Yes.

24 **MR O'DONOGHUE:** First to go back to the issue, there is a factual finding in the

25 Decision that the CMA proceeded as expeditiously as possible. That is why

26 Dr Grenfell is here.

1 **MR JUSTICE MORGAN:** Yes.

2 **MR O'DONOGHUE:** It is on a question of fact. The CMA didn't have to put up
3 Dr Grenfell or indeed any other witness, that was their choice, and he has
4 submitted two witness statements in which he is explaining these delays and
5 saying in his view, paragraph 21 of his first statement, that the delay was not
6 unreasonable. In the absence of a public interest immunity application, I am
7 perfectly entitled to ask him factual questions surrounding the scope of his
8 evidence.

9 If Dr Grenfell for whatever reason chooses not to respond, I cannot get blood out of
10 a stone. But I wish to make very, very clear -- and I will complete my
11 questions in any event even if he refuses to answer all of them because
12 I have to, I have to put this to him -- but we will be asking the Tribunal to draw
13 an adverse inference from his failure to answer.

14 This would be bad enough in my submission, but it is compounded by the fact that
15 Dr Grenfell in his two statements has not disclosed a single document, apart
16 from this Pipeline Steering Group paper, which is said to evidence some of
17 the things he has alluded to. In a sense, they cannot have it both ways. He
18 voluntarily enclosed with his first statement a Pipeline Steering Group paper
19 and I have quite fairly put a number of questions to him in relation to matters
20 raised by that document.

21 What is not open to Dr Grenfell in the absence of an application for public interest
22 immunity or something analogous is to say, "I am not going to answer that
23 because it is a bit awkward". That would be true of any witness in ordinary
24 litigation who doesn't want to give an answer that is inconvenient.

25 So they cannot have it both ways. If he doesn't answer, so be it. It sounds like even
26 with a direction, he is in a difficult position, but I will be inviting the Tribunal to

1 make a series of adverse inferences on findings of fact as a result and I will
2 have to put some other questions to Dr Grenfell in any event.

3 **MR JUSTICE MORGAN:** Right. Just understanding that before I turn to
4 Mr Williams: you are putting down a marker that if you ask a series of relevant
5 questions and Dr Grenfell says, "I do not wish to answer that question," when
6 he says that, you will move on and that will then be dealt with in your
7 submissions, in particular the submission that we should draw inferences
8 adverse to the CMA. If that happens, I think our role at this stage would be
9 a passive one; simply to observe that happening, then we would rule on it in
10 an ultimate decision.

11 If you are not asking for a direction from the Tribunal that Dr Grenfell must answer
12 the question, if we gave that direction -- I don't know what he would do,
13 whether he would comply or whether he would fail to comply. No-one is
14 asking us to discuss what powers we would have if he failed to answer
15 a question as directed by us.

16 So I am just noting that. The other thing I will note is that Dr Grenfell asked us for
17 guidance. I don't know we can guide the CMA as to how it conducts itself, but
18 if the CMA decides that it will conduct itself so as to keep these matters
19 confidential to it, I do not think it is our role to advise them whether that is
20 a proper stance.

21 **MR O'DONOGHUE:** Yes. Being candid, if Dr Grenfell genuinely believes that the
22 confidentiality policy is more important than the particular issues in this case,
23 that is the CMA's own business. But that may have consequences --

24 **MR JUSTICE MORGAN:** I think at the CMC and again today, you were making it
25 crystal clear as to the argument you will put. So you have achieved that
26 certainly.

1 At the moment, I do not feel it is the role of the Tribunal to advise the CMA or guide it
2 as to how it should handle what it tells us it regards as a sensitive area.
3 I think our role is to listen to the evidence and then decide the case at the end.
4 If I am not asked to give a direction to the witness, whatever effect that might
5 have, then I need not discuss whether I should give a direction to the witness.
6 I would add that I am presently advised -- I do not see it is the role of the Tribunal to
7 guide the CMA. They make their decision and they face whatever
8 consequences, good or ill, that follow. I think I am repeating back to you
9 some of the things you are saying to me about this.

10 Mr Williams, do you want to say anything on this subject?

11 **MR WILLIAMS:** Sir, I have obviously been listening to the exchanges. I have not
12 had the chance to speak to my instructing solicitor about it. Could you give
13 me a moment?

14 **MR JUSTICE MORGAN:** Yes. Would you like us to rise or can you do it while we
15 are present?

16 **MR WILLIAMS:** My Lord, it might make sense for us to rise.

17 **MR JUSTICE MORGAN:** How long would you reasonably need?

18 **MR WILLIAMS:** I do not think longer than five minutes.

19 **MR JUSTICE MORGAN:** I think what we will do is when you are ready, if you could
20 indicate to the learned usher and she will fetch us.

21 **(2.37 pm)**

22 **(A short break)**

23 **(2.53 pm)**

24 **MR WILLIAMS:** Sir, before the short break, there were various exchanges with
25 Mr O'Donoghue about the implications for Dr Grenfell answering these
26 questions one way or another. I don't want to address that while the witness

1 is giving evidence, that is a matter we will address in submissions later on,
2 depending on the evidence that the witness gives.

3 You referred back to the date of the CMC, Sir. In the same way that Mr O'Donoghue
4 made some of the points he is making now at the CMC, this is not a new
5 issue on our side either. The Tribunal had argued about this at the CMC.

6 But having said that, Dr Grenfell is here as a witness and he is asked questions and
7 it is for him to decide how he answers them. We have nothing to add to that
8 at this stage.

9 **MR JUSTICE MORGAN:** Right. So that applies to effectively agreeing that it is not
10 the role of the Tribunal to advise first the CMA or its relevant director as to the
11 attitude it should take to giving this information; it is not our function to give
12 advice on that matter. Is that the position you agree with or disagree with?

13 **MR WILLIAMS:** No, it is a position we accept. I mean, I don't want to say very
14 much while Dr Grenfell is giving evidence, but he asked you a question
15 because I think he wanted to understand the Tribunal's attitude to these
16 issues. But I am not asking you to give any indication.

17 **MR JUSTICE MORGAN:** Right. And Mr O'Donoghue conversely did not ask me to
18 direct the witness to answer the question, to make it an order of the Tribunal
19 that he answer the question. I am not asked to do that. Whether we have
20 power to do it or not, we are not being asked to do that.

21 So it seems to me that our function is really to be passive at this stage and allow the
22 questions to be put. If they are relevant questions, we have no interest in
23 stopping them being put and the difficulty then passes to the witness as to
24 whether he will answer those questions. If he says he will not answer them, it
25 seems inevitable that the question will then proceed to another question. He
26 may ask a series of similar questions, but he could go through his series.

1 The onus is with Dr Grenfell to decide what to do. Of course he is a witness of fact,
2 but he is here as the director of enforcement of the CMA, so he will know what
3 the CMA would prefer him to do. He knows that.

4 **MR WILLIAMS:** Right.

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

6 Dr Grenfell, as I understand it, no-one is going to make your situation any easier, nor
7 are they going to make your situation any more difficult. It is what it is. We
8 consider that it is not for the Tribunal to advise you -- we are not unaware of
9 the sensitivities and we are not unaware of the public importance of the CMA
10 having effective powers of enforcement. It is not our job to deny a party
11 information to which they are entitled in all the circumstances.

12 The Tribunal will not advise you what to do. Equally, no-one is saying we are going
13 to compel you which does, as I say, put you in the situation where we are not
14 helping you but we are not making your situation worse.

15 I think having -- first of all, it is entirely right that you raised the subject. Although we
16 have taken a little time on it, it is not an altogether easy position for you to be
17 in, so you have raised it and we are where we have reached. I think the thing
18 to do is to return to Mr O'Donoghue, he has indicated how he will probably
19 proceed, and you can respond, unless you want to say something.

20 **A.** Can I say something very briefly?

21 **MR JUSTICE MORGAN:** I think you should and then we will continue the questions
22 and answers.

23 **A.** In the interval while everyone was conferring and I was sitting here alone,
24 I reflected on this and I think I will have to take a pragmatic view. I am torn, I
25 think the policy consideration I drew to your attention is one that weighs very
26 heavily on us at the CMA in the public interest. That said, from

1 Mr O'Donoghue's reaction just before the break, and also points that were
2 made at the Case Management Conference, I am very concerned that
3 Mr O'Donoghue and his client think that the reason we might not be giving this
4 evidence is because we have got something to hide and there is some sort of
5 dark ulterior motive, and I really want to dispel that.

6 So balancing those two considerations which you have kindly left to me to do, I will
7 do my best to answer, but with regard to the policy concern that we at the
8 CMA has.

9 **MR JUSTICE MORGAN:** Right. We have all heard and understood that, so I think
10 the time is for Mr O'Donoghue to continue his questions and we will hear them
11 and pay attention to your answers.

12 **MR O'DONOGHUE:** Dr Grenfell, I am going to put this to you again because there
13 has been a bit of water under the bridge and I want to make sure we are on
14 the record with where I stand and where you stand.

15 The question I put to you before this discussion is: in March 2016/early April 2016,
16 a decision was made to commence the civil investigation. What I put to you is
17 that the months of April, May and some of June could easily have been used
18 to draft for internal purposes, not for external engagement, a statement of
19 objections and there is no good reason why that was not done.

20 **A.** Well, I will endeavour to answer that as best I can. I don't accept that there was
21 no good reason that that was not done. I have spoken with the criminal case
22 team and the civil case team and, as is often the case with people's
23 recollections they don't wholly cohere. But a general picture does emerge,
24 and I think I would make these two general points: before the Competition Act
25 team actually got to see what it was all about in any detail, they had taken the
26 optimistic view that was in the Pipeline Steering Group paper.

1 When they started to see what the material was, they thought broadly two things.

2 One was that there was just an enormous amount of material to -- which was
3 extremely difficult to navigate if one was to draft a statement of objections
4 asking the kind of questions that you are required to, or addressing the kind of
5 questions you are required to address in the Competition Act. So that was
6 one broad point.

7 The second broad point was that the evidence was still in flux. Although there were
8 at that stage, I think we said 21,000 documents, that was growing and points
9 were being checked and corroborated and not corroborated and
10 double-checked and in the circumstances, there wasn't a great deal that could
11 meaningfully be done. There are kind of operational judgments.

12 There were other cases which could more productively be progressed. It seemed
13 counterproductive and pointless to make those sort of steps that we had
14 envisaged in drafting the SO when the evidence was in flux and not easy to
15 navigate at that point.

16 Q. Look at paragraph 46, the Pipeline Steering Group document.

17 **A.** Yes.

18 Q. It says it will commence the drafting of an SO.

19 **A.** Yes.

20 Q. Did the civil team start that exercise in April 2016?

21 **A.** I do not think it got as far. So -- the absolutely accurate answer is I am not sure
22 whether they made first baby steps towards doing so or not, but they realised
23 pretty quickly when they looked at the evidence and thought seriously about
24 the kind of things you need for a statement of objections, which are different
25 from the kind of issues you look at in a criminal case, there was not much
26 meaningful progress they could make.

1 I am not going to say to you that absolutely nothing was done because I don't know
2 that to be the truth. But nothing very substantial was done and, for want of
3 a better word, meaningful progress was paused on that until the disposal of
4 the criminal case.

5 Q. You are quick to make the point that this was hard, there were lots of documents,
6 and there might be more documents?

7 A. Yes.

8 Q. But that is not a reason not to start. That might be a reason why once you
9 started, it could take longer than you thought. But it is not a reason not to
10 start, is it?

11 A. Well, with respect, that is your judgment. Even I, even though I work in the CMA,
12 I don't feel able to second guess the judgment of the people working, as it
13 were, on the coalface actually grappling with the evidence and the work. I can
14 say that this is a pretty efficient, good team that produces very good work and
15 has a -- has a, you know, a track record of producing efficient work. We are
16 working in a context where, as Mr O'Donoghue rightly pointed out, it is the
17 CMA that has generally sped up case disposition by, you know, quite
18 a remarkable extent compared to what was the previous position, and indeed
19 compared to international comparators.

20 In this case, in this case, when a very good team faced with a mass of evidence and
21 the fact that it was in flux thought that there wasn't much to be gained by
22 making progress with the statement of objections, that is the position I am
23 ready to accept and did accept. And that is, one has to say, on top of the
24 difficulties that had already been identified with doing parallel criminal and
25 civil.

26 I know Mr O'Donoghue says: "well, you knew that at the time of PSG Paper." That is

1 absolutely right, but it is a kind of tipping point. It was the combination of
2 those two did not make it an efficient use of people's time to make -- it
3 wouldn't have been productive at all to try and progress the statement of
4 objections until disposal of the criminal case. And to that extent, you know,
5 Mr O'Donoghue is absolutely right to draw our attention to what was said at
6 the Pipeline Steering Group.

7 And to an extent, you know, I, others, are perhaps blameworthy for the overambition
8 and for not having realised some of the difficulties which became apparent
9 when the Competition Act team actually came face-to-face with some of the
10 evidence. But that is an overambition and over-optimism that we very quickly
11 rectified.

12 Q. It is an extraordinary thing because you told his Lordship that Pipeline Steering
13 Group is an important body: they would report to the most senior people
14 within the CMA, they will make recommendations. They had recommended
15 and it had been accepted that there were compelling reasons to start this
16 parallel investigation, which included in particular internal engagement on
17 drafting a statement of objections.

18 Your evidence, as I understand it, is that notwithstanding that clear recommendation,
19 the case team or other individuals took it upon themselves not to do anything
20 or anything meaningful. Is that your evidence?

21 **A.** No, it is not at all my evidence and it is not at all an accurate characterisation of
22 the reality. First --

23 Q. They didn't draft the SO, you accept that?

24 **A.** I would like to answer the question.

25 First of all, as we have discussed before lunch, the primary purpose of the Pipeline
26 Steering Group was to open a Competition Act case. Second, as we also

1 discussed before lunch, the Pipeline Steering Group understood that not
2 a great deal of progress could be made in the investigations, and so on, that
3 were necessary.

4 It is absolutely true that there was an over-optimistic assessment of how much
5 progress could be made on the statement of objections before disposal of the
6 criminal trial. When the case team came face-to-face with that, combined with
7 the difficulties they were already aware of with running them in parallel, they
8 decided not to proceed.

9 Now it is not the case that they did it off their own bat. I was made aware of that and
10 I accepted that, I agreed to it. So it is not the case that they have just done it
11 without my authority. It seemed to me, on the basis of what I was being told
12 and the advice I was getting, that was a sensible way forward and that is what
13 was done.

14 Q. This was extremely risky because the Pipeline Steering Group document said
15 that if you didn't crack on with drafting the SO quickly, you would face
16 complaints about delay, and the expectation that the SO would be ready
17 within two to six months of the criminal investigation concluding would
18 therefore not be met.

19 **A.** This is a question which I think we alluded to in the morning. There are risks in it.
20 I think one of the things when you are working in a public authority and
21 enforcement agency, there are risks that you need to balance. And there was
22 a risk, which as we can see turned out to be right, that there would be
23 complaints, and so on. But you balance that against the risk that you waste
24 time and money on what wouldn't have been a very productive exercise and
25 the risks that you get it wrong.

26 And both in the criminal investigation and in the Competition Act investigation, we

1 were determined to do our utmost as expeditiously as possible to give
2 everyone a fair hearing, to get to the truth of what was going on, and to decide
3 in the one case whether we should make charges and, if so, whether you go
4 on to prosecute; and in the other case whether to reach a statement of
5 objections and then a decision.

6 In the end, as it turned out, we there reached a decision that there was an
7 infringement which has now been accepted by all three cartelists. And in the
8 case of one of the cartelists, Mr O'Donoghue's own client, that was contested
9 right until the very last minute.

10 So that -- sorry, it is my answer to your question. So yes, there was the risk that we
11 apprehended there would be complaints and we balanced it against the risk of
12 spending time on unproductive activity and taxpayers' money on unproductive
13 activity, and of getting it wrong not getting the right decision.

14 Q. But surely you are more likely to get it right if you start early and crack on with the
15 work. You are more likely to get it wrong by sitting on it, aren't you?

16 **A.** There is so much to unpack in that assertion, I don't know where to begin. You
17 are more likely to get it right if you do it right. If you rush into unproductive
18 activity, you are wasting public money, taxpayers' money, which we are duty
19 bound to try to use in the most efficient and effective way, and you may rush
20 into ill-thought through decisions that don't yield the right outcome.

21 There is a balance of risks, as you say, and it is the CMA collectively and me
22 individually who have to balance those risks. And in this case, I think we
23 made the right decision, notwithstanding the --

24 Q. I do not understand that. The criminal team had filleted a subset of the
25 documents for you and there was further filleting to 625 in the statement of
26 objections. You had to look at these documents in any event. What was the

1 point in delaying?

2 **A.** Sorry, I don't know what the "you" is. For the Competition Act team, the evidence
3 was still in flux, people were still being interviewed, things were still being
4 checked. The Competition Act team, who would have loved to have cracked
5 on -- you know, who believed then at the time of the Pipeline Steering Group
6 and would have loved to have cracked on and done it as quickly as possible
7 and avoided the risk of the kind of complaints that you are talking about, but
8 seeing the reality came to the realisation that that was not a productive use of
9 their time or of CMA resources and public resources.

10 That was explained to me. I don't remember it as precisely as I should, which is why
11 I did not put it in explicit terms in the witness statement, but that was broadly
12 what happened. And if that meant that the risk of people complaining
13 materialised, I think that was a lesser risk than the alternatives.

14 **Q.** The other concerning aspect of your evidence is we see quite a lot of
15 documentation around the decision to open the civil case in parallel, the
16 Pipeline Steering Group, and so on --

17 **A.** Yes.

18 **Q.** -- which would have went to very senior individuals within the CMA. Yet this
19 volte-face which took place quite quickly, you haven't disclosed a single
20 document whereby anyone within the organisation was informed of this
21 dramatic development, have you?

22 **A.** Can I answer that? I do not think it admits for a one-word answer.

23 **Q.** Can we start with the simple factual point? You in fact have not disclosed
24 a single document concerning this volte-face?

25 **A.** That is evidently correct because as I said in the witness statement, as I think
26 Ms Radke said in her witness statement, there were no such documents.

1 Your characterisation of this -- and this is an attractively melodramatic phrase that
2 you use about a volte-face -- I just don't recognise as an accurate description
3 of the reality --

4 Q. Well, hang on. You were recommended by the Pipeline Steering Group
5 document to crack on with drafting the SO and reviewing the documents
6 without external engagement, and then more or less immediately you decided
7 not to do that. So it is a volte-face, it is entirely fair.

8 **A.** No, it is not fair. The thrust of the Pipeline Steering Group was to open
9 a Competition Act case. We did that and we have now concluded that
10 Competition Act case. It was a decision that in addition to having a criminal
11 investigation, we should have a Competition Act investigation. We did act on
12 that, we opened it, we carried on with that, and we have now brought that to
13 a conclusion.

14 The secondary part was the extent to which we could -- the time in which we could
15 do work before disposal of the criminal case. In the Pipeline Steering Group,
16 everyone recognised it was pretty limited, we couldn't really do the
17 investigation. There was a hope which we had discussed that you could
18 make progress with the statement of objections. Faced with the reality, the
19 facts changed, or the apprehension of the facts changed, and people changed
20 their minds. Now that is not a decision in the way that a decision to open
21 a Competition Act case, it is a decision that needs to be documented. It is an
22 operational judgment, it is a sensible, practical operational judgment.

23 There is no public reasons document that is needed for that. There is internal
24 discussion and a sensible operational judgment of how you deploy resources.
25 And so the basic -- the reason I quibble with volte-face is that the basic thrust
26 of what the Pipeline Steering Group paper recommended: to open

1 a Competition Act case. We did that and we continued to do that.

2 One aspect of the timing, one aspect of the timing, we made an operational
3 judgment that in practice wouldn't productively be done.

4 Q. You say one aspect, but it is a statement of objections. You cannot have
5 a decision without a statement of objections.

6 **A.** Absolutely, but equally you cannot have a statement of objections without
7 investigation. We had already recognised that meaningful investigation
8 couldn't be done, but we thought we might make a limited -- a degree of
9 progress with drafting the statement of objections and when we looked at it --
10 and again, this is my understanding from talking to people, so it is not -- as
11 I said earlier, it is not my --

12 Q. You were corporate.

13 **A.** That is a very flattering way of putting it. I wasn't operationally running the case
14 day by day, I was however consulted on whether I approved of pausing
15 progress in that respect. And I did. Having heard (Inaudible) I certainly did.

16 Q. You mentioned disclosure. Can you go to your second witness statement?

17 **A.** I am sorry?

18 Q. You mentioned disclosure of documents.

19 **A.** Yes.

20 Q. Can we go to your second witness statement?

21 **A.** That is also tab 7, isn't it?

22 Q. It's tab 9, page 566.

23 **A.** Yes.

24 Q. I want to be very clear about this: you say secondhand, "I have not myself been
25 involved in the disclosure exercise." Were your documents searched?

26 **A.** I honestly don't know. Mr Williams might like to take instructions from the CMA

1 on that. My guess is that they were, but I honestly don't know. I think the
2 view was taken, and that was the guidance from the Case Management
3 Conference, that we should take a proportionate approach. I know an attempt
4 was made to look at what e-mails and things were around the time, but
5 I honestly don't know. Mr Williams might want to take instructions from the
6 CMA.

7 **MR WILLIAMS:** What I was going to say is that this witness statement was given in
8 July. If Pinsent Masons had questions about searches, they could have
9 raised the question at any time. I am not sure taking them up in
10 cross-examination of the witness is the point to do that. But there we have it.

11 **MR O'DONOGHUE:** Your Lordship has already made clear we will not get any
12 further disclosure. I am picking up a factual point when he says, "I have not
13 myself been involved in a disclosure exercise." Do you mean your documents
14 were not searched?

15 That is the impression you give, and I would suggest to you it is inconceivable that
16 your documents were searched without you knowing or being involved. How
17 would that work?

18 **A.** I am a little bit out of my depth because I don't know how their IT works. But
19 there is people -- other people have access to my files, yes. So I don't-- I am
20 really out of my depth. I don't happen to know whether my e-mails were
21 looked through or not. I wasn't involved in the exercise.

22 **Q.** You also mention that there were at least discussions on this question of the
23 change in position. Is it your evidence to the Tribunal that at no stage, in an
24 organisation as large as the CMA with internal lines of reporting, was a single
25 e-mail sent explaining the reversal of the position?

26 **A.** Again, the premise of the question isn't right --

1 Q. Well, how does your --

2 **A.** I think we need to address the premise of the question before I answer it. Again,
3 if you proceed on the assumption that this was a big decision rather than
4 a matter of day-to-day operational judgment, your question makes sense.

5 It was a matter of day-to-day operational judgment how much -- you know,
6 recognising as everyone did all along that not much progress could be made
7 with the Competition Act case, but whether it was worth progressing with the
8 statement of objections, I -- we have -- I believe we have looked for
9 documents and not been able to find any. I don't find that at all astonishing. It
10 is astonishing if you regard it as a big decision that changes what was
11 decided to open the case at the time of the Pipeline Steering Group.

12 But it was no such thing. It wasn't a volte-face, it was not a big decision. It was
13 simply a practical operational judgment about whether it was worth spending
14 time at this stage making progress with the statement of objections. But it
15 was, I do remember -- although I don't remember the exact circumstances,
16 I do remember it being put to me and my agreeing with it.

17 Q. But you were a senior executive?

18 **A.** Yes.

19 Q. Other senior executives would also have been told for the same reason?

20 **A.** Well, the reason I would have been told is that I was the senior responsible
21 officer on the case and also that this case fell within my particular executive
22 responsibilities because I am executive director for enforcement rather than
23 for other things.

24 Q. You are not suggesting you are the only director at your level, are you?

25 **A.** I'm sorry, I did not hear the question.

26 Q. You are not suggesting you were the only director at your level who knew this?

1 **A.** I honestly don't recall. But again, the premise of the question is that this was
2 a major decision. It wasn't. It was simply a practical, operational judgment
3 about whether it was worth spending time now progressing the statement of
4 objections. And for all the reasons we have discussed, the sensible practical
5 decision was taken that it would not be a productive use of our resources.

6 **MR JUSTICE MORGAN:** Can I get a feel for what might have occurred here?

7 **A.** Yes.

8 **MR JUSTICE MORGAN:** One possibility is that the member of staff -- if that is the
9 right term -- who was asked to take forward the civil investigation looked at
10 what was involved, did an appraisal of what had to be done, and that member
11 of staff then contacted you, either dropped into your office saying, "Michael,
12 can I have a word?" or fixed up an appointment to discuss this case. And that
13 member of staff explained what you have been explaining as the operational
14 difficulties and said, "Michael, I think we should pause this, it is not a good use
15 of our time to pursue it." And you listened and you said, "I approve of you
16 proceeding that way."

17 That is one type of thing. I don't know if that occurs in the CMA, but is that the sort of
18 thing or is it different from that?

19 **A.** I think that is probably correct. We forget in these post-lockdown times that there
20 was a time we all worked collectively together rather than had to call each
21 other on video calls to say anything to each other. I mean, I do not have
22 a very precise recollection. I recall it being drawn to my attention and my
23 approving. I suspect it was that one or more of the case team dropped by,
24 explained the position, and so on.

25 Now as I say in my -- my own recollection is hazy as well because as I say in my
26 witness statement, and FPM rightly pulls us up on this, I seem to remember

1 that my thinking on this was influenced by a counsel's opinion we received.
2 And then FPM rightly says, "If you are not going to waive privilege, you can't
3 cite that as evidence." That is fine, but I am just trying to explain the reality as
4 it is. I seem to remember that.

5 I don't remember precisely it being the way that I described. So the point that I have
6 said about other evidence being in flux, which is what I have discerned from
7 discussions now, I cannot in all honesty say is the thing that I remember from
8 that time. But I do remember a convincing explanation being given for not
9 making progress at this stage with the Competition Act case, and I remember
10 thinking that that made sense and agreeing to it.

11 **MR JUSTICE MORGAN:** I think Sir Iain McMillan has a question.

12 **A.** Yes.

13 **SIR IAIN:** Dr Grenfell, can I ask: is it your position that it was at about that time you
14 looked at the representations your colleagues had made to you, you knew
15 there was a risk of a complaint, knew there was a risk to reputation, and
16 consciously weighed the balance of advantage between the two and came to
17 the decision that you did. Is that your position?

18 **A.** I would like to say it was quite as conscious or as deliberative or as reasoned as
19 you characterise it. It wasn't quite as much as that. I certainly had -- would
20 have had at the back of my mind the risk, because it was a risk highlighted in
21 the Pipeline Steering Group, and I would have judged, but probably more
22 instinctively than articulated, that that risk was very, very much secondary to
23 the risks of not doing the right thing in the way that we decided to do.

24 **SIR IAIN:** Thank you.

25 **MR O'DONOGHUE:** Dr Grenfell, picking up on something you mentioned.

26 **A.** Yes.

1 Q. What I was putting to you is that for pragmatic reasons, there was no good
2 reason not to commence internally the drafting of the statement of objections
3 straightaway. You remember those questions, yes?

4 **A.** I remember the question. I thought I had given an answer which --

5 Q. Now you have in rather vague terms alluded to advice from counsel which you
6 are not waiving privilege, which is your right -- again, you may not want to
7 answer this, but I have to ask you: if you think about this for ten seconds, on
8 what conceivable basis would there be a legal restriction on your case team
9 starting to look at the evidence and drafting an SO? That is wholly unlikely,
10 I would suggest.

11 **A.** You are right, I do not think it is sensible for me to go down this path.

12 Q. We have covered the period April, May and June 2016, I want to move on from
13 that. We now know there was a decision to effectively pause the investigation
14 for about a year from roughly June 2016 until the conclusion of the criminal
15 case to the following June.

16 **A.** Yes.

17 Q. Again, it is the same question: even if externally further investigative work would
18 not be conducted, there was no reason why for this period the CMA could not
19 have continued or started with the drafting of the statement of objections to
20 have it good to go on the conclusion of the criminal case?

21 **A.** Forgive me, and maybe the Tribunal better apprehends Mr O'Donoghue's
22 question than I do, but I thought I had addressed that question.

23 Q. I have to put it to you because these are different periods. I have to put the
24 question to you.

25 **A.** I thought it was --

26 Q. If the answer is the same, so be it, but I have to put the question.

1 **A.** Let me answer it. I thought it was fairly obvious that the answer I gave applied
2 until the disposal of the criminal case while the evidence was in flux, et cetera.

3 **Q.** So to be clear, the statement of objections was not drafted during this period
4 from June 2016 to June 2017.

5 **A.** As I said a moment ago, I would be going beyond what I am certain of to say that
6 no work was done at all. But I do not think it was substantially progressed.

7 **Q.** To go back to his Lordship's question from the break: given those decisions --
8 rightly or wrongly doesn't matter at this stage -- wasn't it therefore inevitable
9 that the period of two to six months following the conclusion of the criminal
10 investigation would be missed? You simply had not front-loaded the work in
11 a way which would allow, for example --

12 **A.** I agree with that.

13 **Q.** -- the statement of objections to come out within two months?

14 **A.** I think that flows from everything we have said, yes.

15 **Q.** When the investigation resumed in June 2017, obviously in parallel the criminal
16 investigation had progressed to a point of conclusion, there was further work
17 done on the criminal side which your team could plug into, for want of a better
18 expression. Do you accept what?

19 **A.** I believe that is right.

20 **Q.** Given that the documents had been filleted already, you had the leniency
21 confession, you had all the interviews, the investigative work in a substantial
22 sense had been completed by the criminal side, it must stand to reason that
23 there was a reasonable expectation that the period for adoption of the
24 Decision after June 2017 would have been quicker, not slower, than the
25 average?

26 **A.** I think all other things being equal, that is true. But in the circumstances, that

1 wasn't the case because, first of all, the vast volume of evidence; secondly,
2 the need to put that evidence into a shape that meets the Competition Act
3 tests. And then as things progressed, we had the development of the
4 approach to us which led to a hybrid settlement.

5 Q. We will come to that.

6 **A.** Yes. I mean, I should flag -- and I don't want another big pause -- I am getting to
7 the point that I feel very uncomfortable about the level of granularity, not
8 because I want to hide things, but I think this goes beyond what I think is --
9 one might reasonably expect a public authority to say about its inner
10 workings. Nevertheless, I will do my best to be as helpful as I can to you.

11 Q. But, I mean, let's think about this.

12 In a normal investigation which starts with a blank sheet of paper --

13 **A.** Yes.

14 Q. -- there are some preparatory steps that you have to go through. In this case, by
15 contrast, all the documentary evidence had been filleted, all the witness
16 evidence had been front loaded, you had the leniency confession in those
17 documents and you had the dawn raid documents. You were in much, much
18 better shape than someone starting with a blank paper. It is obvious, isn't it?

19 **A.** Well, it is sufficiently obvious but as it turned out, no. And I think, as I say, I have
20 spoken to the case teams about this. What I hear is there was just a huge
21 amount of evidence, so we really had to, as we said, reduce to a few hundred
22 documents that are referred to in the statement of objections, let me -- I hope
23 Mr O'Donoghue will forgive me and it may be the Tribunal knows this already,
24 but there is a very difficult balance in Competition Act case because you have
25 to give the parties under investigation access to the file and, in doing that,
26 there is usually quite a lot of discussion about what information on the file

1 might be confidential to another party and therefore worthy of protection and
2 there is a discussion about what parts need to be redacted and so on. That is
3 a long and difficult process.

4 You need to put in the file all that is relevant but you don't want too many documents
5 in the file because that process then goes on and on and on and on and the
6 point that Mr O'Donoghue is very concerned about, that these things shouldn't
7 be delayed too long, you would get to an extreme delay. So the process had
8 to be done by the Competition Act team of identifying out of thousands and
9 thousands of pieces of evidence those few hundred that were relevant and
10 necessary and that is not quick or easy and then of drawing out of those the
11 points that meet the Competition Act test.

12 I am also told that -- you know, we have talked in general terms about the focus of
13 a Competition Act case and a criminal case being different. But whereas
14 a criminal investigation looks at the actions of the individual and in that case
15 whether the individuals were dishonest or not, in a Competition Act case you
16 really have to grapple with what is the extent of the agreement, which
17 products of the many products in the catalogue of these companies were
18 covered by the cartelisation, which aspects, what were the...

19 So it is -- although superficially it sounds, and I suspect when the Pipeline Steering
20 Group paper was written they thought that all you need to do is piggy back off
21 it, the reality turned out to be different.

22 You may form in your view the fact that, well, the people involved could have worked
23 faster or harder or whatever. You know, I can't, it is not something I can
24 document but the people involved were very, very impressive, efficient,
25 effective people and I think they did it as quickly as they could.

26 Q. But surely from the criminal investigation, which by this stage had concluded, you

1 had a very significant head start because they had identified the key
2 documents?

3 **A.** With respect, I think my answer, my previous answer suffices in answer to that
4 question.

5 **Q.** So the investigation resumes in June 2017 and we can then go to volume 2.

6 **MR JUSTICE MORGAN:** Assuming we are sitting to about five, that is half way
7 through the afternoon. I know we had a short break earlier, but were you
8 envisaging we would have another five-minute break for the transcriber or
9 not?

10 **MR O'DONOGHUE:** I think we should. I will certainly finish today. I undertook to do
11 that.

12 **MR JUSTICE MORGAN:** I think even though we had a break earlier, it wasn't quite
13 what the transcriber would have wanted or expected, so we will now break for
14 five minutes, which will take us to 3.45 pm by that clock. Right. Thank you.

15 **(3.40 pm)**

16 **(A short break)**

17 **(3.48 pm)**

18 **MR O'DONOGHUE:** Dr Grenfell, can we go to bundle 2, please, tab 37.

19 **A.** Yes. Tab 37, did you say?

20 **Q.** Yes. This is a letter dated 1 November 2017 from the CMA to Pinsent Masons
21 representing FPM?

22 **A.** Yes.

23 **Q.** Can you read the first two paragraphs, please? (Pause).

24 **A.** Yes.

25 **Q.** You see you are mentioned there. So you as the SRO decided on
26 1 November 2017 that the civil investigation should be continued?

1 A. Can I shed a bit of light on that for the Tribunal and perhaps for your benefit,
2 Mr O'Donoghue?

3 **MR JUSTICE MORGAN:** Mr O'Donoghue has a specific question, so in the interests
4 of speed perhaps hear his question first.

5 A. Okay, of course.

6 **MR O'DONOGHUE:** So you communicated that decision on 1 November?

7 A. It was a decision following a stop/go meeting. Is everyone understanding what
8 a stop/go meeting is in this context?

9 Q. I suspect not.

10 **MR JUSTICE MORGAN:** If you want me to be candid, I do not understand what
11 stop/go means.

12 A. Why should you?

13 **MR JUSTICE MORGAN:** Perhaps I should but I don't.

14 A. Even though I practised as a competition lawyer for years before joining the
15 CMA, I did not really know.

16 **MR JUSTICE MORGAN:** You tell us.

17 A. I will be very brief.

18 **MR JUSTICE MORGAN:** This is your chance to tell us.

19 A. It is when you stop an investigation on the -- and you have looked at the matters
20 and considered them, analysed them carefully and you are on the road to
21 a statement of objections, it is a point where you check in with the senior
22 responsible officer and two other very senior people in the CMA who are not
23 part of the case just to do a sense check: is there enough there to go to
24 a statement of objections.

25 So that letter is not saying yes, we really are restarting the case. What it is saying is
26 having considered at the stop/go meeting where we are, we think there is

1 enough to carry it on and implicitly to carry it on to statement of objections.

2 **MR O'DONOGHUE:** So is it fair to say that you are simply deciding whether or not
3 the public interest warranted the continuation of the investigation?

4 **A.** I do not think that is the test. The test is have you got enough of a case to make
5 a statement of objections? In other words, have you got to the point where
6 the CMA can take a provisional view that there has been an infringement by
7 the parties under investigation and so when we write that we are saying we
8 have gone a stop/go, we think we are, as it were, on the glide path to
9 a statement of objections.

10 Q. From the resumption of the investigation in June to November, that is almost five
11 months.

12 **A.** I would say that by the standards of these things, that is pretty quick, actually.

13 Q. Pretty quick, is it?

14 **A.** Yes. And may reflect to some extent the head start that you talked about. It
15 might have been in a way we did pocket those gains. I mean, there was
16 certainly enough, one knew, the case team already knew who the parties
17 were, had the evidence of the video and so on. So there was a body of
18 evidence that would enable you to be more confident than had there not been,
19 but that you could proceed to an SO but there was also all the other stuff they
20 had done subsequent to the recommissioning of the Competition Act case.

21 Q. I think you are accepting that at this stage you were not reconducting a full
22 evidential investigation; you felt at that stage that the evidence was good
23 enough to go forward?

24 **A.** I mean, later new evidence -- so new witnesses came forward and they were --
25 but it was -- yes, we were on the glide path to an SO at that stage.

26 Q. Recording(?) and so on?

1 **A.** Yes, yes.

2 **Q.** So the state of play meeting, you see invitation to a state of play meeting, that
3 actually took place about six weeks later on 13 December 2017, which you
4 attended. Can I now show you a minute prepared by Pinsent Masons of that
5 meeting?

6 **A.** Yes.

7 **Q.** It is tab 38 the next tab, page 805. If I can ask you to read 3.1 over the page.
8 (Pause).

9 **A.** I have done, yes.

10 **Q.** This, I think, links back to the point you saw in the Pipeline Steering Group paper,
11 which was that there were two items of information the civil team needed from
12 the parties: one was financial information, which we see here, and the other
13 was some information about the relevant products. That is essentially what
14 was --

15 **A.** I think there is a link. I don't know whether that -- what was in the Pipeline
16 Steering Group is a -- comprehensively accounts for this but I -- I mean, you
17 know, that...

18 **Q.** It is fair to say, if you look at the items: corporate structure --

19 **A.** Yes.

20 **Q.** -- products, financial data, and so on; I mean, this is information that at some
21 point you may need, but it is not a roadblock to proceeding with your internal
22 investigations and analysis?

23 **A.** I agree, save possibly for 3.1.3. So the others are sort of mechanical things,
24 which are particularly of use in the calculation of any draft penalty statement.
25 But 3.1.3 is really about the dynamics of the market and that is exactly the
26 kind of thing that the evidence from a criminal investigation can possibly

1 uncover, because that is not what they are looking at, but this, looking at
2 really how the market works, what is really going on in order to draft
3 a coherent and articulate statement of objections, that is a little bit beyond
4 those mechanical things.

5 Q. But it is fair to say, isn't it, that because you had interviewed a large number of
6 people from FPM, CPM and SB in the criminal context, that you already had
7 a significant amount of information on how these companies operated,
8 including their products and move to market?

9 **A.** I mean, I am beginning to be a bit out of my depth because I did not draft these
10 notices, I wasn't involved, as it were, on the coalface in this. But I think what
11 I have just said, drawing on my experience, is a reasonably indicated
12 explanation of what 3.1.3 is about, it is the sort of stuff which you would -- you
13 know, which the criminal investigation team wouldn't have been focusing on.

14 Q. Not exclusively, but I put it to you to some extent yes.

15 **A.** And my response -- but we are now in the realms of kind of educated speculation
16 rather than direct knowledge, my response is that I imagine that the team that
17 is asking these questions will have done so because what was derived from
18 the criminal investigations was not quite enough to do the kind of thing that
19 you need for a coherent statement of objections that supports the provisional
20 decision that the Chapter I prohibition has been infringed.

21 Q. This information, as we saw in the Pipeline Steering Group document --

22 **A.** Yes.

23 Q. -- is a sort of boilerplate in a civil context, this is information you would need in
24 any event --

25 **A.** With the exception of 3.1.3, as I said.

26 Q. In any civil case you would need to understand the move to market, correct?

1 **A.** Yes, I misunderstood boilerplate.

2 Q. Forgive me.

3 **A.** Yes.

4 Q. Again, I put this to you earlier but there is absolutely no reason why this limited in
5 some respects what you call mechanical information couldn't have been
6 requested at least in April 2016, perhaps even before that?

7 **A.** I think the answer to that, but again I am speculating, but I think the case team
8 would say about that that it was only once they had really -- I mean, these are
9 not purely mechanical questions -- only once they had really grappled with the
10 evidence and so on and really understood the case that they knew precisely
11 what questions to ask.

12 So I -- you know, look, I hear what you say. I don't -- I don't, you know --
13 I completely understand the point but I am -- and this is more an act of faith
14 than an act of evidence -- I am willing to take it on trust that a very competent
15 and efficient case team, which is what this was, will have thought that this was
16 the point at which they should be asking these questions and I --

17 Q. I am not criticising individuals, I will make that very clear. I am making -- let's
18 look at this. The corporate structure, products supplied, moves to market,
19 geographic markets, how does your sales force work, who are your customers
20 and competitors, financial data, this is not rocket science, let's be honest.

21 **A.** I have explained why it was thought back in April, that it wasn't -- didn't make
22 much sense, contrary to what had first been thought, to take baby steps
23 towards a statement of objections and at that stage -- but once one had
24 cranked up the Competition Act case following disposal of the criminal case, it
25 made sense to examine and assess the evidence thoroughly and then identify
26 the questions that need to be said. I should also add, and this is very much in

1 line with Mr O'Donoghue's thinking, these are not particularly big or onerous
2 questions that are going to cause a big delay.

3 Q. That is my point.

4 **A.** So it was an appropriate point to have asked them and, you know, I kind of think
5 it doesn't really make much difference here or there in terms of the timing or
6 the progress of the case.

7 Q. Let me put it this way; had this information been asked for, say, in April 2016,
8 there would have been one less job to be done in November 2017?

9 **A.** But I think we are both agreeing that it is not terribly huge.

10 Q. I do not agree with that.

11 **A.** Well, I must have misunderstood, I thought that is precisely what you were
12 saying, but not very onerous, fairly mechanistic questions.

13 Q. Let's see about that.

14 **A.** Yes.

15 Q. You see in paragraph 3.2 that the CMA's original intention was to issue
16 an information request --

17 **A.** Yes.

18 Q. -- in January 2018. You make the point this information is not in a sense that
19 complicated. Can you explain why it took up to a further three months to even
20 draft this questionnaire?

21 **A.** Because it is -- well, as is said, CMA took into account the availability of FPM's
22 staff, so out of deference to FPM they didn't want to set a statutory deadline
23 for asking questions when it inconveniences them over the Christmas period.
24 So what I understand is what was done was that a draft was sent to FPM
25 in January and in short order afterwards section -- the final section 26 notice
26 which imposes legal obligations on the parties. You are right, these are fairly

1 boilerplate issues but you do need to ask them. Because these are questions
2 which people have a legal obligation to answer, you have to ask them fairly
3 precisely and phrase it fairly precisely. Again, I am talking more from my
4 general experience than from precise familiarity with the granular details of
5 this case, but I imagine that that is what would have been going on.

6 Q. The first request was then issued on 26 January 2018?

7 **A.** My understanding is that there were -- that a draft of it had gone -- had been sent
8 to FPM, presumably for comment, earlier, earlier in January.

9 Q. There was then a second request, March 2018, correct?

10 **A.** Mmm mm.

11 Q. And a third request on 10 May 2018?

12 **A.** Yes.

13 Q. Can we look at the third request, it is in tab 48.

14 **A.** Yes.

15 Q. Page 887. Do you see question 1, turnover figure?

16 **A.** Yes.

17 Q. Then it is related and then testaments of market shares, do you see that?

18 **A.** Yes.

19 Q. First of all, this is all financial information. You obviously accept that?

20 **A.** Yes.

21 Q. You see from the questions in question 1 and 3 it is all purely historic
22 information?

23 **A.** Yes, indeed.

24 Q. So at any point after 2013, this information could easily have been obtained?

25 **A.** I agree. If I might add. You are right, I -- you know, I can't second guess the
26 order in which things were done, but I suppose it is worth saying that while

1 this -- you know, in that period, certainly after the re-ignition of the case, it is
2 not as though people were sitting on their hands. An awful lot of work was
3 being done. For reasons that I can't second guess the appropriate point to
4 send these requests was thought to be now, but as I think you have
5 recognised and I have recognised, not particularly own onerous requests.

6 I have seen and no doubt you and members of the Tribunal may have seen
7 section 26 requests that run to hundreds plus questions and require a very,
8 very, very great deal of work. This is not of that order at all.

9 Q. Isn't that all the more reason why these should have been asked earlier?

10 **A.** As I said, I can't second guess. People were not sitting on their hands. They
11 were doing other things. I mean...

12 Q. If we go back to tab 38, the state of play meeting.

13 **A.** Yes.

14 Q. Can you look at paragraph 2.2, please?

15 **A.** Yes.

16 Q. You see at that stage the case team was telling FPM the statement of objections
17 would be issued in March 2018.

18 **A.** Yes.

19 Q. This estimate would have been provided on the basis of the amount of work the
20 CMA had done and still had to do?

21 **A.** As it appeared at the time.

22 Q. You mentioned earlier settlement. It is also the CMA's policy, isn't it, that it will
23 not commence settlement discussions unless, effectively, it is in a position to
24 issue a statement of objections, there is a threshold --

25 **A.** Yes.

26 Q. -- for settlement discussions?

1 **A.** Yes. It formed the view that it can issue a statement of objections. In other
2 words, that it has formed the view that there should be a provisional decision
3 on infringement, yes.

4 Q. We see, for example, over the page at 2.6 --

5 **A.** Yes.

6 Q. -- you raised settlement.

7 So certainly by this stage you had concluded that the evidential material met the
8 threshold at least before you issued your statement of objections?

9 **A.** And as I said a little while ago, really when we approached to Pinsent Masons on
10 1 November or whenever it was following the stop/go meeting that is
11 essentially that point.

12 Q. In fact, we know that the draft statement of objections was sent to CPM and SPC
13 on 20 July 2018, so this is a slippage of a number of months. Yes?

14 **A.** Well, slippage is a funny word. For reasons which are really reasons to do with
15 the settlement approach, it was the statement of objections.

16 So the statement of objections was finally issued in December of that year and that
17 reflected a combination of things: the fact of a settlement process, the fact
18 that it was a hybrid settlement and the emergence of witnesses from CPM
19 who were worth interviewing as a result of CPM having approached us for
20 a settlement.

21 Q. You refer to settlement but we know that SBC made no representations at all on
22 the draft statement of objections, correct?

23 **A.** That is a detail you are on top of. I am not but I will take your word for it.

24 Q. And CPM made three pages of representations on the draft SO?

25 **A.** Yes.

26 Q. So it wasn't a case that the settling parties were slowing you down, they were

1 speeding you up?

2 **A.** I think I need to explain a little bit and it might be helpful for the Tribunal to
3 explain a bit about settlements because I think just -- I think that proposition is
4 incorrect. It doesn't give a very good or an accurate picture of reality.

5 So a settlement, as I think the Tribunal knows, is an admission of liability by parties
6 and basically they then no longer contest the case. As a reward for it they
7 typically get a reduction in the fine that would otherwise be imposed. So there
8 are pros and cons to settlement. Negotiating the terms of the settlement
9 takes a bit of time and to a degree prolongs the case, but generally that is
10 outweighed by the fact that, well, people have then accepted liability and won't
11 contest the case.

12 So after that, it is going to be pretty quickly disposed of and then there isn't -- almost
13 certainly isn't going to be an appeal because they have accepted liability.

14 Now, in this case we had what we have come to call a hybrid settlement, the oddity
15 that two parties approached us and agreed to settle, and one,
16 Mr O'Donoghue's client, didn't.

17 Now, the trouble with a hybrid settlement in a way is you get the worst of all worlds
18 because you are having to spend time negotiating the settlement but you still
19 have a party contesting it and we spent a bit of time in the spring of 2018
20 discussing internally, including in our highest committees, whether it was
21 worth agreeing a hybrid settlement in this case because it was much more
22 finely balanced.

23 We decided we would do so because we thought actually the savings in time and
24 effort probably outweighed the cost, in that we would have two in the bag, as
25 it were, and I must say at the back of our mind there was a hope that FPM,
26 seeing the other two settle, would itself see sense and settle and in fact it

1 waited until after the decision in October.

2 Q. You thought it would put the pressure on?

3 **A.** Not at all, not at all. We hoped, we hoped that seeing that two other parties had
4 settled, FPM would also realise that it made sense to settle, and would realise
5 that there was a strong case that there is an infringement, something it did
6 realise when it decided not to appeal against the infringement finding in this
7 appeal.

8 Sorry, I just want to finish this explanation.

9 Now, so that is -- so in a way it is the worst of all worlds because you spend time
10 negotiating the settlement and you don't fully get it resolved but we decided it
11 was worth doing. And then -- but the within thing that came out of it was that
12 CPM in co-operative mode having agreed to settle offered up two witnesses,
13 Mike Stacey and Paul Turner, to be interviewed more fully, and so we did
14 interview them, of course all that takes time, but it provided valuable evidence
15 so that we could finalise and complete a much more rounded and effective
16 statement of objections. And that is what we did and it took a little while, but it
17 meant that we had a very, very good statement of objections at the end of the
18 year.

19 Q. I think you just accepted that overall --

20 **A.** Yes.

21 Q. -- the efficiencies of settlement outweighed all parties contesting the infringement
22 to the bitter end?

23 **A.** Yes, they are more finely balanced in the case of a hybrid settlement. So, again,
24 it comes back to it. Was this a quick case compared with the much quicker
25 cases we now have? By the standards of the European Commission and by
26 the standards of before 2014 it was a very quick case. But Mr O'Donoghue is

1 quite right to say by the much faster standards we have now, it wasn't
2 a particularly quick case. That doesn't mean it is an unreasonably long case
3 but it wasn't a particularly quick case. There are lots of good reasons for it.

4 On the question of settlement, that is one of the things that that because the
5 discussions and because of the witnesses and because it was a hybrid
6 settlement stopped it being a very quick case. But doing it this way was
7 quicker than it would have been if we had not agreed to settlement.

8 So I suppose what I would say to that is no, it wasn't a quick case, it was not
9 unreasonably delayed because it wasn't a quick case, but had we not made
10 these decisions it would have been a slower case. So I think we were making
11 decisions bearing in mind that we should do it as quickly as possible but also
12 to get a right and well reasoned decision that gave the parties a fair hearing.

13 Q. The draft statement of objections, as you indicated, was issued in July 2018?

14 **A.** As a draft, yes.

15 Q. And the statement of objections (inaudible) FPM was on 13 December 2018?

16 **A.** Yes.

17 Q. So there is a quite a substantial gap for reasons you have indicated?

18 **A.** Yes.

19 Q. But you do accept that the content of the draft statement of objections was not
20 materially different to the final statement of objections?

21 **A.** I don't want to contradict that but I don't know that for sure. But if that is correct,
22 I am prepared to accept that.

23 Q. I want to move on to something else, which is access to file.

24 **A.** Yes.

25 Q. So the ordinary position when the SO was issued is the CMA has to make
26 available to the parties all exculpatory and inculpatory documents.

1 **A.** Yes.

2 **Q.** And this is a rather painful exercise because they have to be reviewed by the
3 CMA in advance for things like privilege, confidentiality, other redactions?

4 **A.** Yes.

5 **Q.** This is what Sir John Laws would call a life-shortening experience, isn't it?

6 **A.** I mean, it is the process that I briefly explained to the Tribunal about half an hour
7 ago.

8 **Q.** So it obviously makes much more practical sense if parties waive their right of full
9 access to file and agree a streamlined access to file?

10 **A.** Yes.

11 **Q.** This involves them being provided with the key documents in the SO as opposed
12 to the full suite?

13 **A.** That is what a streamlined access is, yes.

14 **Q.** All of this saves the CMA substantial time and costs?

15 **A.** It saves everyone substantial time and costs.

16 **Q.** In this case the streamlined access to file was first raised by the CMA at the state
17 of play meeting. Can we look at 2.4 of the file note, which is tab 38,
18 Dr Grenfell?

19 **A.** Yes, 2.4, yes.

20 **Q.** You will see that Ruth Ashworth, she explained the possibility of streamlining and
21 so on. If you move on to tab 42.

22 **A.** Yes.

23 **Q.** So this is an e-mail from the CMA to Pinsent Masons, FPM's solicitors, on
24 24 January.

25 **A.** Yes.

26 **Q.** If you turn over the page and read the second paragraph, the CMA was asking

1 on 24 January whether FPM would agree to streamlined access to file and
2 that was obviously sensible to get the SO at that stage issued in March as you
3 have envisaged. We then go to the next tab, you will see the response of
4 Pinsent Masons on 8 February?

5 **A.** The 6th I think.

6 Q. Just to pick up one point, in the first paragraph you certainly knew by this stage
7 that FPM would not settle, correct? Do you see that? The second sentence?

8 **A.** Yes, that is what they are saying on 6 February.

9 Q. You will then see on the streamlined access to file there is a series of questions
10 about how this would work, do you see those?

11 **A.** Yes. Sorry.

12 Q. There is the heading: streamlined access to file?

13 **A.** Yes.

14 Q. Do you see there are some questions?

15 **A.** You have asked whether...

16 Q. Request for clarification.

17 **A.** Yes.

18 Q. These are reasonable questions, aren't they?

19 **A.** I don't feel competent to answer that. I don't know whether they are reasonable
20 in the context.

21 Q. Do they strike you as unreasonable?

22 **A.** I do not feel competent to answer that.

23 Q. If we move on to tab 66, page 999, so this is a letter dated 27 September 2018?

24 **A.** Yes.

25 Q. To FPM?

26 **A.** Yes.

1 Q. If you turn over the page and read the first paragraph.

2 **A.** Yes.

3 Q. The CMA was at this stage setting out its proposals for access to file. This was
4 seven months after the Pinsents letter we have just seen. It is far too long,
5 isn't it?

6 **A.** Well, I am going to say what I say tentatively because I am not wholly on top of
7 every granular detail here but I think that the reasons I gave earlier for the
8 time that was spent in the first half and beyond of 2018, in other words
9 working out whether we want a hybrid settlement, negotiating a hybrid
10 settlement with two of the parties and getting the benefit of witness interviews
11 with one of those settling parties, meant that the SO that we might have
12 issued earlier in the year was issued later in the year.

13 My best guess is that that accounts for this gap of months. I think we have already
14 addressed that.

15 Q. Let me put the question another way.

16 **A.** Right.

17 Q. Unless and until you had resolved access to file on the streamlined basis with
18 FPM you couldn't issue the SO?

19 **A.** That is correct.

20 Q. The position, as we saw, as to which parties were settling was made clear
21 in early February of 2018. You saw Pinsents' letter saying that FPM was not
22 settling and the other two were settling. So by 21 March, the CMA had
23 obtained a mandate to enter into settlement negotiations --

24 **A.** Yes, I think --

25 Q. -- with SBC and CPM.

26 **A.** I think it is worth explaining this bit to the Tribunal. Mr O'Donoghue, you know

1 this and I know this but not everyone will know this. The whole settlement
2 process involves, you know, an indication from a party in principle that it
3 would be interested in entering into settlement discussions. Then there is
4 a decision that is taken by the case and policy committee, which is basically
5 a committee that consists of the most senior members of the CMA, the
6 chief executive and executive directors and general counsel and chief
7 economist, whether to allow, whether to mandate the case team to enter into
8 settlement discussions.

9 There is then a period of discussion, what are you prepared to admit? I think there is
10 some talk about what discounts on the fine would be available. So it is
11 a negotiation. Well, it is not a negotiation, it is a discussion on what -- on what
12 offer, what settlement offer the party is willing to make, and that can take
13 a while, it takes some weeks in my experience.

14 Q. But in this case the mandate had been obtained on 21 March?

15 **A.** Yes.

16 Q. Then we see in tab 50 --

17 **A.** Yes.

18 Q. -- that the actual settlement proposal wasn't sent until 22 June, 2018.

19 **A.** Yes.

20 Q. You said this takes a few reason, there is no reason this couldn't have happened
21 in, for example, April?

22 **A.** I wish I had a pat answer to that. I cannot answer that. I suspect that the team, if
23 it were here, would be able to give good answers to that. But I can't answer
24 that.

25 Q. Then you see over the page at 906, third row from the bottom of the table, the
26 statement of objections was then due to be issued in October. So this was

1 done in the full knowledge that there were two settling parties. In fact, as we
2 know, it was 13 December before it was actually --

3 **A.** Mmm mm.

4 **Q.** Even though you knew there would be a hybrid settlement procedure, you had
5 effectively missed your own target by several months?

6 **A.** May I be forgiven for making a more general point. Mr O'Donoghue is perfectly in
7 his right, he is taking me through granular details of every stage in the
8 proceeding of the day-to-day running, which obviously I was not per se
9 involved in, and he might be right that there are some bits, there are some
10 steps that could have been done more quickly than others. It might be that
11 there are other steps which he has not focused on and we have not talked
12 about at all that were maybe done more quickly than the norm, I don't know.
13 I am perfectly willing to recognise that some steps might not have been done
14 as quickly as they could have, some might have been done more quickly.

15 It seems to me and I don't want to get into advocacy but I just -- just to put what
16 I have just said in context, the real question here is whether all that amounts
17 to unreasonable delay and I would have thought the judgment of that is how it
18 compares against benchmarks, both domestically and internationally, and
19 even on the faster process that we now have this was not a massive outlier, it
20 was slower than average, it is not unreasonable.

21 I am perfectly willing, I don't know all of the granular details, but I am perfectly willing
22 to acknowledge -- and I said to Mr O'Donoghue I do not have a pat answer to
23 all of these questions -- that some things might have taken a bit longer than
24 they might have. I suspect the case team, were they here, would say no,
25 there was a good reason for it. There are other things, as I say, which we
26 have not focused on which might have been done more quickly. Like,

1 for example, getting to the stop/go in six months from the re-ignition I think is
2 pretty fast going.

3 Q. Can we turn to tab 84, please.

4 **A.** Yes, I think I need to change files, do I not?

5 Q. Yes, volume 2, you are quite right.

6 **A.** Yes.

7 Q. Volume 3.

8 **A.** 82?

9 Q. 84.

10 **A.** 84, sorry.

11 Q. If you can read the third paragraph, please.

12 **A.** Yes, so we are in July 2019 now and Pinsents is writing to our team.

13 Q. CMA.

14 **A.** Yes. "Also note that the ... schedule 1 list..."

15 Q. You see the last sentence?

16 **A.** Sorry.

17 Q. Forgive me.

18 **A.** "As set out in your e-mail ... confidentiality ..."

19 Q. You see in the last sentence they are requesting documents relating to
20 settlement and leniency that they say are relevant to their response to the
21 draft penalty statement, do you see that?

22 **A.** Yes.

23 Q. That is on 10 July, do you see that at the top?

24 **A.** Mmm mm.

25 Q. We then go to tab 88. This is 25 September 2019, which is some months later.
26 If you look at the third paragraph.

1 **A.** Yes.

2 **Q.** The fourth paragraph.

3 **A.** "This additional material ..."

4 **Q.** Yes, the fourth paragraph: "This additional material ..."

5 **A.** Yes. (Pause). Right.

6 **Q.** So the material was being provided to Pinsent Masons on the basis of the

7 confidentiality undertaking and non-confidential versions could be shared with

8 the client. They were provided on 7th and 10th October 2019.

9 **A.** I am sorry, we know that from where?

10 **Q.** If you look at tab 89 first.

11 **A.** Right, yes, okay. Yes.

12 **Q.** And 1741, then 1745, which is a second batch.

13 **A.** Right.

14 **Q.** If you then go to tab 89, please.

15 **A.** I thought we were at tab 89.

16 **Q.** Yes, we will go back to that. Over the page --

17 **A.** Yes.

18 **Q.** -- 1746, sorry.

19 **A.** Yes.

20 **Q.** So the CMA envisaged FPM responding by 15 October.

21 **A.** Yes.

22 **Q.** So the CMA thought that FPM could review these documents in eight days to

23 make representations on the DPS, and yet it took the CMA nearly four months

24 to review them to provide non-confidential versions. This was a further

25 unnecessary delay, wasn't it?

26 **A.** So, if I am not mistaken, this is a point that I think FPM makes in the skeleton

1 argument and which I put to the case team. I mean, I -- I am not on top of this
2 kind of degree of to-ing and fro-ing between the parties, but what I am told is
3 there was a delay in -- there are two points: there was a delay because of
4 a dispute about not only confidentiality but privilege, not with FPM, but with
5 another party, and that -- but also that although you, you know, highlight with
6 some degree of indignation that it was one a week, actually to the solicitors
7 the version -- they were given more than three weeks. So it is not -- I think on
8 its face of it, it looks -- and I would share your indignation but I think the reality
9 is not that.

10 Q. Even if we accept your point about privilege, on which no document has been
11 submitted, to take four months to resolve a question of privilege is excessive,
12 isn't it?

13 A. Well, that is your view. I am not inclined to rush to that conclusion.

14 Q. This is done in trials in real time?

15 A. I think in trials there is probably more legal pressure that can be brought to bear
16 on the parties than there is in the CMA process.

17 Q. The CMA decided to conduct interviews of the person involved in the meetings
18 for the purposes of the investigation, right?

19 A. Mmm mm.

20 Q. On the FPM's side these individuals had been interviewed on at least two
21 occasions --

22 A. Yes.

23 Q. -- during the criminal investigation?

24 A. Yes.

25 Q. Including in 2015 when the CMA had already conducted a full review of the
26 evidence gathered to date. So the amount of new evidence that this third

1 round of interviews was likely to elicit would be pretty marginal, would it not?

2 **A.** I mean, that is a judgment which I certainly wouldn't presume to make and you
3 may presume to make it but I do not think it likely though -- I am...

4 Without resorting to blind faith, I think it is reasonable that I as an executive director
5 can trust my case teams to make judgments about whether it is worth
6 conducting further interviews, how much added value they have and I am
7 certainly not going to assent to the suggestion that it was unnecessary.

8 Q. Can we go back it volume 2, tab 38, please.

9 Page 807, under: "Interviews".

10 **A.** I am sorry.

11 Q. 3.3 under: "Interviews".

12 **A.** Yes.

13 Q. So at that stage the indication was the interviews would be held in February
14 or March 2018, do you see that?

15 **A.** Yes, it must be, yes.

16 Q. And that would have been before the statement of objections?

17 **A.** Yes.

18 Q. Which at that stage was planned for March 2018?

19 **A.** Yes.

20 Q. We know that didn't happen, yes?

21 **A.** Yes.

22 Q. In fact the CMA issued a statement of objections without conducting these
23 interviews with the three individuals and FPM, correct?

24 **A.** Yes.

25 Q. So the further interviews were not necessary for the CMA to make its provisional
26 case, were they?

1 **A.** Those further interviews would have been thought not necessary, yes.

2 **Q.** In fact the interviews were conducted, two of them, in May 2019?

3 **A.** Yes.

4 **Q.** And the third in August 2019. So in fact the last interview was conducted even
5 after the draft penalty statement was issued?

6 **A.** Right. I mean, on -- again, I am entering the realms of speculation. I could have
7 put these points to the case team.

8 I really don't know about people's availability or any of those issues that might have
9 affected the timing of those interviews. I hear what you say. You know, I can
10 only repeat what I said earlier: maybe, maybe there is a point there, maybe
11 there isn't. I am just in no position to judge that.

12 **Q.** Let me put it another way. After these interviews were conducted, CMA did not
13 issue a supplemental statement of objections or even a letter of facts.
14 Correct? So it is therefore clear that these interviews were really of marginal
15 benefit?

16 **A.** You only know that after you have conducted the interviews.

17 **Q.** You had already done it twice. You had issued the SO. What were the chances
18 in the real world --

19 **A.** Sometimes further interviews do elicit further information. That is why they will
20 have been done. But I accept what you say, there was no letter of facts, there
21 was no supplementary statement of objections. Presumably after the event it
22 will have been concluded that there wasn't such additional material as
23 requiring those things.

24 **Q.** Your evidence in paragraph 23 of your first statement --

25 **A.** Yes.

26 **Q.** -- is that the length of the civil investigation was reasonable.

1 **A.** Yes.

2 **Q.** Before I get to that --

3 **A.** Yes.

4 **Q.** -- the criminal investigation into the individuals at FP McCann was the longest
5 ever conducted by the CMA or OFT, you accept that?

6 **A.** Other than a very small handful, a case that involved more suspects than I think
7 in any of the others, yes.

8 **Q.** Had you considered commencing the civil case in parallel with the criminal case,
9 say, in 2013, there was every expectation that the case could and should
10 have been effectively wrapped up certainly not later than 2016: that was over
11 three years after the OFT had started looking at the matter.

12 **A.** I do not agree with that. I think the difficulties that we encountered that were
13 encountered when we tried to do that after the Pipeline Steering Group
14 probably would have been met at that stage. So what you are suggesting is
15 a saving that could have been made, what we now know suggests probably
16 not.

17 **Q.** What I am putting to you is that the criminal investigation was also delayed?

18 **A.** I am sorry, should I say something -- I was worried you were going to say the last
19 three hours we have to do again. I apologise.

20 **Q.** I put to you that the criminal investigation was unreasonably delayed and you
21 disagree with that?

22 **A.** Yes.

23 **Q.** But if I am right that it was unreasonably delayed and a civil investigation was
24 opened at the same time, then a three-year period to conclude those
25 investigations is more than reasonable, isn't it?

26 **A.** As you rightly say, it is the premises that are in dispute. You're begging the

1 question. I do not think that the criminal investigation was unreasonably
2 delayed for reasons we discussed at some length in the morning.

3 Q. We disagree then?

4 **A.** We do. And on the question of whether the civil one could have been done
5 simultaneously, I think the evidence we have discussed after lunch about the
6 difficulties notwithstanding the ambition in the Pipeline Steering Group
7 suggests probably not. I mean, I can't say definitively not but it seems to me
8 unlikely.

9 Q. If you look at the averages, if we take the opening of the civil case in 2016, that is
10 a period of 42 months compared to the 15-month average we discussed
11 earlier?

12 **A.** Well, let me -- let me reply to that. The 42 months is a funny way of looking at it.
13 It is common ground that the civil case, the Competition Act case, didn't really
14 get going until after the disposal of the criminal case, so really we are talking
15 about two and a quarter years, which is, I agree, by no means the quickest.

16 By the benchmark of the very much sped-up processes of the last few years, it is not
17 the quickest, it is not the very slowest either.

18 By the benchmarks of the seven years preceding it, by the benchmark of the
19 European Commission, it is below the average time. And I would make one
20 other point: that those averages include cases that are fully settled, not hybrid
21 settled or contested but fully settled, and of course those cases lower the
22 average because they are by their nature resolved more quickly.

23 So I just am sorry, I know it would make your life easier if I said yes, I agree, but
24 I simply don't agree either that the criminal investigation or that the
25 Competition Act investigation on any reasonable yardstick or benchmark was
26 delayed slow. It wasn't the fastest case. We have discussed why it was not

1 the fastest case: there were various things that -- the vast mass of evidence
2 that had to be sorted through, the fact of a having to dispose of the criminal
3 case first, the fact of a settlement that was a hybrid settlement; all those
4 things meant that it wasn't the quickest case.

5 But on no measure, on no benchmark could anyone reasonably say that it was an
6 unreasonably delayed case.

7 Q. I put it to you: you did not proceed as expeditiously as possible, as the Decision
8 indicates, did you?

9 **A.** I hope that in the 7 hours that I have been answering questions the Tribunal will
10 have concluded that in the circumstances, in the very challenging
11 circumstances it was concluded as expeditiously as possible and therefore
12 the Decision is quite right to have said that.

13 Q. The CMA has today refused to say anything on why nothing was done
14 from April 2016 until June 2017. Today was the first time we heard from you
15 a limited explanation about that.

16 **A.** With respect, I do not think that is quite right.

17 In my witness statement I couldn't say from my own personal experience what the
18 position was. We did talk about some typical difficulties and FPM quite
19 reasonably said: well, are those technical difficulties the reason? And as
20 I have said from my open personal knowledge, I cannot say exactly what the
21 reason is but I have spoken to the case teams and I have a broad -- and the
22 cases -- their memories are not completely at one, but I have a broad
23 understanding after the little discussion about whether it is appropriate or not
24 for the CMA to disclose this kind of thing. I have given you what my broad
25 understanding is, which is a combination of the vast, vast, vast mass of
26 evidence and the fact that the evidence was in flux that made it inappropriate

1 and not a good productive use of anyone's time or of the CMA's resources to
2 seek to progress the Competition Act case until disposal of the criminal case.

3 Q. A couple of final questions.

4 **A.** Yes.

5 Q. You then claimed today that there were public interest reasons not to say
6 anything, or policy reasons is perhaps a more accurate way of saying it?

7 **A.** I think that is a slightly inaccurate representation of what I was at least trying to
8 say and I might not have said it well.

9 I have, the CMA has, I think any enforcement agency would have, quite serious
10 reservations about the appropriateness of exposing to scrutiny every piece of
11 granular operational consideration in the running of a case. I mean, you can't
12 get much done if you think that every conversation, every thought, every, you
13 know, deployment of one person on one thing or another is going to be open
14 to public scrutiny.

15 To take an obviously contemporary example, the meetings of SAGE currently are not
16 televised and, if they were, you wouldn't have candour, you wouldn't have
17 sensible discussions. So as a matter of policy I feel, and I think the CMA
18 feels, very uncomfortable about going in granular detail through internal
19 operational decisions.

20 Of course all our public-facing decisions are and should be properly reasoned.
21 Notwithstanding those reservations because of the concerns that
22 Mr O'Donoghue expressed that a major part of his case wasn't being
23 addressed and because of the sort of insinuation at the case management
24 conference that we were being evasive and had something to hide, as
25 a pragmatic matter in the absence of directions or guidance I took the view
26 that I would try and be as helpful as possible but I have to say with some

1 discomfort.

2 Q. Isn't the truth of the matter that the reason the CMA has been so reluctant to say
3 anything is because there is no good reason for these delays?

4 **A.** I think I have just told you the truth of the matter and it is very far from what you
5 have said.

6 Q. One final question. The practical consequence of these delays was that my
7 client's turnover trebled between 2013 and 2018. If there was
8 an unreasonable delay, do you accept that my client was prejudiced in the
9 form of its penalty?

10 **A.** Well, it is a big if. I do not think that there was unreasonable delay and I think on
11 the question of prejudice there is an interesting discussion to be had, which is
12 probably more appropriate for counsel representing the CMA to engage with
13 you on.

14 Q. That is fair. Let me ask you this.

15 Do you think the trebling of the penalty is not prejudicial, is that your evidence?

16 **A.** I think the trebling of the penalty, if it is borne by a much bigger company with
17 a much higher turnover, isn't such a prejudice. But I don't -- and there are
18 also -- I don't accept that there was unreasonable delay. On the question of
19 whether there was prejudice, I think that is an important legal discussion to be
20 had, which I think it would be inappropriate for me to engage with
21 Mr O'Donoghue on.

22 **MR O'DONOGHUE:** But you do think it is fine for well-resourced companies to be
23 subject to increased penalties because of delay? That is what you said.

24 **A.** I do not think it is quite what I said.

25 **MR O'DONOGHUE:** My Lord, I have no further questions.

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

1 Mr Williams, any re-examination?

2 **MR WILLIAMS:** My Lord, yes.

3

4 **Re-examination by MR WILLIAMS**

5 **MR WILLIAMS:** Dr Grenfell, you told the Tribunal that when CPM settled CMA they
6 made available two witnesses?

7 **A.** Yes.

8 **Q.** Michael Stacey and Paul Turner?

9 **A.** Yes.

10 **Q.** It was suggested to you that there was no difference between the draft SO
11 in July 2018 and the SO that was published in or provided to FPM
12 in December. It was suggested to you there was no material difference. Do
13 you remember whether you had evidence from Mr Turner or Mr Stacey before
14 or after --

15 **A.** I don't, I am afraid. And also on when that was suggested to me, I did not feel
16 confident enough to say whether that was the case or not.

17 **MR WILLIAMS:** Thank you very much. We will deal with that in argument.

18 **A.** Yes.

19 **MR JUSTICE MORGAN:** Right, thank you. I have no questions for Dr Grenfell. Let
20 me see if the other members of the Tribunal have? Do you have questions?
21 We have no questions for you Dr Grenfell. That completes your evidence,
22 thank you very much.

23 Right. In view of the time, subject to housekeeping, I think we will adjourn to
24 tomorrow. Are there any matters we need to think about in advance of the
25 hearing on Thursday and Friday?

26 **MR O'DONOGHUE:** My Lord, the words of Sir Iain are ringing in my ears about his

1 train at 4.45 on Friday.

2 **MR JUSTICE MORGAN:** Well remembered.

3 **MR O'DONOGHUE:** Would it be possible, my Lord, to start tomorrow at 10 and
4 possibly also on Friday depending how we go? Today has taken longer than
5 I had thought.

6 **MR JUSTICE MORGAN:** I am tempted to say things always take longer than they
7 are predicted to take but we can debate that in the next few days. To answer
8 your question, we will sit at 10.00 unless there is an objection from any other
9 source, there is no objection from the Tribunal.

10 **MR WILLIAMS:** There is no objection at all, it just occurs to me that it might affect
11 the arrangements for arrivals but that has all been quite structured.

12 **MR JUSTICE MORGAN:** Sam, can you --

13 (Discussion between Mr Justice Morgan and the usher).

14 **MR JUSTICE MORGAN:** Right.

15 I am told that there are implications for Tribunal staff. They will be addressed and
16 the Tribunal will inform the parties as soon as possible after the hearing. In
17 any event tonight, today/tonight.

18 The members of the Tribunal will be here ready to begin at 10.00. If there is
19 a difficulty coming in and getting set up, we will wait. If there is no difficulty,
20 we will begin at 10.00. I am sure everyone will do their level best to begin at
21 10.00 and we hope that that will happen. It is more awkward at the moment
22 than typically would be the case.

23 **MR WILLIAMS:** On that, Sir, if for any reason it is not possible to make it happen
24 tomorrow, I wonder whether we could look one day ahead because I will be
25 on Friday and I am conscious we will have to stop to make sure Sir Iain gets
26 away, so it would be good to be able to relax one way or another.

1 **MR JUSTICE MORGAN:** Right. Well, I think the representatives of the Tribunal
2 apart from the members have heard that. There is no objection in principle to
3 it, it is just a matter of making it work.

4 **MR WILLIAMS:** I completely understand.

5 **MR JUSTICE MORGAN:** If we try, we will, we hope, succeed. Aspirationally 10.00
6 tomorrow and we look forward to seeing everyone again then, thank you.

7 **(4.55 pm)**

8 **(The hearing was adjourned until 10.00 am on Thursday, 8 October 2020)**

9

10