IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1337/1/12/19

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

Thursday 8 October 2020

Before:
THE HONOURABLE MR JUSTIC MORGAN
(Chairman)
EAMONN DORAN
SIR IAIN MCMILLAN CBE FRSE DL
(Sitting as a Tribunal in England and Wales)

BETWEEN:

FP McCANN LIMITED

Appellant

v

COMPETITION AND MARKETS AUTHORITY

Respondent

and

(1) EOIN McCANN
(2) FRANCIS McCANN

Interveners

A P P E A R AN C E S

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

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epigglobal.co.uk

Thursday, 8 October 2020

(10.03 am)

MR JUSTICE MORGAN: Good morning, everyone. Yes, Mr O'Donoghue.

(Housekeeping)

MR O'DONOGHUE: My Lord, Members of the Tribunal, good morning. In terms of the plan for the next couple of days, what I suggested to Mr Williams is that I would continue until today at 4.00, giving me a total of five hours. He would then have the same period of time taking him to 3.00 tomorrow, and then I would reply in good time to allow Sir Iain to depart. That seems to me entirely fair. First of all, it is symmetric and second -- I have done six-week hearings in this Tribunal where each side gets a day to close and you have plenty of written material, that seems to be more than ample. I think Mr Williams may have a different view, I will allow you to --

MR JUSTICE MORGAN: You are suggesting 4.00 pm for you, 3.00 pm tomorrow for him and then your reply. Mr Williams?

MR WILLIAMS: I think you are aware that since we started to discuss timetable for this hearing, there has been a disagreement between FPM and the CMA about the balance between witness evidence and submissions. The appeal is of course important to FPM, but the Tribunal is aware that the case raises a number of important points of principle for the CMA which have implications far beyond this case and we have not touched on those legal issues to a large extent yet.

We said at the outset that we thought the evidence needed to be completed by the end of Tuesday -- this is obviously before events -- leaving us a day and a half

each-ish to complete the legal argument. We appreciate things have moved on, but we are still concerned that we need enough time to argue the points properly. We have two days left. I am certainly not asking for more than half of the remaining time, but FPM took a day to cross-examine Dr Grenfell yesterday. We don't criticise them for that, but that was time they chose to use in that way.

In my submission, we ought to have half the remaining time, which by my calculation would be five and three-quarter hours each, give or take 15 minutes. So Mr O'Donoghue could go for today or most of today, I would then have most of tomorrow. If the Tribunal thinks Mr O'Donoghue ought to have a short reply it would be my submission that really should not start until 4.00 tomorrow. In the context of submissions of five hours or five and a half hours or thereabouts, a right to reply of something like 40 minutes is proportionate, in my view. That is our position, Sir.

MR JUSTICE MORGAN: Right. Mr O'Donoghue calculated that if he speaks until 4.00 pm that is five hours. That is a correct calculation, it sounds right, but is that right?

MR WILLIAMS: Yes. Three hours this morning and two hours this afternoon.

MR JUSTICE MORGAN: Then if you begin at 4.00, you have one hour today.

MR WILLIAMS: That is right.

MR JUSTICE MORGAN: We start at 10.00 tomorrow, you finish at 3.00 for this calculation. That is four hours, that is your five hours, so you are equal up to that point.

MR WILLIAMS: That is right.

MR JUSTICE MORGAN: Then there is the question of the reply. We must give Mr O'Donoghue a right of reply. At the moment, he is having one and

three-quarter hours with an absolute cut-off at 4.45 pm, and you are suggesting it be reduced so he is given three-quarters of an hour.

MR O'DONOGHUE: There is a bit of sauce for the goose and sauce for the gander on this. On the reply, there are a number of points where I have not heard what the CMA has said. That is the way things have moved on, I don't criticise, but the suggestion that in 45 minutes I can cover all of these issues -- in the original timetable, I think an hour was pencilled in. There are a number of points.

MR JUSTICE MORGAN: The original timetable gave you a one-hour reply, did it?

MR O'DONOGHUE: Yes, and there are at least three points where we have heard nothing from Mr Williams yet. That is the way things have worked out, but it is relevant to reply, in my submission.

MR JUSTICE MORGAN: Right.

I am going to make a suggestion and see if my colleagues agree with it. I think what we will do is we will begin on the basis that you have five hours each and then on the clock tomorrow afternoon, we will see what is the fairest way to allocate the remaining one and three-quarter hours: whether to allow Mr Williams to develop further some points he may have dealt with more shortly than he wished, or whether we ought to allocate that time to Mr O'Donoghue.

I think we will be in a better position to be fair to the parties then rather than in advance. It is quite difficult to predict how helpful and essential the oral submissions will be. We do have very detailed written submissions which we have all read at least once and we will read them probably two or three times further, looking at them in great detail in the course of preparing a decision.

I am aware that the case will probably be put differently in some respects at some

stages compared with the written case. There will be questions from the Tribunal, which will perhaps take the argument in a slightly different direction. But each side has to be given a fair opportunity to meet any new twist of that kind. But I am inclined to start off with each side having five hours each, we will review the matter as we go along. That is not entirely fair to Mr Williams, because he doesn't know if he has five hours or more than five hours, but you will have to accommodate that.

MR WILLIAMS: Sir, that was the point I wanted to make. When one is dealing with a large amount of material in a short period of time, it is very important to be able to plan for time, and it is difficult for me to make the case in the hope that I will have some extra time at the end to make any --

MR JUSTICE MORGAN: I understand that. Let me see if my colleagues have a better handle on a judgment of Solomon than I have had so far.

MR WILLIAMS: Can I make one more point before you --

MR JUSTICE MORGAN: Yes. I don't want to take too long (Overspeaking) time here.

MR WILLIAMS: No, I understand.

Given that Mr O'Donoghue said he originally wanted an hour to reply and the Tribunal understandably thinks he ought to have that right of reply, it isn't clear to me why he ought to have a longer right of reply. But I think speaking for myself, I would find it easier to plan my submissions knowing he had that hour rather than to keep the matter under review. I will leave it there, Sir.

MR JUSTICE MORGAN: So much depends on our view as to -- if you make a number of powerful points which we see no answer to, then it is more important in fairness to allow Mr O'Donoghue to try to bring us around. If you make a lot of weak points to which there are umpteen answers, we can

perhaps say to Mr O'Donoghue that he doesn't have to take too much time dealing with those weaker points. That is part of my thinking, we will see how we go.

MR WILLIAMS: I have made the point, I am not going to take --

MR JUSTICE MORGAN: I think the big problem on restriction of time for speeches is that we will have questions inevitably and we will take the parties perhaps to places they have not themselves formulated. That can take time and that could be a far more serious restriction on your ability to present the case your way. So we will try and control our questions so we don't waste a lot of time. Let me see if anyone -- we won't rise but I will just see ...

The combined view of the Tribunal is that we will have five hours for each side, and the five hours did start at 10.00 so this is part of it. We will indicate properly at lunchtime tomorrow if we take a different view about the use of Friday afternoon. We will be scrupulously fair to the parties. Everyone will have the opportunity to deal with a point that needs to be dealt with. There are techniques we can use to ensure fairness. We could have supplemental written submissions on specific points, we could have a note on a point of law that has not been explained fully in oral presentations. I am not saying we will need this, but it is a possibility. Everyone expects the hearing will be completed tomorrow, but if something very unexpected occurred whereby it was quite unfair to proceed that way, we will reconvene.

The parties are entitled to have a fair hearing with a level playing field and that is what they will get.

MR WILLIAMS: I am very grateful, Sir.

MR JUSTICE MORGAN: Thank you.

Closing submissions by MR O'DONOGHUE

MR O'DONOGHUE: My Lord, can I start with delay, first of all, on the facts and then turning to some legal points.

The starting point is it is obvious in practical terms why this point matters. I am not going to ask you to turn up the facts and figures, but the table for your reference is at volume 3, tab 85 of the bundle, which is a table setting out FPM's turnover between 2013 and 2018. Two points: first of all, for every year during that period, the turnover went up, and between 2013 and 2018 it trebled. So essentially, had the Decision but for delay been adopted at any point earlier than it was, that would have resulted in a lower penalty for FPM. That is the starting point and that is why we say there has been prejudice.

In my submission, this is primarily or quintessentially a question of fact. The finding we are challenging is the finding in the Decision that, in fact, as regards the length of CMA's investigation, the CMA proceeded "as expeditiously as possible", paragraph 6.78, and we say they did not.

I will now turn to Dr Grenfell's evidence for some specific points, but can I make a couple of general points to begin with. First of all, as I indicated, a finding of fact was made in the Decision which we challenge in our Notice of Appeal. The CMA elected to put in with its Defence a witness statement from Dr Grenfell and certain disclosure, and it was a matter for them at that stage to decide whether to put in evidence and, if so, how much.

In fact, that first witness statement says virtually nothing that would assist the Tribunal in terms of understanding the reasons for the delays which occurred. The CMA was then given a second chance in May of this year following the disclosure hearing to put in further evidence, whether by way of witness statements or disclosure, or both. It chose to put in another witness

statement from Dr Grenfell, which was, in my respectful submission, as unilluminating as the first witness statement, and a letter from the CMA explaining certain generalities about parallel cases. It did not even say at that stage that those general points in fact explained the delay in this case.

We then had Dr Grenfell's cross-examination yesterday. I will come to a handful of specific points on that. But there were two striking features, in my respectful submission. First of all, it was striking just how little he actually knew or professed to know about the criminal and civil cases, despite the fact he was the SRO in the criminal case and a senior enforcement director on the civil side. Second, on the central issue raised in his statements, the stopping of the civil case, he was particularly non-committal with a default position of not really wanting to answer anything for reasons of policy. What limited explanation he eventually gave was also obviously unsatisfactory for reasons I will come to.

Of course we recognise in fairness that Dr Grenfell is a public official and the CMA is a public body. I do wish to emphasise that we cast no aspersions at all on the CMA, and Dr Grenfell yesterday referred to something about a dark secret. We have never said that and we don't say that, so it is important to be clear about that.

But there is also a question of fairness to FPM. We raised a challenge on a point of fact that the CAT, in our respectful submission, should decide that question of fact on the basis of the evidence it has actually heard and nothing else. I now want to focus on the handful of specific points in relation to Dr Grenfell's evidence.

For the Tribunal's assistance, what I have done is a table with some references to the transcript which will speed things up, rather than me reading out endless

references.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: I will hand that up now. **(Handed)**. There are half a dozen points and what we have done is given the transcript references for each point.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: The first point is Dr Grenfell candidly admitted that he was not a criminal investigator and was somewhat, as he said, out of his depth in explaining what had occurred in the criminal investigation. There were repeated slippages in the criminal investigation which, in my submission, were unexplained; for example, the date of the second interviews being pushed back from February 2014 to February 2015, the time of the final disposal decisions slipping from the summer of 2015 to the first half of 2016 until it was ultimately made June 2017.

With respect, Dr Grenfell was unable to explain any of these in detail and the CMA has not attempted to do so in any of the documents. Nor could he justify other delays; for example, the year taken to charge Barry Cooper after he gave a full account of what (Inaudible) the cartel under caution. The one specific point, in many ways the only specific point, Dr Grenfell mentioned in connection with slippage the first half of 2016 until the summer of 2017 was a question concerning the waiver of privilege. But his evidence on that point, in my submission, was so vague as to be worthless. He said he was "not wholly on top of the detail", despite being the SRO at the time. He couldn't say who raised the issue, or what specific evidence it applied to. He couldn't remember if the issue had in fact been referred to independent counsel, and he couldn't recall how the issue had been resolved, or even when it ceased to

be an issue.

It was open to the CMA to put forward documentary evidence on this point and it chose not to do so for its own reasons. In my respectful submission, the only inference the Tribunal can draw is that the criminal investigation took far too long. It could and should have been resolved by the summer of 2015 at the latest.

Second, Dr Grenfell argued the key issue for the Tribunal was how the investigation "compares against benchmarks". But even at this late stage in the day, the Tribunal cannot engage in that comparison because we still don't know how long the investigations actually took. Dr Grenfell was unable to confirm when the first step in the criminal case occurred prior to the first recorded meeting in August 2012. He said he asked the criminal team and they didn't know because "the people who do the intelligence do not talk to them about these things," so there can be no confidence about that at all.

But even assuming a start date of a few weeks or month before August 2012, this case on any view compares very badly against the relevant benchmarks. Dr Grenfell accepted it was the longest criminal investigation in the history of the OFT or CMA. The next longest, *Galvanised Steel Tanks*, took half the amount of time. And he accepted in no other case had the investigation -- had more than two years elapsed from the final interviews to a charging decision.

Following the course of the criminal investigation, the CMA had, in my submission, a massive head start in the civil case. Dr Grenfell accepted, all other things being equal, the civil case should have been completed substantially quicker than it actually was and substantially quicker than average. Yet we know it took very substantially longer than the 16-month average for the CMA.

The third point is that there was then a question of consideration given to the opening of the civil case in March 2016. Dr Grenfell on this point was unable to give any meaningful evidence on or explanation of that decision. In answer to the Chairman's questions in particular, he said the CMA had been unable to find the equivalent OFT documents which might shed light on this matter. This was despite Dr Grenfell saying that there were compelling reasons to run the two investigations in parallel. In our submission, the civil case should have been open in parallel from the start, as happened in *Steel Tanks*.

The fourth point is that Dr Grenfell endorsed the recommendation to open a civil case in April 2016 without dissent and it is to be inferred that he agreed with it. That was a very detailed and specialist assessment which was endorsed by the Pipeline Steering Group and an update was provided to the CMA's board. As the Tribunal has seen in detail yesterday, that paper concluded that if work got underway in April 2016 while the criminal case was ongoing, the statement of objections could then be produced very quickly during a period of between two months and six months following the conclusion of the criminal case.

The penultimate point in Dr Grenfell's evidence is the question of what I call the volte-face. There is a preliminary point here: at paragraph 7 of his second statement, Dr Grenfell mentioned some advice, or I should say alluded to, some advice of external counsel. In cross-examination yesterday, he frankly accepted that FPM was right to say that that point goes nowhere because of the CMA's failure to waive privilege. So he didn't in fact rely on that point, really, in any shape or form by way of justification.

The actual explanation, so far as one can call it that, which was provided by Dr Grenfell is manifestly inadequate and obviously unsatisfactory. He

accepted, despite the importance of this point to the case and his own involvement in the decision, that his explanation was, "A rough idea, it is my best guess for reasons". In answer to Sir Iain's question, he was unable to say how conscious, deliberative or reasoned the decision-making process had been.

The tentative explanation he eventually advanced under some duress was that, "The CMA was faced with a mass of evidence and the fact that it was in flux". But he and the case team knew what they were facing. They knew the cohort of documents in the criminal case, they knew there was a subset, about a third of those documents, which might be relevant to the civil case when they opened the investigation in March 2016. That was hiding in plain sight.

The core evidence: the recorded meetings, the documents seized in 2013, the leniency confession and the interviews by the suspects at this stage, that evidence was fixed, it was historic. Put in candid terms, his explanation simply amounted to saying that the work needed to be done, but it was too hard and the case team preferred not to do that work for the time being. On any view, that is not an acceptable explanation.

Dr Grenfell said, and the CMA has maintained throughout this case, that there were some reasons of public interest, but I emphasise falling short of public interest immunity, why he shouldn't answer questions on this point. That simply wasn't the case, as the Tribunal saw. There was nothing from what he later said that could give away any of the CMA's strategic thinking on policy making or matters of that sort. As I indicated, his evidence in its most basic form was that there was a lot of work to do and they did not fancy it at that stage.

In my respectful submission, the inference the Tribunal should draw, and we don't say this lightly and I did not put it to Dr Grenfell lightly, is that the CMA's

repeated obfuscation and extreme reluctance to explain the volte-face is because in fact it has no good explanation for what occurred.

That inference, in my respectful submission, is strengthened by the total failure on the part of CMA to produce any documents relating to the volte-face. Dr Grenfell accepted that he approved personally of the volte-face, but when asked whether his documents had been searched as part of the CMA's disclosure exercise, Dr Grenfell said, "I honestly don't know".

He could not recall even whether any other director had been told, and despite the importance attached to the decision to open the case and the seniority of those involved, the Tribunal is being invited to believe that not a single shred of paper exists within the CMA informing anyone in the CMA of a significant decision to effectively reverse or to stall an important decision made in March or April of 2016. In our submission, that is wholly incredible.

The final point, I will not dwell on this. You will see, my Lord, Members of the Tribunal, in the note before you, under the last point over the page, there are a series of references to particular aspects of the investigation where we say there is unexplained delay. If I can pick up maybe on a couple of points -- you have the references there, I am not going in a clinical way to go through those.

One of the points raised by Dr Grenfell is: well, we went down the route of a hybrid settlement investigation. But after some probing on my part, he fairly accepted that but for that procedure, it would have been a slower case still. He suggested following the so-called stop go meeting that the CMA thought there was enough material for a statement of objections as early as November 2017, but that makes the CMA's failure to actually issue the SO until December 2018 all the more inexplicable.

He could provide no explanation for an extraordinary seven-month delay period in which the CMA took to make proposals to FPM on access to the file stating, "I cannot answer that". He accepted that most of the information eventually requested of FPM, which was limited, concerning market shares and financial information, was "mechanical". When asked why it hadn't been collected earlier as it could and should have been, he invited the Tribunal to accept as an act of faith, not of evidence, that it had been done at the right time. In fact, for the Tribunal's reference, the CMA basically had all this information from many years earlier in the interviews. That is bundle tab 127, pages 2285, 2298 -- this is interview evidence.

Finally he tried to justify a four-month period in which he said an issue of privilege had to be resolved with another party. As I put to Dr Grenfell, the suggestion that it took four months to resolve an issue of privilege really beggars belief. One final point, Sir, forgive me. He really had no good explanation for why, following the statement of objections response and even following the draft penalty statement, the CMA decided to do yet further interviews of the FPM personnel.

So in conclusion, this issue obviously needs to be looked at in the round on the basis of the evidence the Tribunal has heard. In my submission, there are two alternative options which are open to the Tribunal.

The first possibility is that there is no good reason why, as the CMA did very successfully in *Galvanised Steel Tanks*, the CMA could not have run the criminal and civil cases in parallel either from the outset or at least from a very early stage. The *Galvanised Steel Tanks* proceedings on the criminal side took less than three years to a conclusion, and this included a full trial. So the present case, if anything, should have been shorter still. Overall, our

submission is that taken in the round and having regard to the excessive length of the criminal investigation, the civil decision should have been issued not later than 31 December 2016. That is the first date.

The alternative submission really is based on the volte-face. The unexplained volte-face alone, which is at least a year, effectively longer, means that the Decision could have been issued at least a year earlier than it actually was. So that is our alternative submission.

MR JUSTICE MORGAN: Right. So the end point is that the Decision should have been by 31 December 2016, or one year before it actually came in October 2019. Those are the two submissions.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: You are going to address us on the legal consequences of that. But can I just have a little help on what question of fact we are addressing. Having in mind the decision, are we asking: did the CMA proceed as expeditiously as possible? Or are we asking: did the CMA proceed to produce unreasonable delay in the decision? They are not the same questions, it seems to me. I can explain that, but --

MR O'DONOGHUE: I think I understand the point.

MR JUSTICE MORGAN: I think you are saying there was unreasonable delay.

MR O'DONOGHUE: I am effectively saying both.

MR JUSTICE MORGAN: Well, I mean, the Decision used the phrase "as expeditiously as possible". It may be they didn't mean that, but literally what that means is you do it as quickly as it can be done.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: You are focusing on this piece of work, so to do this quickly as it can be done, you give it priority, you do it and that is as

expeditiously as is possible.

To illustrate by an example from a barrister's practice: a barrister with not very much work to do is asked to write an opinion. It takes him a day -- to open the papers, to consider the point, to produce the opinion is a day's work. So if he does it as expeditiously as possible, he does his day's work when the papers come in and the work is done a day later. The barrister with a lot of work who has court hearings, 20 opinions, consultations, and so on, he doesn't get to this set of instructions for a month. When he gets to it, he does it in a day. But it takes him a month and a day to give the opinion.

You could say he didn't do it as expeditiously as possible. He fitted it in, he didn't give it priority, he attended to other work. So a standard of "as expeditiously as possible" strikes me as being too severe because the CMA, on any view, has other cases and other commitments to which it properly has to attend.

Do you say we should nonetheless substitute for the time taken the time that would be taken as expeditiously as possible?

MR O'DONOGHUE: My Lord, I would say a couple of things. That is the finding of the Decision which in the only way we have challenged it and we are entitled to do so.

MR JUSTICE MORGAN: But we may be persuaded that it wasn't given priority, it wasn't done as expeditiously as possible, it wasn't promoted to the top of the queue at every stage. When a piece of work had to be done, it was placed in the workload of the individuals. We may well find from my literal reading that it wasn't. But if the standard is, which I think your Appeal Notice says and your submissions say that there was unreasonable delay, then that strikes me as a different standard. So we might say we don't agree with the Decision, but we don't find unreasonable delay.

MR O'DONOGHUE: I see the point. But my second point is that ultimately, at least in this case, it doesn't actually matter because the problem with the CMA is that if they were to come before the Tribunal and say: well, actually we didn't proceed as expeditiously as possible but we had some agonising decision to make in terms of we had at that point N number of cases where we had to calibrate our resources. If they came up with an explanation like that, that would be one thing.

But the problem with the evidence you heard yesterday is literally the only thing you heard is that in this particular investigation, there were a bunch of documents. They looked at these in April 2016, thought it looked hard, then waited a year. And that is completely de-contextualised; it was not put in the context of, "We had X number of other investigations which we had to" -- there was nothing.

MR JUSTICE MORGAN: You are right, we were not given any detail about allocation of resources.

MR O'DONOGHUE: When you think about this, it doesn't make any sense because at some point you have to read the documents. So kicking the can down the road to a year later, that is all it is doing.

I go back to the evidence the Tribunal heard and there is literally nothing before the Tribunal which in any shape or form would allow it to reach a conclusion that the delay was justified because of objective reasons to do with reasonable prioritisation. There is nothing on the record that is even capable of beginning to substantiate such a decision.

MR JUSTICE MORGAN: Sorry, yes. Mr Doran has a question.

MR DORAN: I just wanted to ask one question, Mr O'Donoghue. I thought Dr Grenfell had said they looked quickly at the documents which were available from the criminal investigation, they realised they were -- I think he

said "in flux", so in other words there was material coming in, there was cross-checking to be done, there was -- and I took it from that that it meant they were not able to substantiate all the points because there were things which needed to be resolved between some lines of evidence and other lines of evidence.

He then went on to talk about the efficiency I think on page 85 of the transcript. He characterised it as an "operational judgment", which is actually a huge amount of effort to try to get to grips and we still wouldn't get to grips with it because the criminal case is not yet fixed, so we don't have a corpus of documents which we can rely upon.

Do you place any weight on that, or should we merely say: you should have thrown resources at it and resolved that matter both at the criminal level and at the civil level simultaneously?

MR O'DONOGHUE: Well, I think one needs to be precise in terms of what he actually said. What he actually said was that in April of 2016, he used the phrase "no substantial work" was done on the existing corpus of documents. It is one thing to say, "We have X number of documents and there may be more. There may be incremental work if further documentation comes in which may then require some cross-checking.

But his evidence and the use of the word "substantial" meant that they decided, it seems as a matter of principle, that they wouldn't meaningfully start this exercise because it was too much work. So I think it is important to be precise.

And again, this was literally the first time this was mentioned. You have two witness statements from him, which so far as they say anything, there is some vague allusions to counsel's advice, and that completely crumbled when he was

questioned about it. You have to decide the case on the basis of the evidence before you and, frankly, the most that could be said about the remark you highlighted, Mr Doran, is it was a bit of a throwaway remark, and that is not a serious forensic basis for a justification on the scale he would need to advance.

Because of course the starting point, and this is a critical point, is there had been a very detailed senior-level decision in April 2016 that they should crack on with this and the decision at the time was get on with drafting the SO. They knew exactly what they were facing in terms of the corpus of documents that had been filleted for the criminal case, so that is the decision which had been made.

His Lordship said: well, maybe a member of the case team came in to you, had a fireside chat, but it turns out this was a lot of work. Again, it was not advanced by him until yesterday and it is not a serious -- when one sets that side by side with the level of detail and the planning and structural features of the Pipeline Steering Group document, it really doesn't amount to a row of beans.

MR JUSTICE MORGAN: Let me go to some concept of a reasonable time or the opposite of that, unreasonable delay. Questions of reasonable time are very common in the law, usually in a contractual setting, and there you reflect the position of both parties to a contract on what is reasonable in terms of time to take having regard to the position of the parties. So the party that is waiting for something to happen, you would say what are the adverse consequences for them? Is it reasonable they should bear those consequences? Is it reasonable to allow the performing party a period within which to perform? Why do they need time? What are the constraints, and so on? You have

something to go on.

In this administrative setting, it is not quite so easy. You might say that good administration means that public bodies should make their decisions without unreasonable delay because people are out there waiting for the answer and they are affected by the answer. You have not stressed to us that there were any particular adverse consequences of time passing, apart from the turnover point. You are not saying to us that it was extremely hard on the individuals that they were kept dangling in uncertainty for years and years. We have not got any real feel for that.

We can see in theory that might arise, but what you are saying is that a delay is unreasonable because we end up with the Decision at a point in time where a preceding year's turnover is higher than other years. But tell me if I am wrong, FP McCann didn't write every six months saying, "You do realise our turnover is going up and we are going to be hammered when the statutory cap is applied, so please get on with it." The McCanns might even have understood that was a conceivable possibility, they certainly didn't bring it to the attention of the CMA. The CMA had no idea, one assumes, that the passage of time was going to result in this consequence. Is that relevant when we consider whether we should say they were unreasonable in what they did?

MR O'DONOGHUE: My Lord, I think that collapses into the legal point which I am coming to. On the factual side, I want to make one further comment, which is that it was not just from FPM's perspective that it was important to proceed expeditiously. If you think back to the Pipeline Steering Group paper, there were compelling reasons for them to run these investigations in parallel, this was an internal policy. But they had identified in that document that if they

didn't get the SO ready within two to six months of the conclusion of the criminal case, there would be adverse reputation and other consequences for the CMA. So they had internally identified that proceeding with reasonable expedition was important for them.

MR JUSTICE MORGAN: That makes it harder to criticise them because they have a balancing exercise. They want to do it with expedition, there was a culture in the CMA, we were told, to avoid delay, so that is a positive reason they have -- they have a negative reason, they don't want to be criticised. And yet having those policies, they say, "No, to do the job efficiently, we shouldn't do it once with inadequate material and then do it a second time. We should wait for the adequate material and then do it."

Is that an unreasonable stance? That is a question for us. You will say yes, Mr Williams will say no, we will have to review that. But that leads to another point you can help us with -- if you are coming to it, say so. Mr Williams says this is a public law question as to whether a public body has been guilty of unreasonable conduct, so we apply some sort of public law standard to it.

The mere fact that it is not as expeditiously as possible is not a legitimate criticism of the public body. The fact there is some delay is not itself a criticism, it is only if they have conducted themselves in a way which no reasonable enforcing authority would do, something like that. Is that the right approach?

MR O'DONOGHUE: My Lord, I am coming to that.

MR JUSTICE MORGAN: Okay, I think then you are coming to that. You have helped me with answers to my earlier questions.

MR O'DONOGHUE: My Lord, just to wrap up on the facts.

It is very important in this context again that the Pipeline Steering Group had emphasised the need to get the SO up and ready within two to six months of

the conclusion of the criminal case. The difficulty the Tribunal now faces is it is all very well saying, "Well, in April or May 2016, somebody more or less immediately decided that they wouldn't do that."

But for the Tribunal to get any handle on that, you would expect to have quite a lot of material because one could think of this in terms of scales. There is a very, very detailed, quite sophisticated paper in the Pipeline Steering Group setting out all the reasons, including internal reasons, why they should crack on with the SO, then yesterday we had essentially hints at a decision to effectively not do that for at least a year. In terms of the fabric of the other side of the scales, there is more or less nothing before you which allows you to calibrate and evaluate the starting point of the Pipeline Steering Group with the outturn during this period. There is essentially a vacuum.

That is why -- I don't wish to make a sort of pointy headed point, but you do have to decide this issue on the basis of the evidence you have heard. It should not, in my respectful submission, be done on the basis of instinct, supposition, or things which are extraneous to the proceedings. They have had every indulgence of the Tribunal to put forward any and all evidence that they wanted to on this issue. They have had two statements of Dr Grenfell, Jessica Radke's statement, a letter. They could have put it into the bundle before the hearing, anything they wanted to.

Effectively what happened -- and I don't wish to be harsh about this, but I am going to be blunt -- Dr Grenfell and the CMA took essentially a calculated risk that they could say the minimum in his statements and see if that would fly before the Tribunal. Then yesterday, when the wind had clearly shifted, his plan B was to say, "Well, please help me not to answer these questions."

Then having had a break, he thought better of that and said, "Well I will go for plan

C," which is to give a bit more hint at some of the things which I have refused to set out until to date. But ultimately you are left with a profoundly unsatisfactory forensic position where for him to begin to make good what the CMA would invite you now to find, it doesn't even get off the ground.

MR JUSTICE MORGAN: Right, thank you.

MR O'DONOGHUE: Those are the facts. Turning to some legal points.

First of all, the CMA concedes in paragraph 124 of its skeleton that the CMA and the Tribunal at least have jurisdiction to make reduction for delay. The CMA, in our submission, is right to make that concession because in the *Paroxetine* case, which is in Authorities 2, tab 25, page 1353, the CMA itself granted a reduction to the parties in the penalty on grounds of delay.

MR JUSTICE MORGAN: What was the reduction reflecting? It is not a kind of fine for the CMA being slow. It must be that the delay has caused somehow the penalty to be higher than it ought to have been. Does Paroxetine spell out that?

MR O'DONOGHUE: My Lord, it is rather brief. We can have a look at it.

MR JUSTICE MORGAN: Give me the reference again because I did not get that.

MR O'DONOGHUE: Authorities 2, tab 25, page 1353, at paragraphs K14 to K16. But the gist of the point is that they felt the delay in that case, which was lengthy, might have affected the availability of documents, for example.

MR JUSTICE MORGAN: I see. Difficult to translate that adverse effect into a monetary consequence.

MR O'DONOGHUE: Yes, I think it was -- let's have a look at it. I think it was a 10 per cent discount. To be clear, this is simply to make the point that the concept of a reduction in penalty on grounds of delay is not unheard of, including for the CMA. I am not over-egging that pudding, I just want to make

a --

MR JUSTICE MORGAN: You will guide us when we go to the CMA guidance, assuming at one stage of your argument you will address the guidance and how it should be applied. At what step do you bring in delay, or do you just simply work through the guidance and then make an end allowance saying, "We have arrived at X million but now we consider delay. There was delay and therefore we reduce the penalty," whether it is an end allowance or an earlier piece of reasoning.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I have this enormous *Paroxetine* decision.

MR O'DONOGHUE: If it is any consolation, your Lordship, I was involved in the case.

MR JUSTICE MORGAN: That was a benefit to you but no help to us.

MR O'DONOGHUE: My Lord, yes. It is in Annex K to the decision, which is on page 1353.

MR JUSTICE MORGAN: Right, I have K. Shall we just read this quickly? We may need to read it slowly later, but shall we read K14 onwards quickly?

MR O'DONOGHUE: My Lord, yes. Perhaps also K17, my Lord.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: And K16, the question of documents.

MR JUSTICE MORGAN: Okay. **(Pause)**.

Right. With respect to the CMA, you have a consequence of delay. Let me just get the very words:

"The delay meant that the burden of searching for documents ... was greater for the parties."

They would have borne that burden and that burden may well have had a monetary

tag because it involved more work and that costs more money.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: But there is no attempt to -- I am not saying there should have been -- there is no attempt to quantify that.

MR O'DONOGHUE: No.

MR JUSTICE MORGAN: And 10 per cent is just, to use a phrase you used, plucking something out of the air. Let me just put a marker on that page.

MR O'DONOGHUE: My Lord, to save you coming back to it, K17 is where they make the point that the CMA, unlike the European Commission, is not subject to a limitation period, which is something I will come back to.

MR JUSTICE MORGAN: And the European Commission period is ten years.

MR O'DONOGHUE: Five years.

MR JUSTICE MORGAN: Five years? I thought we had seen ten. Sir Iain thinks like I, that it is ten.

Yes, Mr Williams?

MR WILLIAMS: I think there are different limitation periods for opening a case and completing a case. So I think both Sir Iain and my learned friend are right.

MR JUSTICE MORGAN: Five years to open and ten years to complete, is it?

MR WILLIAMS: Broadly speaking, I think.

MR JUSTICE MORGAN: I certainly understood ten years to complete. I picked up that from something --

MR O'DONOGHUE: I will come back to that. I think we are both right for different reasons.

MR JUSTICE MORGAN: All right, good. So we have swallowed everything we need to swallow of *Paroxetine*.

MR O'DONOGHUE: Yes. So the two starting points is there is a concession there

is jurisdiction to make a reduction for delay at least on some bases, and before you is an example of a reduction, albeit made on the articles --

MR JUSTICE MORGAN: If Mr Williams says we cannot reflect delay, then he will make that case. At the moment, it seems to me that if we are applying the guidance, we have regard to the guidance so it is not -- we are not slaves to it, but it may be possible to bring it in at some stage, or it may be possible to make an end allowance to make an appropriate penalty.

MR O'DONOGHUE: I will come back to that. What worries me of course is that if I am wrong on the *vires* of the cap, then the correct year is not 2018, it is some other year. That is one possibility. But I will come back to that.

MR JUSTICE MORGAN: Right, thank you.

MR O'DONOGHUE: The second legal submission is while we do say in financial terms to the tune of millions of pounds FPM was prejudiced by the delay, it is not essential under Article 6 of the Convention to show such prejudice. Prejudice is a fortiori but is not an essential ingredient. We can quickly go to the *Dyer* case Authorities 3, tab 35.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: It is paragraphs 78 and 79, the second half of 79 in particular:

"The mere fact of inordinate or excessive delay is sufficient to raise a presumption in his favour that he will be prejudiced."

And the second important point:

"The burden of coming forward with explanations for inordinate delay is on the prosecuting authorities."

That dovetails with the point I made on the facts: lack of explanation from the public authority in this case concerns a failure to discharge a burden on it.

MR JUSTICE MORGAN: Article 6, you are suggesting, says you have a right to

a fair trial before an independent and impartial Tribunal within a reasonable time or something like that, does it not?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: What was the context of *Dyer*? Delay between charge and trial, police officers awaiting trial for perjury, delay of 20 months; another case minor awaiting trial for sexual offences, delay of 28 months.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: What was the issue? Whether the prosecution should be stayed as an abuse of process or allowed to proceed?

MR O'DONOGHUE: Back to the headnote.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: (Mic on mute).

MR JUSTICE MORGAN: They were sentenced and the defendant said the sentence should be reduced to reflect delay. Let me read the headnote.

This is an appeal from -- oh, it is a Scottish case, isn't it, but it came to the Privy Council under the appropriate constitutional arrangements for human rights cases from Scotland, or something like that.

MR O'DONOGHUE: Yes, my Lord, that is right.

MR JUSTICE MORGAN: Right, okay.

MR O'DONOGHUE: The third point is that the crux of the CMA's case now on this point is that there are a small handful of European Court judgments which say that delay does not affect penalty. So I just want to unpack that a little.

First of all, it is not entirely clear to me where exactly that submissions goes, given that there is a concession that there is jurisdiction to make a reduction on the basis of delay, and we saw *Paroxetine*, but I have made that point.

Secondly, it is not actually correct or fully correct even on its own terms because

there are a number of European cases where, as a result of delay with the administrative investigation, reductions in penalty have been granted. If I can give you two references, the first is in Authorities 8, tab 104. If we can just turn that up, please.

MR JUSTICE MORGAN: Yes. It might be Authorities 9.

MR O'DONOGHUE: It is 8 in mine.

MR JUSTICE MORGAN: Anyway, it is 104. I have it in 9, that is *Dutch Beer* which we heard about.

MR O'DONOGHUE: It is at the back end my Lord, 434, starting at 425.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: You see at 426:

"There is a basis to make an equitable reduction in a fine as a result of delay."

Then you see at 429, there was a reduction of 100,000 euros which was appealed. Then over the page --

MR JUSTICE MORGAN: We will just read it to ourselves, I think.

MR O'DONOGHUE: The 100,000 euro reduction was appealed on the basis it was too stingy. Then at 434, the Court in fact increased the reduction to 5 per cent. This was in the context of a 220 million euro penalty, so in fact it was 11 million euro reduction in penalty.

MR JUSTICE MORGAN: We are just scanning it. **(Pause)**. Right.

MR O'DONOGHUE: If I could hand up one further decision which is essentially the same, a case called *FEG*, where the Commission made a similar reduction on grounds of delay. **(Handed)**.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: It is striking in this context that in contrast to its submissions on the 10 per cent cap, the *vires* point, on the question of delay and reductions in

penalty, the CMA doesn't say that section 60 of the Competition Act requires you or obliges you to have regard to the judgments of the European Court.

There are at least two reasons for this. One in fact we know because we have seen, the Commission and European Courts can and do make reductions on grounds of delay; but secondly, which is a more substantive point, which is Sir Iain's point, there is a relevant difference for the purposes of section 60 between the EU and domestic statutory schemes on penalty, and therefore section 60 is not activated. The relevant difference is the existence of the limitation period.

We can quickly look at the legislation starting at the European level. It is in Authorities 6, tab 76.

MR JUSTICE MORGAN: Before you do that, the very short document you have handed in --

MR O'DONOGHUE: This is a European Commission decision.

MR JUSTICE MORGAN: Which paragraph is it?

MR O'DONOGHUE: Page 1, recital (152).

MR JUSTICE MORGAN: Right. **(Pause)**. Thank you. Then you were taking us to tab 76?

MR O'DONOGHUE: Yes. 4708, my Lord.

MR JUSTICE MORGAN: We have that in Authorities 7, I think.

MR O'DONOGHUE: It is Regulation 1/2003.

MR JUSTICE MORGAN: Right, got it.

MR O'DONOGHUE: Tab 76.

MR JUSTICE MORGAN: (Pause). Yes.

MR O'DONOGHUE: The five years you see in Article (1)(b).

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: And then I think Sir Iain's point is in Article 25(5) over the page.

MR JUSTICE MORGAN: Article 1(b)? This is 1/2003, is it?

MR O'DONOGHUE: My Lord, yes, Article 25(1)(b).

MR JUSTICE MORGAN: 25(1)(b), right.

MR O'DONOGHUE: 1(b) is the five years I mentioned, and over the page at 25(5) is Sir Iain's -- it says:

"A period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment." So the ten years on the issue of interruption.

MR JUSTICE MORGAN: We can read the words ourselves, but the basic point is you must start within five and must complete within ten; is that it?

MR O'DONOGHUE: Yes, my Lord.

MR JUSTICE MORGAN: Let me make a note. This is the current Regulation, is it?

MR O'DONOGHUE: Yes. By contrast, under domestic law, there is no limitation period in statute. Indeed, on a footnote, the reason the *Paroxetine* case was referred from the Commission to the CMA was because the Commission was time-barred under its legislation.

MR JUSTICE MORGAN: Yes. So it left it to the UK authority to take action if it wished.

MR O'DONOGHUE: My Lord, yes. It was striking. It was an agreement of 2002, and almost 20 years later the CMA was able, because of the lack of limitation period, to continue to look at that ancient agreement. On a further digression the judgment of this Tribunal remains pending in *Paroxetine*, so the saga continues.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: For the Tribunal's note, the reason I highlighted paragraph

K.17 of *Paroxetine* is that that is where the CMA makes the point, "The Commission has limitation periods, we don't."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: A further relevant difference, in my submission, is that under Article 340 TFEU, there is the possibility of a person who has suffered damage because of delay to raise proceedings against the European institution in question for damages. For your reference, that is the *Bolloré* case, Authorities 8, tab 108 paragraph 106.

For example, you can sue the Commission for delay.

MR JUSTICE MORGAN: Yes, we have that in Authorities 9. In fact, it has not been put in my bundle. I know in the electronic bundle *Bolloré* came separately. We don't have *Bolloré* in our bundle.

MR WILLIAMS: There was a more recent translation, so we can provide that to you. You have it electronically --

MR JUSTICE MORGAN: Yes, I did see it electronically. I did not read it but I saw it. It is in French and it is translated into English, is that it?

MR WILLIAMS: Yes, my Lord. This is a judgment where the official judgment is not in English, so the CMA have taken an official translation.

MR JUSTICE MORGAN: Yes, I understood that. Here we have it. This is a translation, not the official judgment, but we will proceed with that. Do you want to show us a particular paragraph?

MR O'DONOGHUE: I will just give the reference, 106. It simply notes there is the possibility of bringing a tort action against an institution at the European level which infringes Article 6.

MR WILLIAMS: If it helps, I will take you to it later on, Sir.

MR JUSTICE MORGAN: Okay. So you can sue the European administrative body

for damages, compensation for unreasonable delay, you cannot sue the CMA for unreasonable delay.

MR O'DONOGHUE: No. And you can say, for example, well the delay in your decision caused a different turnover figure to be used and I suffered damage on that basis. That would be one example of a causal link.

We submit that because of the legislative difference on the limitation period and the possibility of a damages action on the European plane, there are at least two relevant differences between the domestic framework on penalty and delay and the European framework. That is why the CMA does not rely on section 60, but the furthest they go is to say that their submission is consistent with certain European judgments. As I have shown the Tribunal, that is at least half true.

MR JUSTICE MORGAN: You say *Dutch Beer* is a case of a penalty being reduced by reason of delay.

MR O'DONOGHUE: 11 million euros, purely on an equitable basis.

MR JUSTICE MORGAN: But then Mr Williams has cited European cases saying delay is irrelevant to penalty.

MR O'DONOGHUE: Yes. My Lord, we will see what he says, but I am laying down the marker now. But that doesn't get him me as far --

MR JUSTICE MORGAN: Okay, thank you.

MR O'DONOGHUE: The final point, which is not really a legal point: the CMA in paragraph 132 of its skeleton is keen to make a floodgates argument. But in my respectful submission, it is hard to see where that takes the CMA. First, as we saw in *Paroxetine* and other cases, the CMA and other public bodies can and do grant delay reductions where appropriate. Second, we are entitled to challenge the finding of the Decision that they proceeded with

reasonable expedition or as expeditiously as possible, depending on what the Tribunal says is the relevant test.

A floodgates point cannot have the effect of neutering the Tribunal from determining a question of fact. It is certainly common ground that at least where the rights of defence were prejudiced, the Tribunal would be obliged to set aside any penalty on delay grounds -- that is paragraph 205 of the CMA's Defence.

The final point, and we commend the CMA on this front, they are keen to emphasise that things have speeded up compared to the days of the OFT; and if that is right, they have nothing to fear.

MR JUSTICE MORGAN: Has there been any earlier case in Europe or here where there has been a detailed examination of the time taken by the administrative steps? What you have shown us so far is pretty broad-brush, where the decision maker says well, this has just taken too long, they don't perhaps try and specify the duration or the length of the excess period. They say well, we feel it is too long, it looks too long, we have not really gone into it, and we are going to take off a percentage.

This case is different because there has been a day of cross-examination as to what occurred during two investigations, and then there is a specific monetary consequence in the form of the term of a year which is identified. So I get the impression this is the first time the argument has been presented in quite the way it is in this case. Is that more or less right?

MR O'DONOGHUE: My Lord, that is entirely fair. The reductions we see in *Dutch Beer* and *FEG* are all finger in the air variety. On a domestic level, I am not aware of any case scrutinising individual periods of delays. And to an extent as well, given the European Commission's procedures are quite different and involve many different languages, it would be difficult, in my submission, to

map anything really useful from that on to the domestic plane.

MR JUSTICE MORGAN: There is a floodgates point, but a question of whether there was unreasonable delay could be, could involve an extremely elaborate and detailed inquiry. At the disclosure stage, I indicated that I felt some other approach would be better than a detailed factual investigation.

I gave the example of a judge who is asked to award interest on damages where the litigation took nine years, the judge says well, I am not giving you interest for nine years, you really were very slow about it, I am going to give you interest for six years, or something like that. That is done perfectly fairly but in a pretty broad-brush way. A broad brush wouldn't have floodgates consequences, but if it is becoming routine in every single penalty appeal to have days set aside for a factual investigation, that might be of concern to the procedure.

MR O'DONOGHUE: My Lord, I understand the point.

MR JUSTICE MORGAN: Right, okay.

MR O'DONOGHUE: I can make a few points, if I may. First of all, your Lordship was very, very clear at the disclosure judgment that the suggestion we would get any further disclosure on the inner workings of the CMA was not going to happen. So a very clear judicial marker has been laid down in that regard, so that is the starting point.

Second, in this case, I deliberately avoided wasting the Tribunal's time with footling points about a week here and a week there and things like that. The big picture in this case is two points: first of all, why wasn't the civil case even considered for running in parallel at an earlier stage than April 2016? Secondly, we have a point which may well be unique, which is there was a very detailed decision taken in March or April of 2016 with extensive documentary support that it should be run in parallel with a view to getting the

SO ready within two to six months of the criminal case concluding. We then have something which is largely unexplained, which is the opposite decision to pause everything in the civil case for a year. We have simply had no real explanation of that.

So that is something which is highly unusual and may well be unique to this case. If the CMA in other cases -- as I said, they seem to be proceeding very expeditiously, we commend them for that, so therefore they have nothing to fear. But it wouldn't be difficult for them to give a minimal explanation for why they have taken certain prioritisation decisions. That is not a difficult thing to do.

In my submission, it would be appropriate and not difficult to indicate that this is an exceptional case where there are at least two particular items that remain more or less wholly unexplained.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: I perfectly see the concern and I don't want to be (Inaudible), but that is not the case I am putting. It is not some microscopic dissection of weeks here and there and you could have sent this e-mail quicker than you actually did, and so on. I have focused on more important issues and bigger points and things which remain more or less completely unexplained.

My Lord, I am about to move on to a different point. It is a bit early, but I wonder whether that would be a convenient moment.

MR JUSTICE MORGAN: Right. We will break for five minutes and sit again at 11.30 am. That is giving you seven minutes.

(11.23 am)

(A short break)

(11.32 am)

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: I am about to move on to a different topic, which is grounds 1 and 3, which is the question of implementation and effects.

The basic point is a simple one. Although an object infringement doesn't require the CMA to prove that the infringement had actual effects on prices, evidence as to the infringement's non-implementation or a lack of effect is relevant in the context of penalty. In my submission, the reason is obvious: an infringement which is not implemented or otherwise has no actual effect on prices is by definition less deserving of a higher penalty than one which does.

In my submission, one can already see this quite clearly from the CMA's own guidance. We can quickly look at that in Authorities 1, tab 21, starting at 2.8.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is the last sentence:

"When making its case-specific assessment, the CMA will consider the relevant circumstances of the case."

And it gives some non-exhaustive examples of that.

Over the page, it talks about the actual or potential effect of the infringement, competitors and third parties, and any actual or potential harm to consumers.

Then to go back to 2.4:

"The penalty must reflect adequately the seriousness of the particular infringement and ultimately the extent and likelihood of actual harm to competition or consumers."

Then under step 4, 2.24, last sentence, it talks about the impact of the undertaking's infringing activity on competition. In my submission, that would include a lack of effect or implementation. So that is the starting point.

There are both factual and legal issues wrapped up in this ground. On the factual

front, there are essentially two different buckets of issues. One is what I would call a granular picture, whereby in respect of each of the tenets, there are particular items of evidence, documents referred to in the Decision which the CMA says demonstrate implementation. We have in our skeleton and in our NoA engaged with those in some detail. So subject to the Tribunal's comments, I was not proposing to go document by document simply because there is not time.

MR JUSTICE MORGAN: I think that is realistic. We will have to see what did the CMA decide about this question on the facts, and then we will have to see which of those findings of fact do you challenge, then we will resolve that challenge. So we will end up -- the product will be findings of fact on these questions. We have an agenda for that in the skeleton argument, we know where to go and how to do it.

MR O'DONOGHUE: Thank you, my Lord.

MR JUSTICE MORGAN: You are right, there are three tenets, and we have evidence from your side that FPM did not charge the list prices, so it didn't keep prices up in accordance with its price list. But of course, there is much more to implementation than that. There is making an agreement with the other party and then the other parties doing something for the benefit of FPM and to the harm of consumers. That is implementation, although it is not FPM's own action in relation to its prices.

Then there are the points about market shares and bid rigging, and so on. We will have to see -- and I don't profess to be word perfect on the CMA Decision because it is such a big piece of work, but we have to see what were the findings there and which of those you challenge.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: There are also points as to giving information as implementing -- receiving information as implementing, and so on.

MR O'DONOGHUE: Yes, I am going to pick up on some of those, albeit briskly.

MR JUSTICE MORGAN: Right, good, thank you.

MR O'DONOGHUE: On the second tenet of course, we did have a live witness in the form of David Williams again in relation to his evidence, which is referred to extensively in the Decision under the second tenet. The Tribunal will have to make certain findings based on the evidence you have heard from him. A few points on Mr David Williams, if I may.

I take no relish in saying this, but in relation to the CRM entry, he was a self-confessed liar. He accepted he had inserted a wholly fabricated entry into FPM's CRM system about a visit to a customer. His explanation for doing so, which Sir Iain very fairly put to him, that he felt he was under pressure about mileage, was wholly implausible.

MR JUSTICE MORGAN: It was wholly implausible?

MR O'DONOGHUE: Yes. Because why wouldn't he have recorded what he said in response to Sir Iain's question if that was the true position? Indeed, in response to Sir Iain's question, he said that making false entries -- he said, "This is something which happens all the time". If by that, he meant deliberately inserting false references, it is a rather curious interpretation of honesty. If he meant sometimes meetings don't actually happen, then fair enough. But the problem for him is that that is not actually what the entry said.

The entry, it wasn't just that he made up a visit that didn't actually happen, it was a whole yarn. It was about work flooding in, he will send over drawings, and so on. So it was a deliberate and relatively detailed and multifaceted attempt

to concoct --

MR JUSTICE MORGAN: He said he spoke to a colleague of the named person, and I wondered if he was going to say the colleague had told him this. But he didn't say that.

MR O'DONOGHUE: No.

MR JUSTICE MORGAN: He could have said and probably no-one would have been able to challenge it, but he did not say it.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: But -- all right. He wrote something that was not true, certainly. I am not minimising that, it is his own evidence. I think you put to him that he had admitted fraud as if he had something to gain from this. He didn't have anything to gain on mileage because he had driven the miles. Could he have something to gain from it?

MR O'DONOGHUE: Sir Iain's second question, which again was very fair -- I am glad you raised it, Sir Iain -- did you personally gain from this?

In my submission, the way to think about this is you put in this entry, in principle you can claim the mileage even if in fact the visit didn't take place for some good reason. But if your employer, as in this case, discovers that this whole yarn has been concocted about the visit, the employer, in addition to gross misconduct, may well feel justified in disallowing mileage on that basis or be more circumspect in future. So Sir Iain was perfectly fair to put that question; he didn't actually, it seems, personally benefit in this instance. But in my submission, it doesn't detract from the gravity of the situation.

MR JUSTICE MORGAN: I mean, I did not go into it more thoroughly because I thought we were at risk of going too far away from the point to examine the entry rather than examine the evidence about competition. It looked as if he

was trying to "big up", to use that phrase, the work he was generating, that this was a very exciting opportunity --

MR O'DONOGHUE: Yes. "Wonderful meeting, work is flooding in, drawings coming over."

MR JUSTICE MORGAN: -- perhaps he was bigging up his contribution to the company at a time when he knew his contribution was being questioned. What are you doing for us? Here he has this story about getting a big contract or similar.

But that is speculation. I did not go there deliberately because we can take a long time drilling down to that.

MR WILLIAMS: In a sentence, can I say the CMA does have a concern that these are public proceedings and there will be a transcript in which allegations of fraud are now on the record. In our submission, there was no basis for them, and I just want to say at this point that the CMA strongly resists the idea that any suggestion of fraud should be made in this situation.

MR O'DONOGHUE: I have clarified exactly what I am saying in response to Sir Iain's question.

MR JUSTICE MORGAN: Right, you do that. He made a statement which he knew to be untrue. It is a falsehood and he said it was a falsehood in his e-mail. What his motive was and whether it was personal gain of a direct monetary kind, that is not really established. Whether there was some other advantage he was driving towards is not clear one way or the other. You don't generally tell lies for no reason, you usually tell them for a reason.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I'm not speaking from personal experience, but observing others.

MR O'DONOGHUE: Nor am I.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: But I don't want to trivialise this and I also don't want to dwell on it too much. But there is an important nuance which is if your employer gets wind of the fact that you are actively concocting false meetings and pipeline work that never took place, the employer may well feel that your mileage allowance or expenses should be withdrawn.

So there is a distinction perhaps between did he make a personal gain in this instance and would this have been a basis for disallowing certain expenses which were claimed on what I would submit was a fraudulent basis? There is a distinction, I hope I have made that clear.

MR JUSTICE MORGAN: All right.

MR O'DONOGHUE: Sir Iain was perfectly fair to pick me up on that and to allow the witness a chance to clarify his position.

MR JUSTICE MORGAN: Yes. I think Sir Iain has a short point.

SIR IAIN: I think just to clarify: if Mr Williams had used his own vehicle and had claimed, say, 40p a mile for a journey that he never took, then it could be argued by some that his fingers were in the till, and I think these were the words you used. But that is not what happened. He did make the journey and he used a company card.

Now he didn't tell the truth about who he met at the other end and the nature of the sales discussion, if I can call it that, but he did not make any cash monetary gain from it, and I think it was that distinction that I was trying to draw out there. But again, your point about the truthfulness of the entry on the company's record was one that was made.

MR O'DONOGHUE: I think we have taken that as far as we can humanly take it,

and I am grateful to Sir Iain for allowing me the chance to clarify what I am saying and what I am not saying. Because I do wish to be fair to the witness, I am not here to make cheap points.

MR JUSTICE MORGAN: Right, thank you. You said that about Mr Williams. Of course he was not here to explain that, he was here to tell us about what he said he was told about poaching.

MR O'DONOGHUE: Yes, let me come to that straight away.

On that issue, the substance of his evidence was, in my submission, for the most part speculative and riddled with assumptions. Just to give you a very vivid example, you recall in his witness statement he said that without a doubt, somebody had been told about the alleged no poaching agreement.

When I put that to him, he accepted straight away that he had no actual knowledge about that at all. So it's an example of a very strong statement in his witness statement which on the gentlest of probing, he admitted he knew nothing about. And it is fair to say that he seemed to have difficulty distinguishing between speculation and assumptions on the one hand and what he actually knew on the other.

The other point I would make in connection with David Williams is that in truth, he was a peripheral figure within the company. He was not there very long, he was a regulatory guy working mainly from home in Wrexham, albeit visiting customers on the regulatory side. The suggestion, for example, that he was approximate enough to Eoin McCann, the managing director of a large organisation, who by the way he detested, that he was approximate enough to him that all of these aspects of the infringement would be made aware to him, is wholly remote.

The only two people he specifically mentioned having allegedly told him about the no

poaching agreement was Eoin McCann and Andrew Cooper. I put to him on more than one occasion that they simply didn't, and that is a finding I am inviting you to make.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: We would say in relation to the CMA's only witness of the second tenet that they have not discharged their burden.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: That is all I wish to say about that.

The third bucket is in relation to the economic evidence. If we can just quickly turn that up, it is in volume 1, tab 3.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: I am sure the Tribunal-- is aware of this, but it is important to be clear and precise about what conclusion is reached in this report. We can see it I think at 117 on page 356 in particular.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Overall, that's my analysis of the regression. No evidence to suggest an effect on prices charged by FPM during the relevant period. One of the points your Lordship put to me is that is all well and good, what about CPM, and I will come to that.

MR JUSTICE MORGAN: It is all about FPM, yes.

MR O'DONOGHUE: Yes. That is fair, I accept that. That is the conclusion which is set out and of course none of this is contested. I want to be quite clear about the upshot of that, what are the legal consequences. In my submission, this is a question of the law on evidence; that if an expert report is tendered by a party, particularly in a merits appeal which is uncontested, as a matter of the law of evidence, the Tribunal, subject to the report complying with formalities,

is obliged to accept that the conclusions in the reports are made out. The reference for that is the *Griffiths* case, which is in Authorities 6, tab 73.

MR JUSTICE MORGAN: We have it in 7 but we have it at tab 73.

MR O'DONOGHUE: I am grateful. It is paragraphs 33 to 35. I invite the Tribunal to look at those, and in particular paragraph 35.

MR JUSTICE MORGAN: Right. The type of case it appears from paragraph 1 where the judge summarises what the claim was, so 33 to 35.

MR O'DONOGHUE: Read the middle of 35, the second half of 35. **(Pause)**.

MR JUSTICE MORGAN: We have seen what is said there.

MR O'DONOGHUE: Sir, in circumstances where it has not been suggested that Dr Chowdhury's report does not comply with the reference of formalities, the CMA is stuck with it. That is a rule of evidence, not a matter of discretion.

MR JUSTICE MORGAN: Right. But the particular part of it you are relying on is 117, isn't it?

MR O'DONOGHUE: That is the conclusion, yes, there was no actual adverse effect on FPM's prices during the relevant period.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: To pick up a point your Lordship fairly put to me, which is well, that is FPM, what about other aspects of the infringement? In particular, one of the points made by the CMA is what about CPM and SBC? There are a number of responses which can be made in relation to that.

First of all, my client has done everything it can within its sphere to put forward and discharge any evidential burden. I mean, it would obviously be impossible; indeed there would be a particular irony given what we are appealing, if my client had to or was expected to obtain price costs and margin data for the purpose of regression of its competitors, so clearly we could not do that.

MR JUSTICE MORGAN: That might be anti-competitive behaviour, yes.

MR O'DONOGHUE: Yes, we might be in more trouble.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: But the second point, which is an important one: in fact CPM suggested to the CMA, handed them on a plate evidence that it had done an econometric study showing that there was no impact on its prices either. If I can just show you that, it is in volume 3 of the hearing bundle.

MR JUSTICE MORGAN: Yes. Which tab?

MR O'DONOGHUE: Back to the first reference, this is FPM's response to the draft penalty statement. It is 2.4.2.

MR JUSTICE MORGAN: All right. The draft penalty statement is divider 83, the response is 85?

MR O'DONOGHUE: It is tab 90.

MR JUSTICE MORGAN: Right, this is FPM.

MR O'DONOGHUE: Making two points 2.4.2, does the Tribunal have that?

MR JUSTICE MORGAN: Yes. Speaking for myself, I have 2.4.2.

MR O'DONOGHUE: 2.4.2 says we have seen from CPM's response that it is making quite a detailed case on non-implementation, and that is consistent with the case we are making on non-implementation.

Then at 2.4.3, there is a reference to this economic study from CPM. Effectively, we are inviting the CMA to engage with this evidence, which is not within our sphere but is available to the CMA. The actual CPM document which refers to this evidence is in hearing bundle 2.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Tab 60, my Lord. If I can invite the Tribunal to start reading at the bottom of the first page, page 981, which is hidden. You see incomplete

summary of the alleged factual matrix starting with, "There is cogent evidence", and then if you could read the following page and the first paragraph of the third page, please.

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

Right.

MR O'DONOGHUE: In particular on the top of the third page, "CPM commissioned an analysis", and you see the results. Of course at this stage, the Decision obviously hadn't been rendered and at this stage there was an entire section in the statement of objections which is concerned only with implementation.

You would have thought on the face of it that if you had written a statement of objections concerning implementation and if someone is handing you on a plate both factual evidence on non-implementation and a study on a lack of effect, you would grab it with both hands because it would be relevant to your assessment. It doesn't seem that the CMA even asked for this study. We certainly have seen no evidence they even asked for it at any stage, which does strike me as extraordinary.

MR JUSTICE MORGAN: What is being said is CPM didn't adhere to its price list, it offered discounts.

MR O'DONOGHUE: Yes, no implementation.

MR JUSTICE MORGAN: But there had been an exchange of sensitive pricing information?

MR O'DONOGHUE: Yes, the fact of the agreement was not denied. They had to admit the agreement.

MR JUSTICE MORGAN: And it was implemented because information passed from one to the other --

MR O'DONOGHUE: In a legal sense, yes.

MR JUSTICE MORGAN: -- and FPM was able to take account of that information when charging its prices. It did go below its list price many times, but it knew what the other competitors' price list was. The question really is: would it have awarded the same discounts or bigger discounts if it had been acting independently of CPM and Stanton Bonna? The problem is once you get the information, you have it and you know it and you cannot fail to use it. That is the problem.

MR O'DONOGHUE: My Lord, there are a few points and I think one needs to be precise. Certainly in the case of FPM, we have submitted an uncontested econometric regression study showing that there was no actual effect on FPM's prices, so that comprises the point you are putting to me at least in relation to FPM.

In relation to CPM -- this is a point the CMA makes and I may need to come back to it -- but the point being put by the CMA, in my submission doesn't really get them anywhere. It is as a matter of law that if horizontal competitors disclose sensitive information, the case law on object assumes that it was taken into account unless they show otherwise, there is a rebuttal of presumption.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: But there are two points to make. First of all, that has to do with the existence of an object infringement which I don't contest as far as it goes. But in any event, through the econometric study we submitted and the other evidence -- and there is more, I will show you -- that CPM was putting forward, this was rebutted, or at least the CMA needed to consider a robust case being put forward as to a lack of implementation and/or effect.

So relying on this legal presumption, in my submission, doesn't get the CMA very far, the game by this stage has moved on. There might be a good point in object,

but it is not a good point on the lack of implementation, and it is not a good point on the lack of actual effect on prices.

Just to round off the picture for CPM, if we go back to tab 53, page 944, if I can invite you to read paragraph 4. This is a letter from CPM's solicitors to the CMA on 10 July 2019, which was around the time the draft statement of objections was issued. It was our position -- you see, for example, in paragraph 6, "You state the draft SO will be 180 pages," so it had not at this stage been issued. But if you could look at paragraph 4, the CPM was already making a number of points.

MR JUSTICE MORGAN: I have read paragraph 4. Is that what you want us to read?

MR O'DONOGHUE: My Lord, yes. You see in the last sentence, they describe this information as an important aspect of the case. And something I have to come back to the context of compliance, they say in the middle under "secondly":

"It may be relevant whether an agreement existed at all."

Which is one of the things FPM has been castigated for saying. And of course this was a settling party who as a condition of settlement had to fess up to the existence of an agreement. I will come back it that later today.

MR JUSTICE MORGAN: They are saying we did agree elsewhere in this document, "We did agree to fix prices."

MR O'DONOGHUE: My Lord, they are saying, secondly, it may be relevant as to whether an agreement existed at all. I will come back to that.

MR JUSTICE MORGAN: I don't know what they mean. It might be saying: we used the words, everyone said we agreed fixed prices, done deal. But then we didn't comply with the agreement and everybody knew we didn't comply, so

the agreement effectively didn't exist anymore. Words have been used but it ceased to govern conduct.

It might be saying that.

MR O'DONOGHUE: My Lord, maybe. Maybe.

MR JUSTICE MORGAN: I mean, they don't seem to be saying: because we didn't do it, it shows we never used the words in the first place. They seem to accept they did use the words in the first place.

Right, I understand your point, you are comparing this with what FPM said.

MR O'DONOGHUE: Yes, I will come back to that.

MR JUSTICE MORGAN: You will.

MR O'DONOGHUE: It is a bit more complicated in the sense that if the infringement is being expressly articulated as one which comprises implementation, then on one view a challenge to a limitation may be a surgical strike on the existence of an agreement to begin with. But I will come back to that, I don't want to sort of digress too much.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: If we go to the Decision in volume 1, paragraph 5.99.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: I do not think you need to read it now, but the essential point is 5.99. FPM has made representations of a lack of effect. What you don't see, in spite of the number of documents I have shown you -- sorry, Sir Iain doesn't have that yet.

I get the impression FPM is making representations on the lack of effect and it is quite surprising, in my submission, that in view of the extensive submissions made by CPM in relation to a lack of implementation and effect, this is not even mentioned in this section of the Decision dealing with no evidence of

effect.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Can I pick up on a handful of legal points going to this ground. The first point is that a lack of actual effect is at least relevant to penalty, even if a proof of actual effect is not required for object. Can we start with the *Kier* case on this point, which is in Authorities 4, tab 49?

MR JUSTICE MORGAN: I think this is now accepted by Mr Williams, isn't it?

MR O'DONOGHUE: I am not sure it is, at least entirely.

MR JUSTICE MORGAN: He may emphasise it less than you, but --

MR O'DONOGHUE: Perhaps he can clarify to save time.

MR WILLIAMS: Could I ask what you think I accept, Sir?

MR JUSTICE MORGAN: That when considering penalty, the impact of the conduct is relevant to penalty. To put it another way, the impact or the effect of what was done is relevant to penalty; the effect on competition, the effect on consumers.

MR WILLIAMS: Yes. We accept, as the guidance says and as *Kier* says, that the actual or potential impact is relevant.

MR JUSTICE MORGAN: But to say there is no actual there was just potential, is that the same as there being both actual and potential?

MR WILLIAMS: There are two separate questions, Sir. The first concerns the extent to which there is an obligation on the CMA to investigate facts and --

MR JUSTICE MORGAN: I agree. I agree that is a different question.

MR WILLIAMS: Yes. On that point, we say there is no obligation on the CMA to investigate facts. As to the relevance of evidence about actual effects, we accept positive evidence of actual effects may go to aggravate the penalty.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: But we don't accept that evidence of the type submitted by FPM that there was no effect on its prices is a factor going to reduce or mitigate the penalty.

MR JUSTICE MORGAN: Second proposition: positive evidence of actual effects may aggravate the penalty and your second(?) proposition?

MR WILLIAMS: We don't accept the evidence of the type submitted by FPM, which was intended to demonstrate that the infringement had no impact on its own prices and only on its own prices, is evidence which is capable by itself of mitigating or reducing the penalty. FPM has put this variously in terms of it being a mitigating circumstance; and in terms of it as a factor going to seriousness, we don't accept it achieves either of those purposes.

MR JUSTICE MORGAN: It is easier to analyse this not in terms of aggravation or mitigation, but in terms of how serious was the infringement, which is what you have just said. The central argument for the appellant is that something which is agreed and then implemented having effects is more serious than something which is agreed but is not implemented has no effect. I thought you did accept that --

MR WILLIAMS: No, we don't accept that.

MR JUSTICE MORGAN: It's not more serious?

MR WILLIAMS: No, and I will develop this point --

MR JUSTICE MORGAN: I have misread or misunderstood something. Mr O'Donoghue should continue then to put his case on the relevance of effects.

MR WILLIAMS: I can add another sentence, if it helps.

MR JUSTICE MORGAN: It may help him and it may therefore help us.

MR WILLIAMS: Yes. There are two points we make: first of all, liability for the

infringement is joint and several, so it is not a good point for FPM simply to look at the impact on its own prices.

The other point we make is that the evidence FPM has submitted is consistent with the view that it merely cheated on the cartel and exploited it to its own advantage. We say that that kind of distortion of competition is not less serious compared to a situation in which the party goes on and charge cartel prices.

MR JUSTICE MORGAN: Right, good. Thank you, that is helpful.

MR O'DONOGHUE: I am somewhat staggered to hear that we would have been obliged to implement the cartel to mitigate these alleged distortions of the competition. Anyway, the idea we would be in a better position if we had implemented it as opposed to compete by cheating is a surprising point. But anyway ...

It looks like I am going to unpack some of this. I had thought some of this was accepted, but it seems it is not.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Can we start with *Kier*?

MR JUSTICE MORGAN: Yes. You said it was what tab?

MR O'DONOGHUE: Tab 49 in Authorities 4, my Lord, 133.

MR JUSTICE MORGAN: Yes, thank you. **(Pause)**.

MR O'DONOGHUE: If the Tribunal can look at the start of 132, it picks up on your Lordship's point the seriousness of the infringement, which is closely related to its harmful effects, actual or potential, on the specific market, and so on.

Then 133, the OFT's response is that the present infringement is by object and it is not required to identify the effects on the market. This does not meet the

point.

With respect, Mr Williams is tilting at a windmill because of course I accept that for an object infringement, he doesn't need to demonstrate an actual effect. Everybody knows that. The CAT goes on:

"Whilst the characterisation infringement "by object" means that effects need not be proved in order to establish the breach, this does not render irrelevant the likely effects [and I emphasise "likely"] to *penalty*. It is clearly necessary to take into account the effects (actual or potential) of an infringement when considering its seriousness, as the Guidance states in unequivocal terms. There is nothing in the Guidance which suggests that a different approach should be taken for infringements by object. Moreover the Decision itself emphasises the importance of "ensuring that there is a correlation between the penalty and the harm"."

I would suggest all of this is blindingly obvious. If we go back a few pages to 3038, the last sentence at paragraph 88:

"Had the OFT reached conclusions as to the actual effects of the infringements, it might have been justified in setting higher starting points."

MR JUSTICE MORGAN: We are on 3038. Which paragraph?

MR O'DONOGHUE: Paragraph 88, the last sentence.

MR JUSTICE MORGAN: 88, right.

MR O'DONOGHUE: The Tribunal in this case didn't reject the submission in any shape or form and it is obviously right.

The suggestion made by Mr Williams that they can jack up the fine where they can show effects but where there is evidence which is unchallenged coming from the defendant showing a lack of limitation and/or a lack of actual effect counts for zero is a surprising one.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: One further authority, if I may: *Allianz Hungária*, Authorities 8, tab 102, paragraph 38 on page 6342.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: If I could ask the Tribunal to read paragraph 38. **(Pause)**.

It is the same point you saw in *Kier* which is fine to establish breach by object, you don't need to show an actual effect. But the lack of effect is at least relevant to the amount of any fine and assessing any claim for damages. This is not a flash in the pan, you see there is cross-reference to paragraph 31 of *T-Mobile*, which is another Court of Justice judgment.

MR JUSTICE MORGAN: Sir Iain has a question.

SIR IAIN: It is just a question. It seems in paragraph 38 that a cheater has the potential to have a negative effect on competition. May I ask you what your understanding is of the word "potential"?

MR O'DONOGHUE: Mr Williams's argument in a nutshell is that for his purposes, potential is sufficient and even if there is lack of actual effect, well, so what? He can still fall back on potential.

Let me just pick up on that.

MR JUSTICE MORGAN: My understanding is the reference to potential there is when deciding whether there is an infringement, whether there is an infringement by object.

MR O'DONOGHUE: Yes. That clearly goes to the question of breach, which I am not concerned.

MR JUSTICE MORGAN: Reading it for the first time, the second part of 38 then goes on to make your point, you say, that the effect in fact of what was done can be relevant to --

MR O'DONOGHUE: And damage.

MR JUSTICE MORGAN: Plainly if there is no effect, there can't be damage. You don't get damage for conspiracy just because there's a conspiracy. I am sure there are adverse consequences to conspiracy.

MR O'DONOGHUE: My Lord, that is quite right. That is why it is very difficult to see that when they say effect in this context that they are only referring to a potential effect, or that a potential effect would suffice. Because as you say, my Lord, you would get zero damage for zero actual effect, the potential would be neither here nor there.

So even textually, what the CMA says doesn't make any sense. The other textual point I would make is they say whether and to what extent in fact such an effect results, and again that seems to be unlikely to comprise only a potential effect.

MR JUSTICE MORGAN: No, results is by way of contrast with the potential to result, I think, right?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Of course the guidance refers to actual and likely as two things. It is actual or likely. You can be penalised where there is a likely effect --

MR O'DONOGHUE: Indeed, or even the potential effect.

MR JUSTICE MORGAN: -- or potentially you could be penalised for a potential effect.

MR O'DONOGHUE: Of course, one can see -- for example, suppose I entered into an unlawful agreement yesterday and today I am dawn raided and in fact it was never put into effect. You can see in that situation you may have probably an unusual case where the agreement which was clearly liable to

have significant effect had no effect at all.

In that situation on the question of breach, you can understand why if the CMA could not rely on potential effect, that would be very, very surprising, there would be a serious gap in enforcement. But when it comes to penalty, if there is evidence tending to suggest a lack of actual effect, then of course for all series of obvious reasons they should look at it.

MR JUSTICE MORGAN: Yes.

MR DORAN: If I could ask: if you have a cartel of this type which lasts at the highest level for six maybe seven years, if you discount -- if you only look at the actual effects, then you sort of render the object case rather difficult to -- it requires the same digging which in fact an object case is meant to obviate, is it not?

Because you have to track down in order to calibrate penalty, which is what an object case is designed not to do but is actually designed to enable the relevant authority to take a view about potential effect without doing that enormous drains up exercise.

MR O'DONOGHUE: Yes. I hope I have made crystal clear on the question of breach, I am not arguing in any shape or form that it is incumbent on the CMA to engage with the question of actual effects on prices at all. I take that as read.

MR DORAN: I want to be absolutely fair and this is why I asked the question. Because at its extreme, you could be saying to us that liability is found because there is a potential effect because it is an object case. But one can only then calibrate the damages if one does the drains up exercise, which would sort of obviate the benefit which ostensibly an object case grants to regulatory authorities.

MR O'DONOGHUE: Well, Sir, if I can put it this way --

MR DORAN: I don't want to be unfair to you.

MR O'DONOGHUE: No, no, it is a perfectly fair question. Let me see if I can answer it.

As I indicated, it is clear beyond peradventure that a lack of actual effect is neither here nor there on the question of object. The object is justified because there are certain things like cartels which as a matter of procedural economy, there is no point worrying your head too much about how much effect it had. There was a prophylactic purpose in prohibiting certain categories of conduct.

That is understood for obvious reasons, it is essentially through iterative experience. We know there is not much point wasting a lot of time and energy in deterring certain types of conduct. Having said that, it is entirely possible in the real world that you may have a serious object infringement which as it turns out has zero actual effect and there are a lot of econometric studies on median overcharges say in cartels which showed that in a surprising number of cases, there was no effect at all on the cartel. Even more surprisingly, I have been involved in cases where serious economists on the basis of regression have said not only is there no actual effect, in fact it seems there was a negative overcharge.

These things are conceivable but it doesn't suggest in any shape or form that it is incumbent on the authority at any stage on breach to engage with econometric evidence, for example. You may well have a world where there is a decision rendered with quite a serious object infringement and no actual effect, and you also have a lot of decisions, and *Paroxetine* may well be one of them, where there is a simultaneous finding of object and/or effect and the object infringement is made out but for whatever reason the effect case is not made out.

The submission therefore was often made: look, how is it possible that we have shown a lack of actual effect but you persist with your object analysis? The Court has said for decades at this stage: well, that is completely irrelevant. It may well be a conundrum, it does sound a bit odd, but if one thinks about in terms of procedural economy, this and the prophylactic purposes of object and the burden to be imposed on the public authority, that is justified.

But in this case, I am making a separate point, which is when we and CPM put forward a whole series of evidence tending to suggest lack of implementation and/or actual effect at the stage of penalty, they cannot bury their heads in the sand and say: well, because it is object, why would we bother looking at that? In my submission, that is a different point.

MR DORAN: Just to finish my question: one has a cartel which you don't contest lasts for six, nearly seven years. One-way information flow at the very least, co-ordination and allocation of customers. As an object case, the argument is that it is as a matter of public policy bad for the economy if competitors meet in these circumstances persistently. And without us tracking down precisely what the impact was in the real world, that is just bad, and they can be fined accordingly.

What you seem to be suggesting is they can be fined but only a very small amount unless they do an enormous exercise of econometrics, which as I said at the outset, the object case was designed in order to avoid that.

MR O'DONOGHUE: Again, there is repetition --

MR DORAN: I don't want to repeat. I am merely puzzled by the answer.

MR O'DONOGHUE: The question of breach for the authority is in the bag. There is then a question at the stage of penalty as to how big the penalty should be.

At that stage, things like seriousness, market impact, and so on, are, as we see in

the guidance, relevant considerations. In my submission, there is nothing intrinsically wrong or offensive about the idea that if an object infringement turns out to have been a complete waste of time or not to have had much impact, that on some level should be reflected on penalty.

MR DORAN: Are you suggesting one could say: in terms of aggravation, senior people involved up to 15 per cent, or whatever the number chosen by the authority is, lack of detectable effects as evidenced by the parties (Inaudible) something and one just tots up through the guidance and comes up with a figure?

MR O'DONOGHUE: Yes, one goes to the debit side, one goes to the credit side.

MR JUSTICE MORGAN: Speaking for myself, it is not really aggravation and mitigation -- it might be, but it is really seriousness of the conduct. It would be perfectly permissible for a decision maker to say that this anti-competitive behaviour by object was of the most serious kind. I mean, price-fixing is very serious wrongdoing, agreeing to price fix is very serious wrongdoing, and we are going to give you this penalty whether you implemented it or not.

It is like conspiracy to murder where the murder never happens for whatever reason. Some may minimise culpability, some might not, and you might be given a life sentence for conspiracy to murder. There is nothing wrong about that.

What would be wrong would be if the sentencer says, "We are going to fine you X million for anti-competitive behaviour by object and we will increase it to X plus £5 million because of the very serious consequences." Because if they were to identify a distinct step based on consequences, then there have to be consequences.

Turning to Mr Doran's question about -- which is very much Mr Williams's case that it will place a quite inappropriate burden on the enforcer if it has to lift the drains

and measure the effects, Mr Williams says that we must stay away from producing that result.

I thought I saw in your written argument that you have a way of dealing with it. You say: well, this is penalty, you have to deal with a number of issues in a broad-brush way. So you can ask in a broad-brush way: did this have an impact? Did it in fact have an impact? You don't measure it in detail, you are not awarding damages or compensation. You are just saying "Is this an agreement without impact or an agreement with some impact? How serious is it?"

That would not entail an oppressive burden at the penalty stage. Of course, what we have to do is we have to see what did the CMA find about impact. Did it do a broad-brush and say, "Get real. These are three aggressive companies. They make an agreement restricting competition, they have repeated meetings, it goes on for nearly seven years. To say it had no impact on competition is just too big for us to swallow," says the CMA.

It has obviously had some impact. It is broad-brush, but that is what Mr O'Donoghue says is permissible: broad-brush. That is a territory we have to go to, I think, in due course.

MR O'DONOGHUE: Yes. But to be clear, I am not saying that there is any obligation on the public authority at the penalty stage to go out and find evidence of a lack of effect. You can think of this in terms of public law. At the stage of penalties we see in the guidance, the impact, for want of a better word, is a potentially relevant consideration. If a defendant discharging his evidential burden puts forward a piece of evidence -- which I do emphasise in this case is completely uncontested -- then at that stage the public authority has a duty to engage with that uncontested evidence.

I entirely accept that the CMA doesn't then have to construct some sort of competing counter-regression, but it has to form some conclusion, particularly when it is uncontested, that this has some impact on various aspects of the penalty. It may well be broad-brush and it may be this is not binary between no effect whatsoever and the most pernicious effects imaginable.

The authority or the Tribunal on appeal may well be justified in reaching some intermediate position, which is the question of actual damage would be particular to private parties. But based on the evidence we have seen, we think there was a credible prima facie case of a certain lack of effect of implementation and that is a relevant consideration in the context of penalty.

MR JUSTICE MORGAN: Another feature: there were three tenets, anti-competitive, by object, likely to have an effect on competition. After all, the parties were doing this to improve their commercial position vis-a-vis consumers. And you are making the case well, we can show you that FPM didn't increase its prices and we can show you that there was a case to be explored that CPM did not increase its prices. But that is one tenet, that is price fixing. There are the other two which were anti-competitive and likely to have an adverse effect on competition.

Isn't it open to the CMA in a broad-brush way to say that anti-competitive by object, seven years, serious wrongdoing, and all we are told is that it didn't have an effect in a small part, an important part of the area of wrongdoing? Isn't that enough for broad-brush which you yourself say is the approach, broad-brush?

MR O'DONOGHUE: My Lord, that is why I showed you paragraph 1.17 of the Oxera report. They didn't just do a snapshot, they analysed all of the prices for all of the relevant products. So to put it another way: for none of FPM's products covered by the Decision have they found any discernible effect.

It is true that there is a tenet which is concerned with market shares and the no poaching agreement. But ultimately, this is a market where competitors competed on price and in one way or another, this will have to come out in the wash in prices and the evidence --

MR JUSTICE MORGAN: No, but also the consumer is denied the choice of contractor. There are three contractors here and in a proper market with proper competition, the consumer can go to the one it prefers. But what is happening is that the market is being restricted and it doesn't really have the opportunity to go to one of them or two of them. That is anti-competitive behaviour with an impact on a consumer. It may not be measurable in terms of price, we don't --

MR O'DONOGHUE: My Lord, in my submission, the effects that are relevant are economic or market effects and the only rational reason on which you would prefer to deal with competitor B rather than competitor A in this market is you are getting a better deal. Again, we see in the FPM data that that was not the case.

MR JUSTICE MORGAN: I wonder. I think quite often when you have tenders in, you do not take the lowest price because you prefer the higher charge from a different contractor for other reasons. So it is not just about price, it is about choice.

Anyway, I still indicate that we have to read what the CMA decided, we then have to interpret it. You and Mr Williams read it differently, so we have to resolve that. Then we have to identify what you challenge, and maybe your challenge falls away if we do not read it the way you want us to read it. If your challenge remains we have to resolve it. We then see "did the CMA increase the penalty by reference to any effects impermissibly?"

MR O'DONOGHUE: One can look at this another way which is: under the guidance, there is a sliding scale of 21 per cent to 30 per cent at the top level. In my submission, a lack of effect may be relevant to where on that spectrum one might sit.

MR JUSTICE MORGAN: I understand, right.

MR O'DONOGHUE: My Lord, again it may not be binary, it may be that there are two or more considerations which you need to weigh up. (Inaudible) a lack of effect which as I say is uncontested based on the Oxera report, that is one consideration; and it may be that in the other direction there is an indirect impact on a market, perhaps choice, which is a different form of consideration. But it doesn't mean that the former becomes entirely irrelevant. At the very least on the first tenet, which is all about price, it must be relevant there. I would submit that in fact on analysis, it probably straddles all of the tenets, so it may not be a binary thing. These are assessments to be made about prima facie impacts perhaps in different directions, and the question is: is the Tribunal satisfied on balance that there is an element which makes this infringement less serious and therefore less deserving of a higher penalty?

So in my submission, that is an alternative position.

MR JUSTICE MORGAN: Understood, right.

MR O'DONOGHUE: Just to round off a couple of points on potential effect. If I can quickly go to our skeleton.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is at 132(3).

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: We set out there a number of authorities. The point this is addressing is the dichotomy between actual or potential effect. The essential

point being made here is that there are a series of European and domestic authorities which say that where there is a potential effect identified, what I would call ex ante, if it turns out with perfect hindsight you can discern a lack of actual effect, then to fall back on the hypothetical ex ante effect is no longer open to you.

If I can just invite the Tribunal to read 132(3) in particular and also footnote 169, so the *Streetmap* case, Mr Justice Roth -- there is a quotation we set out there -- and also the *Intel* case. At 169 there is a reference to the *Intel* case, which I hope partly addresses your point on potential effect.

MR JUSTICE MORGAN: You want us to read 132, sub-paragraphs 3 and 4 and the footnote?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: We will do that **(Pause)**. Right.

MR O'DONOGHUE: While we have it open, a couple of pages on, paragraph 133 and in particular (b). I think that goes to Mr Doran's point which is what you are not doing in the context of penalty is mapping on the object assessment or the effect assessment due to penalty, it is something different.

MR JUSTICE MORGAN: It was (3)(c) I had in mind when I said you urged not a detailed assessment of effects, but a broad-brush acknowledgment of effects. Because you are saying that without inappropriate resources to conduct a full defence analysis is not appropriate at the liability stage, becoming appropriate at the penalty stage.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Right. Just on effects: the restriction by object may be so serious that its implementation may not increase the gravity of the wrongdoing. But some restrictions by object may have had fairly modest

objects or potential for harm but in fact cause very great harm, much greater. And that would surely be relevant to penalty; they did something wrong, they did not perhaps foresee how successful they would be at harming competition. It was a whopping impact on competition and the penalty can reflect that.

MR O'DONOGHUE: My Lord, I accept this cuts both ways, and in fact perhaps we can turn up the guidance because there is quite a good example on this.

It is Authorities 1, tab 21. If we can go to footnote 36 on page 325, it makes the point about a predatory pricing case. (Inaudible) and a reputational effect for predation may be a benefit and that may be a reason to increase the fine.

But to your Lordship's question, this actually is a very good example because if you take predatory pricing, which as you know is a period of below cost pricing with a view to eliminating and marginalising competitors, followed by a hike in prices in the recoupment period. On the face of it, if you are selling below cost, not only are consumers not being harmed, but they are in fact benefiting from low cost prices for that period. But of course no-one with a right mind would say if it is genuine predation, that is a good thing.

So that would be an example of a case where not only was there a lack of actual effect, but the lack of actual effect or the positive effect was indeed an ingredient of the infringement. And in a case like that, of course very stiff fines would be entirely justified. I do accept, my Lord, this cuts both ways, that is an absolutely fair point.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: My final point on this is that ultimately under the guidance at a high level of aggregation, you are doing two things. You are asking yourself how serious is this infringement in general and are the circumstances of the

particular case more or less serious in the context of that general assessment. On the second part of the assessment, our essential submission is a lack of implementation or effect is a relevant circumstance tending towards a lower penalty. That is essentially what we are saying.

My Lord, I am about to move on to something distinct. I wonder would it make more sense to come back at 1.55, but I am in your hands.

MR JUSTICE MORGAN: It doesn't really matter to us. We can now adjourn and sit at 1.50, not 1.55. If you would prefer that and you can use the time well, we will do that. We will sit at 1.50, very good.

(12.53 pm)

(The short adjournment)

(1.50 pm)

MR O'DONOGHUE: My Lord, for the remainder of my time this afternoon, I want to do three things, if I may. Firstly, there are a small handful of discrete grounds which I can take extremely rapidly, and I hope to do that in 15 or 20 minutes. Then there is a meeting point in relation to *vires* which I will need to spend some time on, so I propose to spend most of my time on that.

And finally in the interests of expediting things, your Lordship put to me on Monday that on proportionality, we should set out what we say should be done on the penalty and why. We put this into a note form, which I can hand up.

MR JUSTICE MORGAN: Right. Do you go through all the stages and produce (Overspeaking) --

MR O'DONOGHUE: All the stages, yes.

MR JUSTICE MORGAN: Splendid. That seems very helpful, thank you. **(Handed)**.

MR O'DONOGHUE: As your Lordship will see, it also deals with the other question you raised for both Mr Williams and myself concerning relief.

MR JUSTICE MORGAN: Yes, good. You will take us to that in time, we will put it to one side at this point. Thank you.

MR O'DONOGHUE: Thank you.

My Lord, in a more rapid fire, if I may, the handle of points I want to deal with very quickly. First just to wrap up on the compliance point, ground 5(d), five quick points if I may.

First, the purpose of awarding a discount for compliance under the guidance is to ensure compliance, paragraph 2.19. The Tribunal heard on Tuesday from Don Mulholland. It is clear, in my submission, that Mr Mulholland takes his role as compliance officer in the company very seriously and conscientiously. He has as good a grasp as can be expected for a layman of the high-level competition law principles.

At paragraph 4.10 of FPM's compliance policy which the Tribunal saw Monday, it provides that any contact with competitors should be reported under the company contact form. Importantly, in our submission, Mr Williams did not suggest to Mr Mulholland that this system is not being implemented in practice, and I showed the Tribunal on Monday a series of contact reports for the entire period post-infringement; in particular contact reports involving Eoin McCann and Andrew Cooper, the protagonists on the FPM side, showing that they were actively reporting at meetings with competitors and the nature of those meetings. Mr Mulholland also confirmed under re-examination that the system was operating as it should be and if he had any doubt on the matter, he would refer to specialist legal advice.

So there is a failsafe to ensure compliance, even if individual directors are in doubt or have misunderstood the training and its operation. So if one stands back and asks the question in the guidance, "Is compliance being ensured?" in my

submission the answer is yes.

It is important in this connection to emphasise that compliance in the context of a mitigating factor is a forward looking thing as opposed to the situation concerning historic liability. For the Tribunal's reference it is paragraph 128 of *Eden Brown*, Authorities 5, tab 52, page 3392.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: The submission here is that you should get -- why don't we quickly look at that.

MR JUSTICE MORGAN: Okay.

MR O'DONOGHUE: It is Authorities 5, tab 52.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: The second at 128, the submission here is you should get a higher compliance discount because you have admitted liability under the leniency programme. The Tribunal rejects that because the discounts serve different purposes, so it is emphasising the distinction between the prospective and the historical.

Second, Mr Williams took the Tribunal at some length on Tuesday to the 2019 interviews with the FPM personnel. The context of these interviews, in my submission, is important. They are compulsory statutory interviews undertaken for the purpose of director disqualification proceedings, they are by their nature likely to produce defensive responses and are by their nature not suited to producing the kind of response which would ensure when Mr Mulholland has been consulted in the context of compliance with legal advice if necessary. So we submit that little weight should be placed on these interviews in assessing FPM's corporate attitude to compliance.

Mr Williams also took the Tribunal to the comments of Mr Stacey, a serving CPM

director in interview. But what he didn't address, despite the fact that I raised this very clearly, is the following: Mr Stacey -- I will give you the reference, volume 4, tab 144, page 2487, line 22. Mr Stacey says Paul Turner didn't want to get involved in the meetings, but he then says:

"He saw it was vital for the survival the business and the fact we survived and maintained the jobs of 130 people at the time ..."

And there are similar comments at page 2520. In my respectful submission, that is a far more serious suggestion than the one made by FP McCann.

Three final points on this before I move to another ground. Third, Mr Williams took you to FPM's response to the SO which he says revealed misunderstandings on implementation and effects. But exactly the same misunderstanding is revealed by CPM. We saw this this morning, I will give you the reference: volume 2, tab 53, page 944. What you will see there is that the CMA told CPM they were alleging an object restriction, so effects were not relevant. But CPM's legal representative, who saw this, said, "An unimplemented agreement may be relevant as to whether an agreement existed at all", and Mr Williams frankly conceded that this was at least, "A version of the point that FPM ran".

So we say there is no basis on which to make a material distinction between CPM and FPM, and indeed SBC, from this perspective. It would be in my submission in the context grossly unfair to make that distinction. I am not going to take the Tribunal to every twist and turn, but fundamentally the CMA in the statement of objections put a case on object that was wrapped up in things to do with implementation. Just to give you the references, it is paragraphs 23 and 29 and 84 and 85 of our skeleton.

The essential point is that at that stage, implementation was at least being used to

corroborate the existence of an agreement. If that is the case and is the context in which FPM is responding, the CMA cannot have it both ways. If it is using implementation to corroborate the existence of an agreement, it cannot then penalise an undertaking for denying infringement by saying that a piece of CMA's circumstantial evidence doesn't stack up.

Two final points: Mr Doran asked, was right to ask, whether it would be sensible in light of the matters relied upon by the CMA that the efforts and knowledge through training and otherwise for all we know pervades the organisation would count as nothing. In our submission, that would make no sense. Compliance training from specialist solicitors and the like is by its nature very expensive and if the CMA were right, FPM would have been better off not spending the money in training in 2013 and 2017 and trying to promote compliance. That would be wholly perverse and send the wrong message out to others.

The CMA in practice has shown a much more pragmatic approach itself. If I can just hand up one extract from a CMA decision. **(Handed)**.

This is the *Residential Estate Agency Services* decision and on page 134, you will see that Saxons, who did not admit the infringement -- the same as FPM -- nonetheless got a 5 per cent discount for compliance because:

"Whilst the identified compliance activities do not demonstrate appropriate steps to identify, assess and review risk, they do nevertheless demonstrate that Saxons has engaged in appropriate steps that mitigate the risk of non-compliance."

Plainly at the very least, what FPM has done is to engage appropriate steps to mitigate the risk of non-compliance and it should get a discount, and indeed we go further. We say there is significant evidence that in practice this is

working effectively.

Finally, to pick up on a point raised by the Chairman: the Chairman raised a question about footnote 1105 of the Decision which makes reference to the risk register, and so on. This notes correctly that FPM doesn't have a group risk register and has not undertaken a formal classification for rating of the risk of breaching competition law.

A few points: first, there is no such requirement to do so in the guidance. Second, if one looks at the compliance activities of CPM and SBC, one can see at 6.52(d) of the Decision that CPM has a group risk register but SBC does not. Finally, there is no finding in paragraphs 6.51 and 6.52 concerning compliance that either had a formal classification of the risk of breaches either. These two particular points are, by and large, criticisms which would equally be levelled at CPM and SBC, but they nonetheless received a 10 per cent compliance discount.

So on that basis, they cannot logically prevent FPM from not receiving a compliance discount for those reasons. Finally, on this point before I move to a different topic, the Chairman quite rightly raised this footnote, but it is not a point which has been really emphasised by the CMA at all in these proceedings.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Next ground very quickly, one point. Ground 5(c) concerns the co-operation discount. Just to remind the Tribunal of the terrain because this is not a point I opened on Monday.

At footnote 1097 of the Decision, the CMA refused to take into account the fact that FPM waived its right to an oral hearing in the context of discounts for mitigation. The reason the CMA gave for denying this mitigation was that the waiver of the hearing did not lead to "significant resource savings for the

CMA." In its skeleton, paragraph 161, the CMA's position was that the waiver of an oral hearing would not have added any significant time to the investigation.

The only point I wish to make on this ground is that this position essentially fell apart yesterday when Dr Grenfell accepted in cross-examination that the saving with the waiver of the oral hearing was non-trivial and in fact shaved several weeks of length off the CMA's investigation. For your reference, that is transcript Day 3, page 42, lines 8 to 19.

The third ground I want to address very quickly is the step 1 and step 2 turnover duration steps. This is ground 4. We have five points to make.

First of all, Mr Williams's principal submission was that it was not good enough to show a deviation from the average under step 1 because the guidance could have prescribed an average but didn't. But in this case, there was a difference of over £4 million, or nearly 20 per cent, between the average, and the last year. That is on any view not only material but very significant in financial terms. That is, in our submission, a sufficiently good reason, as he put, it to depart from the guidance.

Second, Mr Williams did not dispute that the purpose of step 1 as stated in *Kier* and *Eden Brown* is to reflect the undertaking's real economic situation during the period of infringement. He fairly conceded there was no issue of averaging in those cases, so they are not authority for the approach of looking at the final year only. You don't need -- and in fairness Mr Williams did not suggest -- that facts as extreme as those in *Balmoral* are required to justify a deviation from the starting point.

Third, as the Tribunal was shown, FPM's real economic situation did change during the period of infringement because it acquired Ennstone in January 2009. So

the first two years, 2008 and 2009, were years in which the business and the conceivable impact of the infringement were substantially smaller than in the last year. As Mr Williams fairly accepted, the market as a whole was depressed during the first three years of the infringement because of the global financial crisis. In our submission, that is precisely the sort of volatility which would justify the use of a more representative figure. The global financial crisis was not a run-of-the-mill event but a once in a generation occurrence.

Fourth, the Chairman raised the issue of the possible impact of inflation and whether that suggested the average was a bad idea. However, the final year of the infringement will in most cases be many years before the date of the decision, so inflation will affect CMA's chosen figure as well. If inflation is in fact an issue, and Mr Williams did not suggest in this case that it was, that can be if necessary taken into account under step 4 when the impact on the financial position of the undertaking at the time of the decision is considered.

Two final points. The first is that the Tribunal will have noted that Mr Williams steered clear of FPM's related argument about the duration multiplier. He had nothing at all to say about why the CMA has the discretion it does under the guidance in relation to the duration multiplier. In FPM's submission, that is because you cannot apply step 1 in isolation from step 2. They serve a joint purpose, which is to produce a representative measure of the impact of the infringement.

So in our submission, it is perfectly logical and consistent with the existence of that discretion to apply a lower duration multiplier to offset the use of unrepresentative turnover. Mr Williams avoided this point, we would suggest, because it is clearly correct and he doesn't have an answer to it.

The final point is more of a detail but not a trivial one. The Chairman raised the question of rebates which were the actual figures be used. It is common ground that the figures used in table 2 of the response to the draft penalty statement -- that is volume 3, tab 85, page 1597, which are the figures then picked up in paragraph 188 of the CMA's Defence -- need to be adjusted to exclude rebates. These figures amount to roughly 2.32 per cent of the relevant turnover in each year. So not a big amount, but also something which has to be taken into account.

The final ground I wanted to cover very quickly before moving on to the meatier points is ground 7. Although this comes last chronologically, it is not a tail-end Charlie point. The basic point -- perhaps the quickest way to do this would be it turn up our skeleton. It starts at 198.

MR DORAN: Where am I?

MR O'DONOGHUE: It is the skeleton arguments, our trial skeleton argument, paragraph 198.

MR DORAN: Thank you.

MR O'DONOGHUE: If I can ask the Tribunal to quickly peruse paragraphs 198 to 206 and then I will quickly make a point.

MR JUSTICE MORGAN: Yes. **(Pause)**.

MR O'DONOGHUE: The only point I want it pick up on is really at 199 and following. If we can quickly turn to the CMA's skeleton at 209(a), please.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The Tribunal will see at 209 in the second sentence, they are addressing the point we make that if the second tenet was only in place in 2007, it must follow that the third tenet, which was dependent on the second, was only in place in 2007 and any finding to the contrary should be

set aside. Then they go on to explain why they have not dealt with this before.

It is the first reason in (a) I want to pick up on. They say:

"The decision does not state that the third tenet was at all times dependent on the existence of first and second tenets."

If we can quickly turn up the Decision on this point at 4.277, page 161.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: It says the agreed division in market shares was achieved by the allocation of customers through the agreement in relation to term deals. But the CMA has not explained how the third tenet could have come into existence before the second. Furthermore, as we have appealed this finding, it is for the CMA to prove it and it has adduced no evidence on this point, despite FPM's pleaded case. Indeed, as you saw in the skeleton at 209, they almost make a virtue of the fact that they have not addressed this until now.

The Tribunal has, in my submission, only one option, which is to make clear that as we have pleaded in the NoA, the third tenet did not begin to at least until at least 2007, and that has a knock on impact on the question of penalty for the reasons set out under grounds 6.

My Lord, those are the rest of our grounds. I think the final task for me today is to address the question of *vires*, which I have not touched on before and requires us to cover quite a bit of ground.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Can I start, if I may, with two points of principle. First, is a rather obvious point that when Parliament imposes a maximum penalty in the criminal sphere, that maximum must be reserved for the worst possible case. It follows that imposing the maximum in a case which is not the most

serious of its kind or where there is substantial mitigation is wrong in principle, since it implicitly but clearly suggests that Parliament has set the maximum too low.

This is a basic principle which has been endorsed at the highest levels of judicial authority. If we can start, please, with the *Carroll* case in Authorities 3, tab 32.

MR JUSTICE MORGAN: I may be wrong, but I do not think Mr Williams disputes this general proposition in the type of case to which it applies. The question is: is that what section 36(8) is all about, or is it doing something else, performing a different function? But by all means show us these *dicta*, these statements.

One of the best cases is the quite recent case of Lord Justice Nigel Davis dealing with -- I can't remember the name of it, but it is a very recent statement which I felt gave you what you (Inaudible), do you understand me? But *Carroll* is --

MR O'DONOGHUE: My Lord, I think that is a very good idea. Authorities 6.

MR JUSTICE MORGAN: I took the statement from your skeleton, I did not read the case. But if your quotation is accurate, and I daresay it is, then -- this is the advantage of being very up to date.

MR O'DONOGHUE: My Lord, yes. It is Lord Justice Davis, paragraphs 31 to 34.

MR JUSTICE MORGAN: It is tab 72.

MR O'DONOGHUE: My Lord, you are right in the sense that Mr Williams doesn't necessarily disagree with this proposition, but the reason I want it take the Tribunal to it is that in my submission, it is a proposition of fundamental and general application and that has -- his real point, which is the second one I am coming to, is well -- so in the Defence, they appear to be dying under the ditch with the point that these principles applied to custodial sentences but not to criminal penalties. They have now conceded that is wrong and instead they

have a more rarefied point, which is that it applies to all kinds of criminal penalties, apart from competition law penalties which are "criminal" in nature. But I do want to establish essentially the force of the proposition before coming to the second point. So it is paragraphs 31 to 34 and in particular paragraph 33.

MR JUSTICE MORGAN: (Pause). Right.

MR O'DONOGHUE: The sentencing judge essentially can't proceed on the basis of but for the statutory cap, I would have fined you even more, and therefore in the presence of mitigation, you are nonetheless at the maximum. That is the basic point.

As I adverted to, the CMA now concedes, as they must on the basis of this judgment, that the principle applies equally to criminal penalties. Their case now is uniquely, it seems, it doesn't apply to a certain species of criminal penalty, which is competition penalty. There are a number of points to be made in relation to that.

The first I hope is an uncontroversial point. If we can pick this up in *Phenytoin*, Authorities 6, same bundle, tab 69, please.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Paragraphs 136 to 137.

MR JUSTICE MORGAN: We have the sentence between G and H on 136.

MR O'DONOGHUE: Yes, the starting point. Starting with, "The starting point is that competition law is treated as a species of criminal law," and there is a wealth of case law establishing that.

So essentially the CMA's case seems to be that the 10 per cent statutory maximum in the Competition Act is totally unique in UK criminal legislation in that unlike every other statutory maximum set by Parliament considered by the domestic

courts to date, the 10 per cent maximum is only relevant at the final stage and not at some intermediate stage before that.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Just to show you exactly what they say in paragraph 57 of their skeleton, the last sentence:

"It is cogent that a cap which is intended to ensure that the final number is not too onerous for the undertaking in question should be applied after other considerations have been taken into account."

There are a number of responses to this. Firstly, a basic but not an important point: the CMA cites no authority for the proposition I have just shown you.

MR JUSTICE MORGAN: Not at that point.

MR O'DONOGHUE: Not at that point. Put more accurately, no direct authority, maybe that is a fairer way of putting it.

Secondly and perhaps more significantly, this is precisely the approach taken in *Roth* by the Recorder which Lord Justice Davis rejected. We can pick up the example in paragraph 111 of our skeleton.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is paragraphs 110 and 111. **(Pause)**.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Just to tease out some of the inconsistencies and, in my submission, absurdities of the CMA's position.

If we start, for example, with the Decision in this case under step 4, paragraph 6.74.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: We see at 6.74 they have therefore applied a reduction to ensure that the penalty is not disproportionate or excessive. Then we see at 6.76(a), they go on to say, for example, that a penalty of the order of 11 or

12 per cent of FPM's worldwide turnover is quite clearly, by implication, proportionate and not excessive. But if Parliament had thought a penalty of more than 10 per cent of an undertaking's turnover would be too onerous, how can the CMA direct itself at step 4 that a penalty in excess of that figure is not excessive? On the CMA's own case, its approach in step 4 contradicts the statutory purpose.

We say on any view that is unlawful. Just to give you an authority for this principle, Authorities tab 45, it is the *Ralphs* case, my Authorities 4. It is paragraph 29.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: You see at the end of paragraph 28 dealing with consecutive sentences, it says:

"When we invited Mr Atkinson to draw our attention to any sentencing decisions which provided direct support for his submission that in this particular case consecutive sentences were appropriate, he was unable to do so. The problem is simple. In the context of a narrow range of available sentencing powers, and in particular the statutory maximum sentence, we are in reality being invited to circumvent the statutory maximum sentence on the basis that we believe it to be too low and to achieve our objective by disapplying well-understood sentencing principles of which Parliament must be deemed to have been aware when the statutory maximum and minimum sentence was fixed. Tempting as it is to do so, that is a step too far."

MR JUSTICE MORGAN: This is not a criminal case and -- I will rephrase that. It is not that sort of criminal case, but what is Lord Judge saying? Take a case of two robbers and let's assume the maximum sentence for robbery is 14 years, and on the second robbery the right sentence is eight years. You then have to decide should you have the two sentences concurrent or consecutive and

applying the usual principles the right answer is consecutive, making it 16. Are you prevented from doing that because you are giving 16 years for two robberies when the maximum is 14 years for one robbery? This is a problem of consecutive sentences rather than statutory maximum, but I just didn't know. What is being said?

MR O'DONOGHUE: My Lord, in a sense, you could take the view that it is more of the same in relation to *Roth* and *Carroll*, which is when you have got a maximum, you can pretend it is reserved for anything other than the most serious case.

MR JUSTICE MORGAN: Forgetting the specific problem in *Ralphs* if your point is if you have a maximum, it is a more serious case, that is a sentencing principle and it is well understood. Parliament legislated or is taken to have legislated against that background, has not it?

MR O'DONOGHUE: Yes. In a nutshell, yes.

MR JUSTICE MORGAN: I will read the case for myself about the robberies if I am interested. Right.

MR O'DONOGHUE: In my submission, where the guidance really unravels in relation to this point of the CMA is under step 6. Because under step 6 of the guidance, discounts for leniency and settlement are applied to the maximum penalty, and not in the final analysis as suggested at paragraph 57 of the CMA's skeleton -- perhaps we can turn to paragraph 57 because this, in my submission, is a clear mistake.

MR JUSTICE MORGAN: Yes. I am going to CMA's skeleton, 57.

MR O'DONOGHUE: 57, yes.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: At the top:

"Even when other considerations such as mitigation and settlement are taken into account ..."

That of course is untrue, and we can turn to 126(5) of our skeleton.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: We make the point that even within the guidance, mitigation discounts or reductions are made after the application of the 10 per cent cap. If the CMA's argument were correct in relation to the 10 per cent maximum, then step 6 must be *ultra vires* because it conflicts with the suggested statutory purpose, the cap be applied in the final analysis after settlement has been considered.

It may well be that in practice, the CMA says well, for policy reasons we want to encourage people to settle or apply for leniency, but that doesn't detract from the point in principle. To put it another way, the CMA cannot have it both ways.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: The final point on the guidance is that there is a further contradiction because if the purpose of the cap is to ensure the final number is not too onerous for the undertaking, then step 7 of the guidance also contradicts the statutory purpose since step 7 allows the penalty to be reduced on grounds of financial hardship, even though on the CMA's case Parliament thought that undertakings would be able to pay 10 per cent of their turnover.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Even on the basis of their own guidance, there are a series of significant problems with their interpretation of the legislative scheme.

I think your Lordship has picked up my essential point, which is the basic flaw of the

CMA's argument is it doesn't follow from the fact that Parliament thought a penalty of no more than 10 per cent of an undertaking's turnover would be excessive for an infringement of competition law as Parliament did not also establish that the range of penalties from 0 to 10 per cent depending on the nature of the infringement.

Our case is that the 10 per cent maximum applies at both stages and not just at the end.

MR JUSTICE MORGAN: This is (Inaudible) a question of statutory interpretation, is it not? Interpret its (Inaudible) and in particular the section dealing with the 10 per cent cap -- it is 36(8), just looking at the legislation in front of me. We have it in Authorities bundle 1, don't we, and section 36 is on page 35 of the bundle.

Section 36(8) plainly needs a Regulation to supplement it but we know what was done. 36(8) on its own says:

"No penalty ... may exceed 10 per cent of the turnover of the undertaking."

The choice for the Tribunal when considering the purpose and function of this provision is this: is this a provision as in dozens of criminal statutes defining the maximum penalty for the offence to which the ordinary well understood sentencing principle applies, [to quote Lord Judge] or is it something else?

It is in a statute which tells you in other places how to deal with seriousness, deterrence, proportionality, by which I mean the other places are first 36(7), (8) and 38 because this statute requires the promulgation of guidance. That section 38 is headed "The appropriate level of a penalty", making you think that the appropriate level of a penalty is going to be governed by the guidance.

So 36(8) is not there in the typical criminal statute to say, "The maximum penalty is

this", it is there to perform some other function, which has to be taken together with the other sections and is, as it turns out, subordinate to the other sections when you are considering seriousness, deterrence and proportionality. You can express the function of 36(8) in various ways; one might be to say it is a cap which of course is only relevant where you would otherwise be above the cap. The cap only operates where you would be above it, so it is consistent with imposing a cap that there is a possibility you would otherwise be above the cap; otherwise above the cap is governed by the guidelines and by 36(7) and (8). So this is statutory interpretation at the bottom.

MR O'DONOGHUE: My Lord, at the risk of sounding like a teacher's pet, that is the choice.

MR JUSTICE MORGAN: That is the choice.

MR O'DONOGHUE: Just to wrap up on this point, we pick up this up in paragraph 114 of our skeleton. If I can ask the Tribunal to quickly turn to that.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: We make the point there that in fact like ordinary principles of statutory construction, if the CMA were correct it would mean the cases I have referred to, all of those were wrongly decided.

MR JUSTICE MORGAN: No, no, that is because in those cases there was clarity, that the purpose of the statutory provision was to impose a maximum and you would use that maximum when you were assessing seriousness and deterrence. The maximum was for the most serious cases. You know that as a point of departure when you assess the seriousness of the particular case. That is what those statutes provide, that is the function of the provision.

MR O'DONOGHUE: My Lord, I think that is fair. Maybe the more accurate way to put the point is the cases we have seen were construed to involve a true

maximum.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Our submission at 114 is the same as the other legislation. This is also legislation which provides ...

MR JUSTICE MORGAN: You are entitled to say that if all one had were the words of 36(8), it couldn't be more clear, "No penalty ... may exceed 10 per cent," so there is the maximum sentence. And we know that, as Lord Judge put it, it is a well understood, established principle of sentencing that the maximum sentence is for the most serious case. So if all we have is 36(8) --

MR O'DONOGHUE: It is game over.

MR JUSTICE MORGAN: Well, you have a very strong case. But as always, there is sometimes more to be thought about.

MR O'DONOGHUE: Yes. My Lord, that is the central issue at least, the first central issue.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Just to round off this point to put a bit of fabric on it: you can see in this case the problems, so we know for example in the case of FPM's penalty that after steps 1 and 2, it was more than double the statutory maximum.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Most bizarrely we have a situation where despite receiving a 5 per cent reduction for co-operation under step 3, the penalty at the end of step 3 was nonetheless much more than double the statutory cap. To put this another way, even having applied the statutory cap, the mitigation which my client received in practical terms counted for nothing.

To put this another way, this is a case where by virtue of the reduction for

co-operation, there was a mitigating factor, and therefore the penalty was not of the most serious kind. Yet in practical terms it counts for nothing.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: I have made the point that under step 4, even having made what it calls a proportionate non-excessive reduction, we are still above the cap.

MR JUSTICE MORGAN: It said 11 per cent of last year's turnover is proportionate. It is a statutory provision which Parliament seriously meant to apply saying the maximum percentage is 10 per cent.

MR O'DONOGHUE: Yes, it is difficult to see how you can say that with a straight face. It is something which is manifestly excessive and disproportionate.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: That is the first issue. In reality, in my submission, the CMA has only one point, which it says by virtue of a small handful of European Court judgments, which in my respectful submission, are extremely poorly reasoned: that this Tribunal by virtue of section 60 is stuck with those and instead of applying the ordinary principles of domestic statutory construction, the section 60 constraint effectively obliges you to apply a uniquely different interpretation just because it is competition law. That is the second string to their bow.

That requires quite a bit of unpacking and I hope to round off my submissions just by giving you the key points in relation to that. Can we start by looking at the nature of the wording of section 60 itself, please?

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Authorities 1, tab 4, page 41, please.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: I would invite the Tribunal to read section 60, please. **(Pause)**.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: In view of the wording of the statute, there are five points we wish to make to support the submission that section 60 in this case simply does not apply.

First, a small but not unimportant point: the CMA has cited no authority for the proposition that section 60 requires the calculation of penalties under sections 36 and 38 of the Competition Act to be interpreted consistently with the European Commission's separate penalty powers under Article 23 of Regulation 1/2003. In a sense, that might be a bit glib because if they had such direct authority, this would be a very short point. But it is nonetheless important to note that nothing on point has been cited by them, at least in the sphere of penalties.

Second and perhaps more importantly, the test under section 60 which has the duty of consistency arises in connection with a question related to competition in the UK. In this context, section 60, apart from one exception which I will come to and which I submit is no longer good law, has been applied to interpreting substantive competition law prohibitions under the Act in a consistent manner with Articles 101 and 102.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: This obviously makes sense because one can perfectly see how an inconsistency on such issues could lead to undertakings being simultaneously subject to different sets of substantive rules, including of course in the same case. One may be more or less strict than the other, and you can see at least in practical terms a reason for consistency to that extent.

To give you an authority on that proposition, can we go to the *UKRS Training* case,

Authorities 5, tab 61. This is a judgment of Mr Justice Roth, so obviously from a very good pedigree in this context. You see under paragraph 3, it was effectively a preliminary issue trial, Mr Jones for the CMA was in fact involved in this case. The preliminary issue was essentially on the definition of an undertaking and whether the defendant met that definition.

You will then see at paragraph 55 in the judgment, the President engages with the question with consistency. The bit I want to emphasise is the first part of 55, the so-called consistency principle whereby the Chapter I and II prohibitions are to be interpreted consistently with the analogous provisions of EU law.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is a substantive obligation as opposed to one in relation to penalties.

MR JUSTICE MORGAN: Well, section 60 says several different things in different ways to achieve consistency. Mr Justice Roth was concerned with the substantive provisions of Articles 101 and 102 and their domestic parallels. He says in 54, the Chapter II prohibition in section 18, so he is basically saying "When I construe section 18, I am going to do what the Europeans do when they interpret Article 102." He is not limiting the scope of section 60, he is just saying how it could potentially operate before him.

MR O'DONOGHUE: Perhaps if we can go to Authorities 1, tab 14.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: You see a quarter of the way down, it is talking about clause 60 and Mr Ian McCartney says:

"The prohibitions are interpreted and developed consistently with EC competition law system. That is critical in minimising the burdens on business."

MR JUSTICE MORGAN: Yes, of course they do. But to say that they cover the

substantive provisions does not say that they cover only the substantive provisions.

MR O'DONOGHUE: My Lord, yes, I don't want to over-egg this pudding. I am saying this is at least a good start for my purposes, but I ...

MR JUSTICE MORGAN: Well, it is missing the target. What section 60 covers primarily, you would ask section 60 to do. It says, "The question arising under this part." In fact, (1), (2) and (3) are three separate provisions, not covering precisely the same territory. They have three different zones of operation. But if you take specifically subsection (2), "When the court determines a question arising under this part," now there is a question arising under 36(8) that has the purpose and function of 36(8). So *prima facie*, it is a question arising under this -- it is the same part, is it? Let me correct myself ...

MR O'DONOGHUE: I think the problem is we don't have the full Act.

MR JUSTICE MORGAN: Is it in Part 1 of the Competition Act? If it is not, then we would go to subsections (1) and (3). I think Mr Doran has the Act.

MR WILLIAMS: Sir, I think you can see at the bottom of the note for the section, it says "Commencement, Part 1, Chapter 5", and so on and so forth. So that does tell you that there are --

MR JUSTICE MORGAN: Sorry, I forgot. No, I understood, it is still in Part 1. We do not have out of Part 1 yet. We are still in Part 1.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Section 36(8) is in Part 1, this part is Part 1. So we have to determine the question arising under Part 1 and we must act as far as compatible with Part 1 to ensure there is no inconsistency between the principles we apply and the principles applied by the court in determining that question.

You may say the court never determines the meaning of 36(8), but the court doesn't determine the meaning of section 18, it determines the meaning of Article 102.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I think it is (b), "Any corresponding question." The question is whether the decisions on 1/2003 about the cap there are a corresponding question to the question we have under 36(8).

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: While we have it open, can we look at 38(9).

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: This is what I would call a peaceful coexistence provision that a penalty imposed by the Commission or another European authority would be taken into account when considering a --

MR JUSTICE MORGAN: To avoid double jeopardy as I think it is described as in some places.

MR O'DONOGHUE: Yes. What they show is that obviously the position in relation to penalties on the European level is not harmonised. There is no convergence at the level of penalty.

MR JUSTICE MORGAN: You will need just to help me and help others possibly as well. As I understand it, the European regime has got something which is superficially similar, if not completely similar, to this 10 per cent capping mechanism.

MR O'DONOGHUE: There is a 10 per cent limit, yes.

MR JUSTICE MORGAN: And the Europeans have said that is not something which leads to the general sentencing approach that that figure is reserved for the

more serious cases. They have said that. They have said it is possible to apply seriousness and deterrence, arrive at a higher figure, and only then come down to the cap. That is what the European Court has said.

MR O'DONOGHUE: They have certainly said it comes in at the end. I am not sure they have said in terms.

MR JUSTICE MORGAN: I think we are being shown four cases in particular, aren't we?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: But that is what they say. The way they do it in Europe is they talk about seriousness, they talk about deterrence, they talk about proportionality. They arrive at a figure which is appropriate and then apparently for reasons of affordability, they bring in a capping mechanism; and even if you end up paying the 10 per cent of turnover in a case which is not the most serious case, that is how the provisions work in Europe.

MR O'DONOGHUE: Yes. My Lord, to cut to the chase, if Mr Williams is right on section 60, their approach is simply to apply it at the end.

MR JUSTICE MORGAN: I think it is more fundamental still. As I understand it, that is what Europe provided for in its legislation and 36(8) of the Competition Act 1998 was enacted after Europe had created this scheme. And even without section 60, it would be open to argument, open to suggestion, that the domestic legislation was intended to replicate the European legislation.

So the European legislation is a kind of background to the interpretation of our legislation, and given that we now know what the European legislation means, we should consider that our legislation is an effective mirror of the European one. If that is wrong because, for example, the court decisions have not been made by 1998, which I don't know if that is right or not --

MR O'DONOGHUE: That is point we make. It is striking that all Mr Williams's cases --

MR JUSTICE MORGAN: Are post-1998.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Then section 60 does come into it.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: I see, right. I think I have a vague idea of the history of this. I will check to make sure I have it right, but I think I have. Right.

MR O'DONOGHUE: Just to turn thirdly to some of the section 60 cases. The only case applying section 60 to a non-substantive provision under the Act is the *Pernod* case, and that is in Authorities 3, tab 38. We can pick this up at 110. The headline point is -- for reasons I will come to, *Pernod* has been heavily distinguished in subsequent cases, but just in fairness to the CMA, to put *Pernod* in its own context at least.

You will see from the start, this is a case from 16 years ago and essentially the CAT concluded in that case that the approach taken by the European Commission in terms of its procedure to the treatment of complainant's rights could, relying on section 60, be imported into the treatment of equipment issues under domestic law.

You can see at 110 on page 1921, the OFT's position was that section 60 is concerned with consistency, related to questions in relation to competition and not in relation to questions of procedure. So that was their position. As it happened in this case, it was not accepted, but I note that that was their position.

We can pick up the Tribunal's own conclusions at 231.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Essentially what they concluded is that high level principles such as proportionality, legal certainty and administrative fairness in this context were imported by section 60. You see that at 231, particularly towards the end "High level principles".

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is not authority for the proposition that the calculation of penalties representation a question in relation to competition.

MR JUSTICE MORGAN: It is not authority for the proposition that a provision relating to penalties is what?

MR O'DONOGHUE: Is a question relating to competition for the purposes of section 60. To put it another way, this is dealing with procedure and not with penalties.

MR JUSTICE MORGAN: But we have section 60 itself and when all else fails, we could read the section, can't we?

MR O'DONOGHUE: My Lord, yes, but the statutory wording in question in relation to competition has been the subject of a handful of cases.

MR JUSTICE MORGAN: Let me keep open section 60. You are stressing the words, "a provision in relation to competition".

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: But that is not in section 60. Section 60(2), "The question arising under this part", and then 60(2)(b):

"Any relevant decision of that court in determining any corresponding question arising in EU law."

So you ask yourself: what is the question arising under this Part and is the question dealt with in the European case the corresponding question in EU law?

MR O'DONOGHUE: 60(1).

MR JUSTICE MORGAN: Section 60(1).

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: You say that 60(1) cuts down subsection (2).

MR O'DONOGHUE: Yes. I think that is common ground, but Mr Williams will tell me if I am wrong.

MR JUSTICE MORGAN: You cannot simply apply the words, "A question under this Part and a corresponding question in EU law."

Instead you say --

MR O'DONOGHUE: One of the conditions that has to be met is a "question in relation to competition" --

MR JUSTICE MORGAN: Is it in addition a question arising under this Part in relation to competition within the United Kingdom?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: I see.

MR O'DONOGHUE: I think that is common ground with Mr Williams --

MR JUSTICE MORGAN: And you say a question arising as to the operation of sections 36 and 38 about penalties for infringements, you say they are not questions arising under this Part in relation to competition in the United Kingdom.

MR O'DONOGHUE: Yes. It is a question --

MR JUSTICE MORGAN: It strikes me that is not obviously right, that submission. But if we are bound to accept it, we will loyally apply any authority to that effect.

MR O'DONOGHUE: Yes. My Lord, what I am doing now is going through a small handful of cases which address what is the question in relation to --

MR JUSTICE MORGAN: All right. So you have shown us *UKRS*, you have shown

us *Pernod*.

MR O'DONOGHUE: In my submission, *Pernod* is really the high watermark of the CMA's case because you see a procedural right in reliance on section 60 being read into an analogous question of procedure.

MR JUSTICE MORGAN: Can I read 231 carefully in parallel.

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: I see it does touch on some of these points. **(Pause)**.

But 231 really summarises the arguments. Does the Tribunal in *Pernod* give its decision accepting that argument?

MR O'DONOGHUE: That is what I am coming to. So if you look at 235 and 238 -- if I could ask the Tribunal to read 235 and 238, please. **(Pause)**.

The point I wish to make is that there is actually considerable ambiguity within *Pernod* itself as to whether the basis for the decision was based on domestic administrative law or section 60. You see, for example, 238, "Whatever the strict interpretation of section 60," at 235 referring to administrative powers.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Even within Pernod, which as I said is the high watermark of the CMA's case on the question in relation to competition, there is some ambiguity.

But the --

MR WILLIAMS: Sorry, I will try not to go back to this. Could you read 234 while you are there, I don't know if you have read that. If you could read that, it might just save time.

MR JUSTICE MORGAN: I will.

MR O'DONOGHUE: My Lord, I obviously accept they considered section 60. The point I am making is that it seems to be joined up to some extent at least with

questions of domestic law in any event.

MR JUSTICE MORGAN: My reaction to section 60 absent authority is that section 60(2) is relatively straightforward to apply. You ask two questions: you say what is the question arising under Part 1 of the Competition Act and did the European decision determine a corresponding question arising under EU law? When you have done that, you know the answer.

My instinct is it say section 60(1) talks about the purpose of the section, questions arising under this Part in relation to competition -- well, either every question under this Part relates to competition, or a question as to the penalty for infringement relates to competition.

So even if section 60(1) cuts down section 60(2), we are still within a question arising under this Part in relation to competition within the United Kingdom.

I mean, why is a decision as to penalty involving the interpretation of sections 36 and 38 not a question arising under this Part in relation to competition within the United Kingdom? What does it relate to?

MR O'DONOGHUE: My Lord, it is a bit circular. There is a question of the meaning of the statutory provision, the question in relation to competition. In a sense, you assume it means everything to do with competition; that answers itself. But the point I am trying to show to your Lordship based on the case law is that the issue of a question in relation to competition has a particular meaning.

MR JUSTICE MORGAN: Is there something in Part 1 of the Competition Act that doesn't relate to competition?

MR O'DONOGHUE: Yes. The *Gibson* case which relates to collective proceedings orders, that is a case where the court declined to apply section 60 for that reason.

MR JUSTICE MORGAN: Yes. *Gallaher* considered section 60 and said it didn't

apply because it wasn't about the operation of a statutory provision in Part 1 of the Competition Act, it was about --

MR O'DONOGHUE: Yes, my Lord, absolutely. *Gallaher* in some ways is a stake to the heart of *Pernod*.

MR JUSTICE MORGAN: Well, I see that. Don't take valuable time --

MR O'DONOGHUE: My Lord, this is tricky in some respects. On *Gibson*, obviously there was a collective proceedings order, so there was a follow-on damages action on a collective scale, and plainly that concerned a question which concerned substantive competition law. But that is an example of a case where section 60 was not relied on.

MR JUSTICE MORGAN: What is the reference to *Gibson*?

MR O'DONOGHUE: Authorities 5, tab 60, paragraphs 66 to 67.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: Even though the CPO proceedings plainly concerned competition, it didn't raise a question in relation to competition.

Just to wrap up on *Pernod*, your Lordship has the point that *Gallaher* in the Supreme Court, paragraph 22, really puts to any end at least this narrow point in *Pernod*. But the *Quarmby* case, which is in the same bundle at tab 55, Authorities 5, paragraphs 44 to 46 --

MR JUSTICE MORGAN: Yes, I see.

MR O'DONOGHUE: Two points: at paragraph 45, Lord Carlisle essentially says *Pernod* was a case on its own facts.

Then he says at the end of 45, "Further" -- so that is the domestic law point I made, which is that it is not entirely clear from *Pernod* whether it was relying on section 60 or some sort of hybrid section 60 and domestic administrative law, which is the point picked up in *Gallaher*.

In terms of the archaeology of this, *Pernod* I accept seems on a somewhat ambiguous basis to suggest that procedural issues achieve may have a section 60 component. But in my submission, based on the authorities I have shown you, there has been a very significant rolling back of *Pernod*, and I think for practical purposes it has effectively been overruled.

MR JUSTICE MORGAN: I mentioned *Gallaher*, I was aware of *Gallaher*, but I have not read it closely. Perhaps the other members of the Tribunal should be given the reference to *Gallaher*.

MR O'DONOGHUE: It is tab 64, my Lord. This was a case on equal treatment and I touched on this on Monday, I think. It was a case where the OFT had fined a number of undertakings for an infringement of Chapter I. Some of them appealed, the decision was annulled. But *Gallaher*, which had a £50 million fine, did not appeal, and they then sought to re-open the case on the basis of an equal treatment argument and they were unsuccessful.

We can pick this up at paragraph 22, Lord Carnwath.

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

He refers to questions arising under the statute which of course is an easy conclusion to reach, with respect, because 60(2) talks about a question arising under this Part.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: In addition to subsection (2), we have subsection (3) where in addition we must have regard to a relevant decision of the Commission; right?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: That is not the point; right?

MR O'DONOGHUE: No.

MR JUSTICE MORGAN: Right, thank you.

MR O'DONOGHUE: So our submission on this criteria on the question in relation to competition is that it does not apply to the question of penalty.

MR JUSTICE MORGAN: That is on any view a very narrow reading of subsection (1). First of all, it treats subsection (1) as imposing an additional condition for the application of subsection (2). Secondly, having imposed that additional condition, it then construes it very narrowly so that a question arising under Part 1 as to the penalty for an infringement of competition law is not a question arising in relation to competition. I am tempted to ask you why on earth is it not?

MR O'DONOGHUE: Well, what one cannot disregard -- the first point is that this is a question of statutory construction, it's a question in relation to competition. It has a particular meaning as we have seen in the cases.

The other point of course is that you cannot read section 60 in complete isolation from the parallel domestic framework on penalties. So if as a matter of domestic law there is specific legislation dealing with deterrence and punishment functions in relation to criminal penalties, that is something which also needs to be factored into account in terms of understanding what are the four walls of section 60 and that part.

So one has to pull these together, in my submission.

MR JUSTICE MORGAN: But 60(2) says we are to do it so far as compatible. If section 36 had said -- let's call it the O'Donoghue provision -- the maximum penalty is 10 per cent of turnover, the Tribunal shall apply the general sentencing guideline that the maximum penalty may only be awarded in the most serious case and any other case will attract a lower penalty, then we couldn't construe that in accordance with the European decisions. We

couldn't and we wouldn't.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Right, understood.

MR O'DONOGHUE: That is a question related to competition. The next criterion which -- these are cumulative, if I succeed in any one of these, they cannot rely on section 60, so in that sense they are cumulative. The next question in terms of the application of section 60 is: are there any relevant differences between the EU approach to penalties and the domestic one?

If I could give you a couple of authorities on that, first of all starting with *G F Tomlinson*, which is in Authorities 5, tab 51. My Lord you will see from the cover page that it is a judgment of Lady Justice Rose -- so I note the pedigree to start with -- and then we can pick this up at paragraph 102, please.

MR JUSTICE MORGAN: She was then a humble Chairman of a Competition Appeal Tribunal, but no worse for that. What page/paragraph?

MR O'DONOGHUE: My Lord, paragraph 102.

You see at 100 the argument which is being put by Apollo. This relates to a Commission decision statement, section 63. It is the bit set out at 102. The second sentence is important:

"At the time the Guidance was adopted in 2004, the fining practice of the European Commission pursuant to the former 1998 Guidelines … was very different in structure from that set up in the OFT's Guidance."

That is the point I adverted to earlier, and she says therefore there were relevant differences between (speaking away from mic) then goes on to list certain differences.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: If we can go on to tab 54. This is the *Crest Nicholson* case,

another penalty case.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: At paragraph 49, essentially this is endorsing the judgment of the Chairman in that case:

"We agree with the Tribunal's conclusion at paragraph 102 of the *Tomlinson* Judgment that there is a "relevant difference" between the UK and EU provisions in this regard, and that the Commission's fining guidelines do not supplant the OFT's statutory duty under section 38(8) of the 1998 Act to have regard to its own published guidance."

MR JUSTICE MORGAN: Yes. One reading of it is to say that what section 60 requires you to do is to find a provision in Part 1 of Competition Act, to find a corresponding question in EU law, and so far as compatible with Part 1 to interpret them in the same way. If when you do that exercise you find that the question under Part 1 is different from the question in EU law then this doesn't apply and even if the question is the same, you cannot do it if Part 1 is not compatible with EU law.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: So there will be cases where you will end up with one set of English rules and a different set of European rules.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: And one can see in substance that may well be undesirable, particularly where the same substantial rules, Article 101 and Chapter I, apply in the same case. But in the context of penalty in terms of a burden on the companies, the same point does not apply.

MR JUSTICE MORGAN: It is plain from these decisions that in practice this

jurisdiction can decide for itself how to approach penalty.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: It is not bound by a Directive to approach penalty in any particular way.

MR O'DONOGHUE: Yes, one of the points we pick up in our skeleton, there is proposed legislation which would in future lead to a degree of harmonisation on the question of penalty but the United Kingdom obviously will not be party to that legislation.

MR JUSTICE MORGAN: No.

MR O'DONOGHUE: It is striking for that to occur there had to be a harmonising measure, it was not something you could excavate.

MR JUSTICE MORGAN: At the time we are dealing with there is no duty to harmonise?

MR O'DONOGHUE: No. My Lord, would that be a convenient moment?

MR JUSTICE MORGAN: Yes. Shall we say five minutes again and keep it to five minutes. We will come back at 3.30 pm sharp.

(3.25 pm)

(A short break)

(3.31 pm)

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: My Lord, a handful of points just to wrap up.

First to pick up on a point your Lordship raised, which is what is the approach to the European case law actually based on, and the approach in the European case law, in my submission, is based on the 10 per cent maximum involving ability to pay, whereas, as we have seen, the domestic law approach to penalties is rooted in the 10 per cent or the cap being reserved for the most

serious offences imaginable, with lesser offences requiring lower penalties. Ability to pay is something distinct in the domestic penalties regime. So to start with the European dimension, can we go to the *Dansk* case in Authorities 7, please.

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: This really is my learned friend's key case.

MR JUSTICE MORGAN: Yes. Tab 89?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: It is at paragraphs 280 and 281, please. It says:

"That upper limit seeks to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay."

You see in the footnote this is a principle of some longstanding, there is a footnote to a much older case.

MR JUSTICE MORGAN: I see. What is the year of *Dansk*?

MR O'DONOGHUE: This is 2005.

MR JUSTICE MORGAN: But you are now saying there was an older case, *Musique Diffusion*. Did that make the same point or is that a different analogous point?

MR O'DONOGHUE: I don't know, my Lord, if that is in the bundle. It is not a 10 per cent case, if I can put it that way, but we will obviously obtain a copy if the Tribunal wants a copy.

MR JUSTICE MORGAN: There is a point quite apart from 60(2), if Europe had a provision, a 10 per cent provision, and that had been interpreted as having a certain meaning and effect and if the purpose of section 36(8) was to mirror the European law and its meaning and effect was already interpreted by 1998,

that would be one thing, but you have deflected that point by saying that that interpretation was not based on the European provision until after the Competition Act was enacted.

MR O'DONOGHUE: Exactly.

MR JUSTICE MORGAN: Unless that is weakened by the case in the footnote.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Which was, let's just get the date of the case in the footnote. Looking at the cases cited, it is 1983, the *Musique Diffusion* case is 7 June 1983.

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Okay.

MR O'DONOGHUE: We will check that overnight. But it is not a 10 per cent case.

MR JUSTICE MORGAN: Yes. I expect you are right. Good.

MR O'DONOGHUE: To be fair to Mr Williams, the point your Lordship put to me is a point that they had made, albeit in my submission half-heartedly, it doesn't actually suggest a lot of confidence in the section 60 point. My answer is the cases he relies on are post 1998, so it doesn't get him anywhere.

MR JUSTICE MORGAN: I am not sure I have understood the nuance.

MR O'DONOGHUE: Well, he doesn't need that argument.

MR JUSTICE MORGAN: If he has section 60.

MR O'DONOGHUE: If he has section 60.

MR JUSTICE MORGAN: I understand that.

MR O'DONOGHUE: That is why I say it is made rather half-heartedly, it doesn't suggest a lot of confidence in section 60, but you have my answer to that. It may be a reply point.

MR JUSTICE MORGAN: *Dansk* has been followed and not doubted in Europe.

MR O'DONOGHUE: Well no, I mean -- it may be a bit glib but you have seen the reasoning applied in these cases and it won both of that side by side with the domestic cases we have seen which reached the opposite conclusion for much more fundamental -- in my respectful submission.

MR JUSTICE MORGAN: The sentencing cases, the criminal cases?

MR O'DONOGHUE: Yes, it is absolutely fundamental. With respect, if section 60 applies, I am stuck with them, but I do make the optimum point that there isn't really any ...

MR JUSTICE MORGAN: Well, it depends how it is argued but they said this is the purpose of the provision.

MR O'DONOGHUE: Yes, but in a sort of conclusory way.

MR JUSTICE MORGAN: It is just an assertion.

MR O'DONOGHUE: It is literally a sentence.

MR JUSTICE MORGAN: Did it matter? It must have mattered in some of these cases that --

MR O'DONOGHUE: Yes, the reason people run these points is it would potentially make a difference.

MR JUSTICE MORGAN: Right, okay. Do you need to show us the other cases in this line of authority? We have references to them. We can read them, in view of the time. You need not take us there.

MR O'DONOGHUE: My Lord, no. In a sense, if Mr Williams has a case which is bang on point and section 60 applies, the fact he has three more doesn't make any ...

MR JUSTICE MORGAN: I looked at the last one hoping the last one would tell me about all the earlier ones.

MR O'DONOGHUE: Yes, they are brief and consistent at least in terms of outcome.

MR JUSTICE MORGAN: What they do is they face up to the fact that it might be that even when there is mitigation, even when there are things that bring the penalty down absent the cap, the cap comes in and it reduces the penalty and all the earlier analysis and so on is supplanted by a simple application of the cap. The cap determines the result.

MR O'DONOGHUE: Yes, well, in a way it is almost more overt. There is an explicit recognition in some of these cases that, well, the Commission has decided nowadays that everyone is hitting the cap anyway so what is the point?

MR JUSTICE MORGAN: Yes. Right.

MR O'DONOGHUE: Whereas, by contrast, if I can turn to our skeleton on this point.

MR JUSTICE MORGAN: We have Germany, Austria and Spain.

MR O'DONOGHUE: We set that out in some detail in our skeleton. I was not proposing to -- I mean, if it's battle by numbers, I have a number of cases, albeit not at the European Court level, which agree with me. But those authorities are what they are. The simple point I would make in relation to those is that essentially the reasoning on those is more or less on all fours with what we have seen by the Court of Appeal in the domestic cases.

MR JUSTICE MORGAN: I had a quick look at those cases. I confess it was quick and being quick I find them quite difficult to unpack. But no doubt if one takes more time one can see -- it may be Mr Williams will accept that is what the cases say. We will hear tomorrow.

MR O'DONOGHUE: Yes. Obviously they don't have section 60. So for my purposes they are persuasive but they are not section 60 material.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: That is the approach in the European authorities, ability to pay. So we have seen the domestic cases in a non-competition context. Just to

give you the statutory material for the CA 1998, we have set out a quote in 1251 of our skeleton from the then Secretary of State for Trade and Industry.

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Who says:

"There will be the possibility of financial penalties of up to 10 per cent for the worst offenders."

MR JUSTICE MORGAN: Yes.

MR O'DONOGHUE: Our submission is a simple one. There is a difference in approach, a relevant difference between the domestic approach and the European approach. That is the first point.

The second point, even if I am wrong on the statutory criteria which I have addressed you on, there is a final statutory criterion, which is that the obligation at best is to act, and I quote, "with a view to achieving consistency" or to securing that there is no inconsistency, and we make a very simple point as a matter of construction that if Parliament had wanted that duty to be absolute, they would have said so and instead it is a more muted obligation to act with a view to achieving consistency.

Mr Williams, in my respectful submission, rather ducks this point and you could be forgiven for thinking in reading his skeleton that the obligation was effectively absolute, and on the basis of the statutory wording that is an impossible submission.

The final point I wish to make is that there are some clear suggestions in the European jurisprudence that the approach taken in relation to the 10 per cent cap is not without difficulties and criticisms. I just want to give the court a small bit of context. If we can first of all go back to *Dansk* to the Advocate General.

MR JUSTICE MORGAN: I put mine away. Can you remind me.

MR O'DONOGHUE: Authorities 7, tab 89. This time it is 5401. It is 131.

MR JUSTICE MORGAN: AG.

MR O'DONOGHUE: Yes. 131 to 133. I invite the Tribunal to read it but he is setting out in fairly clear terms that this approach is actually quite problematical. He says at 131:

"Those situations are not in fact exceptional and run the risk of becoming ever more frequent."

Then over the page:

"A new situation is emerging which is more problematical."

Then 133:

" ... compatible with general requirements of reasonableness and fairness."

MR JUSTICE MORGAN: Right.

MR O'DONOGHUE: The final point then, in the next authorities bundle, Authorities 8, tab 97.

MR JUSTICE MORGAN: *Putters*.

MR O'DONOGHUE: My Lord, yes. Paragraph 75. It is a Belgian company. The Court said that:

"The application of the 10 per cent ceiling ... is now the rule rather than the exception for any undertaking which operates mainly on a single market and has participated in a cartel for over a year."

MR JUSTICE MORGAN: You quoted that in your skeleton. What is the paragraph?

MR O'DONOGHUE: Paragraph 75, my Lord.

MR JUSTICE MORGAN: Thank you.

MR O'DONOGHUE: It does seem in practice the 10 per cent upper limit has become more like the rule than the exception. That contrasts, in my

submission, markedly with the position under domestic law, whereby the maximum has to be reserved for the most serious offences.

That is all I wish to say by way of section 60 and that concludes my closing submissions.

MR JUSTICE MORGAN: You gave us your note, didn't you, on relief and calculation of penalty?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: You have got 10 minutes. Should we just look at this with you?

MR O'DONOGHUE: Yes.

MR JUSTICE MORGAN: Perhaps if we read it through, that will be the most convenient use of time.

MR O'DONOGHUE: Yes. (Pause).

MR JUSTICE MORGAN: There is a lot there, Mr O'Donoghue, we won't discuss it in the time available to you but I will at the expense of raising a tiny, tiny point. In your paragraph 4, where you are referring to the average turnover rather than the turnover in the last year of the infringement, you have £20,390,564. That is the average, isn't it?

MR O'DONOGHUE: My Lord, yes.

MR JUSTICE MORGAN: What about the rebates? Has that figure been reduced?

MR O'DONOGHUE: This is the correct figure.

MR JUSTICE MORGAN: You have reduced the average by taking out the rebates?

MR O'DONOGHUE: Yes, but it is common ground that the --

MR JUSTICE MORGAN: They should be taken out.

MR O'DONOGHUE: They should be taken out, yes.

MR JUSTICE MORGAN: I think at one time we had an average figure which didn't

remove the rebates. This does remove them.

MR O'DONOGHUE: Yes, and I think it is common ground these are the correct figures.

MR WILLIAMS: Sir, the principle on the rebates I think is common ground.

MR JUSTICE MORGAN: I understand that.

MR WILLIAMS: I am not completely sure, from memory, whether I know where the average of the post-rebated numbers comes from. I don't know if my learned friend can help me with that.

MR O'DONOGHUE: I will check overnight but I am pretty sure there was a separate submission on the question of rebates following the --

MR WILLIAMS: I just can't remember if we had been into the material or not.

MR O'DONOGHUE: I think we have opened it but I will get the reference overnight.

MR JUSTICE MORGAN: It is just that if we are to use a figure --

MR O'DONOGHUE: It should be agreed.

MR JUSTICE MORGAN: There is no point getting it wrong, even in a relatively minor way. Good, that completes your submissions, Mr O'Donoghue, thank you very much.

You can begin.

Closing submissions by MR WILLIAMS

MR WILLIAMS: I am going to start with delay as well, Sir. Grounds 5(a) and (b) concern delay. The legal issue is to what extent can a complaint of unreasonable delay lead to a reduction in a Competition Act penalty and ground 5(b) is the question of fact of whether there was an unreasonable delay on the facts of this case, and the Tribunal heard about that from Dr Grenfell yesterday.

In the Decision, the CMA rejected the complaint that there was unreasonable delay on the facts and paragraph 6.78 says that the CMA had proceeded as expeditiously as possible in the circumstances. FPM has sought to set that out as a disputed fact. 6.78 is the CMA's position but I think it has become clear that for the purposes of this appeal the relevant legal question, the only relevant legal question is whether there was unreasonable delay, not whether the investigation proceeded as expeditiously as possible. that is the only finding that could have legal consequence, I think even on FPM's case.

In the Decision, the CMA rejected that complaint on the facts and it then noted in footnote 1136 that such delay would in any event be irrelevant in law as to its decision as to penalty. In our Defence, we followed that logic and suggested that if we were right on facts, the legal issue does not arise, and as we indicated on our skeleton, on reflection we think that may not be the right way round the issues for two reasons, one is that the Tribunal shouldn't on reflection decide the factual issue in a legal vacuum and that is important because the case law which FPM has put before the Tribunal includes observations about the legal test and the legal threshold for establishing unreasonable delay and the second is that the issue has become a very large part of the appeal and it has been fully argued on the law as well as the facts and the CMA thinks the issue ought now to be determined.

FPM has put delay in issue because it says it affects the turnover value that was used for the purposes of deriving a penalty. Turnover at the time of the Decision comes into the CMA's penalty methodology at two stages, as the Tribunal has seen. One is at step 4, which is concerned with deterrence and proportionality, and the other is that it forms the basis of the cap, and it seems from what Mr O'Donoghue has said today that FPM thinks this argument plays

out in terms of the way the cap might be applied.

In fact, the choice of year for the cap is a matter of legislative choice. In our submission, FPM's argument must go to some aspect of the CMA's discretion or an exercise of discretion by this Tribunal. In the Notice of Appeal the point was put in terms of mitigation. In the skeleton there was reference to proportionality.

But standing back from the legal argumentation, FPM argues that it has been prejudiced by delay because its turnover was increasing during the investigation and one way or another that led to a higher penalty. I am going to leave the legal relevance of that to one side just for a moment. The first point we make, and we have made it in our skeleton argument, is not a point of law but it is a point about the way that the CMA's penalty methodology works.

Under the CMA's guidance, FPM's penalty will only be higher in one year than another if its financial circumstances in the year the decision is made warrant a higher fine applying the relevant principles. A higher fine will be imposed if that is what needed to create a sufficient deterrent effect at the time the fine is imposed. Conversely, if the party's circumstances warrant a lower fine than might have been imposed in previous years, then a relevant reduction will be made, and in both instances the penalties is set at a level which is appropriate to fulfil the statutory purposes at the point the decision is made, and we looked at those authorities on Tuesday.

In making these points I am not glossing over the fact that at one level paying a higher sum of money in absolute terms, if not in relative terms, is something which the undertaker may object to. We understand that point, but the point we make is that one cannot look at the absolute number in a vacuum and

label it prejudice without looking at the number in context. If I can illustrate that point this way. One can have a tax system in which everyone pays the same percentage of tax, a flat rate of tax in their income, and in which the better off pay more tax in absolute terms than others on a flat basis. In such a system, one wouldn't simply say without more that the person that pays more tax is prejudiced by the tax rate; you would say it is more complicated than that, you have to look at the position in the round and in context and in the context of their income.

In our submission, that thinking can be carried over to the fine, to the fining methodology. If a party has to pay a sum of money in year A that is the same proportion of its turnover that it would have paid in year B, then in one sense it has paid more than it would have done in another year but in another sense the impact is consistent across the years. We say this is different from the criminal suspect that has to wait a period of years for a trial, who suffers anxiety in the meantime and then faces a sentence which is the same in absolute terms as the sentence they would have faced had the trial happened earlier, for two reasons: firstly, in that case, the anxiety is extra prejudice on top of the duration of the sentence, it is extra prejudice and, secondly, in that situation the prejudice is an unhappy accident of the process, the anxiety of the suspect is an unhappy accident of delay.

In contrast, the calculation of the penalty based on turnover at the time of the decision is a deliberate and principled part of the process to ensure that the penalty is tailored to the undertaking's position at the time the penalty is imposed, at the time the penalty bites. So in that way, the assessment builds in a means of ensuring that the penalty is proportionate to the undertaking's circumstances when it is imposed, and we do repeat, if the circumstances as

they developed warrant a lower penalty then that is what will happen.

That is the context in terms of the penalty methodology.

Turning to the law, as the Tribunal has observed, there is no domestic precedent on the point. FPM has sought to rely on the *Argos* case but the legal point wasn't determined in that case and in any case there was no reduction for delay.

The issue has been considered in EU law and it is clear and in its skeleton at least it is accepted by FPM that in EU law mere delay doesn't lead to a reduction in its penalty. I say mere delay because other ingredients may mean that delay creates grounds of appeal. For instance, delay may prejudice the rights of the defence and in that situation the infringement decision may be set aside and the penalty may be set aside. But delay in itself is not a mitigating factor which leads to the fine being reduced. I will explain that point in the context of the *Dutch Beer* case, if I may, in a few moments.

MR JUSTICE MORGAN: I can understand it may not be universally applied, I can understand a rule that says mere delay does not lead to reduction in the penalty, so that if you are convicted today and the penalty is £1 million and had you been convicted two years ago the penalty would have been £1 million, then it's £1 million at all stages. But the particular point in this case is that the amount of the penalty is affected by the time of the conviction. It is not as if it is £1 million then and £1 million today not reduced. In this case it was a figure in the past, if there had been a conviction in the past, and a higher figure at the present. The European principle that you are fined £1 million on any occasion you are fined is different from what we are faced with, which is two years ago you would have been fined one figure and this year you are fined more because time has gone by and a different year of account is taken and the mathematical number is a bigger one. That is

different.

MR WILLIAMS: Yes, I think we make three points in response to that.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: The first is that, as I have explained, one has to set that kind of thought process in the context of the penalty methodology and the reason for taking the turnover value at the time of the decision --

MR JUSTICE MORGAN: What you say is the same, it is always 10 per cent, rather like your tax example.

MR WILLIAMS: That is the cap. In terms of the basic level of the penalty, we do not say it is always 10 per cent, obviously, if one goes through the stages that the Tribunal sees in the guidance.

MR JUSTICE MORGAN: Fair enough.

MR WILLIAMS: But the application of the cap in the final analysis is the turnover in the year prior to the decision but the Tribunal has seen that is a matter of pure statutory interpretation, that is the cap.

But the point I am making for the moment is that there are principled reasons why you are looking at the turnover in that final year, whether in the context of the cap or in the context of step 4.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The second point is that when one looks at the *Bolloré* case, which I will come to, in our submission that supports the view that there are principled reasons for not reducing the penalty, not reducing the penalty on account of delay.

The third point is that when we look at the *Dutch Beer* case, which my learned friend does rely on, even on that case, which I think is almost the high watermark of his case, the way he puts it in terms of causation, that is to say the point of the

decision has affected the level of the penalty or has caused particular damage, that cause of causal analysis is rejected.

So that, in our submission, undermines the way he puts it.

I think what I would like to do is go to *Bolloré* next, Sir, which Mr O'Donoghue took you to I think briefly for one point but I do not think we really looked at it. In our folder it is tab 108.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: This is a decision of the Court of Justice. It is a decision of May 2014, so it is later in time than *Dutch Beer*, which is a General Court decision, an inferior decision, from I think three years previously. We will get that out in a while.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: *Bolloré* concerns a cartel relating to carbonless paper. There was an argument that delay had prejudiced the rights of the defence and that was rejected on the facts and that is picked up in the passages we will look at. The way the General Court had decided the legal issue is at paragraph 22, which we were looking at.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Do you want to read that, Sir?

MR JUSTICE MORGAN: Yes. Right.

MR WILLIAMS: That is the argument, effectively, that the limitation period excludes a complaint of unreasonable delay with the limitation period.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: That is the way my learned friend tries to make sense of some of the European cases. We will see the way that the Court of Justice dealt with that.

If you turn on to 101. We have a treatment of particular parts of the grounds of appeal relating --

MR JUSTICE MORGAN: It is paragraph 101.

MR WILLIAMS: Paragraph 101, sorry. Yes. Paragraph 101 is excessive duration of the procedure should lead to reduction in fine.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: Even without prejudice to the rights of defence. 102 is put in terms of Article 6 and the limitation period.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: So those are the two issues. 104 is the rights of defence argument, which was rejected. 105 is an important paragraph and in fact you probably want to read 105 to 109.

MR JUSTICE MORGAN: All right. We will do that. (Pause).

MR WILLIAMS: Sir, the significant points are 105, this is really acknowledging the tension between the desirability of enforcing the competition rules and the idea that delay in the procedure should lead to a reduction in the fine. In my respectful submission, that is another way of putting the point that we made, which is that one has to look at the principled reasons for imposing a fine and whether in that context delay or reducing the penalty for delay would be compatible with those principles and, in my submission, the paragraph is rejecting that argument.

It then moves on to consider other matters. In particular at 109 it deals with the Article 6 argument. The point we make is that this judgment holds that even if the limitation period doesn't preclude the court from considering unreasonable delay within the limitation period, that a finding of a breach of a reasonable time requirement cannot lead to a reduction of the fine imposed.

So that is very clear, in my view, Sir, that is what driving this line of European case law is not the fact that there is a limitation period, it is saying even if the limitation period doesn't exclude the duration of this, we are not satisfied that there is any incompatibility with Article 6 in declining to reduce the penalty on account of delay.

MR JUSTICE MORGAN: Did the facts of *Bolloré* involve a fine being fixed by reference to turnover in any particular year, in particular in the year of the decision, rather than an earlier year? I mean, had the delay changed the computation of the fine in *Bolloré*?

MR WILLIAMS: I don't know if one can get that from the judgment. I think one might need --

MR JUSTICE MORGAN: To go to the lower court.

MR WILLIAMS: Perhaps we can take that question away.

MR JUSTICE MORGAN: Yes. I understand that delay of itself doesn't reduce the fine, so that if you are fined in year 5 and the fine would be £1 million but there is delay so you are only fined in year 7 and you are going to be fined £1 million and you say: I don't want to be fined £1 million, reduce it because of delay, the answer is: no, it is £1 million.

But if you are going to be fined in the year 5 and it is £1 million and in year 7 it is £2 million, does *Bolloré* preclude you from saying: don't fine me £2 million, it has become £2 million because I am being fined late and I am being fined late because of the enforcement agency's fault?

That is not necessarily foreclosed by *Bolloré*, is it?

MR WILLIAMS: Not in the direct way that you have articulated it, Sir. But what it does say is that it doesn't entertain delay in itself as a mitigating factor.

MR JUSTICE MORGAN: It doesn't mitigate it.

MR WILLIAMS: It doesn't entertain it as a factor going to reduction of the penalty because the rules need to be enforced and, in my submission, what that is saying is that penalties under competition law are imposed for good and principled reasons and if delay in the investigative procedure can lead to reduction in that fine, then the penalty is no longer going to achieve that purpose.

MR JUSTICE MORGAN: Well, you see the point.

MR WILLIAMS: I do see the point, Sir. But the reasoning in that paragraph of *Bolloré*, it is a compressed reasoning but I think that is what one has to take from it and that is of a piece, in my submission, with the way in which the argument in relation to Article 6 is dealt with, the limitation period, in paragraph 109.

Against that, Mr O'Donoghue points to the *Dutch Beer* case and I don't know if you want to have it in front of you. I am going to make some fairly general points about it.

MR JUSTICE MORGAN: I will have it. It is tab 104. It comes quite late on, does it not? It is paragraph 425 onwards.

MR WILLIAMS: Yes. I think the way Mr O'Donoghue puts this, he relies on this first and foremost as going to a question of jurisdiction. To be clear, we don't say that the CMA doesn't have the power to make a reduction to a fine on account of delay and we don't say that this Tribunal doesn't have the power to do it in the sense -- you heard about the breadth of the Tribunal's powers earlier in the week. So it is not a question of powers in that sense. It is a matter of identifying the appropriate legal and principled framework for exercising your discretion. In relation to *Dutch Beer* I have started to foreshadow this. First of all, it is inferior authority to *Bolloré* in the sense that it comes earlier in time

and from a lower court and the context for that is significant because the Commission had made a reduction on account of delay, so the issue was not about whether a reduction ought to be made in principle but it was about the level of the reduction.

So what the Court did there was reappraise the level of the reduction that ought to be made, but it is not clear that because of that context that there was really discussion about whether in principle such a reduction ought to be made or, more particularly, whether a reviewing court ought to make a reduction to the fine imposed by a competition authority on account of delay in the competition authority's procedure, and that is quite a different question, in my submission, from the question that is being dealt with in the *Dutch Beer* case.

The other point that I have made already in relation to the way this is reasoned is that it actually rejects an analysis based on causation in paragraphs 431 and following. So even if one follows the logic of this case, it is put in terms of an equitable reduction, it is not put in terms of mapping the causal consequences through. So that is, in my submission, not the way FPM puts its case.

To the extent that FPM thinks it is in this world, it doesn't follow from this, in my submission, that one tries to calculate the impact of the delay on the penalty and then tries to reverse it out. That is not what follows from this.

I think I just asked the Tribunal to read these paragraphs. Mr O'Donoghue is asking --

MR JUSTICE MORGAN: You say it is not causation but causation might be a stronger case rather than a weaker case. If you can show that the delay has caused a deterioration in the position of the infringer by a measured amount, that might be given considerable weight compared with some general

plea that this took a long time and it was a breach by the enforcement authority, that should be rectified and the way to rectify it is to confer a benefit on the infringer. To remedy the loss caused by delay is a more compelling case, isn't it?

MR WILLIAMS: I see the way you put it to me, Sir. But actually the counter-argument is that if the penalty is imposed for principled reasons then one has to keep in mind the principled reasons for setting the penalty at that level and not simply reverse out what the complainant says is the consequence of delay because the logical consequence of FPM's argument is that even if a penalty at level X is what it needed in order to achieve the statutory purposes in a given year, for better or worse, that penalty, they say, should not be imposed because it is two or three years down the road or whatever it is and, in my submission, that approach, whether it is based on causation or not, is an approach which undermines the statutory purposes.

MR JUSTICE MORGAN: At the moment it strikes me that the beer cartel, the *Dutch Beer* case, is contrary to what the lower court and the Court of Justice said in *Bolloré* because the lower court recalled its jurisprudence or some such phrase, recalled its case law, of exceeding a reasonable period cannot justify reducing the fine. Whereas in *Dutch Beer*, they held that exceeding a reasonable period justified reducing the fine.

MR WILLIAMS: I think that is the point I put to you, Sir. It is a prior inconsistent authority.

MR JUSTICE MORGAN: You do say that in terms?

MR WILLIAMS: Well, it is inconsistent -- let me unwind slightly.

The first point I made it that is approaching the question through a different lens because the authority had made the reduction for delay and the question was

how much. There was simply a different question.

But we do say that actually it is inconsistent with the reasoning in *Bolloré* in paragraph 105 that one shouldn't make a reduction for mere delay because of the need to enforce the competition laws. The way in which one can reconcile them is to say that they have been decided on different premises but actually if one looks at them at the level of principle, it is inconsistent with *Bolloré*, which is higher authority.

MR JUSTICE MORGAN: The lower court in *Bolloré* seems to have reviewed its case law, so there is quite a lot of case law which tells us the proposition you are making that you don't reduce the fine by reason of delay and you prefer that to *Dutch Beer*.

MR WILLIAMS: Well, but the significant development in *Bolloré* is that the previous justification to at least a degree had been the point about the limitation periods, but that is positively rejected in *Bolloré* in the sense that there is a decision that one -- it is said even if the argument isn't ruled out by the limitation period. That is paragraph 109.

MR JUSTICE MORGAN: The next point is: we take the view: well, they can do in Europe what they like, but in this jurisdiction we can do what we think.

MR WILLIAMS: We don't say that you are bound by *Bolloré*, we are simply saying that is it consistent with the principled framework which we rely on, which is that the penalty is fixed with reference to turnover in the year before the decision on a principled basis.

MR JUSTICE MORGAN: Okay, understood.

MR WILLIAMS: If I can then turn to the Article 6 cases. The first question is where is Article 6 engaged? This has a legal and a practical aspect and as a legal matter the case before this Tribunal is a civil case, which was a case against

FPM as distinct from its directors and employees personally. The civil side of the case started at the earliest in April 2016, although we say the *de facto* start date was later, but we accept for these purposes the date of April 2016 is when the case was opened.

On that basis, the question is whether Article 6 is engaged to the extent of the civil proceedings but not any further. FPM wants to say that effectively Article 6 required us to bring the civil case sooner to the extent that they base their case on Article 6 but Article 6 requires the determination of a charge within a reasonable time and there was no civil case to determine before April 2016 and a charge cannot be determined before it is made.

We have identified in our skeleton argument the *Tychko* case on this point which we have cited at paragraph 131 but I will show you some domestic authority on that same point in due course.

MR JUSTICE MORGAN: I will just turn that up.

MR WILLIAMS: That is a cross-reference to *Tychko*, which is tab 129, paragraph 63. I was not going to open the case up, I will show you some domestic authority.

MR JUSTICE MORGAN: It is tab 129, just for reference.

MR WILLIAMS: What it says is that the case is opened when there is official notification that the person has committed an offence and here we say that the person for these purposes was FPM not the individuals and there was no official notice as far as they were concerned until the civil case was opened. I will show you the domestic authority. That sounds like a technical point but it is not, in my respectful submission, a technical point because it reflects the practical reality that the civil case didn't exist to be determined until April 2016.

Article 6 is not there to enable FPM to argue that we effectively should have brought

the civil case before the criminal case or overlapping with it.

There is another point which I will try to make briefly. If the Article 6 issue were not limited to the civil case, this Tribunal would be in the position of adjudicating on the timeliness of a case which is not a case before it in any sense. The criminal case involved different parties, different issues, different evidence, it was separate and it was different in kind. The Tribunal was aware it was an investigation leading to a criminal prosecution and in other cases it was prosecution.

The material for the Tribunal clearly provides it with a picture of the shape and contours of the civil case. There is a Decision, there is a body of evidence and so on. But it is a different matter, we say, to expect the CMA to come to this Tribunal and to effectively reconstruct its conduct of a criminal prosecution. We have explored these issues previously in the disclosure context. There are obvious sensitivity and issues of privilege. I won't go back into all that. One could never really expect the CMA to explain its conduct of a criminal pre-prosecution procedure in anything at the broadest level. This, in contrast, is a specialist Competition Tribunal. It does not have jurisdiction in respect of the cartel events and it is not set up to deal with criminal matters.

If I can make this submission respectfully, Sir: we say there are clear reasons why the legal framework shouldn't require the Tribunal to try and assess an estimate from a distance what may or may not have been possible in separate proceedings not before it and which were different in fundamental respects from the types of case the Tribunal exists to supervise.

So that is a big picture point.

If you were against us on that point in any way, we say at a minimum that is a point which will go to the intensity of review.

Sir, moving then on to two Article 6 cases. You opened one earlier on. The first one is *Dyer v Watson*, which is tab 35, bundle A3. I stood up and told you earlier on this was a case about sentence, which was an unhelpful intervention, because it was wrong.

MR JUSTICE MORGAN: Because we were shuffling our bundles I missed the last couple of sentences, Mr Williams. Give us those again.

MR WILLIAMS: You asked Mr O'Donoghue earlier on what this issue went to and I popped up to tell you but I was wrong, unhelpfully. This is not a sentence case because in *Dyer v Watson* the conclusion was there was no unreasonable delay, that was the police officer side of the case, and so there was no remedy. On the other side of the case, *K*, there was a finding of up reasonable delay and that lead to quashing of the indictment.

MR JUSTICE MORGAN: *K v HM Advocate*, right. It is tab 35.

MR WILLIAMS: Tab 35, yes. I think you picked up when you opened this earlier, Sir, that two police officers were charged with perjury, 20 months was considered not to be unreasonable delay. The *K* case was concerned with sexual assault charges against a 12 and 13 year old. K was 14 when the charges were brought and there were 27 months until the indictment. In broad terms, the Privy Council rejected the complaint of unreasonable delay -- I think I've said this -- in the police officer case and allowed it in the second, taking account of the vulnerability of the suspect.

I just want to pick up a few points. I will take it as read for the moment that the context is this very different context I have just been describing.

Paragraph 27 picks up the case of --

MR JUSTICE MORGAN: 27. Yes.

MR WILLIAMS: The significance of *Darmalingum* is in part a point Mr O'Donoghue

has already made, which is that it has become authority for the proposition that prejudice is not a constituent element of a breach of Article 6. But in dealing with that point he articulates the test and one can see in the middle there they say -- do you see at D on the right hand of the page -- "it may, of course, be applicable", and this is the speech of Lord Steyn in *Darmalingum* for the Privy Council:

"It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has become inordinate and oppressive."

So we pick up that test, really.

Prejudice is not an element of the breach but the delay does need to be oppressive and that test has been adopted in subsequent cases.

If you could move through, this is the speech of Lord Bingham. That was Lord Steyn in *Darmalingum*.

Paragraphs 52 to 55. 52 says:

"The first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed."

And it goes on. Then 53:

"The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the

burden of documentation ... But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable."

The second matter is the conduct of the defendant.

MR JUSTICE MORGAN: I am not going to dwell on that.

MR WILLIAMS: The third matter is the manner in which the case has been dealt with by judicial authorities.

This introduces the sorts of practical points that we started to hear about over the last day or so that (inaudible) efficiency of cases and so on.

If you look at the end of the paragraph, do you see it says:

" ... the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

So that is the point I said you could get from the *Tychko* case, but I think this is probably a more useful authority and obviously there is another side to that coin, which is if you delay the case then there is an expectation you will get on with it after that.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: If you could then turn through to internal page 1809. We now move to the speech of Lord Rodger. If you could just read from G on page 1809.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: The points I wanted to pick up were -- so this is inordinate again:

"The test is whether the proceedings have been, or can be, completed within a reasonable time, not whether they could or should have been completed sooner. So the fact that there may have been some slackness on the part of

the prosecuting or judicial authorities does not necessarily mean that the guarantee has been breached."

Again, I am not treating this as an authorities charter but it is just injecting a degree of rigour into the test. You can see this in Lord Rodger's disposal on page 1817.

At the bottom of the page, just below H, it says:

" ... there is no basis for holding that a period of 20 months between charge and trial is excessive or inordinate. It may be longer than was either desirable or strictly necessary. But that is not the test."

I am sorry, I am standing by my bundles, not by the microphone.

If you could then on to the next tab, 36, this is *Mills*, this is the other case we refer to in our skeleton.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: It is a different sort case because this is a case where there was a conviction in 1996 and then an appeal and the appeal took two years and the particular significance of this is because I wanted to draw out the interaction between the breach and the remedy. The first speech is given by Lord Steyn again. He picks up the *Darmalingum* case and there is quite a lot more exploration in this case of the point I raised earlier on about whether prejudice is a constituent element. This is one of the cases which comes down on the view that it is not.

Paragraph 14 is a useful passage which picks up the rationale guarantee. It contains the formulation, a formulation one sees in other cases, which is:

"In criminal matters, especially, it is designed to avoid that a person charged could remain too long in a state of uncertainty about his fate."

There are other forms of potential prejudice. Paragraph 16 identifies the fact that

there are a range of possible remedies. Indeed it says that the finding of a violation of the guarantee may in itself be a remedy in some cases.

In fact, this case resolves the issue as to whether quashing the conviction is the normal remedy. Effectively it said that that is not the normal remedy and one has to look at the remedy in each case.

Lord Hope covers much of the same ground. I wanted to pick up his speech at paragraph 53. It might be sensible just to read 53 and 54.

MR JUSTICE MORGAN: Yes, we will do that. (Pause). Right.

MR WILLIAMS: That draws out two particular forms of prejudice, the most obvious from the criminal law context being the factor of anxiety, which is not really the point in this case.

The other is that a party may have adjusted its circumstances in reliance on the lapse of time and I've made my submissions about how in the present case the CMA's methodology is itself adjusting to changes of circumstance, whether upwards or downwards.

I want to make, really, two sets of points about the Article 6 cases because I appreciate Article 6 is one of the angles which my learned friend relies on. The first is that if one is looking directly at the Article 6 cases, I have already made the point that they only really apply from the point of the civil case. Beyond that, there is a high threshold stated in terms to be high, the delay was inordinate and oppressive. One starts with the overall period having regard to the complexities and the circumstances of the case. It is not enough to pick holes in the process and point to things that could have arguably happened more quickly, whether it was longer than necessary or longer than desirable, it is a much higher threshold than that.

Even in the criminal cases there is no inevitability that sentence will be reduced

where there is finding of unreasonable delay. It is always a question of remedy. That does accord with paragraph 109 of *Bolloré*, which says mere delay need not lead to reduction in fine.

That is the argument put in strict Article 6 terms but we say that that mode of analysing the case is consistent with the point we have made elsewhere, that really this is a public law type question and that one is apply a standard which is -- I'm not calling it a *Wednesbury* standard, because plainly it is intellectually a different standard, it is different question, but it is a public law type question and indeed it is a public law question of a standard which is high even by the standards of something like a rationality test, inordinate and oppressive delay.

Those are some observations on the legal framework. We do say that taking all that together, it is not really locked into any clear and established principle that the authorities are broadly against it to the extent that it relies on criminal case law, as it does in other parts of this case, it is trying to extrapolate from a body of case law that doesn't really transpose. If the Tribunal agrees with those submissions, then the question of fact wouldn't arise but the Tribunal has heard from Dr Grenfell and I will now move on to factual issues.

The Tribunal has considered the approach to the facts to a degree previously in this case on the disclosure application. This is not an audit, the inquiry is a broad one. Does the duration create real cause for concern, call for explanation and so on? In our skeleton we make the point that FPM's skeleton argument expanded the way this issue has been litigated from 2 to 17 pages. I am not going to rebut its unpleaded case point by point, I am going to deal with the issue in the round and having regard to the evidence because that is, in my submission, the way that we ought to do it having regard both to the Tribunal's

ruling and to the more general authorities.

If one asks whether the time taken by the CMA is so long as to cause concern, we do accept of course that the investigations were heavy investigations which took time but we don't accept that the headline duration of the cases gives rise to concern however they are analysed.

Can I say something about Dr Grenfell's evidence generally before I get into the detail?

The CMA has made no bones about its discomfort that an allegation of the type made in this case should require it to reveal its internal workings, its interim thinking and its internal procedures. It is, as Dr Grenfell explained, difficult for an organisation like the CMA to defend this kind of allegation without opening up operational and strategic decisions to scrutiny and to be second guessed by an applicant without wide implications.

Having said that and notwithstanding its reservations, the CMA has made a very senior official from its organisation, Dr Grenfell, available for cross-examination to account for the position and to explain what was happening in sufficient detail for the Tribunal to understand the conduct of the case.

MR JUSTICE MORGAN: I understand all that. You have shown us these criminal cases involving Article 6 and the courts in those cases had to grapple with the issue: was the time taken inordinate and inexcusable?

We have seen the comments and the approach, which is helpful. I am quite sure that the prosecutor was not put on the stand and cross-examined about what he did from Day 1 to Day 500. I am quite sure that what the Court went on was the externalities, if you like: when was the charge brought, what interviews took place, the dates of those interviews, all the stuff that would be

external and available to be discussed and the cases suggest you don't look at a date of an interview and say: could that have been a month earlier? You just look at the timetable of the events that are that are known and you say: is that inordinate and inexcusable?

I suppose a court discussing litigation, criminal or civil, will have a feel for how long something should properly take and when it exceeds the proper bounds of what it should take.

What we have done in this case is we have examined, to some extent, with a witness being cross-examined, what was being done at this stage, what was being done at that stage, why it wasn't being done earlier, which I daresay is a departure from what is done in these other cases and it may be appropriate for us to comment on whether this should become routine, which I think the CMA would not want to see, or whether it should be discouraged to the point of it not happening again unless another court feels that it is imperative to do justice in another case.

I make that comment. I am not giving any conclusions at this stage but that is a matter we will have to consider what we should say about it. Right. You were then going to tell me about Dr Grenfell's evidence when cross-examined.

MR WILLIAMS: Yes. But if I could just pick up thread that you were just on.

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: I think that, if I may say so, those observations are of note because this has been, as you have observed, an unusual and difficult procedure. The story started with Dr Grenfell's first statement, the purpose of which was to identify the PSG paper and what happened thereafter in an absence of documentation one could use as a point of reference and obviously the matter moved on from there with the FPM disclosure application and the Tribunal

ruled on that application and we had a framework for resolving the issue at trial.

But we endorsed the observations you made, Sir, that it has been an unusual procedure and if with the benefit of reflection the Tribunal has observations on the suitability of the procedure then --

MR JUSTICE MORGAN: What is interesting is these cases, *Dyer* and the other Scottish case, *Mills v HM Advocate*, weren't cited last time. Last time I think we understood that the issue which had to be explored is what are the difficulties of running a civil and criminal investigation in parallel. Dr Grenfell gave evidence about that but he wasn't actually cross-examined about the difficulties of running them in parallel. It was not explored in his evidence.

MR WILLIAMS: No.

MR JUSTICE MORGAN: We have not heard submissions really about that. It was always accepted it could be done and indeed it was done in the sense that the civil was opened but then it became not an inquiry into matters generally, but into a very specific point, which was whilst there was an efficiency in drafting the SO during the criminal investigation, that might be available, we were told that efficiency wouldn't exist in this case on the facts.

The inquiry which took place at this hearing was not the inquiry I thought we were leading up to at the CMC.

MR WILLIAMS: If I could make this point, Sir. The case has become somewhat fixated on the volte-face issue and I understand my learned friend brought a broader case and I am not boiling the case down to a single issue but there was an extraordinary amount of scrutiny around that issue, and I will come to deal with the evidence shortly, but the volte-face issue was a small part of the wider issue that you identify, Sir, which is the question of parallel proceedings

and sequencing generally and the point we made in our Defence is this case is not really about the so-called volte-face period, it is about the fact that there was a very major heavy criminal procedure, which for all practical purposes came before the civil case, and that puts a completely different complexion on the timings of this case and when one looks at it through that lens, the notion that we are talking about an 80-month case is not really the right way to look at it. But exactly as you say, Sir, the specific point about the volte-face and the difficulties around parallel proceedings, that was a microcosm of a bigger point which applies throughout and explains why at that stage the civil case had been on ice for a considerable period, and I am going to come to that in a moment. But we think the microscopic focus on that period, whether there was a good reason for the CMA on reflection to do something different from what had been envisaged in some paragraphs of the PSG decision, it is actually losing the bigger picture, if I may say so, Sir.

MR JUSTICE MORGAN: The SO was always going to come after the conclusion of the criminal proceedings and nobody submitted to us that that was wrong and should have come during the criminal proceedings or in advance of the criminal proceedings. If the civil investigation had been opened before April 2016, the criminal proceedings were always going to postpone the date when the SO was published. So opening the civil proceedings when it happened did not have a causative effect on what happened after June 2017. There is a separate issue about pausing civil investigation, which we can deal with, we think we know what the evidence shows on that. And if there had been some preliminary drafting done at the SO and then the criminal proceedings ended and then the SO was looked at again and more drafting done, maybe it would have been published earlier. But also the

curiosity in this case is when the Decision was made in October 2019, the preceding year was 31 December 2018, so if the Decision had been made on 1 January 2019, that would still have been the preceding year.

MR WILLIAMS: I was going to come to that.

MR JUSTICE MORGAN: So there are lots of causation pipeline points we have to address.

MR WILLIAMS: Depending on what you think on the primary factual issues.

MR JUSTICE MORGAN: Yes, we will probably have to reflect on lots of points before we ultimately come to our conclusion. Indeed, in the course of his submissions Mr O'Donoghue has -- he started by saying that the criminal proceedings were too slow. We know very little about the criminal proceedings.

MR WILLIAMS: In order to make a case that the civil case ought to have been decided within three years he has to say the criminal case was too slow because --

MR JUSTICE MORGAN: On the basis of the SO always coming after the criminal case, he is not getting enough delay for his purposes. We know very little about the criminal case, there have been very few criminal cases, so taking an average and comparing it is statistically unsound. To say it was twice as long as *Steel Tanks*, well, we don't know enough about *Steel Tanks*, we can do own enquiries but I do not think we should do that.

So there are real difficulties for a Tribunal dealing with arguments of this kind it strikes me.

MR WILLIAMS: Yes.

MR JUSTICE MORGAN: Right.

MR WILLIAMS: I was making the point about the background and the sensitivity

and I think the point that I did not make was that (inaudible) on other issues an appeal on the merits and one slightly feels that the delay issue has been rolled into an appeal on the merits principle when in fact it is a different sort of issue but I think that is the point you were making to me, Sir.

The point is not withstanding its reluctance and reservation the CMA made Dr Grenfell, who is a very senior official, available for cross-examination to account for the position and to explain matters to the Tribunal. Some of his evidence was inevitably based on discussions with colleagues because he is the senior responsible officer, he was not at the coalface. So, in my respectful submission, it is not a fair criticism to criticise him for not being able to give the evidence a case director would be able to give. He gave the evidence that the senior responsible officer could give. He was a direct, straightforward witness. He accepted fair points that were put to him and he was clear when he could and could not speak to issues. His evidence was entirely credible and I would ask the Tribunal to accept it in its entirety.

A point he made a number of times was that it is better to take time and get it right than to do it more quickly and getting it right both as a matter of process and as a matter of substance, that is to say the decision ultimately reached, and there is a great deal to be said for that where one is dealing with criminal charges and multimillion pound fines and one only needs to put it in that way to see that there are obviously competing pressures on the CMA and it is the CMA that is in the front line deciding how to manage those pressures.

Overall, the cross-examination of Dr Grenfell didn't suggest that there was any unreasonable delay in the context of the two investigations looked at separately or cumulatively. The big points, in my respectful submission, around sequential proceedings and volte-face, there were obvious answers to

those points. Beyond that, there were some almost nitpicking points about whether disclosure could have been two months sooner or section 26 requests could have come at an earlier stage where Dr Grenfell said: perhaps they could have done but I do not think it really affected anything, and, in my submission, those points are not ones that are capable of taking this case across the line and I am not going to take up time meeting them. I will just make one more point before I stop for the day.

FPM complains that Dr Grenfell provided some additional detail when he was questioned yesterday and they say this is detail that was not provided in his witness statements. I think I have already really set the scene for this: the CMA has been clear that it would prefer not to have to explain exactly what happens in these investigations, he made no bones about that, the disclosure application --

MR JUSTICE MORGAN: Yes.

MR WILLIAMS: In putting forward Dr Grenfell's evidence, Mr O'Donoghue chose to ask Dr Grenfell questions which went to that evidence, which resulted in him ultimately providing more information, and I should say so on pain of threat of asking the Tribunal to draw adverse inferences, and Dr Grenfell cannot be criticised for answering the questions. It was obviously open to FPM not to cross-examine him but, having chosen to do so, they cannot complain that their questions were answered and that the Tribunal now has the evidence that it has.

Those are some introductory observations and I have submissions on the detail.

MR JUSTICE MORGAN: Right. That is a time to adjourn and I think we will sit again, I think the agreement is, at 10 o'clock tomorrow. We will adjourn until 10 o'clock. We look forward to seeing everyone again then. Thank you.

(5.00 pm)

(The hearing was adjourned until 10.00 am on Friday, 9 October 2020)