IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1123/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 July 2010

Before:

VIVIEN ROSE
(Chairman)

GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) SOL CONSTRUCTION LIMITED
(2) BARKBURY LIMITED Appellants

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Rhodri Thompson QC (instructed by Browne Jacobson LLP) appeared for the Appellants.

Mr. David Unterhalter SC and Miss Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Yes, Mr. Thompson.

MR. THOMPSON: Good afternoon, madam chairman, sir, madam. A 45 minute speech, or a 50 minute speech is a somewhat unusual length for an English barrister, it is neither the 15 minute sonnet form used in Luxembourg nor the epic poem familiar in the domestic courts – in sporting terms, it is "neither a sprint nor a marathon".

In the time allotted to me I will address three fundamental points of principle, and then three issues specific to this appeal, leading to a conclusion that will not be a surprise to the Tribunal that the fine imposed on my client is too high both in absolute and in relative terms.

The three points of principle concern first the burden of proof and what the OFT has actually established in its decision. Secondly, the correct approach in principle to the setting of a penalty in the exercise of a discretion, and thirdly, the place of the OFT's fining regime within the wider system of deterrent penalties under UK criminal law.

The three specific points concern the following issues: first, the OFT's refusal to recognise the unfairness of its approach to the fine imposed on Sol in terms of the relevant turnover used as the basis for the starting point for the fine - what might be called the *Boël* point. Secondly, the arbitrary and unjust nature of the adjustments made to Sol's fine at Step 3 of the OFT's fining methodology and finally, the unfair level of fine imposed on Sol when compared to other comparable addressee's of the decision.

Turning to the general points. First, the burden of proof. The fundamental defect in the overall decision is that the OFT fails to recognise the limited nature of what it has established in this case. First, it has not established any form of multi-lateral infringement, in contrast to many of the cases that it relies on as comparators.

Secondly, it has not established any form of consumer detriment in the large number of individual cases that it has chosen to pursue. Each case is in effect treated as a *per se* breach of the 1998 Act. Thirdly, it has not established any form of continuing infringement. Fourthly, it has not established any meeting of minds that would have precluded the recipient of confidential information from putting in a competitive bid. The OFT has simply relied on evidence of the bilateral supply of confidential pricing information as sufficient in itself for the imposition of a heavy deterrent fine. Fifthly, it has made no finding as to the state of mind of any of the individual addressees of the decision. It treats the large number of discrete infringements as justification for a heavy fine in every case, but the fact that a practice is common place, such as driving above 70 miles per hour on a motorway, may indicate a widespread feeling that the law is unrealistic and not to be taken

too seriously, rather than as evidence of an endemic practice justifying heavy fines. In such a case a rational enforcement policy might well be to focus on serious breaches such as driving above 90 miles per hour rather than a ferocious and indiscriminate clampdown on trivial cases. These are all important factors that the Tribunal will wish to bear in mind but the OFT is deaf to these points in its pleaded case.

I should make clear that as an applicant for leniency Sol does not dispute that it was party to a number of infringements of the 1998 Act. However, if the burden of proof is to mean anything then it must mean that the OFT can only exercise its fining discretion in relation to the infringements that have been proved or admitted. The OFT is not entitled to engage in speculation as to possible effects on consumers, or on future bidding processes that are unproven. However, the decision and the pleadings, and the skeleton arguments of the OFT are shot through with such assertions and speculations. This is also something that the Tribunal will need to bear in mind in exercising its own discretion as to the appropriate level of fine.

Finally on this point, the OFT places some reliance on the *Apex* judgment of the Tribunal and, in particular, on pp. 94 to 95, paras. 251 – 252 at bundle 3, tab 46 of the authorities. However, the summary at para. 252 of the judgment in *Apex* shows that the Tribunal considered the actual facts in that case with some care.

Insofar as para. 251 of *Apex* is relied on by the OFT as a simple formula that applies indiscriminately to all cases of a cover price, then SOL respectfully submits that it should be viewed with caution and I note in passing that the fine in *Apex* was, I think, £35,000.

The second topic, discretion in imposing a penalty. The Tribunal will have noticed two quotations at the start of the skeleton argument setting out two fundamental principles derived from Greek moral philosophy and Greek mythology. To translate those principles into propositions of law, one might say that they are very early articulations in Western thought of the following basic ideas. First, a discretionary exercise of ethical judgment cannot be reduced to a system of rules however elaborate and, secondly, treating different cases the same can be just as unfair as treating equivalent cases differently. These ideas are fundamental to all the appeals before the Tribunal and the decision is radically flawed in failing to observe these basic maxims.

In more concrete terms, and as explained in detail in the notice of appeal and skeleton argument, the fining mechanism used by the OFT is intrinsically incapable of generating fair results in that it is a system of rules, not the application of judgment to the particular facts. The elaborate nature of the OFT's fining machine does not change that basic fact.

So far as the point about the "bed of Procrustes" is concerned, the adjustments made by the OFT bear a marked resemblance to this mythical villain with adjustments up and down being made not to reflect differences between individual cases, but to fit all the cases into a pre-ordained framework.

Turning to the role of the Tribunal it is clear from the *Napp* judgment, approved by the Court of Appeal in 'Replica Kits', that the Tribunal is exercising an independent discretion on a case by case basis. In some cases, of which Replica Kit is an example, the Tribunal will no doubt wish to form an overview of a multi-lateral infringement. Here, by contrast the decision concerns hundreds of essentially unrelated bilateral infringements. In those circumstances although there is a common element in the character of the conduct involved the Tribunal's role is to set individual fines at a level that it considers fair in the individual case. Its role is not, contrary to the OFT's apparent understanding, to sanction or to amend in some way the elaborate mechanism devised by the OFT.

The third general point, penalties for breaches of the 1998 Act, as part of the British penal justice system, it is a point we address at paras. 18 to 21 of the notice of appeal, and I note in passing that this appears to be an important point which has been picked up by a number of appellants.

Although I and others appearing before the Tribunal in these appeals have been, and will undoubtedly continue to be, strongly critical of the decisions, its highly unusual character and the multiplicity of appeals to which it has given rise offer the Tribunal what is likely to be a unique opportunity to set the OFT's fining policy on a more rational and lawful basis.

The Tribunal will be aware that the approach of the OFT in this and other cases has given rise to widespread concern that the OFT has lost its bearings and appears to be adopting an increasingly arbitrary and unprincipled approach to its jurisdiction, and I make that point if nothing else by reference to the tobacco decision, which I think has been published in a non-confidential form today, where I note that Shell, after a two year infringement which the OFT characterises as "serious", has received a fine of £3.5 million as against a worldwide turnover, I think, of £458 billion. If the approach in this case had been adopted I think the fine would have inevitably have been a minimum, of £2 billion which clearly the OFT has offered no explanation as to why these smallish firms are being fined in this way and a firm such as Shell is being treated in a different way, except perhaps that they are frightened of the numbers.

In assisting the OFT to get back on track, I would respectfully submit that a valuable source of guidance is to be found in the long established and commonsense principles adopted

under the English criminal law which, like competition law, is centrally concerned with issues of punishment, and deterrence. However, in accordance with commonsense, and the considerations that I have just mentioned about the exercise of a discretion the criminal law uses a broad set of discretionary principles including where appropriate guidance as to tariff penalties not a baroque fining machine of the kind devised by the OFT in this case.

As the most obvious comparator to the present situation we provided the Tribunal with both case law of the Court of Criminal Appeals and very recent an authoritative administrative guidance to the criminal courts in respect of corporate crime resulting in death to members of the public, i.e. the most serious form of corporate crime.

This is of value for two reasons. First, to confirm the obviously flawed approach of the OFT in its decision, and secondly to indicate the absurdly over inflated level of penalty imposed by the OFT at these relatively speaking trivial and fleeting infringements of 1998 Act.

I understand that in response to this the OFT is understandably keen to protect its own little bailiwick but it has offered no principled reason why that should be condoned by the Tribunal or by the higher appellate courts as necessary or desirable. Sol respectfully submits that there is no such reason and that there is no reason why principles of penalty and deterrent should be interpreted differently in the criminal law as against the quasi criminal world of competition law.

If we look briefly at the cases, I think it will be worth turning them up just to see how the criminal courts deal with them. First, there is a case called *Friskies* which I think is about pet food, which is at tab 26 of bundle 2. If the Tribunal has that you will see that in the headnote it says:

> "The appellant company was a large manufacturing concern operating a factory manufacturing pet food. In the factory were 11 stainless steel silos in which meat was mixed by stirrers attached to a revolving cross shaft at the bottom of each silo."

Then it gives the details and says:

> "Two technicians went into a silo to repair a stirrer, for which they would use a welder which would heat the relevant parts to a high temperature for the purpose. In the course of carrying out this process, one of the technicians apparently suffered an electric shock."

- and he died from electrocution. Then at the bottom of that paragraph:

> "There was no system in place which alerted the technicians to the risks inherent in their activities. The system had been in operation for three years before the factory came into the ownership of the appellant company about three months before the accident. The underlying cause of death was that welding with a potentially lethal voltage was taking place in a confined, conductive and damp environment. No proper assessment of risk associated with activity had been done and no steps had been taken to avoid it."

The Tribunal will see that it was not, as it were, a *per se* infringement here, this was a case where there had been a breach of the applicable criminal law, and a serious consequence, namely the death of the welder.

Then the holdings, in the middle of the first holding there is reference to a case called *Howe & Son (Engineers) Ltd* at the start, and then in the middle it says:

> "The reported showed that fines in excess of £500,000 tended to be reserved for those cases where major public disaster occurred, where breaches of the law put large numbers of the public at risk of serious injury or worse."

Then towards the bottom:

> "The court took into account the financial position of the appellant company who had a substantial business with a considerable turnover generating pre-tax profits of £40 million. Taking those factors into account the court considered that the appropriate fine was £250,000."

I will take this fairly quickly, but for the detail of the reasoning I refer the Tribunal to the first main paragraph of the judgment of Judge Brian Walsh QC on p.2 where he sets out the principles to be applied referring to the case of *Howe (Engineering)* and the Tribunal will see reference to aggravating and mitigating circumstances both there, and three lines from the bottom of that paragraph. Then the detailed analysis is from pp. 4 through to 6, and you see first of all in the third paragraph on p.4 reference to the amount of time that the breaches had been going on for.

Then the next paragraph refers to the gravity of the infringement – a very serious matter. Then there are aggravating features below it, and at the bottom there are mitigating features. Over the page, p.5, there is a series of examples given of the levels of fine, and that led to the conclusion about the £500,000 figure, which I think is in the sixth paragraph down. At the bottom of pp.5 and 6 there is a summary of the aggravating and mitigating features and then over the page there is reference to the turnover and profits as the basis for the fine.

In my submission, those principles are not ones that are particularly alien to the OFT or anything surprising about them. This is carried on, firstly in the other case that I briefly draw the Tribunal's attention to - the *Balfour Beatty* case, which is at Tab 59 of Bundle 4. The facts are set out in the judgment of Lord Phillips in summary at paras. 1 to 4, and then in greater detail at paras. 11 to 21. In summary, they concern the Hatfield rail accident in which four people were killed and over 100 injured. Then, para. 22 is significant. It sets out the *Howe* guidelines that were referred to in the *Friskies* case. Again, these principles are in fact detailed, and I would refer the Tribunal, in particular to paras. 8, 10, and 11 which concern the approach that the court was recommending. Then, para. 24 sets out the reasoning followed by the judge at first instance, and in particular I refer to Point 8, the second paragraph,

> "On the other hand, I should not inflate any fine I had in mind because the parent shareholder's means are substantial. I intend to fix a fine in each case which is appropriate to be paid by a company able to pay it but one whose impact should be felt by those who own and/or control it".

So, there is a deterrent element there. Then, the analysis of the Court of Criminal Appeal goes in particular to paras. 40 through to the end of the judgment. I refer the Tribunal in particular to paras. 42 to 44 in relation to the general analysis of the fine, and to paras. 47 and 48 in relation to proportionality and discrimination.

THE CHAIRMAN: Interestingly, he says in para. 44,

> "We did not find that the exercise of comparing this fine with those imposed in other case helpful".

MR. THOMPSON: Yes. I think that is in relation to fines on completely different facts. I think that is what he says. For example, I think there was a case where Transco had been responsible for the explosion of a gas pipeline.

Does the Tribunal have a Tab 59A?

THE CHAIRMAN: Yes.

MR. THOMPSON: I believe this was referred to the Tribunal yesterday by Mr. Robertson in another case. This was a fine imposed on, in fact, Serco in another rail case - a fine of £450,000, again in relation to the death of a person as a result of negligent systems. I think Mr. Robertson drew the Tribunal's attention to the fact that the turnover of Serco was, I think, £4 billion, so that the equivalent MDT in that case was, I think, on the OFT's methodology of the order of £30 million.

The final point that I refer to is the Guidelines, which are right at the end of the authorities bundle at Bundle 12, Tab 180.

THE CHAIRMAN: These are the corporate manslaughter guidelines?

MR. THOMPSON: Yes. Can I draw the Tribunal's attention first of all to the second page, the Forward, which explains what they are - in particular the third and fourth paragraphs of the Foreword.

> "This is the first offence guideline relating to sentencing organisations rather than individuals, and concerns sentencing for offences where the most serious form of harm was caused, the death of one or more persons.
>
> The guideline takes a different form from that used for most other offences. It sets out the key principles relevant to assessing the seriousness of the range of offences covered which may involve a wide variation in culpability. Principles concerning the assessment of financial penalties are also provided and consideration is given to the additional powers available to a court imposing sentence for these offences".

Then I would refer the Tribunal, in particular, if you look at the contents, to Parts B, C, and D - Factors likely to affect seriousness; financial information; size and nature of organisation; and level of fines. In particular, para. 6 gives indications in relation to gravity; para. 7 in relation to aggravating factors; para. 8 in relation to mitigating factors; and then para. 9 refers to the need for involvement of senior management in a case of corporate manslaughter. Then, paragraphs 15 and 16 - the approach recommended in relation to the financial strength of the company. Then, in particular, paras. 22 through to 25 in relation to the level of fine and in particular the reference at para. 22,

> "Fines must be punitive and sufficient to have an impact on the defendant".

So, the element of punishment and deterrence. Then, indications of the level of fine at paras. 24 and 25. So, in relation to corporate manslaughter involving gross breach at a senior level, they are suggesting that fines should seldom be less than £500,000 and may be measured in millions of pounds, and that the lesser infringements seldom attract less than £100,000 and may be measured in hundreds of thousands of pounds or more.

What we are saying here is that the factors are notably common to those indicated by the OFT in its fining guidelines ----

THE CHAIRMAN: Which factors? I mean, looking at the factors listed in paras. 6 and 7 it is very difficult to see how one would start trying to read across those factors. How far up the organisation does the breach go? How common is this kind of breach in this organisation?

How foreseeable is serious injury? Injury to vulnerable persons -- How can you read those factors across ----

MR. THOMPSON: We could look at the Guidelines, but in my submission those are precisely what the Guidelines do say - the involvement of senior management, for example, is an aggravating factor.

THE CHAIRMAN: Yes. That was a factor here. If directors were included then there was a 5 per cent increase in the fine in these cases.

MR. THOMPSON: The categories of aggravation and mitigation are not closed, either in relation to this or ----

THE CHAIRMAN: I know, but you are trying to draw an analogy between this case and saying that somehow we should have regard to these guidelines on corporate manslaughter in determining in some way that these fines are too high. I am just trying to see how one would start going about doing that.

MR. THOMPSON: I have seen reference to corporate manslaughter in some of the previous transcripts. It is actually causing death to members of the public - not necessarily involving corporate manslaughter. One of the points that I think is relevant is that the degree of involvement of senior management is relevant for the question of corporate manslaughter and the high level of penalties. Yet, the penalties are much lower than those that the OFT has seen fit to apply in this case. So, this is a senior UK body applying its mind very recently to the issues of gravity, duration, aggravation, deterrence, mitigation and setting out guidelines which are intended to bind the criminal courts for the most serious forms of corporate crime and coming up with numbers which are markedly lower than those which the OFT has come out with in this case. That is the point.

THE CHAIRMAN: Suppose next week there was then a Health & Safety Act prosecution in which the judge was considering what fine to impose, and he (or she) indicated, "Well, we are thinking of something -- We have looked at these Sentencing Council Guidelines. We think it should be £450". Suppose somebody acting for the party who had been killed said, "Well, we think that is a piffling amount. Just look at the fines that the OFT imposes in elation to cover pricing in the building industry. Those fines are far in excess of what you are considering. You should be imposing a fine of £15 million on this company". Would the judge not say, "I am sorry. But, those are the Guidelines which have been made to apply to this particular case. They were applying guidelines which applied to their case. I do not see how I can have regard to those"? Does the OFT not have to have regard to the

Guidelines that have been approved by the Secretary of State under the Act? I am not sure how we can have regard to these Guidelines?

MR. THOMPSON: I think there is a slight mis-match of perception here. These numbers that we have got here are not some inexorable product of the OFT Guidelines. They are the inexorable product of a fining machine. But, that fining machine is not laid down in the OFT Guidelines. All I am saying is that when the Tribunal, taking things in the round, and looking at the OFT Guidelines and thinking of itself as part of the UK justice system with the Court of Appeal above it, and the Supreme Court above that, is very much in the same position as a judge who is thinking about what level of corporate fine should be imposed, who also has the Court of Appeal above him, and the Supreme Court above that. I mean, why should the principles of justice be different in this room from those in the High Court in relation to these very issues of gravity, duration, aggravation, and mitigation?

THE CHAIRMAN: So, are you saying that you accept that the OFT does not have regard to the sentencing guidelines when it is devising its fine, but once it gets to us, because our jurisdiction is to look at the matter afresh, we can have regard to that?

MR. THOMPSON: No. I think it would have been salutary for the OFT to have considered a bit more about what the implications of its fine in this case are. As I have already indicated what the implication would be were a Shell or a Tesco to be found to have infringed the competition rules, would it really have the nerve to impose a £2 billion fine because of global turnover?

THE CHAIRMAN: That is a different point. That is at least comparing this with something that is under the same regime. At the moment we are looking at what we can draw from a different regime on the basis, you say, "Well, it is all part of fining for criminal, or criminal-like, conduct. Therefore there ought to be some kind of equivalence".

MR. THOMPSON: I do not know if it would help if I make the submissions I was going to make about this, and then, if there are further questions we can see whether that answers those questions. Can I just make the submissions?

THE CHAIRMAN: Yes.

MR. THOMPSON: I do not know if Mr. Mather wants to ask me something first?

MR. MATHER: Very briefly. In the earlier discussions on this the Chairman mentioned the fact that there is different history involved in these areas, the way in which fines have developed in the world of competition law and the way in which they have developed in the area of corporate manslaughter for example, have a quite different history and she I think suggested that there may be an element of catch up going on in the latter case. Would you accept that

that may be the case and we may, in the world in which we are operating, be influenced by those historical developments which have left the position different and not necessarily comparable?

MR. THOMPSON: Well, sir, I am not sure that what I was going to say is going to quite answer that point. I am obviously just dealing with this appeal on these facts and I am not sure I would accept that there is any necessary mis-match between what are, as it were localised although very serious infringements, such as the poor man who is electrocuted in the welder at the packaging factory as against the sort of things here.

What I would accept, and it is also going to be my first submission is that where one is dealing with an international cartel, and I think two or three decisions have been taken by the Commission in the last few days imposing fines of €200/300 million, or where you are dealing with a massive monopolist such as a Microsoft or an Intel, then those cases raise completely different considerations from the ones with which we are concerned here and nothing I am saying today suggest that fines from Microsoft or Intel should be set at €0.5 million or some paltry amount that they would not notice. The point we are dealing with here is these fleeting infringements involving single objectionable activity between two companies. In my submission, there is a lot more mileage in looking at how would the criminal courts view, indeed, what I would say much more serious criminal conduct going on over a period of months, and if they impose penalties at a much lower level it does seem to me at least to raise a question as to whether the OFT has gone completely off its rocker in applying fines at this sort of level for this sort of activity, especially when you see the mis-match with the treatment of, for example, Shell *Tobacco*.

Just to make my submissions I am not saying that fines for abuse of dominance, or major multilateral cartels are subject to this approach or that they should be lower, although I note that the Court of Appeal in *National Grid* chopped the fine in that case in half for particular reasons, but I do say that the issues of principle are common, for example, gravity, duration, aggravation, mitigation, financial strength. I say that the issues of proportionality and equal treatment are common and I referred the Tribunal to the issues as noted in *Balfour Beatty*, the criminal case, and most importantly I say the need for judgment – a discretionary judgment – taking into account all the relevant factors is clear in the criminal case, and equally clear I would say in the case law of the Tribunal and the Court of Appeal in the fining cases that we have seen.

Finally, I would say that the level of penalty here is obviously inconsistent both with principle and with the analogy so far as it goes and far too high. Those are the points that I would make by reference to this material.

I see I have lost a little bit of time – I do not know whether I am allowed a bit of extra time at the end as a result - but I have three specific points.

First, the *Boël* principle, and the starting point which is paras. 28 to 37 of the notice of appeal at annex 9, it may be worth turning up the notice of appeal at annex 9 – it may be worth turning up the notice of appeal in that it is set out fairly clearly in writing there. The statement of principle is at para. 29 of the notice of appeal – it does not seem to have page numbers, but it is not a very long document, it is para. 29 and, in fact, the principle of the *Boël* case is summarised in a subsequent case of *Fiskeby* and the italicised wording in the first paragraph, 42:

> "*…for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed.*"

And then the same point in 46:

> "*… the turnover upon which the Commission had relied for the purpose of determining the amount of the fine did not give an indication of the applicant's true size and economic power and of the scale of the infringement which it had committed…*"

We rely on that in two respects. First, the point at 31(a).

> "The use of three infringements, all of which relate to the educational sector in the East and West Midlands, does not give a fair indication of Sol's 'true size and economic power', in that a much more substantial proportion of Sol's overall turnover is concentrated in those markets than is the case for the great majority of addressees of the Overall Decision."

And then the points are set out in more detail in paras. 32 to 34, and implications are summarised at para. 34 showing the lower level of fine would have been used on various different bases and, in particular, if the OFT had happened to penalise the first three rather than the last three infringements, which was an entirely chance factor that they went for the last three rather than the first three, and that had a fairly substantial financial effect on Sol.

Then the second point we take at para. 31(b) and then developed in paras. 35 to 36, we show that the year that the OFT happened to light on 2008, 2009 was very much higher both on the relevant market and on its global turnover, than in any year from 2005 to 2008 or in

the present financial year and this again had a major economic effect on the level of fine and, in particular, in 36(c) you see:

> "Had any year other than 2008/2009 been used, the maximum fine that would have been imposed would have been £1.2 million, approximately £600,000 less than the fine actually imposed, so that the effect of the choice of year has been to inflate the fine imposed by at least 50 per cent and, with reference to other years, by a much higher margin."

We say that that is a classic case of the *Boël* type of evidence. We have said "What difference did it make?" We have given specific figures and we have shown that both in relation to the proportion and level of turnover it has made a massive difference. The OFT I do not think has made any substantive response, except as it were to fold its arms and say "not convinced" and we would say that really the maxim: "There is none so deaf as those that will not hear" applies here and that this is a clear case where a reduction should be made on that basis if no other.

The second point I take in relation to Step 3 ----

THE CHAIRMAN: That principle is in relation to which Step, or do you not tie it into a particular Step?

MR. THOMPSON: We are taking it at Step 1 in relation to 36(a) and in relation to Step 3 at 36(b), so it affects both the relevant turnover used at the start and the MDT figure, because both of them were completely abnormal. I think the OFT says that that is an EC principle "so we do not take any notice of that", but of course in my submission it is a perfectly sound principle, and whether it has the blessing of the EC or not it is one that a rational body should take into account, and we say the fact that the EC thinks it is a good point is in our favour we well.

The next point, MDT and Step 3, this is the point we take at paras 22 to 27 and I think the Tribunal will be aware that Sol is only one of eight companies whose fines at Step 3 were recognised by the OFT to be so disproportionately large as to justify a reduction rather than increase to reflect appropriate deterrence. One sees that at Annex 4 to the notice of appeal. The decision does not explain the OFT's thinking in any detail beyond informing the reader that fines above 4.5 per cent were reduced, and that is what you see at para. VI.273. However, we are now told that the OFT reduced such fines by a number of different means to ensure that all those fines were ultimately below 4 per cent.

As explained in detail in the notice of appeal both these cut off figures appear to be either completely arbitrary or else possibly based on a multiplier of three of the highest deterrent

penalty that the OFT's methodology would permit, namely, 1.5 per cent. But the reason why 4.5 per cent and 4 per cent were used as cut offs is totally unexplained, in fact the 4 per cent does not appear in the decision at all.

Sol makes the following submissions on this remarkable feature of the decision. First, we say the trigger of 4.5 per cent of global turnover is effectively unexplained and is both arbitrary and set at far too high a level.

Secondly, given that there is no element of culpability involved in a high Step 1 or 2 figure, but merely commercial success in 2007/8 there is no reason to set the trigger level at anything like such a penal rate. Sol submits that a clearly more appropriate level would have been 2.25 per cent, three times the level that the OFT had itself adjudged sufficient for deterrent purposes on an individual infringement, so it would effectively be a deterrent penalty for each of three infringements instead of just one.

THE CHAIRMAN: At 2.25 per cent you say?

MR. THOMPSON: Yes.

THE CHAIRMAN: Is that if you applied 5 per cent to three times 15 per cent rather than 10 per cent?

MR. THOMPSON: What was done, 0.75 per cent was the standard MDT and it was only applied once. If that was considered sufficient deterrent for one infringement our point is that if that deterrence had been applied to each of the infringements, that was surely sufficient deterrent for anybody, instead of which the OFT applied the cap only at double that level. That is the point, and we see no justification for that in the reasoning in the decision, or in rationality or justice.

THE CHAIRMAN: Yes, I think probably what we were saying turns out to be the same thing. You think that the 4.5 per cent comes from the total that would be fined for three fines if the maximum starting point were applied, that is 10 per cent ----

MR. THOMPSON: Yes, I understand.

THE CHAIRMAN: -- in a situation where the relevant market turnover represents 15 per cent of total turnover. So 10 per cent of 15 per cent is 1.5 x 3, whereas you are saying that there is no reason to take the maximum starting point because they have based the MDT on the 5 per cent ----

MR. THOMPSON: Exactly.

THE CHAIRMAN: -- so it should be half of that, so it should be, if you took 5 per cent of the 15 per cent and then multiplied by 3 you would get 2.25.

MR. THOMPSON: Yes, and one can look at it in a different way. If you look at tab 2 of the notice of appeal – does the Tribunal have that?

THE CHAIRMAN: So if you had gone to 2.25 you would have been ----

MR. THOMPSON: Only 20 people would have been above it.

THE CHAIRMAN: Yes.

MR. THOMPSON: So 80 per cent of the respondents were below that level in any event, so why the OFT thought it appropriate to leave this class of outriders, of which we are number three, with a fine of 3.81 per cent is totally unexplained.

THE CHAIRMAN: The slight curiosity is that although they said that the 4.5 was going to be the cut off, in fact it was not the cut off in the sense that if somebody was above 4.5 they were brought down to 4.5, the eight, I think, were brought down quite considerably further.

MR. THOMPSON: We are now told they were brought down below four, although some of them actually got completely random reductions which brought them in much lower and one sees that at Annex 4. You will see for example, Harper actually ended up with nothing.

THE CHAIRMAN: That was for different reasons, was it not?

MR. THOMPSON: So, there were different reductions made.

THE CHAIRMAN: Those eight at the top of Annex 4 - those are the eight to which this 4.5 cap is said to have applied.

MR. THOMPSON: Yes, that is right. The second table shows why they were reduced. I think Sol was the lowest at 4.7 per cent and McGinley was the highest at 12.3 per cent. But, I agree - if somebody had been at 4.49 per cent I do not know whether the OFT would have said, "Leave them alone", which, to my mind, would have been totally bizarre and irrational. But, that seems to be implicit in the reasoning that we are now told was followed - that for some reason if you were below 4.5 per cent you got no reduction, but if you were above it ----

THE CHAIRMAN: If there was such a person, they do not seem to have appealed.

MR. THOMPSON: I do not think there was such a person, as it turns out.

The third submission we make is that the cap of 4 per cent remains wholly unexplained and was not mentioned at all in the Decision. Likewise, no explanation has been provided for the apparently arbitrary reductions that were made to get below the 4 per cent level. In particular, our fourth point, the OFT has made no attempt to justify the fact that of the eight companies above the 4.5 per cent cap Sol had the lowest fine as a proportion of global turnover after Steps 1 and 2, but ended up with the highest fine on this basis after the Step 3 adjustments which one sees at Annex 4. We say that these facts are the clearest possible

illustration of the arbitrary and unfair consequences of the fining machine approach of the OFT. It is obvious that no rational exercise of discretion could have generated such an absurd outcome which, in effect, reduces the OFT's fining policy to a game of snakes and ladders.

THE CHAIRMAN: You are saying that looking at the second table on Annex 4, you were only slightly above the 8. You were the one that was only slightly above the supposed cap, and yet the reduction you have had brings you to the top of the rest. I see.

MR. THOMPSON: It does not seem to be in the exercise of intelligence at all. It seems to have been some form of arbitrary effort with a pocket calculator.

The third area of specific complaint relates to comparators which we deal with at some length in the Notice of Appeal at paras. 38 to 59 and Annexes 4 to 7. I will deal with it briefly because it is set out fully in writing. We say that the approach of the OFT to fining identified three principally relevant factors for its policy - first of all, relevant turnover in very crudely defined product and geographic markets; secondly, the presence, or absence, of compensation payments; and, thirdly, global turnover. Of these, much the most important in practice was global turnover in that Step 3 adjustments, up or down, were made to many addressees of the Decision. We say that given that this is the main criterion used by the OFT in the exercise of its discretion, the principle of equal treatment requires companies that are comparable to be treated equally by reference to that criterion. We say that that requirement has clearly not been respected in respect of Sol, whose fine as a percentage of global turnover was 3.81 per cent, the third highest of all the addressees of the Decision and at least double the level of fine imposed on the great majority of companies as one sees from the Annex to the Notice of Appeal and, in particular, Annex 2 where I think half of Sol's fine takes you down, I think, to no. 29 - Baggaley and Jenkins.

We say that there is nothing in the Decision that begins to justify this outcome and its gross unfairness is confirmed and illustrated by a whole series of comparators which we set out in Annexes 3 to 7 of the Notice of Appeal. Of these perhaps the most telling comparator is that set out at Annex 3 which shows that all but one of the six most culpable addressees of the Decision - those involved in compensation payments - received fines ranging from 1.07 to 1.51 per cent of global turnover as against the 3.81 per cent figure for Sol. So, the majority of them have fines which are only one-third as a percentage of global turnover of that applied to Sol. Otherwise, we refer the Tribunal to our detailed written submissions on this issue. We say that this submission alone would justify a 50 per cent reduction in its fine.

If I may bring all this together by way of conclusion, as indicated at the start of these submissions, our basic point is that the fines imposed on Sol are too high, both in absolute and relative terms. Paragraph 5 of the OFT's skeleton lays down a challenge to Sol, and to appellants generally, to give an alternative approach that should have been followed. I have seen in the transcripts that this point has been considered before. Sol shares the doubts that I think have been expressed by the Tribunal and by some of the appellants as to whether this is an appropriate challenge for the OFT to lay down. But, Sol is happy to make the following points: First of all, as I have indicated, the fine should at least be reduced to reflect the fact that Sol's figures on which Steps 1 and 2 were based are skewed by the sectors involved and the exceptionally high turnover figures for the year used by the OFT and a reduction of at least one-third and probably one-half would be justified on that basis alone.

Secondly, as I have just said, comparison with the general level of fines would also justify a reduction of at least one-half. Thirdly, if the cap approach of the OFT in the Decision is used, then we say that a cap of 2.25 per cent of global turnover would be much more proportionate than the 4.5 or 4 per cent figure apparently used by the OFT. Fourthly - and this is perhaps the most radical, but, in my submission, the most sensible sub, given the OFT's decision to proceed against so many cases all at once, another obvious possibility would be some form of simple tariff fine. If such an approach were adopted, then Sol considers that a fine of £25,000 to £50,000 per infringement would be appropriate to mark the disapproval of the Tribunal, with a substantially higher figure for those involved in compensation payments. We say that that would be an obviously fairer and more straightforward approach than that adopted in the decision. In relation to Sol, that would suggest fines in the region of £75,000 to £350,000, depending on the tariff used and the number of infringements - so, between three and seven - which were included.

However, Sol ultimately returns to its starting point: that the imposition of a deterrent penalty under the 1998 Act, as under the criminal law, is an exercise of discretion. The Tribunal should take a view on the gravity and duration of these infringements, the size and economic strength of the companies involved, and any aggravating and mitigating factors. That would accord with both the OFT's own guidance and with the approach of the courts to corporate crime. Sol has every confidence that if this well-established and reasonable approach is adopted, then a much better and fairer outcome will inevitably result, and, what is ultimately of greatest interest to Sol, a very much lower fine.

Those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Thompson. Mr. Unterhalter?

MR. UNTERHALTER: Thank you, madam Chair.

We were interested to learn that at least one of the options that the appellant thinks would be appropriate was a simple tariff that would be applicable across the board. We had understood that the greater burden of what is being contended by Sol is that there should be a fining regime that is narrowly and carefully tailored to the individual circumstances of each infringer. Yet, it seems that at the death of the argument, at least one option - perhaps one most favoured option - is that as a result of the kind of investigation entailed here, there should be but one simple tariff that applies to all. It shows that when it comes to thinking through how one sets up a framework that is defensible, and which ensures that there is both proper consideration to individual circumstances and consistent treatment across cases, that the sorts of solutions just suggested are entirely inconsistent with the burden of the argument that is addressed.

Our learned friend starts from this point: he wants to suggest that there are very high level principles that are essentially of the universal application across all fining regimes, and that all that needs really to be recognised is that those principles exist, and for the rest all that is required is to ensure that in each particular case those highly abstract principles of deterrence, gravity, mitigation, aggravation, duration, and the like are then applied on the facts of the particular case. That is said to do justice and no other scheme will do.

The second premise of this argument is that there is an entire continuum in respect of how one considers penalties in, in our conception, entirely different circumstances - that is, not just within the scheme of fining that is appropriate for the purposes of infringement of the Competition Act, but as between regimes. Corporate manslaughter, and presumably other aspects of criminal justice, and, indeed, the sorts of administrative penalties that are applicable for infringements of the Competition Act. It runs as one continuous thread without any variation because the principles are the same, and the identity of issues for the purposes of doing justice are the same.

One immediate curiosity of such an approach is why there are specific guidelines that have been promulgated at all in respect of criminal manslaughter. If, indeed, these obvious principles at the high level that is suggested were just of necessary and obvious application everywhere without further thought and regard, there would be no need to generate these specific guidelines.

So, we begin from a different premise. In our submission there is a guidance which has been carefully worked through and by which the OFT is bound, and which set out a framework

and applicable to the infringements that arise under the Competition Act. There are guidelines that are appropriate to health and safety issues and have been worked through in that context. There are features of them that are particularly pertinent to the questions that arise in that particular area. Of course, at the highest level of abstraction it is true that one can discern some common principles that apply everywhere. It would be very surprising if it were otherwise. But, does it mean that one should read across from one regime to another and say, either by increasing the level of abstraction or by saying there must be some necessary continuity of application between fields of applications, that there is absolutely no warrant for that. Indeed, Parliament has set its face against such a view because the very scheme, as we have indicated previously to this Tribunal, within which the Competition Act works and the fining regime to which it has given rise, works from the principle of a maximum fine in respect of a 10 per cent of total turnover standard which is entirely at variance with the indicative fining regime that arises under the guidelines applicable to corporate manslaughter.

Now, one can question no doubt whether the sorts of issues, as a matter of gravity, that arise from deaths that come about as a result of corporate manslaughter should, or should not, be thought of in the same scheme of seriousness as serious infringements of the Competition Act and whether the fines that are generated thereby should be at the same kinds of levels. The fact is that no such general universal point of principle needs to be resolved by you because Parliament has decided that there are distinctive regimes and the kind of guidance that is issued for these distinctive regimes takes a view which has come about as a result of history and precedent and some sense as to what is the scheme within which fining should take place.

We have sought to submit before - and we submit again briefly to you - that there are in fact, apart from the statutory basis upon which there is distinctiveness and which is hard to argue with, there are in fact issues of principle that do differentiate these regimes One has only to have regard to the Guidelines which our learned friend referred to - and perhaps I could ask you briefly again to take them up at Volume 12, Tab 180. It says in the Foreword, in para. 3,

> "This is the first offence guideline relating to sentencing organisations rather than individuals, and concerns sentencing for offences where the most serious form of harm was caused, the death of one or more persons".

This is plainly a guideline intended for a particular set of offences and the considerations that are relevant for that purpose.

If I could ask you to have regard to p.3 of the Guidelines which deals with factors affecting seriousness? At the heart of corporate manslaughter is the duty of care and questions around the foreseeability of serious injury; how far short of the applicable standard did the defendant fall? How common is this kind of breach in this kind of organisation? How far up the organisation does the breach go? At least as to the question of foreseeability of harm and questions of the duty of care. That is, of course entirely relevant to health and safety issues. It seems to be a concept of rather remote relevance to the sorts of infringements that one is concerned with under the Competition Act. No doubt one will find certain principles at the highest level of generality can be seen to have echoes in the guidance applicable to the Competition Act. The question is: so what? You would not expect otherwise. You would not expect that some treatment of the question of deterrence would not be found in both sets of guidelines, but that is not a reason to suggest that one should either ignore them, or that somehow there is this general universal principle, which is the right applicable basis upon which every single penalty should ever be applied. So we do submit that there are principled reasons for differentiation apart from the obvious statutory imprimatur which differs as between the regimes.

The other point is that one is concerned here with the unilateral liability with organisations which arises in respect of duties of care in respect of the discharge of their performance, whereas the cartel problem is a completely different problem, it concerns how co-ordinations can take place in markets where, as I have indicated previously, there are perfectly rational reasons for such undertakings to engage in such activity, and how the proper incentives are put in place to dissuade undertakings from engaging in that kind of co-ordination gives rise to a different regime and different considerations that are applicable to it. There is no reason why there should be this reading across.

So we do submit, on the first general point of principle, which is that the only way one does justice is to ensure there is but one common collection of principles that are then applied on a discretionary basis to individual cases is not the right formulation of the matter, because there is specificity that is relevant to distinct fields of infringements, and the correct incentive structure that is appropriate to them.

But the second broad theme that is suggested by our learned friend is to suggest that what in fact has occurred here is that these are rather fragmented, bilateral information exchanges of very little consequence, and consequently of course they bear no relationship to corporate manslaughter where deaths are involved, but equally – and at least presumably by reference – it is said that they bear no relationship to the notions that you might have international

cartel behaviour which does warrant fines running into hundreds of millions of pounds or Euros as the case may be. It is hard to understand, even in the appellant scheme of things how all of those factors sit together. If one conceives of the worst kind of infringement of the Competition Act, which is some egregious form of cartel behaviour which permissibly would give rise to a 10 per cent of total turnover penalty, and that is both lawful and there must be some occasion on which it could be applied in the worst of all possible cases, and our learned friend has suggested that those might be cases of aggravated cartel behaviour of the sort that he mentioned. How does that square up with a corporate manslaughter guideline which says in egregious cases it is £500,000 or may run to millions, i.e. not tens of millions, hundreds of millions. It is perfectly clear that there are entirely distinct views taken about these two fining regimes with the obvious consequence that you cannot compare in the way that is sought to be done here, and it is not helpful to seek to do so.

THE CHAIRMAN: In a way I thought you were going to say they are doing the same sort of thing as we have done. In the *Petcare* case they said: "For the worst kind of things, it is £500,000 and this is not one of those cases so where do we put it on the scale, the scale having been calibrated for us by the most serious cases." Here, all right, the calibration is changing and they are saying: "You should not regard £500,000 as the worst, but there is nonetheless some other calibration", and I think what you were saying is that the calibration here is set by the 10 per cent of turnover, it could have been set at £500,000 or £5 million, but it was not, it was set as a percentage of turnover, if that is the most serious then you look at where this is along the spectrum – people may vary as to how serious they think this is – but it seems to me that it is the same kind of process they were using.

MR. UNTERHALTER: Unquestionably it is a question of situating the particulars of the infringement you are concerned with within the scheme of the guidance which has a certain maximum, that is the range across which one will have to make the right determination. What our learned friend is arguing for is that you should compare across infringements by type and not simply within infringements by type. We submit that that cannot possibly be the correct principle. Neither is it indicated as a matter of Statute, but equally so it cannot make sense as a matter of principle either, and as soon as one seeks to do that one just ends up in a morass of uncertainty as to where one must situate oneself in relation to the particulars of what is required to be considered in relation to scaling problems by reference to maxima and minimum sentences.

The second large feature of what is being suggested by our learned friend is that the features of these infringements are really not very serious, in fact, I think at one point in the

skeleton it is suggested that this was a sort of incidental telephone call or two, and really how serious can any of that be understood to be. Well, with respect to our learned friend, that does not bear scrutiny in relation to the way in which the question of seriousness and how to situate cover pricing has been very, very carefully considered in the decision and I wanted briefly to go through a few matters for two purposes. The one to show how carefully the OFT in fact sought to understand the question of seriousness in relation to these kinds of particular practices, not on some broad brush basis but very particularly entertaining a number of questions and dimensions of judgment that had to be carefully thought through for the question of determining seriousness, and then to show through this process that it was not one where there was no recognition whatsoever of the individual circumstances that were relevant to the conduct that was implicated by particular infringements.

I might ask you to turn up the decision for this purpose, and the discussion of this commences at VI.102, where the issue arises as to the nature of the infringement. I shall go through this very, very briskly, but effectively at 103 the OFT says:

> "The OFT considers that one of the most serious examples of collusive tendering would be a cartel where collusion in relation to individual tenders was part of an overall scheme that was centrally controlled and orchestrated by the participants … The OFT does not have evidence of such an overall arrangement in this case."

So it is marking very carefully and at the beginning of its consideration what would be the most serious kind of infringement and it is marking the difference that this is not such an infringement.

It then considers a number of arguments that the parties made concerning why cover pricing was not of any particular seriousness, rather along the lines of our learned friend, and the OFT said the following at para. 106:

> "Whilst the OFT does not accept all of the arguments listed above, when setting the starting point for penalties the OFT has taken into account the fact that discrete individual instances of cover pricing can generally be expected to be less serious than the overall bid-rigging scheme involving all bidders in a particular tender. In other words, again not failing to account for the specific arguments that parties were making around cover pricing, but properly trying to situate it within the spectrum of seriousness."

At para. 108 the question is raised as to there being a desire to maintain relationships withi customers, and then OFT deals with that point. It says:

"[It] does not diminish each supplier's obligation to comply with the Act."

So one of the arguments is raised and again it is dealt with. If I might move over this reasonably quickly, one will find paragraph by paragraph there is then a consideration at para. 113 of compensation payments, and why that is a more egregious form of infringement, which I understand our learned friend agrees with. Then we see at para. 120:

"The nature of the product structure of the market, and the effect on customers, competitors and third parties.

When calculating the starting point, the OFT has regard to the nature of the product, the structure of the market, the market shares of the Parties …"

Then at 121:

"Wildgoose submitted that the Statement included no substantive discussion of the factors set out in the preceding paragraph …"

which was in breach of the Guidance. "The OFT does not accept [this]" and then it considers some of the aspects of this matter including at 122:

"A number of the parties submitted that the OFT should take into account the highly fragmented nature of the construction industry, the size of the Parties and/or their small market shares insetting a starting point at step 1. The OFT can confirm that it has taken the structure of the market into account in setting the starting point. Had the infringements occurred in a more concentrated market, then the starting point would in all likelihood have been higher. In terms of the size of the Parties and their relative market shares, this will be reflected in their respective relevant and total turnover figures and, consequently, the size of their individual penalty."

It proceeds in this manner to deal with many things, including the purported lack of adverse effects which is raised at para. 135 and at 138 the *Apex* factors, which our learned friend says we should not treat in any stylised way, but in fact what the OFT does is it raises the respects in which cover pricing has a potential to distort competition, raises all the issues that arise in respect of that matter and then deals with one of the key points that many parties made, which was to say that it did not deprive the tenderee of the benefit of competition, and if I could take you in that regard to para. 147.

"A large number of Parties stated that, in the absence of cover bidding, the company taking a cover price would have unilaterally submitted an inflated bid, or would have declined the bid so that the cover pricing made no difference to the outcome of the tender or the intensity of competition."

Paragraph 148:

> "The OFT does not accept that these arguments demonstrate a lack of adverse effect on competition. A competitive bid is one which reflects the bidders' perception of the potential risks and rewards involved in the project and in the wider marketplace. Whilst a bidder might unilaterally submit a high bid in the hope of not winning a tender, in doing so it runs the risk that the bid will be so low as to win a contract it is unable (or unwilling) to fulfil, or so high as to damage its credibility. Whilst the resulting bid may be above the level of the winning bid (and, in that sense, uncompetitive) it genuinely reflects the bidder's perception of the risks and rewards involved in the market. Where a bidder submits a cover price, however, these risks are curtailed and the price has simply been obtained from a competitor. In this way, a bidder submitting a cover deliberately substitutes practical co-operation for the risks of competition ----"

So, the question of unilateral bids is dealt with and the potential risks to the competitive process.

All of this - and there is much more which it would not serve me to read to you - in effect leads to a careful consideration of a whole variety of arguments which are made to the starting points which are reflected at 5 and 7 per cent at 168 and 169.

Now, given all of those considerations, which is not a broad view - but a detailed consideration trying to situate the conduct, understand it relatively and in absolute terms, and see it in relation to other kinds of cartel behaviour - 5 and 7 per cent are the figures generated. I do not understand our learned friend to suggest fundamentally that that was an incorrect appraisal at 5 or 7 per cent in relation those numbers. Nor have I heard him say why some other number would be more appropriate against all of the factors that are listed indicating what the nature of this conduct was and why it is serious to that degree in the context of the Decision that is given.

The question that one then has to pose is: Well, against all those consideration and all the arguments that undertakings put to the OFT as to why there were features of their conduct that were different, and that warranted a different treatment from the starting points that were arrived at, why is Sol different? What is about the fact that its cover pricing would warrant some different treatment on the grounds of seriousness at Steps 1 and 2 given what it did? Might I ask you, in that regard, to turn in the Decision to p.520? This is where the OFT summarises what Sol has done and what evidence it gave as to the practices that it had engaged upon. Now, we ask the Tribunal to have regard to these passages from IV.593 to

IV.616 and the evidence that is summarised, and ask: Is this just a trivial telephone conversation between two parties on an incidental basis? Well, nothing of the kind appears from the evidence that is summarised here and which Sol does not disavow at all? I might just highlight two passages. The first of them is at IV.600. This is Mr. Cummings, the chief estimator.

> "JC said that AW would have the final say in consultation with himself and the other managers as to whether or not the tender was attractive. He added that once a month he (JC) would prepare an Estimating Board Report for the benefit of the three managing directors This was to keep them up to day for the monthly board meeting. It would include 'C' markings for cover prices where appropriate. When asked if the Board were all aware of the practice of cover pricing, JC replied, "Oh, absolute, yeah".

At 604 we see,

> "The management at Sol, AW, would make the final decision as to whether or not a tender was attractive to Sol. If it was not, for whatever reason, a cover price was sought from one of Sol's competitors".

Now, that speaks to a practice - not simply some isolated telephone call.

> "AW said in the interview with the OFT, '.. and it would be my final decision whether we proceeded or not actually'. When asked what factors were taken into account when seeking a cover price from a competitor, AW says, 'Well really the level of work on the site actually. Obviously whether we've got -- whether we've just won jobs --"

It essentially indicates whether they thought it was worth bidding for it or not. Towards the end,

> "When asked further if he made the decision alone to obtain a cover price from a competitor, AW said, 'No I'd say after consultation with the various people who provide those services within the organisation. Out obviously as MD at the end of the day you've got to make the decision".

If one then looks at para. VI.616 one sees,

> "Sol provided the OFT with a list of the companies with whom it engaged in cover pricing. The list included the following ----"

There is a long list of companies with which it has engaged in cover pricing at 616 on p.524.

That is the nature of what Sol was engaged upon. This, according to our learned friend, is the trivial odd telephone call that was made. Against that conduct what is there about Sol's cover pricing that differentiates it and warrants some other treatment that the starting points are applicable in the way that is indicated. We can think of none.

The next dimension which is relevant, of course, to the question of Steps 1 and 2 is the issue of the relevant turnover in the relevant market. Our learned friend said on that score that these were artificial markets that had been determined. Again, that is simply failing properly to have regard to the treatment of these matters in the Decision. I dealt this morning with the question of market definition and how it was done. But, what is very clear from the Decision is that, if anything, the OFT went to far greater lengths to consider the question as to how markets could relevantly be defined for the purposes of these infringements and came up with very narrow - not as our learned friend would suggest, very broad - market definitions applying very careful considerations of demand and supply side substitutability going considerably further than it was legally required to do, given that all that was required of it was a broad assessment of markets.

So, we do not understand where the fault lies with the OFT in having defined the markets in the way that it did. It certainly falls squarely within its margin of appreciation for the purposes of engaging in that definitional exercise. We discern nothing beyond the most general criticisms of the means by which, or the manner by which it sought to determine those questions.

Again, we cannot discern what is at fault in respect of the determination of the markets, judged against the test in Argos and the dicta relevant to how relevant market definitions are done, where all that has to be shown is a reasonable basis. That is the test. Well, there is ample reasoning -- there is a perfectly reasonable basis for those relevant markets and we cannot discern where there could be a criticism on that score.

Therefore, we have the determination of seriousness - 5 and 7 per cent. We have the relevant markets that have been determined. What we then have is the fact that this undertaking had very high shares in those markets. That is why Sol is before you - not because it actually wants to test mythological principles of justice, but simply because it happens to be an undertaking which had rather large turnovers in the relevant markets.

Perhaps to see that most easily I could ask you to look at the Decision at p.1814.

THE CHAIRMAN: It is not that it had large market shares. It is that its relevant turnover was a larger proportion of its total turnover than was the case for some of the undertakings.

MR. UNTERHALTER: Yes. So, if one has a look at Sol as Party 84 on p.1814 one sees that in respect of two of the infringements, after Step 2 ----

THE CHAIRMAN: Just before you start saying any numbers, let us just be clear whether there is any confidentiality now attaching to the numbers in this table? (After a pause): You do not want us to sit In Camera if these numbers are being discussed?

MR. THOMPSON: Mr. Woodford. He seems to be content that it is old enough.

THE CHAIRMAN: Yes. I am sorry to interrupt, Mr. Unterhalter.

MR. UNTERHALTER: So, if one has a look, what one sees, taking the two infringements where this arises that because the relevant turnover as a proportion of total turnover is just less than half in the case of 156, when you apply the 5 per cent, as to which we can see no objection being taken, then you generate a relatively large number. Now, the usual problem that has been presented to you in various forms is the opposite problem. The usual problem is that you get a very low percentage, and hence there is a question of, "Well, is that enough for the purposes of doing deterrence?" What you have here is the situation that you are generating relatively large numbers in respect of relevant turnover and is something due by way of a reduction as a result of the turnover numbers that are generated, which is, in essence, the burden of what is now put to you in argument?

We submit that one has to ask what is happening at Steps 1 and 2 because Steps 1 and 2 have three components to it fundamentally. There is a determination of seriousness. There is an application of that figure to the relevant turnover. Now, the question is: Why is there that application of the seriousness quotient to the relevant turnover? The answer to that is that it is intended, as the Guidance makes clear, to show the effect of the conduct in the relevant market. In other words, it deals with the scale of the undertaking in the relevant market. That is what is being captured in the second dimension at Steps 1 and 2. That very point is made in the defence at para. 32 where this question of the scale of the undertaking in relation to the relevant market is the consideration at Steps 1 and 2 beyond the question of the determination of seriousness.

One then asks again, "What is Sol's complaint?" It was engaging in cover pricing in those relevant markets. It was a significant economic power in those relevant markets. Its conduct had the ability to affect to a significant degree what happened in those relevant markets. Therefore, when, upon an application of a 5 per cent figure to the relevant turnover one generates an answer, one is simply doing the work of Steps 1 and 2. The question is: Is there any injustice that is thereby visited on Sol? Now in our submission there is none at all because Steps 1 and 2 give a perfectly rational, reasoned account as to what they have done

in that relevant market has had an effect because they are disproportionately powerful there. The counter that is raised to this proposition is to say, "Ah! But, we are still relatively small in comparison to our total turnover". But, the question is, "Steps 1 and 2 are not concerned with the total turnover standard - deliberately so". Very few parties have argued that it should be because all that you are concerned with is to situate the conduct within the relevant market and the effect between that conduct and the relevant market. What the OFT has done is that it has said, "Well, by reason of the fact that such a significant turnover figure is generated after Steps 1 and 2, there is no additional reason to apply anything more for deterrence". This is, again, where we submit Sol has confused the issues because there is no uplift in this case. The question here is, "Should there be a reduction, and, if so, on what basis?"

MDT applies in circumstances where a low amount is generated at Steps 1 and 2 relative to the overall size of the undertaking. Here, a high amount is generated in relation to the size of this undertaking in the relevant markets. Nothing more needs to be done by way of an accounting for deterrence in respect of its overall size. Nothing has been done. It is not that some added deterrent is being gratuitously added on which is unfair to Sol, Sol is getting exactly what it deserves because it is as big as it is in the relevant markets in respect of which it has committed the infringements.

There are then two issues, namely is there something arbitrary about either the selection of the markets, or the selection of the years? Our learned friend says you could have selected other markets, but we have been through the definition of the markets, there seems to be unimpeachable reasoning as to why those markets were derived, doubtless there might have been others, but there is something arbitrary or unfair about the relevant markets that have been defined.

Then the question is you could have chosen other years for turnover, but the fact is that these were relevant markets in which, given the interpretation of the guidance as to when the relevant year of turnover arises is what is, in our interpretation, binding of the OFT. That is a question of legal interpretation and our learned friend makes no submissions as far as that is concerned. He does not say that the guidance either compels, or does not compel a particular year of turnover, he has no submissions on that score. So there is a correct interpretation of the last year of turnover whatever it is and we have made our submissions so far as that is concerned, Sol has nothing to contribute and raise, there is no point on that. So if the OFT is correct on the year of turnover for the purposes of the relevant market, that is to say the year before the decision rather than infringement, then again it has committed

no legal error at all, and Sol cannot complain that had some other turnover figure been used at an earlier or a different point it would have generated a lower figure. It is true it is probably correct, but why is that something that has to be considered for the purposes of doing justice to Sol. We can conceive of no reason because all that is really being sought to do is to select a year of turnover which reflects the fact that these infringements have taken place in a particular relevant market. So again, in our submission, there is nothing that differentiates Sol, that requires some special individualised treatment that creates an injustice and that is because in our submission Sol has confused what is being done at Steps 1 and 2 with the different work of deterrence that is being done at Step 3, none of which implicates it, because MDT does not apply to it at all. Therefore, the only residual question was to say "Why was there a reduction?" and "How does it compare with the reductions that were given to other parties?"

In our submission the OFT would have been perfectly entitled to make no reduction at all because if you generate the penalties that you do as a result of Steps 1 and 2, it flows simply from the analysis that we have offered at Step 1 and 2. In other words, these are justified penalties applied by reason of the relative size of these undertakings within the relevant markets where they committed the infringements that they did.

The OFT took a view, which was to say "We will apply a cut off point, and reduce those whose penalties go above the 4 per cent range." My learned friend is saying there is no rationale for it, there is no clear rationale for it, and in a sense it is a gratuity that is offered. The OFT simply thought these are higher penalties, they may, as the notion is that they are outliers in some sense, we want to at least bring them down somewhat and if Sol does not want to take, as it were, the gift given it in this regard it can, of course, refuse and insist on the rigors of justice, which apparently the bed that it has lain in must deliver, but we are doubtful that it will want to take that position.

THE CHAIRMAN: Well, it is complaining other people got a nicer gift than it, and why did it not get that nice gift that you gave other people.

MR. UNTERHALTER: Can I just indicate how the gifting was done, so that in handing out these gifts it is at least clear that the OFT was not trying to prefer one infringer over another. Could I ask that you have regard to p.1782, which is one of the infringers that Sol complains about, J. J. McGinley. If one looks at the position of this undertaking.

THE CHAIRMAN: Now you do need to be careful, because this is confidential information of someone who is not in the room, so perhaps just refer to it obliquely.

MR. UNTERHALTER: Perhaps I could just then indicate, that if you look at penalty as a percentage of turnover you will see that it has higher percentages by many orders than is the case in respect of Sol. Sol had 0.21, 2.25, 2.25, and if one looks at the penalty generated at the end of Step 2 in respect of this party one will see, if you add them up, they are considerably more.

What the OFT then sought to do is to say if we see how high this party has reached above a 4 per cent cut off point, and it could have been a little bit higher, it could have been a little lower, but it sought simply to say: "We are going to apply a cut off to trim the outliers" then what was needed was a proportionately greater reduction to bring it down to a point below the 4 per cent, and that is why, if you cumulate the amounts of these percentages and you see what you need then to do to bring it below the 4 per cent level, you have to do a lot more for McGinley than you have to do for Sol, and that is exactly what was done, because if one sees Sol received the 20 per cent reduction, which is reflected at the adjustment stage in its tabulation, but if you look at the equivalent in respect of McGinley you will see the amount that is there reflected.

The result of all of that was simply to say "We are bringing you down, not in order to somehow make sure that we are doing the same amount of work by way of deterrence", but simply to bring down these outliers above a norm which it determined". That is precisely what occurred in this case.

So it is not a case of saying: "In comparison to, for example, those who were in fact more serious infringers judged on other scales, they ended up with a proportionately lower penalty", when one undertakes this exercise one has to look at all the components that went into reaching the final figure, including what was happening with leniency and how every step of the procedure was followed to reach a result. It helps very little to say: "Those who either received or gave compensation payments ended up with less than we did." The question is: is there anything unjust about why Sol is being fined in the way that it is for what it did in the relevant markets in which it engages? There is no error there, no fault to be found.

MR. MATHER: The skeleton from Sol suggests that a key principle that has been set out by the OFT is that higher penalties will be imposed for more serious infringements, but from what you just said that principle does not really apply in practice at the end of the day.

MR. UNTERHALTER: In our submission it does apply because in the instances where parties took or gave compensation payment they had to suffer the 7 per cent norm at the starting point, so when one compares the starting point treatment of Sol and those who engage in

compensation payments there is a relevant difference of approach that is marked. Of course, there are then questions as to issues such as deterrence. Now, I do not understand it is being suggested that those who have engaged in more serious infringements must necessarily get a higher penalty by way of deterrence, that is judged on a different standard by reference to total turnover in the cases of an MDT.

I think our submission is this, at the relevant point of comparison, which is when one is thinking "Was Sol treated differently from those with compensation payments at Steps 1 and 2?" The answer is it was, because it was treated for cover pricing without compensation payments, and therefore there is proper treatment at the level where it counts.

MR. MATHER: But does it not count at the end of the day? Is it not at the end of the day the final penalty which is the key factor which the outside world looks at?

MR. UNTERHALTER: The outside world may look at the total penalty, but the question is if there is no error that has been made in the factors that led to the penalty and its composition then it is hard to know how it is that one simply says: "I will pull at one part of the thread and say: Ah, well on a somehow or another basis I have to get parties who received or gave compensation payments lower than Sol, because they will come and complain and say: we have paid the amount that was due or the amount that has been levied upon us that is due in respect of the seriousness component, now why are you loading something extra for deterrence, because must we be deterred more?"

There are different answers, of course, to that question, but in our submission there is a logical scheme, and if no error has occurred, the fact that you end up with differences is, with respect to our learned friend, a rather crude way of trying to make sure you have a sensible penalty regime.

MR. MATHER: A point which seems to follow on in the skeleton is that - I am quoting from para. 16 – "It is an essential part of this appeal that no such judgment …" referring to the measure of judgment in the guidance, "… has in fact been exercised in the fining decisions, the OFT limiting its attention to the design of its fining machine."

MR. UNTERHALTER: Yes.

MR. MATHER: Is that not what you were just explaining, the "design of the fining machine", and explaining why there could not be judgment applied to the fine.

MR. UNTERHALTER: These are all fine words – "the designing of the fining machine", but one has to examine the reasoning that supports the decisions that are made and that is why I took you to Steps 1 and 2. If one looks at the variety of factors that are entertained and the arguments that are considered, and the judgments made to finally generate 5 or 7 percentage

points for starting point, and to then say that is just a machine that is churning out an automatic number with no regard for the particularities of each party we would submit that that cannot be the conclusion after a careful reading of the paragraphs that I indicated, including a paragraph which refers to specific circumstances of six individual infringers who came and sought to differentiate themselves in one dimension or another, each looked at and each rejected on the points raised. So this is not a machine churning out a number, this is saying: We consider all the factors. We seek to see whether anyone is in a significantly different position" and that is why I asked the question: "How is Sol different on the dimension of seriousness in Step 1 and 2?" We can discern nothing. They fall well within the heartlands of what is relevant to a consideration of seriousness at Steps 1 and 2.

THE CHAIRMAN: So in the same way, just thinking aloud, you could have two people involved in a criminal incident and their level of culpability looks exactly the same, but one of them pleaded guilty and one of them fought the case, and one of them has a whole list of antecedents and one of them has not, and one of them is 17, and one of them is 25,and all those things are other parameters which feed into the final sentence, and you cannot just pull out one parameter when you get to the final sentence and say: "It I unfair according to that parameter because that has been fed in at some point in the process, but it is not the only thing on which the process is founded.

MR. UNTERHALTER: So at Step 4, aggravating, mitigating factors, individual consideration, hardship – we have been through some of the issues around those questions. We submit there is just an over generalisation as to what is happening here, and if one looks at the detail and the reasoning it is simply unsupportable as a claim. We do submit that nothing is due to Sol, it got exactly what it deserved and we would therefore ask that the appeal be dismissed.

MR. MATHER: You have not specifically gone through Annex 4, and I just wondered if you wanted to do that.

MR. UNTERHALTER: Essentially we say that Annex 4 is entirely unhelpful because it is predicated on a notion that there are Step 3 adjustments that are taking place. Consequently, what is being suggested here is that Sol should never have been at the top of the league table because of an adjustment that should more properly have been done at Step 3. The logic of our submission is that this mistakes what is happening to Sol. Sol is not getting anything more added on to it at Step 3. There is no adjustment that is being made against its interests by way of deterrence at Step 3. It is simply that it generated the fine that it did at Steps 1 and 2 for perfectly good reasons and nothing more was due by way of

deterrence. Nothing was in fact placed upon it by way of deterrence. So, this is simply a function not of anything done at Step 3 which is how it is predicated - because it says parties whose fines were reduced -- It is not a reduction at Step 3. The reduction that is occurring is simply a function, as I have said, of a treatment of our clients which it did not have to make. The OFT could simply have said, 'No'. These fines are generated. You must live with the consequences of them.

MR. MATHER: The dividing line between the outliers and the non-outliers was necessarily arbitrary, you would say?

MR. UNTERHALTER: No. Perhaps I should in that regard just show you -- It is attached to the defence as one of the attachments. It is Annex B. I am not sure that it is paginated, but there are annexes to the defence and this is under Tab B. At Annex B you will see computed along the vertical axis are the percentages. If you look at 4 percent you will see that there are a number of undertakings whose penalties rise like skyscrapers above the plurality of the bar charts. This penalty that is 12 per cent is in fact McGinley. Now, the effect of simply saying, "Well, we will just cap this so as to, in a general way, eliminate outliers" -- If you would compare that with Annex E, you will see that effectively those tall trees have simply been chopped. If you want to see comparatively where the parties stand (and it is in reverse alphabetical order) you will Sol is about twelve down, and it comes in below the 4 percent level. You can compare that with McGinley where you will see there is no particularly significant difference.

So, we submit there is no arbitrariness about it. One has only to see graphically what needed to be chopped. You can understand the temptation to do so. It was perhaps gratuitous, but nevertheless I am sure welcome to those that grew above the forest.

THE CHAIRMAN: Just remind me where it is set out how you went about that chopping? It is not that you cut them all back to a given percentage - because they did not all end up with a given percentage. How is it described, the arithmetical exercise which you did?

MR. UNTERHALTER: My reference for that is VI.271 onwards, at p.1688. This is where parties were talking of the cumulative effect of the aggregate penalty with more than one infringement in the same relevant market - which is the Sol problem. It is said at 273,

> "Nevertheless, in response to representations from parties ...the OFT has considered whether any form of reduction would be appropriate ----"

THE CHAIRMAN: Yes. This is an explanation of why you have done something, but it is not really an explanation either of how you got to 4.5 per cent or as to what was actually done

to get them below that, given that we have seen from those bar charts that they were not then all at 4.5 per cent, or even all at 4 per cent.

MR. UNTERHALTER: They were all before 4 per cent.

THE CHAIRMAN: Yes. But, is there anywhere set out either where the 4.5 per cent comes from - unless you agree that it is the three times 10 per cent or 15 per cent - or when you showed us that other party's table and we saw those percentages, how those percentages have been derived? It may be that the easiest thing for you to do is to just produce us a little note to just explain exactly what you did.

MR. UNTERHALTER: We will do so.

THE CHAIRMAN: I think the complaint is that when you look at the percentage reductions they seem to be all over the place and they do not all end up magically at a 4 per cent figure. They end up at something below that, but not the same amount below it. If there is a mathematical formula that you have applied to everybody to arrive at those, then I think I would like to see that set out somewhere.

MR. UNTERHALTER: Yes. We will do so. However, simply to repeat, we say it was not necessarily due at all.

THE CHAIRMAN: No. No.

MR. UNTERHALTER: But, we will put up a note as to how it was arrived at.

THE CHAIRMAN: Thank you very much. Mr. Thompson?

MR. THOMPSON: Madam, unless the Tribunal has any questions I can be brief in response. I think I will just take eight points that were picked up in various places. First of all, I think Mr. Unterhalter picked me up on the tariff suggestion. It is fair to say that that is a different approach. It is simply the fact that it is obviously familiar as an approach to the criminal law where there are large numbers of infringements which are, broadly speaking, similar and where, as here, there has not been any specific findings. The Tribunal, though it is not concerned with all of the 250-odd infringements which are identified in the Decision, it is in fact going to be confronted with quite a large number of them, and it may wish to have some sort of broad consistency. That would be one approach. But, I agree, it is not my primary contention, which is that this is a discretionary matter and should be addressed on that basis.

The second point. There was some discussion of calibration and the 10 percent turnover figure. In my submission - and I think it is a point we touched on in opening - that 10 percent figure is a maximum. It does cover a very wide range of circumstances and

possibilities going right up to multi-lateral cartels lasting for decades and covering a global -
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THE CHAIRMAN: Let us be careful. There are two 10 per cent figures floating around, are there not? There is the statutory 10 per cent in the order that is the Step 5 cap. Then there is the non-statutory, but in the Guidelines, 10 per cent maximum seriousness percentage.

MR. THOMPSON: I am talking about the statutory cap which I think Mr. Unterhalter relied on, which I think appears in s.36(5) of the Act itself. I think that is a parliamentary cap, and obviously it reflects the position under Community law as well. But, that is something which covers, as it were, global cartels which last for the whole of the twentieth century as in *Solvay v. Commission* or something of that kind. So, in my submission it gives very little guidance as to what the appropriate level of fine for regional cover pricing should be.

Indeed, our broadest complaint is that if you look in that calibration why on earth is Sol sitting at 4 per cent of global turnover as against, I think, 1 to 2 per cent, which I think has been the norm for much larger cartels which the OFT has pursued on a multi-lateral basis with, for example, *Football Shirts*, or whatever, which are direct consumer infringements with major multi-lateral features going on over a period of months or years.

Then, in relation to gravity, Mr. Unterhalter, not unreasonably, took you to some prejudicial material in relation to my client and said, "What has Sol got to complain about?" I think the point I was making was that given the fining machine approach none of that actually features. That is not the basis on which these fines have been imposed. But, if, then, we go on to the question, "Well, Sol was like that. So, what has Sol got to complain about?", then one does get into the specific points that I have made by reference to the Boël principle and the fact that we have set out before the Tribunal the fact that we had been picked out, as it were, by reference to our turnover in this year as against other years. I do not know whether other appellants have made this point. I know other appellant have made the legal point that you should be looking at the year of the infringement. That is not a point that particularly attracts me, but it may be that it will attract the Tribunal and then I will feel sorry that I did not take it. But, it seems to me that as a matter of fact the Boël point is a correct point of principle regardless of this, and that Sol has been hard done by in that respect. I also take the point, both by reference to the issue we have just been discussing of what I have called the Snakes & Ladders - the going up and then going down the 4 per cent - but also as an overall figure that 4 per cent of turnover is a very high level, both in itself and relative to the other hundred addressees of this Decision. Now, when I say it is 4 per cent, it is in fact 3.81 per cent.

Mr. Unterhalter also made some points about market definition. I would accept that in relation to product market there was a good deal of work done in the Decision. However, the geographic markets, for the reasons set out in the Decision, are essentially simply administrative areas. That is described in paras. 320 to 328 of the Decision. As I think the Chair put to Mr. Unterhalter, large turnovers in those sort of crude markets are not indicators either of market shares or of market power on any relevant market. They are simply figures which are essentially random results of what happens to be the product and how successful the company happens to be some five years later on those rather broadly defined geographic markets.

So far as Steps 1 and 2 - and this is the point we make at Annexes 3 to 7 - we do say that the choices that were made of the infringements that were picked out (so, effectively, Infringements 5 to 7 of the seven that appear in the Decision rather than Infringements 1 to 3), do have arbitrary effects on the fine, and have pushed the fine up. We have set that out in the Notice of Appeal. When you look at the natural comparators in terms of size, sector, and the other factors that we have set out, we come out at the top on all of them. If the rhetorical question requires an answer, that is what Sol is complaining about.

In relation to discrimination, the OFT seems to think it is a good point, but it has always seemed to me a bad point, that they seem to think that as long as you are not discriminated against at Step 1, it does not matter that you come out with a rotten result at the end. Both in terms of the OFT's own mechanisms that seems to me something that the OFT should be concerned about. If you then move to the level of the Tribunal, which is not bound by the OFT's steps, let alone by its fining machine, in my submission that is something which the Tribunal should be concerned about - that the end result is that large companies with serious infringements which the OFT recognises as serious are getting fines of 1 per cent or just above their global turnover, and smaller companies which had not been involved in this more serious activity are getting fines at a level above 3.5 per cent of turnover, when that is the OFT's own judgment of seriousness and the OFT's own judgment as the right criterion for deterrence. So, in my submission, that is something that should be of concern in relation to discrimination. Likewise, in relation to whether or not it is a gift, in my submission a public body that gives gifts should give those gifts on an even basis. So, the mere fact that Mr. Unterhalter says, "Oh, well, we did not have to do anything", it does not matter. A teacher who gives marks, and for some reason does not penalise someone for spelling, if they penalise one person for spelling, they ought to penalise everyone for spelling. If they

do not worry about spelling, they should not worry about anyone's spelling. It does not simply get them anywhere in terms of discrimination.

Finally, I think on much the same point, Mr. Unterhalter says that this is not a fining machine. We will await with interest what the OFT says in its note. Although it has had plenty of opportunity - it obviously had the Decision itself; it had its defence; it had its skeleton argument. This point is not a new one. What on earth was it doing with its 4.5 and its 4 per cent? Where did they come from? We have asked about it twice now in formal terms. If they come up with something else, obviously we will look at it, but we suspect there is not a very good answer, and such answer as there is is set out in our annex. But, as far as I can see, the fining machine was told, "If fine above 4.5 per cent, then impose percentage reduction to generate fine below 4 per cent". It is difficult to see how any other more sophisticated exercise could have been involved, given the completely random selection of numbers that appear in the tables when one looks at them and sees what reductions are made.

Overall, we maintain our position that the fine is too high; that it was generated in a way that is contrary to principle; and that it is unfair both in itself and by reference to comparators.

If there are any other questions, I am happy to answer them. I think that is our case.

THE CHAIRMAN: No. Thank you very much, Mr. Thompson. That concludes the penalty cases that this panel is going to hear. Thank you very much to counsel involved, particularly, if I may say so, to Mr. Unterhalter who has borne the major share of dealing with all these different arguments with cases and has done so extremely well, if I may say so. I will at least be seeing maybe you or others again at some point. We will let you know the result of this case in due case. Thank you very much.

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