IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1124/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR STONEMAN
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

NORTH MIDLAND CONSTRUCTION LIMITED Appellant

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Rhodri Thompson QC (instructed by Browne Jacobson LLP) appeared on behalf of North Midland Construction Plc.

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

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THE PRESIDENT: Good morning, Mr. Thompson.

MR. THOMPSON: Good morning, sir.

THE PRESIDENT: I gather you are outnumbered a bit.

MR. THOMPSON: Yes, I am sure you have seen that before. Just in terms of the papers before the Tribunal, in addition to the common papers, which I assume you have at least access to. There should be a Notice of Appeal?

THE PRESIDENT: Yes.

MR. THOMPSON: The conventional pleadings plus a defence on liability from the OFT.

THE PRESIDENT: Yes.

MR. THOMPSON: And a skeleton argument from us with two annexes, one of which duplicates the authorities and the other is some additional documents.

There is one other document which I thought it was worth handing up, which is the one original document in the case, which is the memo of Mr. Shorthouse's conversation with Mr. Clarkson in the Rotherham case. I thought that could conveniently go in Annex 16 where there is record of Mr. Clarkson's interview. Would it be convenient to hand that up?

THE PRESIDENT: Yes. (Handed) This is to go in Annex 16.

MR. THOMPSON: Sir, if you look at the Notice of Appeal you will find at the back of it annexes, and there is a little gobbet of the interview with Mr. Clarkson. I thought it could conveniently go in front of that. It gives the flavour of what we are actually talking about.

Just by way of introduction I hope that our Notice of Appeal sets our case out fairly comprehensively and clearly. I am proposing to follow the same structure. There are three issues. First of all, the evidence in relation to the Nottingham House decision. We say that both literally and metaphorically there is a large question mark against the OFT's case on this alleged infringement, so that the OFT has not discharged its burden of proof. Secondly, we say there is an important issue of law in relation to appreciability in relation to both infringements, and that even on the facts as alleged in the decision the OFT has not demonstrated that either of the alleged episodes, the receipt of pricing information about a new house in Nottingham in 2001 or the supply of such information about a mill repair in Rotherham in 2004 had, or was capable of having any appreciable impact on competition on any relevant UK market.

Thirdly, we say that the fine imposed in relation to the supply of information concerning the Rotherham mill repair was far too high both absolutely and relative to other fines imposed by the OFT in this case.

At its most general our complaint is of a form of land grab by the OFT both in relation to evidence and appreciability but also in relation to its penal jurisdiction, the Tribunal in its various compositions has heard a lot about the third issue here, at least for some variety and we would say some importance the challenge has expanded in scope to two important issues on liability and those issues obviously reinforce our concerns about the third issue, the nature of the fining decisions taken in this case.

The other point I would make by way of introduction is that certain points are common ground. First, we do not dispute that there is documentary evidence, in fact the document I have just handed up, confirmed by witness evidence of the transmission of confidential pricing information from North Midland to Admiral in relation to the Rotherham Mill repairs case and we can see that at footnote 6 to the notice of appeal. We have ourselves found no evidence to support this but we have decided not to challenge the OFT's finding on that issue given the standard of proof that we recognise to exist in this jurisdiction. Secondly, we do not dispute that £27,000 or thereabouts was a reasonable fine for the Nottingham House case. If, contrary to our case on liability the Tribunal accepts the OFT's case on the evidence and on appreciable infringement of competition.

Thirdly, as we understand it, the OFT does not dispute that as North Midland has confirmed in witness evidence, which is to be found at annex 2 to our skeleton argument, cover pricing was contrary to North Midland corporate policy and that is a point that is put out para. IV.5255 of the decision. Those three issues are background common ground. I think it puts in terms that the OFT does not challenge that it may have had that policy but, in my submission, for present purposes that is as good a concession that we did, given where the burden of proof lies.

I now turn to the evidence in relation to the Nottingham House decision and I will start briefly with the issue of burden of proof, although I do not think there is anything between the parties on this. It is not in dispute, I think, that the burden is on the OFT or that there is a need for firm and convincing proof, albeit to the civil standard; nor is there a dispute that the OFT is entitled to rely on certain inferences. However, the point we take is that the case is not proved to sufficient standard if documents are ambiguous and if there is a plausible alternative explanation. In our Notice of Appeal we rely on a quotation which I think we do not actually give the reference for. The quotation is in our skeleton argument. It perhaps does not matter. We have quoted it somewhere, but I note we have not given a reference. This is a reference to a case in the supplemental bundle of authorities? Tab 3, paras. 68 to 74 at p.9 of the print-out and following. Although this is EC jurisprudence, in my

submission it is essentially the same issue. So, the basis position is set out at para. 68 to 70 in terms of the burden of proof and the presumption of innocence. Then the consequence is set out at para. 71 through to 74.

> "The Commission must show precise and consistent evidence in order to establish the existence of the infringement ... to support het firm conviction that the alleged infringements constitute appreciable restrictions of competition within the meaning of Article 81(1) EC".

That is relevant also to the second legal argument.

> "That requirement is not satisfied, in particular where a plausible explanation can be given for those alleged infringements which rule out an infringement of Community rules on competition.
>
> However, the Commission rightly observes that the case law, according to which it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another 'plausible explanation' of the facts to be substituted for the one adopted by the Commission, is applicable only where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by converted action between undertakings. It is not, therefore, applicable where the Commission's findings are based on documentary evidence".

That point is glossed in paras. 73 and 74. In particular, at para. 74 it is found that the documentary evidence is ambiguous. You see that in the second line.

> "Since the evidence calls for interpretation, the Commission's argument is unconvincing. According to the Commission, as there is documentary evidence, it is not sufficient for the applicants to provide a plausible explanation. However, that evidence is 'documentary evidence' only if the Commission's, rather than the applicants', explanation is accepted".

What they are saying, I think, is if the documentary evidence is ambiguous, then you are entitled to the general question of whether you have got a plausible alternative explanation. So, if there is a clear document then a plausible explanation is not good enough, but if you have got an ambiguous document then, as a matter of common-sense, and there as a matter of authority, the respondent is entitled to the benefit of the doubt.

So, we would say that that is a fairly uncontroversial approach. We have set out our position on this in some detail at paras. 23 to 35 of the Notice of Appeal. We say that, first of all there was a positive case from North Midland which we summarise at para. 30. The

evidence in relation to that is set out as annex 2 to the skeleton argument. Just for the Tribunal's note, the reference I was looking for before is para. 17 of the skeleton argument where we give an unattributed quote, and I think that is from *Coats*.

Annex 2 compromises a number of statements and reports, first of all, a signed document by a Mr. Evans, signed on 26th June 2008, where he sets out, first of all, under the heading "General" the group policy of North Midland, so in particular 1.01:

> "The group policy was that in all aspects of trading the company was not to be involved in the practice known as cover pricing. Similarly North Midland Building Ltd's policy has been, not to take or receive cover prices, since the inception of the company in 1995."

Then there is reference to close involvement with other tenderers also being excluded.

Then in relation to the specific project on the next page, section 2, Mr. Evans makes a number of specific points about this project. His instructions were to bid competitively for this project for the following reasons: first of all, its size, then the reputation of the architects, and then:

> "Synergetic to have site adjacent to the ongoing snagging and maintenance works at the major recently completed Park Gate project."

So there was another project nearby which made this an attractive project for North Midland.

Then there is reference to the tracking of the tender through the board reports. Then there is reference to Mr. Wheelhouse who:

> "… remembers pricing this job and 'billing' it, and recalls visiting site on at least two occasions to meet specialist trades including tower crane hire companies due to material handling problems on the site."

That is Mr. Evans.

Then Mr. Wheelhouse, himself, if you turn through you will find a statement of 25th June 2008, where he sets out his recollection of the project, first of all, what he did do in the first paragraph, and the fact that he says:

> "However, I do not have any recollection of taking a cover price on this project or any other project during my current employment, as it is not, as I have always understood to be company policy/practice to apply such methods, according to my knowledge/experience.

> As a conclusion, I can only think that this is a post contract exchange of information, normally due to a late or no response from the client's representative on issuing tender feedback information, as seems to be the case these days."

That is what Mr. Wheelhouse says about that.

Then the next page is Mr. Catlin, the managing director.

PROFESSOR STONEMAN: Before you go too far, could you explain the third paragraph. What does that mean?

MR. THOMPSON: It is something that we see also in the evidence on which the OFT relies. Apparently there is a practice after a tender has gone through where, as a sort of mopping up exercise, people ring round and say, "What did you bid? What did you bid?" and they keep a record for their own purposes. That seems to be the practice. I do not think it is challenged, but obviously it then raises a question as to what actually happened here.

PROFESSOR STONEMAN: It is that just the phrase "client's representative", I am not quite sure whether "client" is those asking for the tender or those giving the tender.

MR. THOMPSON: I think what he is saying is that the client, in this case I assume the architect, if the architect does not provide the information then sometimes they will ring one another after the event to see what happened. That is what the practice seems to be, that if you do not get a prompt response from the client sometimes you will ring around your competitors afterwards. That is the story.

Then there Mr. Catlin, the managing director of North Midland, and he has been managing director since 2005. He also has a recollection of this project:

> "… I do recollect that the Project was of great interest as we were working in the locality on another Project at the time. I also recall the unusual design of the building and discussions with members of the estimating department during the course of the preparation of the tender. With the company currently working on site in close proximity to the proposed development internal discussions also took in respect of potential sub-contractors. The Project was an innovative design and we were keen to secure it to raise the profile of the growing company."

Then finally there is an independent letter from a Mr. Rennison, managing director of a mechanical and electrical contractor, and he recalls quoting for M&E service works on the project, and it is a letter dated 10th June 2008, so that was, as it were, independent evidence that this was a case where we were actually actively seeking information for the purposes of tendering.

THE PRESIDENT: Just remind me what M&E is?

MR. THOMPSON: Mechanical and Engineering, I think. Electrical, I am sorry.

THE PRESIDENT: Mechanical and Electrical?

MR. THOMPSON: Yes. So that was, as it were, the positive evidence. Against that there was the generic evidence from Bodill, which is set out at paras.27 to 28 and 32 to 34 of the Notice of Appeal. The original documents are annexes 13 to 15 to the Notice of Appeal. What seems to have happened is that the OFT spoke to two former employees, or employees of Bodill – a Mr. Wraith and a Mr. Rosental – and they gave general evidence as to their practice, and then the OFT applied that to specific cases by reference to the information given as to their handwriting and things of that kind.

One finds, first of all, the general explanatory note at Annex 13.

THE PRESIDENT: It is not signed. You will have to look somewhere else to find out who gave this.

MR. THOMPSON: It may be that the decision explains what it is.

THE PRESIDENT: I am sure it does.

MR. THOMPSON: I think it derives from Bodill and I can assume that Mr. Wraith and Mr. Rosental vouched for its accuracy. There is a description of various things under various headings, and then under the heading "Analysis" in relation to tenders it – perhaps I should look at tenders:

> "This provides space for names of other tenderers to be inserted. Usually public organisations have to obtain 5 to 6 prices – in some cases even 8. Names are inserted when intelligence from Agencies, or subcontractors or suppliers reveal other contractors. This is carried out by telephone when enquiring of subcontractors and suppliers if they wish to price the job, or when chasing their quotations prior to completion of the estimate. Discussion both ways with Agencies is carried out by telephone. Glenegan and ABI produce weekly sheets of the information or emails. <u>Analysis</u> – After the tender is agreed at the Tender Settlement meeting the Estimator will fill in the analysis and pass sheet for filing. After the tender is submitted and tender figures are made available, the Estimator may add tender figures of the other Contractors or other comments to the sheet. No further action is taken from these sheets other than to monthly record for Management accounts, the number of tenders submitted and the number won."

So that is an explanation which, I think, partly answers the point that was raised by the Tribunal. Then "Notation":

"The ringed letter 'c' on the sheets means that we are getting or giving help – a cover price."

Then there is explanation of Taking and Giving, and further details. Then "Generally":

"A rings 'c' following by '?' means we are not sure that a particular contractors is actually tendering or are taking a cover price from others. NOTE: In preparing information of the OFT we have worked from the file numbers of the tender sheets. Where we have eventually received an order for a project then we have either added the Contract Number at the side of the sheet or shaded the details on the analysis sheets."

So that is the general explanation. Then we have at tab 14, first of all, the evidence of Mr. Wraith. We should have the evidence of Mr. Rosental, but I cannot see it. What they seem to have done is to have coloured in various documents where they recognise their own handwriting. If you turn over to the next page, this is the original document in this case, it is the tender sheet. The Tribunal should see 7.

THE PRESIDENT: Sorry, which annex would that be in?

MR. THOMPSON: Annex 14.

THE PRESIDENT: So in mind that is the contract document for David Wraith.

MR. THOMPSON: Yes, and if you turn over, sir, you should see the tender sheet.

THE PRESIDENT: Yes, tender sheet.

MR. THOMPSON: There is a 69 in the bottom right hand corner.

THE PRESIDENT: It is in manuscript.

MR. THOMPSON: Yes. This is, I think, an original document as far as I understand it, or a copy of an original document. You will see it is a new house at Western Terrace. The Architect is Marsh & Grochowski. The date is Monday 22nd January 2001. Then you will see a list of names in the right hand boxes: Bodill, Tomlinson, Frudd, North Mids, R. Woodhead, Woodsend and Craske.

THE PRESIDENT: Yes.

MR. THOMPSON: Bodill was the leniency applicant, as it were informant, in this case and then there was Tomlinson and Woodhead who admitted liability I think at the fast track stage. Woodsend (number 6) could not find any evidence and because of the question mark at the 6 they were let off. Then North Mids at 4, we were found to be parties to this infringement. The reference there is "North Mids Const (C) from us" and then a telephone number and Mr. Wheelhouse. The point we make is that a question mark, although it is not next to the C, there is a large question mark on the left hand side against our entry. As I understand it,

the writing for the North Midlands entry is by Mr. Rosental, and I think the question mark appears to be in the same writing as the one against Woodsend. We would say that appears to be a question mark from Mr. Wraith. So the question then arises what are we to make of this document?

THE PRESIDENT: You say whose question marks they may be, is that because that is something that emerges from the evidence?

MR. THOMPSON: There is no reference to the big question mark on the left in the Decision or in any OFT document, but the question mark in the Woodsend case is apparently by Mr. Wraith.

THE PRESIDENT: And they look, superficially, as though they are the same?

MR. THOMPSON: They do, they have got the same circle under the question mark sign instead of a simple dot, but obviously we are not in a position to give any evidence on this. It appears to us that that question mark was put there by Mr. Wraith.

We take the point at footnote 11 of our Notice of Appeal (I do not think it has been contested by the OFT) that there has been no specific confirmation from Bodill about this case. It does not appear that either Mr. Wraith or Mr. Rosental were asked in any interview whether they have any recollection of this case. No further evidence has been forthcoming during these proceedings. The OFT has simply taken its stand on the evidence as it stands. So it appears that the OFT case turns on an interpretation of the contemporary document. You will see the relevant part of the Decision appended to the Notice of Appeal at tab 1 I think.

THE PRESIDENT: Sorry, Mr. Thompson, on the same basis that you understand that the question mark next to Woodsend is by Mr. Wraith, do you have the same kind of intelligence about the rest of the writing?

MR. THOMPSON: It may be convenient if we look at the decision, tab 1. We have not actually had confirmation of this, but I take it it is correct, p.679, paras. 1488 and 1499 there is evidence from Mr. Rosental – for example, in relation to Tomlinson Mr. Rosental seems to have written the figure "£310,400" and 26 weeks, and Mr. Wraith seems to have written "© from us Mr. Thompson." In relation to North Midland it all seems to have been written by Mr. Rosental except for the question mark on the left, which looks like Mr. Wraith. Mr. Woodhead, the number, the "26 weeks" and "Ben Hunter" is Mr. Rosental, and "© from us" the phone number and "Bob Johnson" is Mr. Wraith, and "Woodsend", the number and "TBA" is Mr. Rosental, and "© ? from us" is Mr. Wraith. So in every case except ours it

seems to be Mr. Wraith's evidence, and in relation to ours Mr. Rosental puts us down and it appears that Mr. Wraith had expressed some, doubt.

We do say that it is really a short point, the impression. We say that our account, both as a matter of general practice, which is in fact confirmed by Bodill and the uncertainty apparently on the part of Mr. Wraith does raise the possibility of a plausible alternative explanation which would simply be that we had bid, and because our number comes in the middle of the people Mr. Wraith knew to have taken cover prices, a suspicion arose that we had taken a cover price. You will see that our figure is between that of Tomlinson and Woodhead. The question mark that the OFT does not mention in the decision has an unknown significance, but we would say that it is at least as plausible that it expressed uncertainty as to whether or not a cover price had been taken in this case, as that a cover price had in fact been taken in this case.

The other point we take is that we do feel that we have been hard done by as against William Woodsend, but although their question mark was in a different and, in a way, a more conventional place, they did not in fact adduce any alternative evidence, and you find that at paras. 1506 to 1507. Otherwise, we would say we were very much on par – I think the OFT takes a point that our telephone number appears but I do not think it is in dispute that that is in fact our switchboard telephone number, and so that would be equally consistent with them seeking information from us after the event a seeking information before the event, and then I think they also take the point that the number here is £11 different from the number that appears in the actual sheet prepared by the architect, and again it appears to us that a mistake has been made somewhere, and it is not clear where that mistake has been made.

We say that a plausible explanation is that Mr. Rosental has inferred from the figures that North Midland must have taken a cover but that Mr. Wraith was doubtful, and we know that all the other cases are evidenced by Mr. Wraith, and overall we say the *Coats*' standard is not satisfied and that North Midland is entitled to the presumption of innocence, particularly given the positive evidence we have put forward about this particular contract. It is not clear what exactly happened, but we say it is clear that the case is not proved.

THE PRESIDENT: Your witnesses say that they have put in a genuine tender.

MR. THOMPSON: Yes, it is not clear what happened to this document, and why there is a question mark, and who exactly did what, but given that we do not have specific evidence from Mr. Wraith or Mr. Rosental we cannot take it any further.

PROFESSOR STONEMAN: Can you say something about the entries, 24 weeks, 26 weeks on that attendance sheet? Would these be part of any cover price given? If the cover price was given would the duration likely to be spent on the project to be given as well, or would this likely be post-tender information, or does it not figure in any way in your explanation?

MR. THOMPSON: To be honest I do not know, I am not an expert, nor do we have an expert as to whether or not ----

PROFESSOR STONEMAN: No, but it is raised in the evidence, is it not?

MR. THOMPSON: Yes, it is but I do not think I have any information, I certainly do not concede that it is more likely to have been that information in advance than afterwards. I do not concede that there was any particular significance in relation to having that figure there. I think there are plenty of cases where no such duration is given. This is Mr. Evans, I do not know whether you want to hear from Mr. Evans?

MR. EVANS: Just on the duration, it can be attractive to a client to have a 24 week programme, rather than a 26 week programme, and a more expensive price on a shorter time might be more attractive, that is the significance of the weeks with the price. Is that clear?

PROFESSOR STONEMAN: Yes, I am starting from that point but the question then is why does it appear on this sheet?

MR. THOMPSON: Should I take instructions from Mr. Evans?

PROFESSOR STONEMAN: If you can, yes.

MR. THOMPSON: Now, or shall I come back to it – what would be the better course?

THE PRESIDENT: We are going to take a 10 minute break at some convenient point, between half past 11 and quarter to 12, so may be you can chat then about it.

MR. THOMPSON: Shall I make the points on appreciability, then we can take a break?

THE PRESIDENT: Yes. Before you leave the documents can I just ask you – it is my fault I cannot read something – I am looking at tab 12, the one with the question marks on, the "TBA", is there any information about that either in the decision or anywhere, it usually means "to be advised", or "to be agreed", or something of that kind, does it not, but I do not know whether there is anything about it that throws any light on how these things are, when or how they are put down there, what time they are put down?

MR. THOMPSON: No, without any ill will towards Woodsend, in my reading of that it might have been relied on by the OFT as saying that it was future looking rather than historic looking, but it clearly did not persuade Mr. Wraith because he only put a question mark against the cover price but presumably once they had lost the bid they would not have been going to advise it.

THE PRESIDENT: But anyway there is no information.

MR. THOMPSON: No, I do not think so, I do not think it is referred to by the OFT.

THE PRESIDENT: Is that a name above "6", is that "Ben" something?

MR. THOMPSON: It is said to be Ben Hunter.

THE PRESIDENT: He would therefore be the contact, would he? I see there is a Bob Johnson there after that.

MR. THOMPSON: At para. 1488 Mr. Rosental reported that he gave the information "Ben Hunter".

THE PRESIDENT: Does it say who he was?

MR. THOMPSON: I cannot recall.

THE PRESIDENT: It probably does not matter, it is just that I could not read it on the copy I have.

MR. THOMPSON: Yes, I do not think it is referred to specifically in relation to the point against Woodhead, although ----

THE PRESIDENT: All right, maybe Mr. Unterhalter at some point can help on that. Nothing hangs on it, I just want to know what it was. Yes, appreciability then.

MR. THOMPSON: I do not think anything is made of Mr. Hunter.

In relation to appreciability this matter was fully canvassed in the notice of appeal at paras. 36 to 52 and the basic point – which is familiar since the case of *Volk v Vervaecke* and also the case of *Beguelin* which I think sets the matter most clearly, and which I have put at tab 1 of our supplementary authorities – is that both Article 101 of the Treaty on the Function of the European Union (formerly Article 81 of the EC Treaty), and s.2 of the 1998 Act, are subject to an appreciability requirement. The OFT accepted this point in its defence at para. 27 and also at para. 172 of s.3 of its Decision. But, as we understand it, from its skeleton argument, it has now hardened its stance, maintaining that a requirement of appreciability no longer applies in respect of object infringements. It is fairly scathing about the thought that any such requirement could apply in relation to object infringements. It takes the pint very shortly and effectively says that it would be absurd to have such a requirement.

We say that this is a manifest and obvious mis-statement of the law which goes right back *Béguelin*, but since the point is taken I had better take it because if it were at least arguably correct then it would certainly be a point that would warrant the consideration by the Court of Justice. Certainly had a trainee advanced the proposition that the appreciability requirement does not apply in object cases, it would have counted against them during my

training period. So, I am surprised to see it advanced by the OFT in a case where this specific issue is raised.

The *Béguelin* case is at Tab 1 of the supplementary authorities. The paragraph where the point is dealt with is paras. 16 and 17, The basic point is set out at para. 7.

> "Article 85(1) [now Article 101] prohibits agreements which have as their object or effect an impediment to competition".

Then there is reference to the facts. Again, at para. 10, object or effect. Then, at paras. 16 and 17 the basic point is made,

> "Finally, in order to come within the prohibition imposed by Article 85, the agreement must affect trade between Member States and the free play of competition to an appreciable extent.
>
> In order to establish whether this is the case, these factors must be considered in the light of the situation which would have existed but for the agreement in question".

So, it applies both to object and effect. In fact I think this is an object case as, indeed, was the leading case of *Völk v. Vervaecke*. The pint is confirmed repeatedly in the leading textbooks. If one starts with **Bellamy & Child**, at Tab 6 of the supplementary authorities, 2.078 to 2.079 sets out the facts of *Völk -v- Vervaecke*. The comment at 2.079,

> "Völk decides that if, having conducted a market analysis in accordance with *Société Technique Minière*, the effect on the market is insignificant, Article 81(1) does not apply even where the agreement gives rise to 'absolute territorial protection'".

That is a clear object case. Then there is discussion of it at the next passage at para. 2.121.

> "In general. An agreement falls outside Article 81(1) if it is not capable of having an appreciable effect either on competition or on trade between Member States.
>
> The *de minimis* principle was established by the Court of Justice in *Völk* which has already been discussed, and applies to 'object' cases as well as to 'effect' cases".

Then there is further discussion. I think that is probably sufficient on that point. Then if you turn back a tab, a no less authoritative statement of the law, including by Mr. Nikpay, who is now a senior director at the Office of Fair Trading There is, in fact, a whole section at pp.227 and following on restriction by object and appreciability. It starts,

> "An agreement which, prima facie, has as its object the restriction of competition can nevertheless escape the prohibition of Article 81(1) if it has only an 'insignificant effect' on the market or on trade".

Then there is a detailed discussion. At 3.161,

> "As for horizontal cases, it seems highly unlikely that, even if applicable, market shares in this region would ever be relevant from a practical perspective: it is difficult to conceive of price fixing or market sharing agreements between entities with combined market shares in single digits on a properly defined market. In any event, given the general tenor of the case law on cartels, it would seem implausible that the European Courts would permit cartels to escape the Article 81 prohibition on the basis of law market shares alone".

What they are saying there is that it is not credible that you could have a price fixing cartel for people who had only one percent of the market because it would clearly collapse immediately because it would not have any significance. But, they certainly do not say that you cannot have an appreciability requirement in an object case. Then the point is confirmed by Professor Whish, who is obviously also an eminent former board member of the OFT, in his discussion of the *de minimis* doctrine at Tab 7. For example, on p.138, just under the little quote,

> "The *de minimis* doctrine applies both to agreements whose object and whose effect is to prevent competition, which means that even horizontal restraints of a clearly anti-competitive nature or export bans in a vertical agreement could fall outside Article 81 because of their diminutive impact ----"

Then there is the other side of the coin. Even if the *de minimis* notice, which I think will be familiar to the Tribunal, does not apply. Nonetheless, the appreciability requirement still has to be satisfied. You see that at the bottom of the page.

> "-- agreements above the thresholds may have only a negligible effect on competition and so not be caught; another way of putting this point is that the Notice establishes a 'safe harbour' for agreements below the thresholds, but does not establish a dangerous one for agreements above it".

So, the onus is still on the Commission or the OFT even where the Notice does not apply. In response to this very consistent and clear case law the OFT, surprisingly to my mind, relies on a recent case about object infringements concerning *Glaxo Smith Kline*. One finds that at para. 10 of the skeleton. It does appear in the defence, but it is more prominent in the skeleton. That is a case about the meaning of object infringement. I do not know if it is necessary to turn it up. Mr. Unterhalter can take the Tribunal to it if he wants to, but the simple point is that it was not a case about appreciability. The Court of Justice made no finding on appreciability. The case concerned export restrictions imposed by a massive

supplier of pharmaceutical products. So, the requirement was obviously satisfied. The case concerned an object infringement and the question of whether or not one needed to show effects in addition. It was not a question about appreciability at all.

THE PRESIDENT: Sometimes one gets confusion, does one not, between when one has to show actual effects and forgetting that one can get home on potentiality as well.

MR. THOMPSON: Yes.

THE PRESIDENT: Obviously, your case is that with an object infringement the object nevertheless has to have the potential.

MR. THOMPSON: Yes - or not even the object. But, the contract, or the agreement, or whatever it is has to be of sufficient commercial significance to have some potential impact on a relevant market. Here we say the mere fact that Marsh & Growkowski may, if they had known the facts, have been dissatisfied about the bidding process in this case, does not have any significance for the wider building market, and likewise for the Rotherham Mill.

THE PRESIDENT: The argument that is raised in para.9 of the skeleton, is it not that you do not have to have an appreciability, but there is an assumption in certain types of infringements that it is satisfied?

MR. THOMPSON: The authority they rely on appears to be simply the confusion that you put to me, Mr. President, namely that the question of appreciability simply does not arise where you have an object infringement. In my submission, that is plainly contrary to the case law, and indeed the reference that is made to two cases on which we rely, the later one, the *Lubricarga*, which is almost contemporaneous with the *Glaxo SmithKline* case, was in fact a case about resale price maintenance so it was an object infringement, and it was, I think, within a matter of weeks of the *Glaxo SmithKline* case, so what the OFT is inviting the Tribunal to do is, *sub silentio*, in a case not about appreciability, the Court of Justice reversed 40 years of case law which they had re-asserted only a few weeks before. In my submission, that is a very surprising submission for the OFT to make, and were it to be correct, or even arguably correct, it is something the Court of Justice ought to look at. In my submission, it is not arguably correct, it is obviously wrong.

Were the Tribunal to see any attraction in the OFT approach, then that would be a clearly referable issue. It would overturn consistent case law, *Völk* and *Beguelin*, and introduce a category of *per se* infringement contrary to the most fundamental features of EU competition law since the 1960s, and in effect we would be back to the formalism of the RTPA. If you had the right type of restriction that would be the end of it.

We say that the true position is as we have stated in our notice of appeal, that appreciability is normally determined either by reference to market shares or by reference to the absolute size of the parties involved, and you see that in *Völk* and *Miller*, the two leading cases, which are summarised in **Bellamy and Child** at paras.122 to 124. I think it might be worth just looking at that, because ----

THE PRESIDENT: You have got *Miller* in your authorities.

MR. THOMPSON: We have included *Miller*, yes. That was another exclusive distribution case, I think, and ----

THE PRESIDENT: Do you want us to look at that or **Bellamy**?

MR. THOMPSON: I think probably **Bellamy** sets it out. The appreciability argument failed in *Miller*, in that it was said that *Miller* was a big enough company ----

THE PRESIDENT: 2.122, is it?

MR. THOMPSON: Yes, 2.122. There is the well known fact that in *Völk* the products concerned represented only 0.2 to 0.5 per cent of production in Germany. Obviously here nothing has been proved at all about the share of either Marsh & Grakowski or North Midland, or indeed Corus in the repair of steel mills. Nothing has been shown.

> "Subsequently, in *Miller* the defendant undertaking sought to take advantage of the principle in circumstances where Miller had on average about 5 per cent of the total market in sound recordings Germany, with high market shares in some sectors and a turnover in 1975 of DM34. The Court of Justice held:
>
> 'It is evident that Miller's sale constitute a not inconsiderable proportion of the market and that it specialises in the production of certain distinct categories for which it occupies a position on the market which, if not strong, is at any rate important … it must accordingly be concluded that Miller … is an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade'."

I do not think we need to look at the actual authority. It is clearly stated that the normal test, and obviously that is carried over into the *de minimis* notice, and I think the OFT follows the same approach in its guidance, that the normal starting point is market shares or absolute importance.

Then at 2.123 there are other possibilities:

> "Undertakes with a market share of less than 5 per cent may still be caught by Article 81(1) if, on the facts, a sufficiently appreciable effect can be demonstrated in the light of the competitive structure of the market."

So effectively they are saying that if you are below the market shares, or the importance levels, then there is an onus on the OFT to show that there is something about the structure of the market that demonstrates an appreciable effect.

PROFESSOR STONEMAN: Could I take you back to **Richard Whish**, which you were referring us to a minute ago, p.140, tab 7. Half way down p.140 under (ii), having heard the argument that you have just been presenting, this basically said that applies to non-hardcore restrictions. If it is hardcore restrictions those arguments do not apply. Is that what that part of the notice says?

MR. THOMPSON: What it says is that the administrative comfort given by the Commission and the OFT does not apply for some quite specific hardcore restrictions. Then, as it were, you are out on the open sea, you do not have the safe harbour. It then goes on:

> "The judgment of the ECJ in *Völk v. Vervaecke* [the leading case] did concern a hard-core restriction, in that the distributor was granted absolute territorial protection; and ultimately it is for the Court to interpret and apply Article 81 …"

PROFESSOR STONEMAN: Carry on.

MR. THOMPSON: All I am saying that the administrative protection does not apply, so I cannot say that it would be contrary to the notice, subject to the point that the Tribunal will, of course, wish to consider whether or not this particular type of conduct, namely ringing somebody up and telling them a price, is actually within the scope of horizontal agreements to fix prices, limit output or sales and to allocate markets or customers, given the point that I will make in a moment that, in fact, there is no evidence that, for example, had Admiral turned round and put in a competitive bid North Midland would have been in any position to complain. All, I think, that has been shown is that North Midland did Admiral a favour and gave them information. There is a question at least about whether or not it actually is a hardcore infringement of the kind referred to in the notice.

The other point that I think emerges, particularly from *Beguelin*, is that we are looking at a counterfactual analysis, so para.18 of *Beguelin*: so what difference did the conduct make? We would say that nothing really has been identified here. There is no evidence of what would have happened if these telephone calls had not been made, and there is at least a question as to whether they made any difference at all to anything, even in relation to these particular contracts.

Then there is the fundamental point that both object and effect cases are subject to appreciability, and I have referred to *Völk*, *Beguelin*, *Miller* and indeed the *Lubricantes* case, which is in French, but the relevant passage is at paras.23 to 24, at tab 114 of bundle 8,

but I do not think it is necessary to turn it up. We would say that if the conventional legal approach is adopted, it is manifest that the OFT has not shown any appreciable effect arising from either the Nottingham House case or the Rotherham Mill case, and we set that out in detail at paras.37, 38, 43 and 45 of the Notice of Appeal.

There is one point that I should take the Tribunal to in the Decision itself, which is, first of all, para.177 of III. I think it is all in our Notice of Appeal. I do not know whether it is more convenient to look at that.

THE PRESIDENT: Yes.

MR. THOMPSON: It is at tab 5 p.381 para.177 the OFT appears to accept that it has the burden and standard of proof in relation to appreciability and then the second sentence, it says:

> "These representations are addressed in Section IV in the context of each Infringement"

So the assertion seems to be that each infringement is shown to be appreciable in the specific discussion. But then look at tabs 1 and 2 at what is actually shown in relation to these cases, the finding in relation to the Nottingham House, the only finding on consequence appears to be at p.685 para.1523. Subparagraph (a) is simply a formal finding about the provision of figures. The second one is that North Midland can be presumed to have taken account of the information received from Bodill, so that it would have affected the price it bid in this case. And (c) is that Bodill can be presumed to have taken account of the information it received. So the finding is simply limited to this bid on this one house. There is no finding of any wider consequence.

The same is true at tab 2 para.5264. It is exactly the same, simply the provision of information, Admiral taking account of it in relation to the Rotherham bid, and North Midland taking account of it. So again there is no wider finding of any impact of these events on any wider market.

The other point that might trouble the Tribunal in considering this is the question of whether or not a one-off infringement could be appreciable. Happily, there is recent learning from the Court of Justice on this very question which is that could in principle be sufficient. That appears in the *T-Mobile* case decided last year, which is at bundle 8 tab 115 of the main authorities.

It is rather a remarkable case. It was decided on 4th June 2009. It did concern a decision by the Dutch authorities in relation to a single meeting where information was exchanged about prices between mobile telephone operators. So far, that might be said to support the

OFT's case, but if one looks at what actually happened (I think it is sufficient to look at paras.10 to 13 of the judgment) you will see that:

> "At that time, five operators in the Netherlands had their own mobile telephone network [T-Mobile, Orange, Vodafone, O2 and Telfort] In 2001, the market share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%, 26.1% and 11.4%. It was unforeseeable that a sixth mobile telephone network would be established because no further licences had been issued. Access to the market for mobile telecommunications services was therefore possible only through the conclusion of an agreement with one or more of those five operators."

Then there was a description of what happened, and in particular (12) of the meeting where information was exchanged about dealer remunerations. Then (13):

> "By decision of 30 December 2002, the [Dutch competition authority] NMa found that [these parties] had concluded an agreement with each other or had entered into a concerted practice. Taking the view that such conduct restricted competition to an appreciable extent and was thus incompatible with the prohibition in Article 6(1) of the Ma, the NMa imposed fines on those undertakings."

Then the scope of the reference at para.22, you will see that the issue was simply about the single meeting, and no issue was taken on appreciability. But you can see that the basis for a finding of appreciability was pretty well overwhelming, given that you were dealing with an agreement between the monopoly suppliers of telecoms services to the Dutch market. So, in my submission, it stands as the opposite extreme from the facts of this case, where you have joint monopolists agreeing and even a single meeting can apply. Here, we would say we are at the opposite stage: you have simply got bilateral arrangements between people who have not been shown to have any market significance at all.

Our conclusion is that the appreciability requirement is not, and has not been shown to be, satisfied. The OFT's position on the law is manifestly wrong and indefensible. It has no substantive case on the facts. That is our position in relation to appreciability. Would that be a convenient moment to have a break?

THE PRESIDENT: Yes, it would. Can I just ask you this. If we accepted your arguments on this, what should we do?

MR. THOMPSON: The case must be annulled or set aside in relation to our two infringements.

THE PRESIDENT: Should we then have a stab at it, seeing whether we think there was appreciability or not, or do we remit it? Think about it over ten minutes.

MR. THOMPSON: I would not presume to instruct the Tribunal as to its jurisdiction.

THE PRESIDENT: No, not instruct us, but what is your suggestion?

MR. THOMPSON: We would say that when you think about it, the requirement is manifestly not satisfied. Whether it has any wider implications for this decision generally is not something I am concerned with. In my submission, when you think about it, it is obvious that appreciability has not been shown in this case. We do not even know who Marsh and Growkowski are. We do not even know they ever had another tendering exercise at all. The OFT just has not concerned itself with that question. Likewise Corus. So if you actually thought about the issue properly you would see that the OFT has no case. That is really what it comes down to. The OFT just thinks: this is a very big decision; we have taken lots of decisions and it is all very important. But when they actually think about the individual infringements they have not actually done their job properly. That is what it comes down to.

THE PRESIDENT: Is it an important factor in this that there is only a single contract? In which case, does it depend on the size of the contract? To what extent would that have a bearing on matters?

MR. THOMPSON: Yes, it could do. I know there are some much larger appellants or much larger addressees, and there are some much larger clients, some of whom have recurrent demands. It might well be that for those people an argument like this would not get off the ground. It is certainly significant that nothing has been shown about either my client or its significance on the market, or about any of the customers, or indeed any of either Bodill or Admiral, Nothing has been shown about their significance to any relevant UK market.

THE PRESIDENT: Does this argument go to both trade and competition, or mainly to competition?

MR. THOMPSON: I know that Mr. Bailey is an expert on this question; he has written an article on the subject. I have not taken the Tribunal to the *P & S* case and the dispute about *Aberdeen Journals* because in my submission it essentially goes to competition because I do not really think that once appreciability has been shown for competition there is much left to show about trade.

THE PRESIDENT: They stand or fall together?

MR. THOMPSON: Yes, effectively they are the same thing. It is fair to say that there is not a very clear distinction in the EC case law. For example, *Völk* is primarily a case about trade.

It has always been taken as the leading case on competition. But I think I would accept that what I am really saying is that there is an appreciability requirement on competition and that I might be content to say that there is no separate question, if that is satisfied, about trade within the UK. There is no boundary issue. It does not matter whether it crosses the Scottish/English border or between Lancashire and Yorkshire of the kind that you have in relation to interstate trade in Europe. So to that extent, I think they are basically the same issue.

THE PRESIDENT: Another way of going about this is to say every tender situation creates a market, so if six are invited to tender there are six firms on the market, that market never reopens and so you have each of them as potential 100 per cent market share or zero market share if there are only six players on that market.

MR. THOMPSON: Yes. I do not think the OFT has ever sought to define – it would have quite astonishing implications for the expansion of its jurisdiction if every contract could be regarded as a self standing market. That is why this is actually an important point, because it does effectively bring back the RTPA if the OFT were to go that far.

THE PRESIDENT: I am not saying every contract is a market; I am saying every bidding competition is a market.

MR. THOMPSON: Yes, but if it only applied to bidding competitions, that would nevertheless be a very startling implication, given that there is no threshold for bidding competitions and none suggested by the OFT that it has looked at things above a certain value. There is no basis for that in any event.

THE PRESIDENT: We will take a ten minute break then.

(Short break)

MR. THOMPSON: Sir, I discussed with Mr. Unterhalter, it seemed to us that it was perfectly convenient for me to just plough on and for him to deal with everything, rather than for me to deal with that.

THE PRESIDENT: As you wish.

MR. THOMPSON: In relation to Professor Stoneman's question I discussed it with Mr. Evans, and I think it arises by reference to para. IV.1505 of the decision, which is at tab 1, p.682:

> "North Midland has suggested there is no reason why this information (the contract length of 24 weeks) would be exchanged pre-tender in the context of cover pricing, the OFT notes that on the contrary, it was not uncommon for a contractor to provide contract length at the same time as the cover price to its competitor in order to prevent the taker of the cover price from accidentally

winning the contract by submitting the cover price along with a short, attractive contract length."

I think it is a score draw, as it were. I do not think the OFT positively denies that that became uninteresting information after the event, but I think I would have to accept that in some cases it is obviously an interesting information before the event, but Mr. Evans says it is a relevant fact and there are two factors, price and speed, in some cases speed can be very important and very interesting both before and after the event, and I think that is all I can say on that.

If we now turn to the question of the fine imposed, as I think I said in opening, there is no challenge to the £27,000 fine in relation to Nottingham if it is held that the case is sufficiently proved, and you see that at tab 3 to the notice of appeal, the fine is actually a very elementary exercise. Infringement 146, which is the Nottingham case, the fine comes out at £27,200, and there are no adjustments at all so it just goes straight through at that level.

THE PRESIDENT: If you lose on liability you are not challenging the fine.

MR. THOMPSON: We are content with that; that seems to us a proportionate fine for a case of this kind if it falls within the scope of the Act at all. In relation to infringement 190 that is also a simple calculation but of a different kind.

THE PRESIDENT: You are not quite so relaxed about that.

MR. THOMPSON: No, and the OFT did not consider that the £580,700 was sufficient, which to us still seems a pretty stiff penalty, but they said "no, we must multiply it by three for the MDT purpose, and so we say that that is too high a fine, and for what it is worth say the £580,000 and we certainly say £1.5 million for Mr. Shorthouse's telephone call is far too much.

So the issues that I will address here are what I will call "the burden of proof" – it may sound rather strange, but I will explain that in a moment, what has been shown in this case. Secondly, the correct approach to discretionary fines generally; and thirdly, the place of the OFT in the UK regime for deterrent penalties, that is the comparison with criminal law, paras. 62 to 65 of the Notice of appeal. Then I will deal with the two specific issues; equality of treatment and duration.

I apologise, particularly to Mr. Unterhalter, that the first three of these points are essentially the same as points I took in relation to the Sol case on Tuesday, but given that this is a different Tribunal I think I should make those points, even though assiduous readers of the CAT transcripts may have seen some of this before.

The first point: the burden of proof and what has been shown, we say that a fundamental defect in the overall decision, so the decision, viewed as in its full 2000 page glory, is that the OFT fails to recognise the limited nature of what it has established in this case. First, and this applies generally but to this case in particular, it has not established any form of multilateral infringement in contrast to many of the cases that it relies on as comparators in relation to fines.

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 the confidential information from putting in a competitive bid. The OFT has simply relied on evidence of the bilateral supply of confidential pricing information, sufficient in itself for the imposition of a heavy deterrent fine.

Fifthly, it has made no findings 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 commonplace, such as driving above 70 miles an hour on the motorway may indicate a widespread feeling that the law is unrealistic and not to be taken too seriously, whether rightly or wrongly, rather than as evidence of an endemic practice warranting heavy fines. In such cases a rational enforcement policy might well be to focus on serious breaches such as driving above 90 miles an hour rather than a ferocious and indiscriminate clamp down 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.

So far as the specific case of North Midland is concerned, these points are reinforced by the isolated and ephemeral nature of the OFT's findings and North Midland's unchallenged evidence that the policy of the company was not to engage in such practices. These points are independent of, though clearly related to the issues of liability that I have already addressed. The only evidence of allegedly unlawful conduct relied on by the OFT is the two incidents in 2001 and 2004.

Finally on this point, the OFT places some reliance on the *Apex* judgment of the Tribunal and, in particular, paras. 251 to 252 at tab 46 of bundle 3, pp. 94 to 95. However, the summary at para. 252 in *Apex* shows that the Tribunal considered the actual facts in that case with some care. Insofar as para. 251 is relied on by the OFT as a simple formula that applies indiscriminately to all cases of a cover price, then North Midland respectfully

submits that it should be viewed with caution, and we note that the fine in Apex was, I think, £35,000 which we would say is consistent with the level of the fine in the Nottingham House case, which we do not challenge.

I turn secondly to the issue of 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 these principles in to propositions of law, one might say that they are very early articulations in Western thought of the following ideas. First, a discretionary exercise of ethical judgment cannot be reduced to a system of rules however elaborate, and obviously in this case it was not very elaborate at all, we simply got 0.75 per cent just by exercise of a pocket calculator, and treating different cases the same can be just as unfair as treating equivalent cases differently. These cases are fundamental to all the appeals before the Tribunal and the decision, we would say, is radically flawed in failing to observe these basic maxims.

In more concrete terms, and as explained in detail in the notice of appeal in 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 in some cases, though not in this one, 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 villa 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 Kits* 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 the 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 issue - penalties for breaches of the 1998 Act as part of the British penal justice system is, in a way, quite a radical submission. I know it has been mentioned by one or two other appellants. Although I, and others, appearing before the Tribunal in these appeals,

have been, and will undoubtedly continue to be, strongly critical of the Decision, 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. One sees that if you compare this case with the recent *Tobacco* case, which I think has recently been published, from which you see that Shell (who I think has a global turnover of something over $400 billion) has emerged with a fine of £3.5 million, whereas I think the MDT approach used in this case for the telephone call would have -- That is for a two-year infringement which is held to be very serious -- If this approach had been applied to Shell I think they would have walked away with a £2 billion fine. So, it is very difficult to see how a rational fining policy could treat small companies in the UK building trade so much more severely for ephemeral infringements than it has treated much larger companies for much longer infringements.

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 common-sense principles adopted under the English criminal law which, like competition law, is centrally concerned with issues of punishment and deterrence. However, in accordance with common-sense and the considerations which I have just mentioned in relation to 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 and authoritative and 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. We say 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 in these, relatively speaking, trivial and fleeting infringements of the 1998 Act.

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 the higher appellate courts as necessary or desirable. North Midland would respectfully submit that there is no sound reason why the OFT should have such an exorbitant fining jurisdiction.

If we look briefly at the cases, the first one is at Bundle 2, Tab 26. This is a case in the Court of Criminal Appeals from 2000 dealing with, unfortunately, the death of a welder in a silo operated by a pet food manufacturer. One sees the facts in the headnote. The unfortunate fate of one of two technicians who 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. That is in the middle of the first main paragraph.

> "In the course of carrying out this process, one of the technicians apparently suffered an electric shock".

That was fatal to him. Then the findings which form the basis for the prosecution and the conviction are towards 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 there 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 the activity had been done and no steps had been taken to avoid it".

There was an initial fine of £600,000. Then, on appeal, that was reduced to £250,000. The Statements of Principle are summarised in the holding, and in particular in the middle of the first main paragraph,

> "The reported cases 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".

Then in terms of the reasoning, I would refer the Tribunal first of all to the reference to the principles in the judgment of Judge Walsh on the next page in the first main paragraph. He refers to principles set out in the Court of Criminal Appeals in a case called *Howe Engineering*, and reference to aggravation and mitigation which is obviously familiar. One sees that in that whole paragraph.

Then, in more detail, at pp. 4 through to the end of the judgment at p.6, and if you see the third paragraph on p.4,

> "The breaches had been going on for a considerable time . . . When sentencing, the trial judge said that this was a very serious matter ... When one looks, he said, at the aggravating features --"

Then, at the bottom, mitigating features and then the summary of the level of fines is on pp.5 to 6, and in particular about two-thirds of the way down there is the reference picked up in the headnote about 'fines in excess of £500,000 tend to be reserved for a major public disaster'. There is then the summary of the aggravating and mitigating factors. Then, over the page there is reference to the financial strength of the company.

That was the approach that was taken in 2000. That needs to be seen in the light of more recent high authority from the Lord Chief Justice, as he then was, which is in Bundle 4, Tab 59. Again, I will take this swiftly. Apart from the odd coincidence of the identity of the party as against one of the addressees of the Decision, this is a case which concerned the Hatfield Rail Disaster, which one sees at para. 1, in which 102 passengers were injured and four lost their lives. In summary, the trial judge, Mackie, J., found this to be a very serious infringement of the relevant legislation with a number of aggravating features, and obviously the consequences being particularly disastrous. I think he also describes it as one of the most serious cases of corporate negligence that he has had the misfortune to see.

The facts go through in some detail up to para. 21, but I think the statements of principle -- You will recall that there was reference to the *Howe* principles in the earlier judgment, and they are set out at length at para. 22. In particular, sub-paragraphs (8), (10), and (11) set out principles relevant to the fining of businesses.

> "The Defendant's resources and the effect of a fine on its business are important. Any fine should reflect the means of the offender, and the court should consider the whole sum it is minded to order the defendant to pay including any order for costs.
>
> (10) Above all the objective of the fine imposed should be to achieve a safe environment for the public and bring that message home, not only to those who manage a corporate defendant, but also to those who own it as shareholders".

So, that is the approach. There is obviously a strong deterrent element there. Paragraph 25 sets out the grounds of appeal and then paras. 26 through 30 deal with the gravity of the infringement. Then there is an issue in relation to comparison between Balfour Beatty and Railtrack which is dealt with at paras. 31 to 38, and then the size of the fine is considered at

paras. 39 and 40. Then the court's decision is para. 40 through to the end of the judgment. I draw in particular the attention of the Tribunal to paras. 42 to 44 - the characterisation of the infringement and at the end of para. 42 the reference to deterrence and the approach of the criminal courts there. Then, paras. 47 and 48 where the issue of proportionality and discrimination is considered.

So, in my submission that is all helpful and useful guidance in relation to how a discretion should be exercised to mark not only the disapproval of the court, but also to deter such conduct in the future. In my submission, many of the considerations are recognisable, not only from the OFT Guidelines, but from any reasonable exercise of discretion in this type of area.

I do not know if the Tribunal has behind Tab 59, Tab 59A. That is simply a record of a recent case where a fine was imposed on a company called Serco, who were responsible for the Docklands Light Railway. I simply include it because it is in a regulatory field, brought by the ORR, and where the fine of, I think, £450,000 is imposed for a negligence causing death. Obviously, if you again compared that to the sort of fines we have here, I understand, I think in another case in which Mr. Robertson was appearing, he indicated that Serco's turnover was some £4 billion, and so an MDT fine on Serco would have been at the level of £30 million. So, again, out by a very substantial factor from the approach that the OFT has adopted in this case.

The final document I would like to show the Tribunal is the recent guidelines where these cases are drawn together by the body responsible for issuing guidance to the criminal courts. That is right at the back of Bundle 12 of the authorities - Tab 180. It is a guidance document produced in February of this year. I think it is the first such guidance produced pursuant to s.170(9) of the Criminal Justice Act 2003. (After a pause): Sorry. It is the first guideline in relation to corporate offences. It relates to corporate manslaughter and health and safety offences causing death. It is explained in the Foreword that,

> "This 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 dealt 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".

I draw the Tribunal's attention, first of all, to the contents page, factors likely to affect seriousness, financial information, size and nature of organisation and level of fines. I think those are the three principal relevant sections. I would draw the Tribunal's attention in particular to para.6 through to 9, issues relevant to gravity. It is fair to say that some of these issues are obviously specific to Health & Safety, but many of them, in my submission, are essentially readily transferable and indeed are similar to those identified by the OFT in relation to gravity and indeed the EC Commission, such as the involvement of senior officials, how systemic the issue was. Then 7 and 8 set out aggravating and mitigating factors, some of which obviously are only relevant to death, but some of which are similar to those you would find in the OFT and Commission guidelines, and the issues of principle, in my submission, are essentially common.

In relation to financial information, one finds 15 to 16 setting out issues in relation to turnover and profit and I know that the Tribunal has heard submissions from some appellants in relation to that issue and the appropriate way that that should be dealt with a fining case.

Then in terms of (d), level of fines, para.22 states that fines must be punitive and sufficient to have an impact on the defendant, and then sets out indicators about the level of fines which are somewhat above the *Friskies* case, as footnote 8 points out, but, in my submission, are consistent with the approach of the Court of Criminal Appeals in *Balfour Beatty*.

In my submission, this is something that the Tribunal should have in mind. We say it is notable thought culpability, duration, aggravation, mitigation and financial strength are all issues that are common to this regime and to the Competition Act regime.

We also say it is notable that it is at least arguable that the culpability, duration and gravity, including consumer harm, are all much greater – I think it is more than arguable, it is clear – than in this case, whereas the fines are in general set at a much lower level.

I should make clear that I am not saying that fines for abuse of dominance, for example, or for a major multilateral cartel are subject to this approach or that they should be lower than they are. There are obviously some very big players in the market and some very big market consequences, although I note that the Court of Appeal reduced fines in the *National Grid* case on specific facts. We do say that the issues of principle are common, the ones I have already mentioned, and the underlying issues of proportionality and equal treatment

are also common. Perhaps most importantly, the need for judgment and the disapproval of using any particular factor as decisive, in my submission, is highly relevant to this appeal. We would also say that the level of penalty is here obviously inconsistent with that approach and with principle and far too high.

Sir, those are the points we would make. I do not want to do Mr. Unterhalter out of his time, but I think he essentially took two points against this approach when I put it forward before, essentially that our case was too broad or too high level; and secondly, that there was a difference here because one was dealing with multilateral infringements rather than unilateral breaches of Health & Safety.

We would certainly accept that guidelines and principles of this kind must be applied broadly and by reference to individual facts, but we would say that that has been approach of the CAT since *Napp*, and is also consistent with the EU approach. We still say that it reinforces the point that an individual assessment is needed, and that essential issues of gravity, duration, aggravation, mitigation and deterrence are the guiding lights common both to the 1998 Act and to a criminal fining approach, and we also say it gives an important sense check on the level of fines in this case.

So far as the point that this concerns multilateral rather than unilateral cases, there is one main answer, which is that we would say that it was wrong, as a matter of fact, that the OFT guidelines apply as much to unilateral as to multilateral infringements, and they relate to individual culpability. Indeed, the gateway requirement for a fine under the 1998 Act is negligence or intention, which are subjective concepts entirely familiar to the criminal law.

Can I now turn to the two individual issues relevant to my clients, first of all, equality of treatment: we say that the fining methodology used by the OFT has a perverse bias in favour of those with multiple infringements and against those with fewer than three infringements. As we note in para.68 of the notice of appeal, there are four addressees of the decision, Balfour Beatty, Bodill, Strata and Thomas Vale, who have 20 or more infringements identified, but they received a fine on the same basis as North Midland, in that only one MDT is imposed, and only three infringements are fined, regardless of how many there are.

Secondly, we make the point that the OFT based its decision to pursue individual cases on a pattern of behaviour evidenced by at least three proven instances, and that is at para.1470 of section II of the decision, which we have put in annex 3 of the notice of appeal. North Midland has only two instances, and only one, of course, if our points on the evidence in relation to the Nottingham case are accepted, and the OFT does not dispute that our

corporate policy was opposed to cover pricing, and we say that our fine should be reduced to reflect these facts, and in particular that there was no pattern of behaviour in relation to our cases as against many of the other addressees of the decision. If one looks at it in public law terms we would say that the OFT could not simply ignore material factors relevant to its discretion and the effect of its fining machine is to effectively disable it from taking those sort of issues into account, because you get your 0.75 per cent regardless. There is no room really for that sort of factor to be taken into account.

Then the final point is just a short point on duration, which we set out at paras.77 and 78 of our notice of appeal. The only evidence we have is the evidence of this document that I handed up of a scrappy telephone note which indicates that Mr. Shorthouse told Mr. Clarkson of a price at some point on 4th May 2004, the day of the tender. There is no evidence of any wider agreement on price, and no evidence of any knock-on effects if one takes the *Beguelin* approach and looks at the counterfactual for what would have happened. We are told that Admiral was too busy to price, and so it is difficult to know what would have happened, whether they would have just put in a random price or whether they would have dropped out, but the duration of any effect on competition, in our submission, was very short, given that we were miles higher in any event and came third and Admiral came fourth, and so the effect of any infringement was minimal, in terms of time as well as substance.

We refer in this respect to *Aberdeen Journals*, which is at bundle 2, tab 37, and the fining discussion is quite short and towards the end of judgment. It starts at p.137, and then at p.140 there are findings in relation to duration, which goes through to para.477. They find a one month duration at para.477. At p.143 there is a summary of the role of the Tribunal, para.489 is a convenient summary of the approach, the Tribunal makes up its own mind and adopts a broad brush approach with each case dependent on its own circumstances.

Then in relation to duration the findings are at paras.498 and 499. The Tribunal notes:

> "… that Step of the Director's *Guidance* permits the Director to increase the starting point under Step 1 to take into account the duration of the infringement, in particular where the infringement has lasted more than one year. However, there is no comparable provision in the Guidance, at least explicitly, enabling the Director to take into account a duration of less than one year. Although in this case the short duration may be partly taken into account, indirectly, in the reduction of the penalty for mitigating factors made by the Director under Step 4, we think some

more explicit recognition should be made of the fact that the infringement in this case, as found by the Director, lasted only for one month.

In all those circumstances, and looking at the matter in the round, we think it right to reduce the penalty imposed on Aberdeen Journals to £1,000,000, a reduction of just under 25 per cent."

We address the implications of this reasoning at para.83 of our notice of appeal, and we say that if a one month duration warranted a 25 per cent reduction then we should have at least a 50 per cent reduction for duration. It is arguable that the duration of the infringement was limited to the period of a phone call, in that there is no evidence of any actual impact, and there is certainly none of any impact outside the tender exercise itself. Paragraph 83 of the notice of appeal sets that out at slightly greater length and suggests that that, in itself, would justify a reduction of the fine to £758,306.50, one half of the fine imposed by the OFT.

PROFESSOR STONEMAN: If I may interrupt there, I do have some problems in actually understanding what is meant by the "duration of the infringement". You say that it is the five minutes it took to make a phone call. I could say it is the lifetime of the building that was put up at a higher price than it might otherwise have been put up. How do you grasp the idea of the duration of an infringement in a bid rigging process?

MR. THOMPSON: I think one needs to look at the individual facts. There are cases, or at least the Tribunal has indicated that there are cases, as a matter of principle, where bid rigging can have widespread implications which last for a period of months or even years in that the people who are carrying on collusive activities are permitted to stay in the game, as it were, and will, from time to time, take a cover price and there is a systematic distortion of what is going on.

There are other cases, and we would say that these are notable cases, where really nothing can be inferred about any wider implication. All you have is a case where the number three bidder tells the number four that they are going to bid at £2.1 million, or if they bid above £2.1 million they will be all right. The phone goes down, they do bid above £2.1 million, neither of them get the bid. The actual bid that wins is £1.2 million, and if you ask the *Beguelin* question, what difference did that make, a pretty feeble answer comes back. There is nothing really that you can say.

Given that the burden of proof is on the OFT, how can you justify hitting someone with an enormous fine when really nothing has been shown? All that has been shown is that something which might have had an implication has been done, and so you impose a fine because you say that is a bad thing to have done, this is potentially very bad, rather like

somebody driving at 90 miles an hour, but if nothing has actually happened or nothing can be shown to have happened that is obviously relevant as against someone who has ploughed in the in the back and killed 20 people on a bus.

At the level of fining, in my submission, it is relevant to show what actually has followed from any infringement, and here all we say is that nothing has really been shown to have followed.

PROFESSOR STONEMAN: Yes, but that is getting away from the point. When we are talking about events, bidding competitions, does it make any sense to talk about duration? If we are talking about discrete events, how does that translate into durations?

MR. THOMPSON: I thought I had been answering the question. I obviously have not.

PROFESSOR STONEMAN: Your answer has really not got to the heart of what I was saying.

MR. THOMPSON: I do not think it is the duration of the building. I do not think you will get a bigger fine if your building was going to stand 100 years than if it was a pavilion for the Olympic Games and was going to be knocked down in a month's time. I think it is the effect on competition and I think that is the point that is made in *Aberdeen Journals* that predatory pricing, even if it only lasts for a month, is still a serious infringement because if you drive somebody out with your predatory pricing, that effect could last for years, or indefinitely. If, every time somebody comes in you bang your prices down and they go out, that can have a major economic effect, even though each individual incident may be very short. But here, you have still got to look and see, and all we have is Mr. Shorthouse and Mr. Clarkson, a price going in, somebody else winning the bid and that is it, nothing else has been shown. That is obviously partly the appreciability point again. But in my submission it is also relevant to the level of fine that should be imposed, and the duration of any infringement.

PROFESSOR STONEMAN: Earlier you were perhaps playing on our sympathies by describing North Midland as a small Midlands building company, I believe. With the figures in front of me, I understand that their turnover in the year ended December 2008 – the group to which they belong – was £200 million. This is on Notice of Appeal tab 3 in the fining schedule. A company with £202 million turnover does not sound to me like a small building company. Could you explain to me?

MR. THOMPSON: I cannot remember exactly what words I used. It obviously is as big as it is.

The reason why its fine is what it is is because it is 0.75 per cent of its global turnover.

PROFESSOR STONEMAN : Is it a small building company or not?

MR. THOMPSON: Unfortunately, I have not got the table of where it sits. That is largely reflected in the absolute level of fines. I do not know where it sits in the threshold of building companies. But it is true that £1.5 million equates to £200 million in turnover. That is how big it is.

May I simply say by way of conclusion the OFT challenges North Midland and the appellants to propose an alternative methodology that would be fairer than the approach actually adopted. I think a number of appellants have questioned whether this is a fair challenge to put to an individual appellant. I would make the following observations. First of all, we accept (as I have indicated) that £27,000 is a fair level of penalty, if its points on our evidence and appreciability are rejected in relation to the Nottingham House decision. We would consider that a similar fine in relation to the other case would be equally appropriate for an ephemeral infringement with no apparent impact on competition. Alternatively, as I have just indicated, we consider that at least a 50 per cent reduction for duration would be appropriate.

However, our main submission is that this is a case for the exercise of discretion by the Tribunal. If that approach were adopted we are confident that a fair and reasonable outcome would be achievable without difficulty, and a much lower level of fine would be considered appropriate.

In the *Sol* case I did suggest the possibility of a tariff penalty, which would be, from the implication of what I have suggested, in the £25,000 to £50,000 infringement, although it could obviously be uplifted or reduced, for example, for recurrent infringements or if there were aggravating features such as compensation payments. Mr. Unterhalter, perhaps understandably, criticised this as a *volte face*. But we submit that that would be a way, a pragmatic form, of equality which is familiar from summary criminal offences where it is not thought cost effective to go into detail of hundreds or thousands of minor offences – the most notorious being parking fines. But I think it is more consistent with my case in general and with that of the appellants that the numbers are not so huge here that the Tribunal could not reach a reasoned view on its conventional broad brush basis and impose a fine in the light of these specific facts about the company and the infringements involved. Sir, those are the points I wanted to make, unless there are further questions. I am happy to hand the floor to Mr. Unterhalter.

THE PRESIDENT: Thank you very much, Mr. Thompson. Mr. Unterhalter, are you happy to have a quarter of an hour now?

MR. UNTERHALTER: We would like to open the batting, if we could.

THE PRESIDENT: Right.

MR. UNTERHALTER: Might we proceed immediately to the first point on liability, and the question as to whether the evidence provides sufficient to meet the burden addressed upon the OFT. In order to commence that analysis, may I ask that you turn to tab 12 of the Notice of Appeal which is simply, in my version at any rate, a slightly clearer version of an identical document to which my learned friend took you. It is the tender sheet that Bodill comments on. May I ask you to consider what is contained on that tender sheet in the light of the full explanation and summary that is given to that document in the Decision and the treatment of the matter at Part IV para.229 and thereafter.

This is the portion of the Decision where the interviews from the transcripts with Bodill are to be found. It gives an explanation of the tender sheet and some of the evidence that was procured for the purposes of understanding the tender sheet.

May I take you first to the document at tab 12, just to examine some of its features. The first is that you will see in the large square block under the month entry of Monday 22nd January 2001, a listing in blocks from 15 down to 31 and then from 1 to 22. The explanation that is given of that is that that reflects the number of days to the final date on which the tender must be submitted. That has some significance in that the location of the question mark, which is really at the heart of what the appellant wants to say renders this document ambiguous is located, as it were, within the counting of the calendar days. What one sees immediately to the right of those days is a block numbered 1 to 7 and that deals with the tenderers.

What the evidence indicates from those who drew up this document, (and this, we would want to indicate, is not simply a question general explanatory material) those could identify their handwriting were identifying it in respect of this tender and this document, not only by way of the general means by which cover pricing took place, but as I shall show you, what is listed in this part of the document are those parties whom, through market intelligence or other kinds of contact, were indicated as those who were seeking to tender for the job. One can see why that is so, because if one looks at the names, some will be familiar (Bodill, Tomlinson), and then one sees Frudd. Frudd does not appear as one of the parties who actually tendered. There were six parties who tendered but Frudd was not one of them.

So just as to an assessment of probabilities (which will be the ultimate task of the Tribunal) it would be something of a curiosity if this was an ex post effort to determine who had tendered and at what level that a party that had not tendered was listed in the list of tenderers. The explanation, as one will see from Bodill, is: on the contrary, that what is

being compiled here are those who appear to be interested in tendering on the basis of market information, often through subcontractors and the like, and sometimes because phone calls are being made to procure a cover price.

One sees that in respect of Tomlinson there, as opposed to Frudd which was simply one of those indicated to be a potential tenderer, a common form of notation. Next to Tomlinson there is the "c from us" and Mr. Thompson, and then again one sees similar notations in respect of North Midland, Woodhead (again with contact numbers) and Woodsend "c ? from us".

The question mark, and this was the basis upon which that particular infringement was ultimately not pursued by the OFT, was that because the evidence of the people from Bodill was to the effect that where a question mark was inserted in that form in respect of a cover price, what it indicated is some doubt in respect of a cover price having been granted. So there is neither facially, in how one reads this document, nor against the explanation to which I shall come in a moment, any reason to think that the hanging question mark which is to be seen to the left of the document and next to the 22nd of the month, has any bearing on the question as to whether there was a doubt as to whether North Midland did or did not seek a cover price.

Then, reading further, one sees seventh in the list is Craske. There there is no reference to a cover price. Indeed, that was the party to whom the tender was awarded. So if one has regard to the decision (at Part IV from para.1484 but particularly at 1485) one will see there is a summary given of those who tendered and the outcome of the tender.

THE PRESIDENT: I am sorry, can you give me a page, Mr. Unterhalter?

MR. UNTERHALTER: Yes, it is page 678.

THE PRESIDENT: Thank you.

MR. UNTERHALTER: If one has some regard to the amount of the tender and one compares the amounts that are indicated – and here, perhaps I could direct your attention under tab 12 to the middle column – one sees that there is a listing from 1 to 3, and then there is a fourth entry. One sees the numbers there indicated increase in value. So one starts with the first which has got the round circled item next to Tomlinson and that is £310,400. Then one sees £319,999 which is North Midland, and then it goes up to £324,015 under 3. That too is a matter upon which the witnesses who were interviewed by the OFT explained that that sequencing has a significance in and of itself which is that when it is decided what cover price to give, the keenest price, as it were, is given to the first party that sought a cover

price. One sees that reflected in the ascending values of cover prices that is reflected in that middle column.

If one then looks, for example, at North Midland, one sees how very closely correlated the actual price is that was tendered - £319,988 – and the cover that was given to them, £318,999. Similarly, in respect of Tomlinson one sees there is just a very small increment of £83 in respect of the correlation between these two. One can see similarly that there is little variation between the amount tendered and the cover prices indicated in respect of the other parties.

That, taken together suggests that there is a method behind what is represented here that is not simply brushed off by way of saying: "There is a question mark, and there is some requirement that the treatment of that question mark for the purposes of the way in which Woodsend was dealt with must apply with equal force to North Midland", and that is because there is (i) no spatial relationship which suggests an identity of treatment, just as a matter of the construction of the document facially, but if one then goes to see what is said both as to method and as to the fact that this document is itself precisely indicated as one that was completed by the two persons who came to give evidence, there is therefore both a general explanation which coheres with what is seen on the document, and any identification of this document having been filled out by the two persons. All of that taken together we submit gives rise to a very strong case as to what happened here and why it was that there was in fact a cover that was given to North Midland and it led to them making the tender that they did.

Could I then just refer you to some of what is said by the persons who were interviewed by the OFT and that should be seen alongside the explanatory note which is at tab 13 of the notice of appeal. This explanatory note was provided by the solicitors of Bodill, and then the two persons, Mr. Rosental and Mr. Wraith came in and addressed that document, and then spoke to the specifics of the tender which we have just been through.

If I can refer you to Part IV, and the treatment of this matter commences at para. 229, p.442 of the decision. It indicates who was interviewed, so it is Messrs. Bodill, Rosental and Wraith. Then at para. 230:

> "A tender sheet was completed for each contract for which Bodill was invited to tender. DW explained that '*In 99% of the cases*' , he would prepare the tender sheet. On the few occasions when DW did not prepare the tender sheet it would be completed by either JR or AB. When preparing the tender sheet DW would write on the tender sheet the date of the tender submission, a calendar countdown

to indicate the number of days that Bodill had to price the job, the name of the job, architect and quantity surveyor."

So there is an identification of those calendar days which is where the question mark is located, and then: "Each tender sheet was given an in house File Number." Then para. 231:

"Bodill stated that the tender sheet included a section headed 'Tenderers' which provided space to insert the names of other companies tendering for the contract."

THE PRESIDENT: When it says "Bodill" there does it mean "Mr. Bodill", or does it mean "someone at Bodill"?

MR. UNTERHALTER: I think it is simply referring to the firm itself; this is the manner in which they did things.

THE PRESIDENT: Someone stated it but it does not say to whom they refer.

MR. UNTERHALTER: That statement is drawn from the explanatory note, if one has regard to the footnote, so that is part of what is contained in that explanatory note.

"Initially, DW would enter the names of any competitors he knew were going for the job in this section against the numbers 1 to 6."

-which is exactly the account that I have sought to summarise for your purposes.

"As the job progressed DW along with AB and JR would also fill in names of other tenderers when this information was forthcoming. DW said that '*a lot of it is my writing but, the other two would put on as well if they received information.*' These names were inserted when intelligence was obtained by staff in the estimating department, during the tender process. Bodill stated that this intelligence was obtained by telephone when asking sub-contractors and suppliers if they wished to price the tender, or when chasing quotations prior to completion of the estimate. RB stated that Bodill may also have found out about other companies tendering for particular tenders through organisations such as the Builders Confederation …"

So there is an assemblage of market intelligence, as it were, from different sources to try and complete as full a view as possible as to who is tendering and that is the listing that takes place.

Then there is an account that is given of Bodill giving cover prices at para. 232:

"In statements provided to the OFT as part of its leniency application and confirmed in the subsequent interviews with the OFT, all of Bodill's employees involved in the preparation of tenders confirmed the procedures followed for all tenders."

- and then it explains how the process would work for tenders that Bodill wanted to win, and there is an explanation there.

> "233. In tenders where Bodill was giving a cover price, Bodill stated that the ringed letter 'C' against another company who was tendering and the words 'from us' indicated that Bodill was giving that company a cover price. The figure Bodill gave that company as a cover price was usually written on the tender sheet beside their name. The numbers '1', '2', and '3' indicated the order in which Bodill was approached by the other companies for ac over price and the first to approach would get the lowest price and so on."

- precisely the ordering that I sought to indicate to you.

> "If a competitor wanted Bodill to provide a cover price the phone call would be directed to the estimator dealing with that job and AB explained that, '*so it's put through to me, I'd say, yes, Okay, we'll contact you nearer… nearer the date*'. JR explained that at the tender adjudication meeting, '*we settle the tender, and then we would fill in the tender sum analysis'* and that between the tender adjudication meeting and the submission of tender, '*we would put in any figures that, we would give in as help*'. AB confirmed that at the tender adjudication meeting it was decided what price Bodill was going in at and he confirmed that the cover prices would be annotated on the tender sheet between the tender adjudication meeting and the actually submission of the tender.
>
> 234. AB further explained that DW would normally have made the phone calls to a competitor to provide the cover price, '*purely because the estimator normally hand delivers the tender … so David would be in the office and we'd say, can you just ring this through to so and so'*. DW confirmed that the relevant would tell him the cover price to give the following tender …."

- and so on and so forth.

So there is a very clear system at work here, which both explains the notations and the document, the tender sheet at tab 12, it explains the compilation of prospective tenderers, all of which is intended to inform the decision as to what level Bodill itself will tender at, but then having made that determination they then have had indications of who seeks a cover price, or who has sought a cover price and they are then rung round in ascending order by value those who come in are then given a price as one sees.

We submit that on that evidence as to how Bodill proceeded, and the confirmation of the entries that are reflected in the tender sheet, that is a very powerful set of indications that

North Midland was indeed given a cover price, and one sees the correlation between that price and the tender that was submitted by North Midland.

Would this be a convenient time?

THE PRESIDENT: Thank you very much. 2 o'clock.

(Adjourned for a short time)

MR. UNTERHALTER: If I may then continue to indicate why the burden of proof was amply met in this case in our submission.

The second category of evidence that was important for the OFT in making a determination in this matter was, of course, that two of the other parties that are indicated on the tender sheet - that is to say, both Tomlinson and Woodhead themselves confirmed that in respect of this bid they had in fact received a cover price. Those matters are dealt with in the Decision at IV.1496 where Tomlinson's position is dealt with and then, at 1499 where Woodhead is dealt with. Although they cannot cast specific light on the matter they accept that in respect of these matters they were engaged in bid rigging activities on this tender, but cannot recall details of the other party or parties involved.

There are then admissions from others who had received cover prices that they in fact did so. It is hard to understand that the notations which appear on the tender sheet which have a repetitive form of notation, as explained in the explanatory note. In respect of Tomlinson the notation appears, in respect of Woodhead it appears. The contact person is mentioned in both instances; but North Midland, where an identical notation is utilised, it is said by North Midland that, no, this is in all likelihood post-tender information that was procured by Bodill. That is the second category of evidence which, in our submission, is important in confirming what was happening in this case. Of course, it has the consequence that at least three of the parties who were tendering were then influenced by cover pricing which is a significant feature for what had occurred to the authenticity of the bidding process, a matter to which I shall return.

As against the evidence that Bodill has given, both to explain the sheet itself and what lies behind it and the confirmation of the notations that are made there by those who wrote them, we have the account that is offered by North Midland, and that is to be found perhaps most helpfully in the annex to our learned friend's skeleton argument, where the various statements are captured. My learned friend took you to those, but in essence they really amount to three propositions, and perhaps I could ask you to turn up Mr. Evans's statement. In essence, there is a very generalised claim here that cover pricing was not part of the policy of this undertaking.

THE PRESIDENT: Are you going to be more specific as to where it is?

MR. UNTERHALTER: I am sorry, it is an annex to the skeleton. It is annex 2 to the skeleton. There will one see Mr. Evans's statement that was made available. Under "General", which is item 1, is a very general account that this was not part of the policy of the company. Plainly the OFT is no position to suggest that it was a matter of policy of the company, but the fact is that there are many policies in companies which are simply not adhered to for a variety of reasons and this is simply another instance, we would submit, of that possibility. We submit that nothing on the probabilities really turns the matter in favour of this appellant simply because there is a policy. It is something easily said, but the real question is how is that policy enforced, and was it enforced in the particular instances that are relevant here?

As to what is then said concerning the particulars of this tender, it is suggested that there were reasons why this was an occasion where indeed the company wanted to bid. It tracks some of the reasons why that was so. Among the things that is said is that under (e):

> "Chris Wheelhouse remembers pricing this job and 'billing' it, and recalls visiting the site on at least two occasions to meet specialist trades including tower crane hire companies …"

and the like.

Of that matter the OFT considered that in coming to its decision and what it said of that is that there are instances in which an undertaking may commence preparations for a tender, but that does not mean that it follows through and actually puts in a genuine unilateral bid. It may choose for a whole variety of reasons to do otherwise. Whilst it may well be that they set upon starting to bid as if it was going to be a genuine unilateral bid that does not mean that it was taken to finality.

Then could I ask you to turn the page, there is note from Mr. Wheelhouse himself and he says in the second paragraph:

> "However, I do not have any recollection of taking a cover price on this project or any project during my current employment, as it is not, as I have always understand to be company policy/practice to apply such methods according to my knowledge/experience.
>
> As a conclusion, I can only think that this is a post contract exchange of information."

I have dealt with the suggestion that, of the probabilities, is it a post contract exchange of information? On the probabilities, given all the detail that is contained in the document, that is not a plausible suggestion, and it is offered as no more than a speculation.

May I return to what Mr. Wheelhouse says in his second paragraph. There he is affirming that this was no part of what he did. In that regard, could I ask you to turn up Section IV para.5244 p.1340. This is the portion of the Decision where the second of the infringements is being considered, that is infringement 190, which is the cover pricing as between Admiral and North Midland. You will see that at p.133.

May I just read to you what the witness evidence from Admiral was. It says this:

> "AC confirmed in his interview that it was his handwriting on the handwritten document and that, '*it was the back of a telephone pad, by the look of it, that I took a message on, from Martin Shorthouse, who I suspect had given me a ring to tell me what our figure was on that particular contract*.' AC also confirmed in respect of Martin Shorthouse at North Midlands, '*Yes, he's the guy that I always spoke to*.' AC confirmed that '*NMC*' on the document stood for '*North Midland Construction'*. "

In our submission, what this testimony tends to indicate is that far from this practice being one that as a matter of policy was never given effect to within North Midland, it appears that there was somebody who was spoken to, "I always spoke to", and therefore the indication is that whatever more senior management may have thought, there appears to have been something more than a single instance or two of cover pricing going on within this undertaking.

In our submission, that is relevant context for an assessment of the probabilities in the statements that are made and are perhaps all too easily made, to suggest that this practice was simply not followed. We know that cover pricing is something that was endemic in this industry. It was done on the basis of telephone calls and approaches of a kind that are described in the Bodill evidence. In our submission, that does very little to alter the overall probabilities.

So when it comes finally to a consideration of what is the case that suggests an alternative explanation that is plausible for the consideration of the Tribunal, it really is a hanging question mark which is situated in the wrong place and tells no apparent story in relation to cover pricing where there is a particular form of notation which is relevant. Even in that regard it is, perhaps in our submission, worth reflecting, that in the explanatory note there is reference to what the question mark means when it is connected to a circled C. That

appears under tab 13 of the Notice of Appeal, but one can see under "Generally" a ringed C followed by a question mark means:

> "We are not sure that a particular contractor is actually tendering or taking a cover price from others."

That appears to be the key to a particular form of notation with the question mark.

THE PRESIDENT: It indicates a ringed C can be associated with something that is not a cover price.

MR. UNTERHALTER: It means that it reflects uncertainty that a particular contractor is actually tendering, or are taking a cover price from others, in other words that somebody else is giving them a cover price, there is that possibility. In other words it is possible that one gives a cover price but one learns that they are actually not after all going to tender, that is one possibility. Alternatively, that they have received a cover price from another party because all of this of course is intended to be information that is compiled for the purposes of trying to work out what your opposition is in the market and what are they likely to be doing in respect of tendering that is about to happen. Again, it is all consistent with the fact that this is not an *ex post* recitation of prices. One or the other observations that the OFT makes on the probabilities is that it would be peculiar if we were simply tabulating the prices that were in fact offered because what is reflected here is not consistent with the actual prices that were offered. There are variances, and those variances really are much more obviously explained by the fact that cover prices were given, and then when it came to actually tendering there was some slight variations as between the cover and the actual price that was put up by way of that tender.

So there is the hanging paragraph on the one hand, and then there are these rather general and bland statements as to policy and the fact that there were reasons why this could have been a contract that this undertaking would have wanted to tender on, not that it did and that it can be said with absolute clarity that this was the result of unilateral tendering, but simply that there are factors that would have made it the kind of contract that was worth tendering for.

PROFESSOR STONEMAN: Can I pick up on a couple of things? One is that on this tender sheet to which you have just been referring do you have an explanation for the question mark between the two 22s?

MR. UNTERHALTER: No, we do not.

PROFESSOR STONEMAN: The other point is that you said a little while ago in this quote from AC "Martin Shorthouse, yes, he is the guy that I always spoke to".

MR. UNTERHALTER: Yes.
PROFESSOR STONEMAN: It does not say that he is the guy he always spoke to about tender cover prices.
MR. UNTERHALTER: It is true.
PROFESSOR STONEMAN: There could have been a lot of conversation between these companies, they could have a lot of conversation after the bids are closed – "Who won it?" – and as you have already shown us there is a lot of conversation – "Who is in the tendering process?"
MR. UNTERHALTER: Just to be clear, we are not saying that it is conclusive evidence, it is simply that it is said in the context of specific questioning concerning cover pricing. So in other words: "This is the person that I am usually dealing with", now we would accept ----
PROFESSOR STONEMAN: I am not sure it says that actually.
MR. UNTERHALTER: But in general terms we would accept that that person may have been a contact for a whole variety of purposes not solely cover pricing. It is simply that contextually what seems to be indicative from that quotation is that it is specifically in the context of referring to cover prices, "Yes, that is my person on the side", we do not place huge emphasis on it, it is simply another part of the evidence that you would have regard to for the purposes of considering what inferences are to be drawn from it.
THE PRESIDENT: You say "evidence", and I have made this point before but I just make it again for the record, and no particular point seems to be taken by Mr. Thompson about it, we do not actually have any evidence – what one would normally call evidence – from anyone at Bodill in fact, or for Midland ** for that matter. You have your summary which sometimes just refers to "Bodill" the company stating things, it does not say who actually in the company said them. We have recorded statements in the decision, we have some notes of interview on one matter, unsigned, we do not know whether they have been checked or verified by the person for whom the interview was being recorded. We do not have any witness statements signed with statements of truth or anything of that kind. Speaking for myself, I do not find that this is a very safe way to proceed - even when you are taking administrative decisions. I would have thought that when you have got a leniency applicant there, he is willing, for all sorts of reasons, to be forthcoming. The safest thing would be to have taken a witness statement from him and got him to confirm it with a signature, and get him to confirm things. Because half the things in the interview are very leading questions and in some cases the answer is a 'Yes' to very leading questions. I am making this as a general comment really. But, it applies, to some extent, in this case too. I just make that

point in case there is anything you want to say about it. I am not inviting any submissions, but ----

MR. UNTERHALTER: If I could make a very few brief submissions about this? The first is that this evidence is assembled in an administrative process. Hence it is neither, and nor is it intended to be, a highly formal procedure.

THE PRESIDENT: You say that, but you have given a warning that they can be prosecuted if they say anything that is untrue. You give them a caution at the beginning of the interviews.

MR. UNTERHALTER: Yes. That is so.

THE PRESIDENT: That sounds quite formal to me.

MR. UNTERHALTER: It is intended to do two things: the first is that it is intended to ensure that those who answer tell the truth. The second thing that it is intended to do is to ensure that there is an ability to go back and forth in questioning in a way that is somewhat exploratory, which is relevant to an investigative process rather than a formal forensic process that might be more applicable in other settings. So, whilst we recognise that one has to yield up evidence that has value, we submit the value in the testimony is that those who know the consequences of untruths, and therefore it has inherent reliability, it lacks without question some of the formal guarantees that would be more applicable to a different forensic process. That is our first submission.

Our second submission is that for the purposes of the Tribunal its jurisdiction for the purposes of considering these questions is still to determine as an appellate Tribunal whether an error has been made in respect of what the OFT has done in respect of its assessment of the evidence before it. In other words, it is not that this becomes the forum for proof de novo of liability questions, but the issue remains what can one say of the evidence that is served before the OFT with such frailties as it may have had.

THE PRESIDENT: Yes and no. There is no opportunity for a defendant, as I were, for a suspect, whatever you want to call them, to cross-examine any witnesses at an administrative stage. This, in fact is the only forum where, actually, the evidence can be tested by anyone other than the judge and prosecutor. Plus, you accept, and rightly so, that the burden remains on you at the appeal stage to satisfy the balance of probabilities. Thirdly, we are dealing here with something which is not trivial - these are serious matters as witnessed by the level of fines. So, I am not suggesting for one moment that you should not do the interviews in the way that you do them. I just wonder whether it has not been a rather unfortunate shortcut, perhaps because of the volume of cases, that you have not, as it were, at the end of the

interview sought to encapsulate in a statement - that the person concerned can concentrate his mind and sign, having read it through, or even get him to sign the interview notes. It just seems very odd.

MR. UNTERHALTER: I do not think that we would want to suggest that it could not have been done. It plainly could have. We would submit though that it does not fundamentally affect the reliability of the evidence because ultimately I have indicated the circumstances in which this testimony is extracted and why there are reasons to suppose that it is true and then one assesses it all together to see. But, just a propos of the point that is put concerning the rights of confrontation and where can that take place, in our submission this indeed is the place where such rights can be exercised. So, it is not part of this appellant's concern that it wishes to exercise those rights. Just answering the point more generally, were there to be an appellant that says, "I did not enjoy rights of confrontation in the administrative process. I was simply allowed to respond to evidence that was presented to me", they could come, in our submission, before the Tribunal and say ----

THE PRESIDENT: You would have the problem then that you would be producing witness statements arguably for the first time in the Tribunal, and then there would be a question mark as to whether you were gilding the lily, elaborating -- The witness was dealing, as it were, with matters which added to what was, as it were, in the bundle of evidence at the administrative stage. Would it not be a better policy if you took those statements at the administrative stage and had regard to them yourselves in making your administrative decision? As I say, these are quite general comments, but because the procedure applies here and in some of the other cases that we have been dealing with, I thought it was right just to mention it so that you could make those replies.

MR. UNTERHALTER: Those are our submissions. As to this appellant it raises a substantiality point - not a point around the particular form of the statements, but because it itself relies upon unsworn testimony -- That is what one has to then weigh. Their statements that are signed have no inherently greater value because of the form that they take than do those statements that were extracted by way of interviews by the OFT. That is the scheme of evidence which, in our submission, would be considered.

I do not want to unduly prolong this treatment, but there is a very full consideration that is then given by the OFT to all of the factors that it considered to be relevant, including, at IV.1504 – I will just mention the relevant paragraph numbers – where Midland's defence, as it were, on the facts is dealt with. Then there is a treatment of specifics of what appears on the tender sheet, which is at 1511, and the notations and what this says as to the manner

in which cover pricing was taking place. I shall not read it all, but in essence it puts together the evidence, taking the documentary evidence together with the testimony it has received through the interviews that it has done with Bodill, with the confirmation of the two leniency parties and it says that all of that taken together against these rather generalised comments by the appellant before you simply does not dislodge the case that has been made in any way.

As to the question of the burden of proof, it is largely a matter that is common ground as between the parties, but there is perhaps something to be said at one point as far as that is concerned, which is that ultimately the question is, was it more likely than not that cover pricing took place on this particular occasion. That is the ultimate burden. There is discussion as to, what are the background probabilities against which one makes that assessment? We do submit that in an industry where this practice was endemic the background probability is that it is not, as it were, an exotic form of conduct where one say, "Well, it requires something to establish that such an unusual course of conduct was pursued. On the contrary, to use the analogy which was given in one of the cases as to the probabilities of seeing an animal in Regent's Park, is it a lion or an Alsation, the fact is that this is a fairly common or garden domestic animal that we are dealing with here, given the nature of cover pricing and its endemic nature in this nature. We would submit that is a relevant background consideration in the assessment of probabilities.

We would submit that on the conspectus of all of this evidence the civil burden is amply discharged and what is put up against it simply does not rebut the evidence in its detail that establishes clearly what has happened here. So we do submit that on this liability question the appeal should not succeed.

Could I then move to the question of appreciability. Our learned friend, as it were, posits that our position is that we simply that where there is an infringement by object there is no requirement of any consideration of appreciability. That is not our submission. There are considerations as to appreciability which differ when the infringement is one by object. By that we mean to say this: quite clearly there is a distinction between an infringement by object and an infringement by effect. It would be a very strange consequence if the doctrine of appreciability ended up collapsing any practical distinction between those two species of infringement. We submit that when one has regard to the kind of infringement that is constituted by an infringement by object then one can understand appreciability within its proper context – that is by reference to the particular kind of infringement that one is concerned with. Therefore, in our submission, the case law which gives various

formulations both to the doctrine and how it should be applied is simply one which allows that in the case of an infringement by object there are either certain presumptions or there are judgments to be made of potentiality that are relevant to the question of appreciability. I think the burden of what our learned friend wants to submit on this score is that you move from an object infringement to a consideration of the effects that must exist either in the market or by reason of the size of the relevant undertaking in the market, as a matter of shares or the like. We submit that no such consideration is required. Once one is dealing with an infringement by object, then one is concerned with whether that infringement by object can potentially do certain things in the market. Therefore, it is a consideration of what can potentially be done. That is the fundamental of what we want to submit to you is the correct construction as to how appreciability is considered in relation to an object infringement.

It then does not collapse the distinction between an object infringements and an effects infringement, and it allows for a contemplation as to whether the kind of object infringement that one is concerned with has the potential to do certain things in the market of an appreciable kind or not. Therefore, one retains both the concept of appreciability without the conceptual confusion of allowing an object to simply become necessarily an effects based judgment in every instance.

In our submission, that conception seems to square with our understanding of the case law. Perhaps I could very briefly take you to some of the decisions. The first is the *Miller* case, which our learned friend referred to, and is in the supplementary bundle of authorities at tab 2. Could we refer you to p.3 of that case. There is the passage at para.6 that says:

> "Although the applicant does not dispute that these facts are substantially correct it nevertheless maintains that they cannot have appreciability affected trade between Member States in view of the insignificance of the undertaking on the market in sound recordings, the nature of its products, which are chiefly intended for the German speaking public, and the nature of its customers."

So there is the claim around appreciability. Then one sees how the court deals with that, and at para.7 the following is said:

> "In this connexion it must be held that, by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market.

> Thus the fact that the supplier is not strict in enforcing such prohibitions cannot establish that they had no effect since their very existence may crate a 'visual and psychological' background which satisfies customers and contributes to a more or less rigorous division of the markets.
>
> The market strategy adopted by a producer is a frequently adapted to the more or less general preferences of his customers.
>
> Consequently Miller's statement that the disputed prohibitions originated in the wishes of its co-contractors rather than its own unilateral and premeditated strategy, even if it is correct, cannot allow its behaviour to escape the prohibitions contained in Article 85(1) of the Treaty."

That is how in the *Miller* case the question of appreciability is dealt with. We would also submit ----

THE PRESIDENT: There is a bit more about it actually beyond that. It is with that background, and it is turning then to inter-Community trade because it says, "Miller relies upon its weak position on the market in question". This is what one so frequently finds in these cases, they elide from competition to trade, and so on.

MR. UNTERHALTER: Yes.

THE PRESIDENT: Then it goes on to consider the argument that it is too weak to have any effect. There is quite a lot of discussion on it.

MR. UNTERHALTER: In our submission, there is agreement between the parties which is reflected. If one turns on the next page, 5, para.15:

> "In prohibiting agreements which may affect trade between Member States and which have as their object or effect … does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect."

THE PRESIDENT: It sounds as though there is not a lot between you. Some of the confusion is about whether you have to prove an actual effect as opposed to a potential effect.

MR. UNTERHALTER: Yes, and perhaps where the disagreement may become larger – I know not – is what does it take to actually show that potential? At least in our understanding of the matter, it is very often the object as situated against the background within which the particular agreement occurs which will simply show you what its potential is, and I am going to indicate precisely how the OFT understood the cover pricing by object in relation to the way this practice was situated in the relevant market. So to judge it against the

context, in our submission, little has to be done, and it is certainly not about judging actual effects; it is simply saying, "Of this practice, by way of object, what can reasonably hypothesise to be the capacity or potential for harm in this practice".

THE PRESIDENT: There is a dispute about that, is there?

MR. THOMPSON: It was really the way I was putting the OFT's skeleton argument that made me think that they were going off on a frolic, but it is really the end of paras.10 and 15 of *Miller* where they talk about the importance of *Miller* on the market as being a decisive reason why appreciability applies, which is a rather different emphasis from that which Mr. Unterhalter put to the Tribunal. It is pretty old stuff and I am assuming that he does not really dispute it.

MR. UNTERHALTER: Perhaps where the difference lies is that there are no absolute requirements as to what one has to do in order to show appreciability. It is not that you necessarily need to go into the market and see what is the size of this undertaking in the market itself, the question is, what, and is the case in this instance, is the nature of the practice and what one can consider to be its potential for harm in the market to distort competition?

THE PRESIDENT: If you have got something which tries to create absolute territorial protection, by its very nature it is likely, if it has a big capacity, to create distortions.

MR. UNTERHALTER: It is a matter I shall come on to, but in any event in this decision there were very narrow markets that were defined. Consequently, if one engages in the exercise and one says, "In relatively narrow markets is a practice of this kind likely to, might it possibly have harmful effects." It is not terribly difficult to see why these practices are corrosive and have all sorts of consequences which the OFT dealt with in its Decision, because our learned friend (and this was a large part of the theme which he developed in his argument) said this is a once off bilateral telephone conversation; what is the harm because ultimately a competitive bid wins the tender at the end of the day and that is really the end of it? That is a strong part of what is being suggested about this practice. In our submission, that is quite a wrong view, quite a wrong headed view, as to what cover pricing does and what its potential for harm is. I shall come to the treatment of that matter in a moment.

It might also be helpful, again because the area of difference is not that significant, to turn up the fourth case which is at volume 5 tab 67. The statement of the proposition in the judgment which appears on p.302 para.5/7 says:

"If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact …"

So it seems to combine a rather wide ranging enquiry which could be a matter of law, that one actually examines the conduct and says that as a matter of law this is so serious that we will presume the consequences; but it could be a matter of fact and it seems to deal with foreseeability. In other words, what are the foreseeable consequences of the conduct? None of that connotes anything to do with an actual consideration.

THE PRESIDENT: They are talking there specifically about the effect on trade between states. They go on to talk about competition, do they not?

MR. UNTERHALTER: It continues:

"… that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States. Moreover the prohibition … is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the Common Market. Those conditions must be understood by reference to the actual circumstances of the agreement."

It is hard to understand why the rather flexible notion of capability, which seems to be at the heart of the test that is laid out here, would be different for trade between Member States as opposed to the consideration of competition.

THE PRESIDENT: I know there has been discussion about this. There is a sense that it was very much a jurisdictional thing and therefore it could be looked at in a slightly more conceptual, lofty level, a slightly easier threshold, a more theoretical threshold. There is a hint of that in some of the case law, whereas when you get down to competition it is absent law.

MR. UNTERHALTER: It is certainly a position that has been reflected, but in our submission there is no reason in principle to adopt a different position as to how one would understand capability in relation to an object infringement. It seems to allow for the same considerations of law or fact, possibility, foresight, and it is therefore a very general, flexible test which is intended to capture the many different circumstances in which infringements may take place, either by object or effect.

THE PRESIDENT: You have got to read on to the end of the paragraph. They do put a little bit of flesh on the otherwise pretty dry bones in their next bit.

MR. UNTERHALTER: Yes.

"Consequently, an agreement falls outside the prohibition … when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the project in question."

True enough. The question there is whether that is a positive test or whether it is simply a way of looking at the question of potentiality or capacity. In our submission, to try to retain some conceptual coherence in this field, because the ultimate test (in a sense) for the Tribunal is to keep object and effect infringements sufficiently distinct and coherent as types of infringement, and not have a test for appreciability to be so exacting as to its requirements that that distinction is then blurred to the point of --

THE PRESIDENT: You clearly cannot be required to show any actual effects. I think that is the real point, is it not? That is a given and I do not think that Mr. Thompson is suggesting otherwise.

MR. UNTERHALTER: Then the question is: what is necessary to show a capacity to have that, and must that be done necessarily by reference to what is the significance of this particular undertaking in the relevant market? Our submission on this score is that it suffices that what has happened is that this is an undertaking operating in this instance on a relatively small market where there are features about cover pricing that have quite significantly harmful consequences, and they are not confined (as my learned friend has sought to characterise them) to the simply, bilateral exchange of information. I will come to that later.

It is also our submission that although our learned friend would say of quite a significant number of cases that these did not involve appreciability and consequently they do not say anything as to what has to be shown by way of appreciability in relation to object infringements, we for our part do not accept that treatment of a number of cases. Perhaps I can just mention them very briefly. *Apex* and *Makers* are both cases by object where no treatment at all is specifically given to appreciability. So our learned friend says of that: that just shows that those cases were not concerned with appreciability. But if it is a necessary part of what has to be shown in order to be satisfied that an infringement and liability can arise, then somewhere in the analysis of the practices there has to be some conception of appreciability. Otherwise, one has to read this record of cases on the basis that they simply did not grapple with the issue, and there is a huge lacuna that exists in the analysis.

We submit that that simply is not the case. Briefly, in the *Apex* decision volume 3 tab 46 para.210 – the analysis starts a little bit earlier but it is considering the nature of the tendering process. What is said there is that:

> "When the tendering process is selective rather than open to all potential bidders, the loss of independence through knowledge of the intentions of other selected bidders can have an even greater distorting effect on the tendering process. In a selective tender process the contractors invited to tender will in general be those considered most likely to have the required specialist skills. The Tribunal understands that selective tendering is commonly used by local authorities … Selective tendering processes ensure that the workload involved in analysing the various bids submitted can be kept within manageable bounds. (211) Accordingly, since the selective tendering process by its nature has a restricted number of bidders, any interference with the selected bidders' independence can result in significant distortions of competition."

In our submission, that is the sort of treatment which analyses what sort of process one is concerned with. What does cover pricing do and with what consequences as a matter of capacity or potential? So it is really the risk to an independent and competitive tendering process that is necessarily part of this practice. That is given full expression to at that portion of the decision. Again, I shall not trouble you with the lengthy quotations, but there is a further detailed consideration of these matters from para. 250 and in particularly para. 251 which explain what have been referred to as the "*Apex*" factors, and consequently what cover bidding can do in respect of its anti-competitive object or effect.

So at para. 251 there is again a very full recitation of what is at stake in cover pricing, and what its anti-competitive consequences are. We submit that that treatment fully satisfies any appreciability requirement, and it is very much based upon the postulative potentiality and capacity. *Makers* is very much to like effect.

If I could finally mention two cases which our learned friend again has sought to distinguish on the basis – the first of them – that on his conception of the case it is simply not a case which deals with appreciability, but it is the *GlaxoSmithKline* case upon which we have placed some reliance, and I would just take you to the relevant passage – it is in vol.8, tab 117 – in particular para. 55 where one reads from the second sentence:

> "According to settled case-law since the judgment in [*LTM*] the alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which

hit is to be applied. Where, however, the analysis of the content of the agreement does not real a sufficient degree of harm to competition, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted …"

- and then these are the interesting words:

"… to an appreciable extent."

Our learned friend says that is just telling you something about how an effects-based infringement is assessed, but implied in this paragraph is that if you are dealing with an object based infringement, one will look at it in its context, and that will suffice, depending on the analysis of the object as to appreciation.

THE PRESIDENT: "Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition …"

MR. UNTERHALTER: Yes.

THE PRESIDENT: So is that saying everything? Is that saying that in an object case you do not even need to think about it, or is it saying that in an object case you think about it in the context of the agreement and you do not need to look at actual effects?

MR. UNTERHALTER: In our submission that would be correct. In other words, if one looks at the specifics of the agreement, understood in its context, and one says that one can discern harmful effects to competition from that consideration then that will suffice.

THE PRESIDENT: In other words, potential effect is enough?

MR. UNTERHALTER: Indeed.

THE PRESIDENT: I am not sure, is it really going much further than just the difference between potential and actual?

MR. UNTERHALTER: It may be that ultimately there is nothing more to be said for this proposition than that, but it seems to be different ways of getting at the same proposition which is that you can examine an agreement, you can see what its terms are, you can situate the agreement within its relevant context and that may show you that it has the potential to be harmful. If that does not show you that it has that potential then you may need to go to do what is then suggested at para. 55 and, in our submission, to like effect is *T-Mobile*, because our learned friend says of that: "Of course there was appreciability because that involved the four or five leading mobile operators in the Netherlands". But what is significant in our submission about these cases is that when it comes to the treatment of the issue it is either so obvious that it does not need to be said, which would be something of an

oddity if it is a separate requirement that must be met and demonstrated in every case or, as I think we would put the matter, it is very often the case that by reason of the object analysis that is undertaken the potential for harm is manifest in the analysis of object, and therefore no one need to say "Right, we have done the analysis of object, so we are now going to consider the same issue effectively from an appreciability point of view", because many of these questions are connected questions and so one does not see the separate treatment precisely because of the connectedness to the appreciation of the object, and its potential by way of meeting the appreciability standard.

Therefore, thereto in *T-Mobile*, the analysis (paras. 29 to 32), a similar offering is made which shows how there is potential harm which can be understood in that instance, because there was simply an exchange of information and no one actually acted on it by way of putting contracts into the market at those prices.

There is one final authority that we wanted to draw your attention to in the event that you would find it of assistance – we have provided a copy of this decision. It is a decision of the General Court in the *BPB* matter. I have asked that the case be placed before you. There is at para. 90 another treatment of this matter which, in our submission, is consistent with what we say the law requires in this regard:

> "In this respect, for the purposes of applying Article 81(1) EC, it is sufficient that the object of an agreement should be to restrict, prevent or distort competition irrespective of the actual effects of that agreement. Consequently, in the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market. In such a case, the liability of a particular undertaking in the infringement is properly established where it participated in those meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings. The greater or lesser degree of regular participation by the undertaking in the meetings and of completeness of its implementation of the measures agreed is relevant not to the establishment of its liability but rather to the extent of that liability and thus to the severity of the penalty. Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement was not intended to have an appreciable effect on competition."

In our submission what that is in effect saying is that once one has established the object in the context of what is a meeting to discuss matters that really go to the heart of what should not be discussed as between competitors, the nature of that conduct is so egregious that it takes very little to see its potential for harm, irrespective of whether it is acted on outside the meeting once the exchange has taken place.

THE PRESIDENT: I do not know whether that is a reference back to the specific argument that was being raised, that they did not intend to appreciably affect competition. It is a curious way of phrasing it because whether they intended to appreciably affect competition is not normally an issue in these cases, it is a question of whether you had the capacity to.

MR. UNTERHALTER: Indeed.

THE PRESIDENT: It may be that one has to read the arguments and see what was being put – I am afraid we have not done that. We will have a look at it anyway.

MR. UNTERHALTER: There are therefore, in our submission, different ways in which the same proposition has been cast, but it all seems to conduce ultimately to the same proposition, which is more or less where I began. I shall not repeat that submission because it seems really to go to how you show appreciability rather than what the test of appreciability is. There, perhaps, there is some measure of difference between us.

If I could, in that regard, just refer you to a number of passages in the Decision? This matter is considered in two places. The first is in respect of the infringements there is a consideration of what cover pricing is - as to its seriousness and its implications and potential effect. It is considered again under seriousness for the purposes of fining. But, perhaps if I could first refer you to Part III.97. Just to see the context of this, if one turns back to p.361 one sees, 'Cover bidding as a form of concerted practice'. The reference is to *Apex* again, the treatment of which we have already considered, and the principles in *Apex* which are referred to again at para. 95. There is again a recitation of the *Apex* factors under the object of cover bidding. There one sees the four factors at para. 99:

> "Having rejected Apex's argument that the object of its conduct was to remain on its customers' tender list, the CAT went on to conclude that the submission of a cover bid has an anti-competitive object or effect in that:
>
> *(a) it reduces the number of competitive bids submitted in respect of that particular tender;*
>
> *(b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;*

(c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;

(d) it gives the tenderee a false impression of the nature of competition in the market ...

The OFT considers that each of these consequences arise in every instance of cover pricing found to be an infringement in this Decision. Not only do these four consequences indicate that the object of the arrangements was anti-competitive, but also that the arrangements were, at a minimum, capable of anti-competitive effects".

So, in our submission, there is clearly a consideration of the very question of appreciability, the legal test of which we have been considering.

There is then a further consideration of what these impacts might amount to. Just to give you a sense of that, again, at Part III.104 the following is said on duration,

"*In the present case the effect of the infringement is not restricted to the short period referred to above, but has a potential continuing impact on future tendering processes by the same tenderees.*

Such impact may arise in the following ways: [Then they are detailed]

(a) having submitted a bid with the intention of staying on the tenderee's lists for future tenders, new entrants who might otherwise have been invited to compete may not be able to gain entry to those lists for future tenders;

(b) future tendering processes are more susceptible to cover bidding because the competitors who have successfully stayed on the tender lists are aware of one another's willingness to engage in cover bidding, thus reducing the risks involved for one firm to approach another to suggest such conduct;

(c) tenderees' perceptions as to what constitutes a competitive price will be distorted by seeing inflated cover bids, which may affect their assessment when deciding whether to accept future tendered bids".

There is further commentary at paras. 107, 108 and 110. I shall not take you to all the passages.

In our submission it tells one particular story about cover pricing which is simply that it is not something that is confined in the way that our learned friend suggested to a single telephone call where there is an exchange of price sensitive information. It has systemic and dynamic consequences which reach into the future for the integrity of the tendering process. Since so much work is covered by these single stage tenders where a selected

group of parties are invited to tender, once deception of the kind that is practised through cover pricing begins to take hold, it has all kinds of consequences.

Perhaps just simply on this point, what one can never know, once a cover price has in fact been taken and acted upon is: What would have happened had the cover price not been taken? What would the outcomes be if unilateral conduct had been pursued without any kind of co-ordination? There are a number of possibilities, but one of them is that the undertaking concerned would simply have said, "I am not going to bid at all", in which event opportunities may have been created for others.

The other possibility is that either a bid would have been put in which was so way out of contention that it did damage the credibility of that undertaking and they were not invited the next time round, which would have been a good pro-competitive outcome, or they might have bid so low that they actually got the work, and that might be good for competition.

THE PRESIDENT: Which they could then do, as it were.

MR. UNTERHALTER: Which they might not have been able to do, and that would have ruined their reputation. So, in other words, the intrinsic risks of a true tendering arrangement, where you simply do not know what your opposition is going to do, has all kinds of advantages - from the efficiency and pro-competitive consequences of ensuring that these are truly independent bids without co-ordination.

Our submission is that one cannot understand these practices in terms of their potential - and the rot, as it were, that is entailed by them - simply on the basis that the appellant has suggested. They necessarily involve deception. It is known to everybody that the client concerned would never countenance tenders being put up in this way. Yet, the deception is perpetrated and allowed to fester in an atmosphere which, as we know, generally became pervasive in this particular set of markets. So, there are these future risks that amply meet the requirement of the capacity to do harm. We are dealing with a single stage bid with a closed list of parties in the one case - the Nottingham House. Three - and conceivably four - of the six tenderers were in fact engaged in cover pricing. We do submit for these reasons that if one is considering narrow markets and single stage bidding processes with this kind of potential in respect of North Midland, which, as I have observed, is not a small undertaking (its turnover is significant), the combination of those factors amply meets the appreciability standard that we have ----

THE PRESIDENT: Does the size of contract have any bearing, Mr. Unterhalter, in your view on appreciability? It is possible to envisage, I suppose, a selective tendering process for a very

small contract which would be where you select quite small people - a domestic extension or something.

MR. UNTERHALTER: It certainly would be a consideration, but it would not, in our submission, determine the matter at all because it is really the forward-looking risks which are entailed by the practice itself that are really the risk factors as to capability or potential that the OFT took account of, and which are reflected in the Decision. So, even a small contract, conceivably in a market of the kind that has been defined in this case, would, in our submission, still permit the appreciability standard being met because it does not actually require you to determine how big is the contract, how big is the tenderer? It requires one to consider what is the practice; what can it lead to; and what corrosive consequences can it have?

In our submission that is our answer to the appreciability point. Therefore, the Tribunal will take a view as what the right test is. But, we would submit that on that test it is amply met by the OFT in this case, given the factors that I have mentioned.

If I might then proceed to penalty? Perhaps I should offer to my learned friend a similar apology for repetition because it is likely to be a show he has observed once already? There is, in our submission, an odd tension in the argument that is offered by the appellant, which is to stress, on the one hand, that determination of penalties must be a highly individualised judgment in respect of the particular case, and a desire to elevate the abstractness or generality of the principles by reference to which the discretion is sought to be exercised. One sees that argument working itself out through the length and breadth of my learned friend's address because what he presses upon the Tribunal by way of submission is to say that the Guidance - which is not formally challenged, but the Guidance which binds the OFT - has been utilised as a machine to produce mechanistic outcomes and recommends rather an approach to fining which would elevate to a very high level of generality the notions of seriousness, the questions of mitigation, aggravation, deterrence, capacity to pay, and the like. The world that he paints is therefore one in which through very general principles one should then apply a particular discretion on the facts of a particular case. That is the model that he would suggest is the appropriate one to the Tribunal.

We submit that very little is yielded that would constitute an advance by such a call to abstract principle. What the Guidance is seeking to do, and the manner by which the OFT has sought to apply it is to give a more detailed treatment of how these principles, which we can all abstractly tabulate, should be applied in this particular field which is competition law. Our learned friend essentially is speaking to a sort of universally metric which says,

"Every field of regulation or application of criminal norms really must work with the same materials and there must be a very wide and flexible discretion as judged against those principles".

In our submission that is not the correct starting point for the matter to be considered. In the first place, the very guidelines that he relies upon in respect of criminal manslaughter are guidelines which are specifically crafted for a particular field of application of the criminal law. My learned friend reads them on the basis that you can see in those guidelines some of the more general and abstract propositions that he presses upon you. But, the question is: Why then have specific guidelines if all that you require is this abstract treatment of general principles applied to particular cases? The issuance of guidelines is intended to be a modern approach in particular fields of application to try and craft a regime of penalty that will better reflect what is required in that particular scheme or field of application. That is what his own treatment of the matter shows. So, from the case law, which began to develop the principles relevant to health and safety questions, to the guidelines which now formally treat of the matter, what all of that tends to show is that there is utility in crafting the principles for the particular application in mind. Therefore, it cuts very strongly against his basic proposition that one must adhere to universal principle and very specific individual application. We submit that the very materials he relies upon point in the opposite direction. That is our first submission.

The second submission is that there is no warrant to utilise the guidelines that have been worked out for the purposes of Health & Safety issues for the purposes of determining the right penalty regime that is applicable to competition law. We say that for a couple of reasons. The first is simply a matter of statute. The scheme within which penalty determinations are made for the purposes of infringements of the Competition Act begins with a statutory maximum which is determined as to 10 per cent of total turnover. That arises not as a matter of discretionary judgment, that constitutes the framework within which the statutory maximum has been determined. So we posit, as we have previously, this case. We say Parliament has decided that in the worst case of the worst possible infringement, having the greatest possible and harmful consequence, there must be a case that would warrant the imposition of 10 per cent of total turnover as the right penalty to apply in those circumstances.

Everything else must be a judgment of degree by reference to that ultimate penalty that can be applied. In a sense, if one thinks of the parallels in the criminal law, one can take the most heinous crime and work out what is the penalty that would apply to the most heinous

of crimes and where does this then sit in relation to what is the most serious? Necessarily it frames the way in which one thinks about penalties, and that is distinctive to this field. The horizontal application across fields again does not seem to be indicated, and it is not indicated by the statutory maximum.

The second proposition that we would suggest by way of submission is that when one has regard to the guidelines that are applicable to corporate manslaughter one sees a whole range of factors that have indeed be crafted precisely to deal with that field. Perhaps I could very briefly take the Tribunal to those guidelines which are volume 12 of the authorities under tab 180. As our learned friend has fairly pointed out, these are guidelines that are specifically crafted for offences concerning corporate manslaughter and Health & Safety offences causing death. That appears plainly at p.2 of the guidelines. Could I direct your attention to B, which is the factors likely to affect seriousness. What one sees there is a treatment of such matters as:

"**How foreseeable was serious injury?**

The more foreseeable it was, the graver usually will be the offence.

How far short of the applicable standard did the defendant fall?"

Perhaps I could just pause there for a moment. There is not a notion that one is by some degree infringing the Competition Act, you either are or you are not. Negligence is generally a judgment of degree. It is a question of what is the duty of care in all the circumstances and how far has there been a deviation from that standard?

It gives rise to very, very different considerations. One does not speak, for example, about parties to an infringement of the Competition Act to say, "How far did you just fall short of what was required of you to take unilateral action when, in fact, you engaged in concerted practices?" It makes no sense by way of a set of categories within which to think about seriousness.

"**How common is this kind of breach in this organisation?**

How far up the organisation does the breach go?"

My learned friend can fairly point to aspects of these guidelines where there will be an intersection and we do not deny that. Any rational scheme of guideline is going to come up with some points of similarity. The first feature is that they are crafted, and deliberately crafted, to the features that are relevant for this species of offence, just as, in our submission, the guidance is also so crafted, and I will come to that in a moment.

Then there is the question of the level of fines. Again, it is hard to see why there is some read-across that must necessarily take place between the indicative fining levels for the

purposes of this range of offences to those that lie for the purposes of infringements of the Competition Act.

There is obviously a history here, and one can see this from the case law, that historically these offences were insufficiently fined, frankly, in relation to the seriousness of what was happening, and this is some effort to redress that difference. One does not say for that reason that this constitutes a benchmark which now is the clear point of reference for all determination in respect of every field regulatory endeavour. On the contrary, one is much more likely to say that one looks at the regulatory field and one considers what is relevant to that field and one does not read across in the way that is suggested.

We have also made the submission previously that one of the features of competition law enforcement, particularly in the cartel area, is that this is a species of behaviour that can be rationally indicated to parties who engage in these markets. Particularly on the dimension of deterrence, there is ample reason to have a very sharp reminder of why it is that this should not be done, and there will be severe penalties that flow from those who seek to engage in it, because it is, as it were, a constant temptation.

Our learned friend says of this that he can conceive of the fact that for very serious cartel violations, tens of millions, hundreds of millions, might be appropriate, as is the case with the Commission, but not for this species of violation. In our submission, that is a strange submission to make because what it is suggesting is that, in fact, in principle there is nothing wrong with very swingeing penalties for aggravated cases of cartel behaviour. Indeed, presumably on that view nothing is wrong with the 10 per cent of total turnover standard for the most serious kinds of cartel behaviour. The only question that then divides us is, how do you situate this conduct relative to the hundreds of millions that might be appropriate to a Microsoft engaging in a very severe case of abuse of dominance? That would mean, in our submission, that we are entirely within the right framework, that is applicable fining for competition abuses which can raise very high numbers in relation to total turnover as the applicable regime, and then it is a question of where does one stand on the question of seriousness and deterrence within that scope?

In our submission, there is little that is of assistance to you, frankly, in these comparisons with different fields of application. We submit that you should consider the question of penalties within the regime that has been applicable under guidance and will ask the question whether the guidance, which is not formally challenged in any way by our learned friend, has been properly applied or not. I know that raises a vast range of issues that have been ventilated before you in many different dimensions, but since my learned friend's plea

to the Tribunal is that this is an opportunity to reconsider the entire foundations of the penalty regime and hence to rethink the guidance, as it were, in the light of the criminal analogies, we submit that you should decline that invitation and rather consider whether, against specific challenges that are made as to how the guidance has been applied, in your judgment the OFT has or has not correctly applied the guidance.

Just apropos one or two general remarks, again our learned friend listed a series of factors where he said, "Well, this was not a multilateral decision, there was no consumer detriment, there was continuing infringement, there was no proof of state of mind", I am not certain about that because either intention or negligence is required for the imposition of a penalty, and it was so found. In our submission, the fundamental problem with this view that my learned friend takes of the factors that he considers relevant for cover pricing is that he is systematically failing to see what is serious about it. Those are the matters that I have taken you to in respect of the treatment of it under the infringement portion of the decision, but they are returned to – and again I will not repeat all the passages that are relevant to this, but in the consideration of starting point, which commences under section VI, there is a very lengthy consideration from step 1, which is section VI.78, p.1644, which considers a very large variety of challenges which were made to how seriousness should be considered. I will not take you through all of them because some of it is repetitive and some of it simply seeks to categorise different kinds of challenges which were made, including challenges of the kind that our learned friend seeks to ventilate by way of seriousness to say, "These violations are simply one off occasions of little consequence and therefore do not need to be treated seriously". All of that is dealt with and rejected. We would invite the Tribunal to consider whether there is any part of that rejection which was unwarranted by the OFT.

We would point in particular to some of the passages which deal with what I have styled the "counterfactual problem". If one looks at VI.147 to 148 one sees at p.1661:

> "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 to bid …"

Then there is a treatment of that importance question at para.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."

An interesting contrast both between the specifics of the tender and the wider marketplace, all relevant also, of course, to appreciability:

> "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 deals with those matters in that way.

I will not trouble you further with lengthy recitations of what is said here, but there is a very full consideration of seriousness, and a judgment that ultimately, in our submission, is done with restraint, which is to say that in the *Roofing* decisions a similar level of seriousness was determined and the OFT says of that, since the construction sector seems to have ignored that determination, there might well have been warrant to increase the level of seriousness, but it does not do so, and it adheres to the levels of seriousness that were reflected in the *Roofing* decisions, and that is why the 5 and the 7 are determinative of seriousness. In our submission, there is not a simple view that is taken of the matter of seriousness, it is carefully considered, and the arguments ranged against it are raised and dealt with. The consequence is the reasoning and the result that is reflected in the decision. Therefore, from the perspective of the Tribunal the question will be against all of that treatment and consideration of this matter, has the OFT made some fundamental mistake as to the appreciation of seriousness in relation to these practices? We would submit that no mistake has been made at all.

So the question that then arises is: is there anything about the specific conduct of this appellant that differentiated and warrants a different sort of treatment that should be given? Effectively, our learned friend, when he reaches this part of his argument, really has two arguments to raise. Perhaps I can just deal with each of them briefly.

The first is an argument that really rests upon the proposition that there were other undertakings that committed many more infringements, and there was a failure, therefore, properly to differentiate those that received penalties comparably within the scheme of the imposition of penalties where in fact what should have happened is that there should have been a much greater consideration given to the numbers of infringements that were committed.

That, in our submission, raises the wrong question. The question is not whether there are others who might have suffered greater penalties because they committed more

infringements; the true question is whether this appellant suffered any injustice for being penalised for the things that it did. In our submission there is absolutely no reason to think that it did. How has it been fined? It has been fined for each infringement according to the seriousness of each of those infringements. Then it has been fined in relation to the deterrent that is required by way of the application of the MDT.

The MDT is plainly what is said to be required to serve for the purposes of deterrence where the relevant turnover in the relevant market is inadequate to serve what deterrence requires. There has been no direct attack by this appellant upon the MDT as a methodology save in the most general of terms. So the question is: where is the injustice coming from here? My learned friend says: in effect, the sorts of numbers that were generated at steps 1 and 2 would have sufficed as the penalty in its totality. That is in effect what he is saying about these penalties. The question is: why is that so? What is the reason that the Tribunal can be satisfied that £27,000-odd for an infringement will do the work both of seriousness and deterrence in respect of an undertaking of this size? In our submission, it becomes exactly the frailty of the general argument that is postulated by the appellant, which is to say: when it comes to these individualised judgments you must just know it when you see it, and you will have a sense as to whether that is enough or not. That seems to be a call to no clarity or reasoning at all; it simply says there is a figure and I can tell you that it is enough.

THE PRESIDENT: It is a bit of an odd result, is it not, just looking at it in a vacuum? You say that there is no injustice in being fined for what they have done in respect of each infringement. They are fined the sum of £27,000 for one and then £500,000 for another when the two infringements are, to all intents and purposes, identical. It seems an odd result.

MR. UNTERHALTER: In our submission it only is facially odd if one does not have regard to the reasoning that underpins it.

THE PRESIDENT: I know the reasoning. It pops out because of the relevant turnover in the relevant market, but does that not show in a sense that one should not be stopping there; one should be doing something else to try to make it more sensible? It is a very odd result. The same degree of seriousness. All those effects, indirect effects in the market that you have mentioned will be identical, the undesirable effects, yet one is visited with £27,000 and one with £500,000.

MR. UNTERHALTER: There are obviously two dimensions to that judgment . One is the question of seriousness which was consistently applied in both cases at the 5 per cent level. The second deals with the question of relevant turnover, which is how was that affected in

the marketplace, which is what the guidance refers to? That really is a question of considering, given the size of this undertaking within the relevant market, how is there a relationship between these two factors? You are, as with all of these matters, trying to measure up both seriousness and size.

THE PRESIDENT: Are you trying to measure it up, or is that simply the result of the formula? Is any real independent judgment being applied to that, other than the application of the formula?

MR. UNTERHALTER: Two submissions. The first is that the formula is not just a formula. The 5 and 7 per cent are of reasoned determinations that are made with a host of reasons that support them. The question that arises – and I do not really understand this appellant to suggest otherwise – is: is there anything about its cover price that differentiates it in respect of its being of a lesser order of seriousness from comparable cover pricing that others engaged in?

THE PRESIDENT: That is a separate matter.

MR. UNTERHALTER: As I understand the argument, all that has really being said on this ground is simply: but there were others who committed so many more infringements and surely one must give them a bigger penalty.

THE PRESIDENT: It is a disparity point, is it not, which one sees commonly in the criminal field: why has my co-defendant got that much when I have got this much?

MR. UNTERHALTER: The problem with the analysis is that it is not comparing like with like in this sense. The reason that there are only three infringements that are being pursued is a function of two things. One is that the OFT decided to apply a cut off to the number of infringements they were going to engage with. In our submission, that is a perfectly proper exercise of prosecutorial discretion. So there can be no requirement that a regulator must pursue every infringement in order to determine the total universe against which to situate different offenders. It is permissible to decide that you are going to do no more than three. Then there does not seem to be anything irrational about the situation because everyone is getting, for the number of infringements to a maximum of three, what is required by way of each infringement taken one at a time. So the big point that is being made here, which is that major offenders, the Vales and so on of this world, are getting off lightly, is in our submission really just a comment about whether it is permissible to cut off at three.

It is also, in a sense implicitly, a suggestion that leniency as a policy is wrongly implicated here. Again, for reasons we have debated elsewhere, we submit that that is not the case; it

is a pragmatic intervention that is necessary for the purposes of pursuing these kinds of infringements.

So, in our submission, the notion that this appellant is being hard done by and not fairly treated or treated in a discriminatory way because there are others who did more things that could have been found to have infringed the Act really do not take the argument anywhere so long as this appellant got the right penalty for what it did. That others could have been penalised to greater extent had the OFT been willing to follow every last infringement to its final end really does no injustice to this appellant.

In respect of duration, which is the second consideration that is put up, in our submission it is again a function of the way in which the appellant understands the infraction that has occurred here. My learned friend says: but this is really an infringement that is a matter of a very, very short period of time – a telephone call is made and that is the end of the matter. Because cover pricing has systemic dynamic effects within markets of the kind that have been carefully analysed in the Decision, that in our submission is not the right way of looking at what the likely permissible sense of duration is for the purposes of this infringement.

If one poses some of the counterfactual questions which I had raised, it can reach on for a very long period of time because it goes to the next phase of bidding. Were this practice not to have been committed, others may have replaced those who in fact engaged in the cover pricing so the effects could be felt in the next round of bidding. It is by no means clear therefore that the effects are limited either to the specific exchange of information or even the consideration of the bids, because logically if you are trying to find an end point it would be the consideration of the bid or indeed the works that are done pursuant to the successful bid.

Ultimately, the whole process is infected by the vice of cover pricing. Therefore, the effect is at least to the time that one can logically say that this tender has been performed. But we would say its systemic consequences go way beyond that because of the reputational issues that lie at the heart of the reasons for cover pricing. For those reasons we would submit that there is really again nothing to suggest that any reduction is due by way of duration. It is in the guidance a question of something that needs to be shown that is special, extraordinary, about this. There is nothing special about it. We submit that it really reaches forward in a not inconsiderable way that warrants no reduction by way of duration. There has been no elevation, but there is no reduction that is warranted.

So on the two special grounds that are advanced, we submit that there is no reason to treat this appellant differently. We have made our submissions concerning tariffs which, as a suggested formulation, would be an unusual result given the highly individualised treatment of penalties that our learned friend has pressed for. Our submission is that these very low amounts which are suggested - £27,000-odd or some comparable amount – in respect of the second infringement would wholly fail to mark out for a not unsizable undertaking what is due by way of proper deterrence, and the figure that was ultimately determined measures up both the seriousness of what was done and the need to press for deterrence over the size of this undertaking and its economic power within the markets in which it can operate.

I am not going to repeat many submissions made concerning how deterrence works and why it should work on a total turnover standard, but we certainly pray in aid those general principles. Those are our submissions, unless I can assist the Tribunal in any way.

THE PRESIDENT: Thank you very much, Mr. Unterhalter. Mr. Thompson.

MR. THOMPSON: Yes, inevitably at the end of a day when a number of points have been made, one's reply submissions may not be as polished as you would hope, but I hope that I will cover the main points.

There were various points put in argument in relation to the quality of evidence and indeed more recently the somewhat anomalous outcome. We would gratefully adopt those points.

I think the recurrent theme of Mr. Unterhalter's submissions, and indeed of the OFT's pleadings more generally, are to the iniquities of cover pricing as a phenomenon. I guess that the largest issue between us is whether or not that is sufficient as a defence of this decision, or whether it is not rather necessary for the Tribunal to consider whether these particular two episodes actually measure up to that characterisation. Rather as if the OFT could write a disquisition on the iniquities of price fixing, but it would not necessarily be the case that two people in a high street who happened to agree on the price of sweets would automatically fall within the scope of all those implications. It does seem to me still, and it was manifested again this afternoon, that the OFT does tend to lapse into a sort of default rhetoric about the iniquities of cover pricing and it is not necessarily the case that all such examples in the Decision actually measure up to that description. I would invite the Tribunal to say that these two cases are examples of that.

THE PRESIDENT: Are you on appreciability at this point?

MR. THOMPSON: It is a general observation which I think deals with appreciability and also fine. I will come back to it in a moment.

So far as the size of North Midland goes, I measured it over the short adjournment and I believe it comes in at about 48 of the 103, so somewhere in the middle, and so I would not make any particular claim.

THE PRESIDENT: In terms of total turnover?

MR. THOMPSON: Yes, and so that is the sort of size, although I believe it was considerably smaller in 2001, I think it was indicated that it was quite a bit smaller when the Nottingham case came up. I think that the point I made this morning was really by contrast to the Sercos and Shells of this world, that it is not a global player, and there is some sense issue about that.

Turning to the factual issues, I will take them as rapidly as I may. I think the large point is that this is a question of the burden of proof, and the presumption of innocence, rather than our being able to demonstrate exactly what happened to that document, although in relation to the evidence it came out that we do in fact have signed statements and the Tribunal will be aware that s.44 of the 1998 Act makes it a serious matter to put in untrue statements, and so insofar as the Tribunal is making up its own mind as to what happened my clients are entitled to rely on the statements that were put into the OFT just as much as the OFT is entitled to rely on statements that were prepared on its side. There has been no cross-examination on either side, and some of the issues that were raised, in particular the significance of the question mark, there is, as it were, a blank on the OFT's side which it has chosen for its own reasons not to seek to fill.

On the specific points I think Mr. Unterhalter drew significance to what he said that the hanging question mark was in the left hand box, that is obviously a matter that the Tribunal may want to consider, but one simple explanation would be that the line there is very full of writing already, and so if you wanted to express a question mark there is not really any other obvious place to put it. That may be one reason why the question mark was put there rather than anywhere else.

The broader question, and for which Mr. Unterhalter referred to at paras. IV.230 and 234. indicates that Mr. Wraith normally filled in the form and normally made the calls and so there is an anomaly here in that this line seems to have been filled in by somebody else, and Mr. Wraith appears to have put a question mark against it. So to that extent that does cast doubt as to what exactly the significance of this is, and a doubt which the OFT has not closed.

So far as the other points, I think there is a bit of too-ing and fro-ing. There is a reference to Frudd being there and Craske being there – I think that simply indicates that that list was

put at an early stage and then details have been filled in subsequently; I would not say that that cast any particular light on the situation. There is a correlation between what was done in relation to Tomlinson and Woodhead; there is equally some correlation in relation to Woodsend where not only was there a question mark cover price, but there is also a correlation in terms of the bid and the number that appears in this sheet, and that was obviously not considered to be sufficient by the OFT and, for what it is worth I would note that, whereas the other participants including Woodsend, all bid somewhat above the cover price, for what it is worth the bid recorded by North Midland is somewhat below it although only by some £11 which, on the face of it, is rather inconsistent with it being a cover price.

The other references to Mr. Wheelhouse: as I understood it Mr. Unterhalter effectively said that we should hold against Mr. Wheelhouse his evidence in relation to Nottingham in 2001, the fact that Mr. Clarkson used the word "always" in relation to Mr. Shorthouse in Rotherham in 2004. So in addition to the point that Professor Stoneman put that "always" may simply mean that he was the opposite number to whom Mr. Clarkson frequently spoke, possibly for perfectly legitimate reasons, the differences in time and space in my submission mean that you cannot really infer anything against Mr. Wheelhouse in relation to 2001 from the fact that Mr. Clarkson frequently spoke to Mr. Shorthouse in Rotherham in 2004.

At one point I think Mr. Unterhalter appeared to be treating it as some form of review of the OFT's findings. Of course, under Schedule 8 to the Act the Tribunal has its own fact finding jurisdiction and so this is a matter for the Tribunal to consider on the merits rather than simply to review the consideration given to it by the OFT. Those are the points I wanted to make briefly in relation to the facts, and overall we maintain our position.

So far as appreciability goes, I would respectfully maintain that the *Miller* and *Volk* case law is strongly in favour of the position and the OFT seemed to back off quite considerably and, as I think I made in a brief intervention, the *Miller* and *Volk* cases – in particular *Miller* – do appear to place emphasis on the importance of the companies involved, and in my submission the answer to the riddle that Mr. Unterhalter put in relation to the difference between effect and appreciability is that while one is looking at potentiality here rather than actuality you still are entitled to look at the actual scale of the parties involved and the actual scale of the contracts involved in determining whether or not those parties and those contracts or agreements are, in principle, capable of having any effect on the market; that is a question that does not require you to look into the actual effects but to look into what sort of people you are dealing with and what sort of agreement you are dealing with.

THE PRESIDENT: It is part of the economic context in which the case says you have to look at.

MR. THOMPSON: Yes, if it is an international agreement involving very large undertakings, as in *BPB* or *Glaxo*, then there is no question that there is appreciability there. In other cases, and we would say that these were good examples, the issue of appreciability is very much in issue. I think it does feed in as I think the President put to me, the description of cover pricing in the decision is very much at a high level, and we are not dealing here with cover pricing as a multilateral practice going on over a period of months or years, we are talking about individual bilateral connections between two companies, and then it is very much a question of whether there is sufficient there to support a finding of an appreciable impact on competition.

Mr. Unterhalter referred briefly to the *Apex* case, and although I think I indicated that we would say that that case may need to be viewed with caution if it is relied on at its widest, but I would refer to the fact that certainly the passage we looked at was very much in terms of local authority bidding and there, of course, there are particular implications, because the local authorities – or central authorities – have inevitably a stream of demands. They have tendering lists and issues of that kind, and it does, in my submission, raise different issues when you are dealing simply with a firm of local architects, and is very much in question whether the reasoning in relation to local authorities necessarily carries across to individual architects of unspecified economic significance.

I looked at *T-Mobile* in opening so I will not look at that again. In relation to *Glaxo* if we could just briefly look at what that case concerned, that is at tab 117 of vol 8, and particularly paragraphs 4 to 6.

> "4. GSK is a company incorporated under the laws of England and Wales, established in Brentford (United Kingdom). It belongs to the GlaxoSmithKline group, one of the world's main producers of pharmaceutical products. Gateway is a company incorporated under Spanish law, established in Madrid (Spain), whose main activity is the development, manufacture and marketing of medicines in Spain."

Then the case concerned a document notified to the Commission for a negative clearance.

> "6. The agreement applies to 82 medicines intended for sale to wholesalers established in Spain with whom Gateway has commercial relations outside any distribution network. Those wholesalers may intend to resell the medicines to Spanish hospitals or to Spanish pharmacies … They may also intend to resell them in other Member States, through parallel trade, in which they engage on account of price differentials. The 82 medicines include 8 medicines described by GSK

as being prime candidates for parallel trade, principally between Spain and the United Kingdom."

So, in my submission, it is not surprising that the issue of appreciability did not detain anyone in that case, and it does not advance the OFT's case. In fact, I do not think we need to turn it up, but in *BPB* the same issue arose actually in relation to the fine and para. 303 of the *BPB* judgment looks at the issue of appreciability in the context of fine and the significance of the parties in that case.

Then Mr. Unterhalter took the Tribunal to pp 361 et seq of the decision for the generic description of cover pricing and that again takes me back to the point I made in opening, that that description is not necessarily applicable to all cases. It tells a story about the iniquities of cover pricing, but not necessarily confined to single telephone calls, but to systemic consequences, and while I would accept that as a generic description in relation to any particular case – and this case in particular – I would say that it was essentially speculative and that that is not the basis for imposing heavy fines.

Analogies are always a dangerous thing, but an analogy that has been in my mind from time to time is supposing one had two middle managers for one of the major supermarkets who met in a pub and one commended the other on the success of their sausage promotion, and the other person said: "Don't worry, that won't be going on much longer". Mr. Unterhalter's rhetoric might support a lengthy description of the inequities of price fixing, and one would then think: "Would it really be possible that you might impose fines on one of the major supermarkets of 0.75 per cent of their turnover on the basis of a conversation of that kind supported by rhetorical descriptions of the inequities of price fixing. In my submission, we are not far away from that in this case. You have very, very limited facts and then extrapolation to very serious infringements of competition law which have not in fact been proven by the OFT.

So far as the fine goes, I think this point has been fairly well ventilated not only in this case, but in many other cases. So far as the criminal analogy goes I dealt with that at some length. I think at its broadest we would say that it supported the CAT's approach going right back to *Napp* of a broad brush, overall assessment, and that that is entirely consistent with the approach adopted by the criminal jurisdiction.

Insofar as the 10 per cent statutory cap is relied on as a differentiating factor, in my submission that is a very broad field within which to work, and intended as such and, as I think Mr. Unterhalter is bound to accept, if 10 per cent is the maximum for a multilateral cartel that, for example, might deal with a global product and might have been going on for

decades, then that does at least raise the question as to whether 0.75 per cent of global turnover is the right sort of level for this type of infringement, and my submission is that the comparison with the criminal level or, indeed, the level imposed on Shell in *Tobacco* indicates that we are moving quite substantially beyond the right level of fine for facts of this kind.

Other points on the guidelines, negligence, rationality, etc, I do not think I need to comment any further. I think it must be clear that we are not challenging the guidance in itself and as for other appellants the key issue is clearly Step 3 and whether it was right in this case to make a very substantial increase for deterrence, although the other point - and it was a point put by the President in argument - is that given the rather rigid market definitions, particularly geographic definitions given here, perhaps not surprisingly the effect of that has been to throw up some very strange anomalies at Steps 1 and 2, whereas the Tribunal put to Mr. Unterhalter essentially identical conduct in relation to contracts of the same size are visited with fines quite independently of the Step 3 adjustments of a factor of, I think, twenty difference, simply because in 2008/2009 North Midland happened to be doing rather better in the field relevant to the repair of mills than it was in relation to the building of houses, and therefore ends up with a fine of £580,000 instead of £27,000, and any rational fining jurisdiction would, in my submission, have come up with broadly similar fines for essentially equivalent conduct by the same undertaking. So, I would stress that point as well.

In relation to duration I think I have the same point here. Mr. Unterhalter again stressed the generic issues. In my submission such issues are not present in all cases of cover pricing. None have been proved here. So, I would abide by the submissions I have already made in relation to duration.

Can I just ask if anyone wants me to say anything else? (After a pause): No. As far as we are concerned that is the end. I do not know if there are any other questions from the Tribunal?

THE PRESIDENT: We have none. Thank you very much, Mr. Thompson.

MR. UNTERHALTER: Sir, might I come back on something? I am asked to mention two things very, very briefly. We have the transcript which deals with the passage which is referred to in Part IV.5244, p.1340. That is the "I always spoke to" comment and what was actually said in its relevant context. We will make the relevant passage available to you, but it appears from the transcript with Andrew Clarkson on 30th March, 2007 with Admiral Construction ----

THE PRESIDENT: Is that the one we have got? We have a transcript of something.

MR. UNTERHALTER: I am not certain whether you have this page - p.40.

THE PRESIDENT: No, we do not have that.

MR. UNTERHALTER: We can hand you some copies if that would be of assistance to you.

THE PRESIDENT: It may be as well to deal with it tonight if there is a point to be made. Mr. Thompson might want to make a point about it.

MR. UNTERHALTER: Indeed. It just situates the language that is reflected in the Decision in the context of the transcript.

THE PRESIDENT: He can tell us if he feels able to deal with whatever point you make about it.

MR. UNTERHALTER: It is a very short point. It just clarifies what is actually being said. I am asked to point this out to the Tribunal. Effectively, on p.40, more or less, a little more than half-way down, it is said,

> "Yeah. Yeah, and Martin Shorthouse.
>
> "Yes, he's the, ah, he's the estimator that I usually contacted at North Midland Construction."
>
> "You usually contacted -- How often?"
>
> "Um whenever I wanted some help on a job that they might have been pricing that we weren't."
>
> "Right, so, he was your regular contact point."
>
> "Yes."

It is simply to indicate the context within which that somewhat more abbreviated passage is reflected in the Decision.

Then, the final observation I am just asked out to point out to the Tribunal is that in respect of these transcripts they are then made available to those who were interviewed, and they are asked to review them and correct anything in them that they considered to be wrong, or whether it warrants further treatment or amendment -- just *a propos* what process is followed in the administrative process.

THE PRESIDENT: That is all very sensible, but it does not appear on anything that I have been able to see. But, it may be in the Decision somewhere.

MR. UNTERHALTER: I am not certain that it is. But, that, I am told, is the procedure that is followed.

THE PRESIDENT: But whether it was in this case we just do not know, do we?

MR. UNTERHALTER: I can take instructions.

THE PRESIDENT: That is the vice, is it not, in this? It is just that it is not done in that way.

MR. UNTERHALTER: I understand that the document does not reflect it in that way. I can take an instruction as to whether that indeed is the way it is done.

THE PRESIDENT: It does not matter in this case any more, it is water under the bridge now, is it not?

Mr. Thompson, do you want to take instructions and have a few moments on this since it has been sprung on you?

MR. THOMPSON: The only thing that was said to me - and I do not know if Mr. Evans is going to say anything else to me - that does bear on what Professor Stoneman put this morning is that in fact there was a commercial relationship between Admiral and North Midland which Admiral did, on occasions, subcontract for Admiral.

THE PRESIDENT: Yes. I read that somewhere.

MR. THOMPSON: So, there is a complication here. I do not know how far the Tribunal places weight on this. I should say that we did in fact refer to this at Footnote 22 of our Notice of Appeal. In fact, it is the following page where there is the reference, "The guy I always spoke to" appears at p.41. The comment we make, consistent with its general approach under the overall decision, is that,

> "-- the OFT makes no wider allegation of co-operation between North Midland and Admiral. In any event no such issue arises in relation to the Nottingham house case".

I do not have any further instructions in relation to Mr. Shorthouse and I do not think I am likely to get any.

THE PRESIDENT: This presumably has been available to your clients, has it?

MR. THOMPSON: Yes. We saw it. There was reference to this expression "always spoke to" in the Decision itself. We made those comments at Footnote 22. I do not think, beyond reminding myself and the Tribunal that there was an independent commercial relationship between Admiral and North Midland, there is anything more to be said about it, except for the general observations that the Tribunal made about the somewhat unsatisfactory procedure of having this type of rather general evidence dealt with with leading questions, etc. on a rather informal basis as the sole evidence that we all have to work with.

THE PRESIDENT: I suppose if you were concerned about this you could have demanded that Mr. Clarkson be proofed. I suppose there are steps you could have taken. Anyway, you are not taking any specific point on the accuracy of this, or otherwise.

MR. THOMPSON: No. The main point I am taking, and as I understand it the way the Decision works, is that it is essentially premised on this document - the fact that there is primary

evidence here which I am not in a position to say is a forgery which we have accepted on the balance of probabilities suggests that this conversation took place.

THE PRESIDENT: Yes. I think this goes to the point of seeking to cast doubt that it is not the general practice or policy of the company, whereas the implication of this is that it happens rather a lot with Admiral.

MR. THOMPSON: Certainly it appears on its face to suggest that Mr. Clarkson and Mr. Shorthouse had a commercial relationship which may partly be explained by day-to-day, but appears to indicate that there was another occasion at least on which they were in contact on price, but there is no particularity about it. We have no evidence to support it, and were not able to respond to the fast track offer and so we have taken the position that the OFT, as it were, has to prove its case, but we have conceded in relation to the Rotherham Mill case that this, on the balance of probabilities, does satisfy the burden of proof. The only other point is that in my submission it cannot be prayed in aid against Mr. Wheelhouse in relation to a completely different set of events that happened three years before this in Nottingham rather than Rotherham.

I do not think there is anything more than I can add on this.

THE PRESIDENT: Thank you very much, both of you, for your help.