IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1127/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 June 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BOWMER & KIRKLAND LIMITED
(2) B & K PROPERTY SERVICES LIMITED Appellants

- v -

THE OFFICE OF FAIR TRADING Respondent

_____

Transcribed by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

_____

HEARING

APPEARANCES

Mr. Thomas Sharpe QC and Mr. Conall Patton (instructed by Shepherd & Wedderburn) appeared for the Appellants.

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

_____

THE PRESIDENT: Good morning. Mr. Sharpe, you are opening the batting.

MR. SHARPE: I am, Sir. Good morning to you all. I appear form Bowmer & Kirkland Ltd. and B & K Property Services Ltd, the appellants. These are private limited companies in England, family owned. Mr. Robert Kirkland is actually in the room today. With me is Mr. Conall Patton as my Junior. Mr. Unterhalter and Mr. Bates appear as the home team, as it were, for the Office of Fair Trading.

Sir, we will need at hand the Bowmer & Kirkland bundle which you have been furnished with. We need not go to it just yet, but if you have it to hand, it contains the only reference to which I might take you later namely the *HIH* case, which I suspect you will have looked at.

The unique feature of B&K's appeal is the fraud. In 2002 B&K was deceived into making a payment of just under £10,000 plus VAT to its competitor, Herbert Baggaley. Now, the OFT has sought to fine B&K almost £3 million over on top of the fine that they would otherwise have levied because of that payment alone. In our submission that was a grave error on the part of the Office which the Tribunal can, and should, correct. The fraud will be the focus of my oral submissions. The other grounds have been set out fully in our written skeleton and they also feature in some of the other appeals. I addressed you on some of the points taken by B&K in the context of Sisk's appeal yesterday afternoon to which I respectfully return to at the appropriate moment.

THE PRESIDENT: I am sorry to interrupt, Mr. Sharpe. You do not take a point as to the liability of B&K for Mr. Craft.

MR. SHARPE: No.

THE PRESIDENT: Your point is a separate one. Given the circumstances in which you say the payment arose - what you call the 'fraud' - there was no need, as it were, to be deterred to the extent that you were intended to be deterred by the scale of the fine.

MR. SHARPE: Our submission is precisely that. This is not an appeal on liability. We have admitted the infringement readily. But, we just feel that when a company is deceived and defrauded out of this deterrence is an inapt concept.

THE PRESIDENT: Payment was made, as I understand it, on the invoice submitted. It was made to Herbert Baggaley, and that was only unearthed many years later, was it?

MR. SHARPE: No. The payment was made eleven months later, after the presumed date of the cover price being furnished. The invoice was detected only after the investigation was started. It had been authorised - and I will explain this, I hope, in a moment - solely by Mr. Craft. It was sent to him marked 'Private & Confidential', as I will show you.

THE PRESIDENT: No criminal proceedings ensued.

MR. SHARPE: None yet. None yet.

THE PRESIDENT: Has a complaint been made to the police?

MR. SHARPE: Not yet. First of all, there is no limitation issue. As for the criminal aspect of this, that does not let Bowmer & Kirkland off the fine hook one jot. All of this has been explained in great detail to the Office orally and in writing from the earliest moment that it became clear what had happened. Mr. Craft left the employment of Bowmer & Kirkland two weeks after he authorised the payment. The Office themselves say that they have no evidence that he had spoken to anyone within Bowmer & Kirkland either when the payment was agreed between him and Baggaley and when the payment was in fact made, and in particular no quantity surveyor had seen this or had any opportunity to factor in the payment which was invoiced 11 months after the contract discussion. There was no hint that the payment had been factored into the quantity surveyor's calculations when putting in the tender.

THE PRESIDENT: So it was paid some long time after he had left.

MR. SHARPE: It was paid two weeks before he left on his sole authorisation.

THE PRESIDENT: I see, after the authorised date, yes.

MR. SHARPE: So the chronology, we have the cover price. In the decision that is set at, I think, 3rd December 2001, we do not need to be overly precise about it. You may recall what happened about it, there were two tenders ----

THE PRESIDENT: We do remember.

MR. SHARPE: Bowmer and Kirkland were the most successful, but we must not overlook – which is actually overlooked in the decision – the fact that the Derby Daily Telegraph put it out for re-tendering and invited a third party, Britcon.

THE PRESIDENT: Otherwise there would have been nobody else.

MR. SHARPE: Indeed. They took advice from an independent quantity surveyor but nevertheless chose to stick with Bowmer and Kirkland, even though Bowmer and Kirkland had put in a somewhat higher bid. My understanding was that the work was very complex. Bowmer and Kirkland had worked on the site in stage 1, they knew what they were doing and the Derby Daily Telegraph knew them as well.

THE PRESIDENT: Yes.

MR. SHARPE: That ended up let us say in January 2002, and the invoice was paid we think some time in November 2002.

THE PRESIDENT: The invoice was January?

MR. SHARPE: No, the invoice was sent in November 2002.

THE PRESIDENT: The invoice was sent?

MR. SHARPE: Yes, I will show you it later, 11 months later. Let us not try and make too much sense of this, this was a fraud.

THE PRESIDENT: But it is quite handy just to have.

MR. SHARPE: No, no, I quite understand.

THE PRESIDENT: I am sure we have it already in the papers, it was sent November 02.

MR. SHARPE: I am going to take you to it because I think that is more eloquent. This was sent 11 months later, it was sent marked "private and confidential" to Mr. Craft he did not tell anyone else. He had authority to sign off what are called "materials contracts", that is to say a tonne of wood, or whatever, but he had no authority to sign off for subcontracting work. So when we look at the invoices – I will show you in a moment – it is not actually for works done by Herbert Baggaley, it is for goods supplied. If it had been for works done a whole range of different internal regimes, much tighter, would have obtained, a subcontracting document has to be produced, there are tax implications because a special tax certificate has to be produced for subcontractors, and he would have had to pass that over to somebody else to sign off on the work. He knew the way in which this materials contract could be navigated around so that no one else knew what was going on and it was for a relatively small sum of money. So it was not a case of slipping under the radar as such, he knew the radar was not designed to deal with materials contracts of this magnitude. For that, the penalty is £3 million as a deterrent, the mechanical application of the OFT's method has led without thinking in my submission to this penalty.

Our submissions, as you will see, are going to be quite simply this, when it comes to fraud it is, as the House of Lords said: "a thing apart", you cannot guard against it, you can take steps, you can take reasonable steps but in the end fraud unravels everything, and in our respectful submission it ought to have unravelled the mechanical application of this swingeing fine.

However, before doing that, can I state the position in relation to BMK's other three grounds of appeal briefly, starting with the point I did not develop orally yesterday, but which I threatened you and, I think, Professor Bain, and which we have developed in some detail in writing.

With some diffidence, in our submission, the Office is guilty of some hyperbole here in its description of the practice of cover pricing. No-one is going to defend misleading local authorities and the like that a bid which was submitted was not a genuine bid, designed to

win the work. But, you have seen the historic origin of this practice. It is not in dispute. Public bodies, in particular, cut companies off from future competitions if they fail to respond to a bid. Cover pricing was the recognised way in which undertakings could make a credible, but losing, bid without incurring the non-trivial costs of preparing the bid itself for no good purpose. This has been overwhelmed by EU inspired procurement regimes in the public sector with greater openness and objectivity, as well as modern, private sector procurement practices. The documentation does reveal that this is an historic practice, though the infringements which B&K admits go back to 2000, 2001 and 2003. No post-*Makers* infringements of cover pricing.

Cover pricing represented sharing the information that one company was not a credible bidder, but especially where there are lots of other bidders left in the competition the impact on competition itself and on prices is quite likely to be zero. If there had been no sanction imposed by the party putting the contract out to tender, companies would quite simply have not bid at all with exactly the same result. There was no competition to prevent, restrict or distort. There was certainly no benefit accruing to the company seeking a cover price other than the thought that it would not be excluded from the next tendering round.

The Office's extended panegyric in favour of competition in its skeleton argument is, in our submission, inappropriate and somewhat overblown. Yes, this was a rotten practice. Yes, it did deceive parties. Nobody is defending it - still less B&K. But, nevertheless, to elevate cover pricing to the same serious status as collusive tendering and bid rigging proper is thoroughly inappropriate. It is reminiscent of the parson preparing his sermon. Argument weak here. Raised voice.

However, like many others in this series of appeals, B&K has taken the path of pragmatic resignation. It does not contest the infringement. But, where this submission matters is where we start on the scale of zero to 10 per cent of the relevant market. As you know, the Office of Fair Trading decided to pitch this at the level of 5 per cent, it being regarded by them as a serious infringement. We submit that this starting point is inflated, especially in the situation such as these ones where there were several bidders, and where the impact on competition was, in all likelihood, zero. In Infringement 18 there were no less than six bidders. Infringement 134 - five bidders. You know the story in relation to Infringement 85 with Britcon being invited to bid. Of course, the Office's overblown description of the mischief caused by cover pricing and its heroic role in detecting and punishing it also served to confuse B&K and other companies. You will recall that our Ground 3 at para. 47 of our application, is that the Office failed to allow B&K an equal opportunity to claim

leniency. I made my submissions on that yesterday, making the point that the Office has quite simply ignored the remarkable fact that all who sought and obtained leniency were those parties who had been dawn-raided - the serial offenders.

B&K were very much aware of an Office investigation into bid rigging, defined in their eyes as collusive tendering. The Office failed to offer a clear description of precisely what it was investigating. So, what each potentially affected company should have investigated itself to put it into a position to see if leniency was appropriate. B&K, and other companies, did its own internal investigation when it got wind of the dawn raids, looking for bid rigging, collusive tendering, price fixing, as everybody then understood the term, and found that it had not engaged in such practices, as indeed it had not. It was only - and this is a familiar story now - when the leniency gate had been closed and when the Office wrote directly to B&K on 22nd March, 2007 that it became clear that the Office had, as it were, by definition, elevated cover pricing to bid rigging status and was investigating cover prices - not collusive tendering as the term had been understood before. Even then, B&K were in no position to confirm or deny the Office's allegations - immediately at least.

So, we are left with the perverse outcome, as I explained yesterday, that probably the most serious infringers were in practice the beneficiaries of the leniency programme with penalty reductions of 60 per cent or more compared to 25 per cent for the fast track procedure.

There is only one point I wish to add to what I said yesterday about leniency. It is this: my learned friend, Mr. Unterhalter, was at pains to stress that leniency was a tool or device at the disposal of the prosecutor, which serves the ends or objectives of getting the evidence needed by the prosecutor to secure a conviction, or, as it is put in para. 40 of the OFT's skeleton (of which I read an extract),

> "Leniency is a price worth paying to facilitate the effective and efficient detection and punishment of competition law infringements, thereby also serving the objective of deterrence by increasing the chances of infringements being detected, proven and penalised".

Now, as I hope I made it clear, we do not quarrel at all with that statement at the level of principle. But, there is a point which Mr. Unterhalter overlooked, but which features in the OFT's skeleton argument for this appeal at para. 41. It might be sensible to go to that at Tab 11 of our bundle, at p.15. Here, of course, the argument is somewhat different. It is not the ends of justice - it is the practical needs of administration. The point here is that the OFT brought down the curtain on the leniency programme not because there was no further evidence out there which may be of assistance in securing convictions for competition law

infringements because the OFT felt unable to cope with the mountain of further evidence that undoubtedly was available. In short, contrary to my friend's submissions yesterday, it was still perfectly feasible for leniency to serve the goal of increasing the changes of infringements being detected, proven and penalised. The problem was that the OFT was no longer willing or able to detect, prove or penalise them.

Now, this is a significant point in our submission because it relates to the observations made by you, Sir, yesterday afternoon about the leniency programme here being different from the classic situation of a single cartel, each of whose members are put in the prisoner's dilemma. Here, the entities potentially affected by the leniency programme were potentially any construction undertakings in the country, or at least in the Midlands where the OFT chose to focus its inquiry.

Many of these undertakings will have had nothing whatever to do with the undertakings who were dawn-raided because they were parties to entirely distinct and unrelated cover pricing infringements. The dynamics of the leniency programme are entirely different. When the OFT decides to close the leniency programme - not because it has exhausted the useful evidence available, but because it has exhausted its own resources on investigating other infringements by other entirely unrelated undertakings, in that situation, real unfairness does arise.

We are not here seeking to re-open the leniency programme. What we do say is that when it comes to assessing B&K's penalty there is no reason why B&K should be stuck with a maximum reduction of 25 per cent when those who had the opportunity to participate in the leniency programme obtained a minimum reduction of 35 per cent or more. It is open to the Tribunal to remedy the manifest unfairness in the way the leniency programme was operated by making a corresponding adjustment to the level of B&K's fine.

B&K's other ground of appeal, as you know, relates to the application of the MDT to worldwide turnover. There is some overlap with Sisk's case, and I shall be brief. On the facts, B&K's position is different from that of Sisk. Sisk, as I explained yesterday, had a relatively small proportion of UK turnover as compared to its total worldwide turnover. Most of the other appellants by contrast generate most, if not all, of their turnover within the UK. B&K falls between these two extremes, it derives a substantial proportion of its total turnover from the UK, but a significant amount comes from overseas. So an MDT applied to UK turnover only would undoubtedly have produced a very hefty fine. Accordingly, the question I raised in Sisk's appeal yesterday afternoon arises rather starkly in the context of B&K's appeal. Given that it is common ground the penalty must represent the minimum

sum to constitute a sufficient deterrent against future infringements of the UK Competition Act by B&K. On what basis did the OFT conclude that an MDT applied by reference to B&K's relevant turnover or to its UK turnover was insufficient, such that it was necessary to apply the MDT to worldwide turnover.

There is actually no evidence that the OFT applied its mind to this question at all. The OFT simply assumed that it should apply the MDT to worldwide turnover and overlook this essential intermediate question. In our submission that approach was flawed. A fine based upon relevant turnover only would have been in the region of a million pounds, and there is no reason to think that this would have been insufficiently heavy to make the Board of B&K sit up and take notice; quite the contrary. But a fine based on the MDT based upon UK turnover would have been higher still; it would undoubtedly have hit B&K "hard in its wallet" – the OFT's words.

In my submission there is no justification for the OFT to go a step further and calculate a fine based on MDT applied to worldwide turnover, and that error, in our submission means that the appeal should be allowed.

I have dealt with those points relatively briefly because some of them will reappear in other appeals but, as I said, by contrast the fraud point is unique, despite the OFT describing it a nothing exceptional. The OFT has acknowledged the importance of the point by rightly putting the fraud issue at the forefront of its written submissions and by putting forward no less than six attempts as counter arguments. I will explain in a moment in my submission those arrows fall far short of where they are designed to go. In some cases they are directed at the wrong target.

Let me just very quickly explain how the fraud compensation element impacted on the fine. First, the OFT applied the higher starting percentage, 7 per cent rather than 5 per cent as part of Step 1 in relation to infringement 85, and that reflected the greater seriousness of compensation payment which we discussed yesterday. So instead of it being 5 it became 7 per cent. The effect of that was to increase the fine in relation to infringement 85 by just over £100,000 at the end of Step 1. But because of the compensation payment the MDT, reflecting its greatest seriousness, was set at 1.05 per cent of world turnover whereas otherwise it would have been at 0.75 per cent of world turnover. So we have two reflections of a higher penalty to represent the seriousness and you will, I hope, recall my friend's submissions yesterday that that was not what the OFT was doing, but it was precisely what they were doing.

Here, because infringement 134, and ordinary cover price was the highest penalty, the MDT, 1.05 was applied to that infringement, not to the compensation payment of infringement 85 with the result – a fairly dramatic effect – that if there had been no compensation payment the MDT applied in this way would have resulted in a penalty overall of £6.6 million. Instead, owing to compensation being applied to infringement 134 the fine increased to £9.3.

THE PRESIDENT: So the compensation percentage, if you like of 1.05 was applied to a non-compensation infringement?

MR. SHARPE: Yes, as consistent with the OFT's practice for all the fines.

THE PRESIDENT: Well, "consistent" because it was the highest fine.

MR. SHARPE: Yes, but in this case it was not compensation.

THE PRESIDENT: It was not compensation.

MR. SHARPE: No.

THE PRESIDENT: Did you take that point?

MR. SHARPE: No, it was all part and parcel of the imagination and innovation displayed by the OFT in this matter. I described it as "Heath Robinson" yesterday, and I think that was probably a compliment.

MR. CLAYTON: But is it not the case that if they had applied it to infringement 85, the MDT had been applied to that, it would have increased the total fine, that instead of having the £373,000 that you did for 85, and £845,000 for 229, the 373 for 85 got lost because the MDT replaced it, you would still have had the 845 for 134, which would have given you a greater total.

THE PRESIDENT: Yes, that is probably right.

MR. SHARPE: I have not done the calculation and perhaps I should have done.

THE PRESIDENT: That is right.

MR. CLAYTON: That is how it looks. What I think the OFT have been telling us is that by doing it this way, in fact, they get a lower overall benefit than if they had done it differently.

MR. SHARPE: I think that is right, the OFT describe it as being generous to us. The impact of this was, owing to the compensation element, and that is what I am going to focus on, the penalty went up from 6.6 to 9.3, which is about a 40 per cent increment.

THE PRESIDENT: Forget the fact that it was a none ----

MR. SHARPE: It does not matter. I just wanted to explain the methodology.

THE PRESIDENT: Yes.

MR. SHARPE: If we do nothing else but win on the compensation element there will have to be a recalculation to reflect this, but it is 40 per cent higher than it would otherwise have been assuming all other elements of the fine were right, and of course we do not know.

The compensation caused this big increase, and that is one reason why we are focussing on the fraud.

Let me turn to the facts surrounding the compensation payment itself. May I take you now to tab 12 of the bundle. This is the invoice, which we discussed when I opened.

THE PRESIDENT: It is £11,000 plus, with VAT.

MR. SHARPE: Yes, the first thing to note is its date. Can you see the date underneath "Sales invoice", 12th November 2002, pretty well 11 months after the contract was awarded, just about a year from the date of the infringement itself. It is marked for the attention of somebody called "Paul Croft", do you see that?

THE PRESIDENT: Yes.

MR. SHARPE: Paul Croft does not exist. There is a Paul Craft, and that is an error because his name was "Craft" – there is no argument about that – and he left B&K's employment two weeks after he authorised payment.

Mr. Croft appears elsewhere. He appears in the statement of Mr. Roger Hayes, the former chief estimator for Herbert Baggaley, during his OFT interview, and it was there he described help received (and I am going to take you to the decision on that) from Paul Croft.

It is reasonable that the error, its repetition here and Mr. Hayes have something in common, and that was the name that they thought they were dealing with.

Another feature, it is marked "private and confidential", "for the attention of Paul Croft". If this was a genuine invoice nothing in it would have been private or confidential, that is wholly inappropriate for an invoice, and the OFT should have asked him about it – even a compensatory payment made on behalf of B&K would hardly have ever been so described, why should it be?

THE PRESIDENT: The "OK to pay", and the reference to what looks like a contract number, 1163, is that Mr. Croft?

MR. SHARPE: We know it is Mr. Croft's writing and his signature. That is a feature of this, he was the only person who saw this, and this actually emerged from Herbert Baggaley's papers, not from Bowmer & Kirkland.

MR. CLAYTON: The people who are actually paying the invoice, it would have gone right through the B&K accounting procedures, if you will?

MR. SHARPE: It would.

MR. CLAYTON: He would not have been the only person who would have seen it?
MR. SHARPE: No, no.
MR. CLAYTON: It would have gone right through to the finance department.
MR. SHARPE: My understanding is once he said "OK to pay", it was not looked at and questioned again because it represented something which within his authority to okay.
THE PRESIDENT: Such as materials.
MR. SHARPE: Yes.
PROFESSOR BAIN: Is this Contract 1163? Was Contract 1163 this particular contract?
MR. SHARPE: Yes. Yes. We think it was. Now, the services rendered, as you see, are said to be 'joinery works'. But, in fact, that is not the case because if one looks at 'Mat 169' - 'Mat' ' is short for 'materials' – this was a contract for the sale of goods - not joinery works itself, and that is what 'Mat' means in this context. This is in contention. As you see, there is a charge for VAT. One can only speculate where the VAT went.
THE PRESIDENT: If you are putting joinery works, it would have tended to alert, as it were, the accounts department it might be ambivalent, ambiguous.
MR. SHARPE: Possibly. We can only speculate. It is credible - but no more - that Herbert Baggaley would have done joinery works on jobs. Our evidence is that, yes, it might have been in retrospect, that is why it took so much time for B&K to understand what went on - because it is not impossible for Herbert Baggaley to have been instructed and sub-contracted to do joinery work, but unlikely. It took a little time for B&K to understand that actually that is not what happened and no joinery work was actually done outside of B&K.
PROFESSOR BAIN: What you are saying is that while this was ostensibly an invoice for joinery works, in fact so that it could be paid without any other authorisation Mr. Craft changed it to 'materials'.
MR. SHARPE: That is exactly right, I am instructed. Thank you.
THE PRESIDENT: You mean the writing 'Mat 169', or whatever it is, is Mr. Craft's additions.
MR. SHARPE: Yes. Exactly right. One can see that, I think, from the ink used, and the style. That is our understanding of what actually happened.
Respectfully, none of this is new to the Office of Fair Trading. B&K made written submissions to the effect of my oral submissions today. At the oral hearing with the Office of Fair Trading these points were made. They were taken through the invoice and some more elaborate information concerning this, regarding its tax status and so forth, was also given. It would have been possible at that time for the Office of Fair Trading to have recalled Mr. Craft to put these points to him. They chose not to do so. They chose not to do

so because their belief is that this is irrelevant. Part of that could be that there was no question at that stage of B&K actually challenging its liability for infringement. That had never been an issue. B&K has admitted its culpability for all these three infringements. The problem with the Office of Fair Trading is that it has conflated two concepts. One is that this is an employee of a company acting ostensibly within his authority and they say that that is sufficient to ground liability. For our purposes, we have never contested that. It is an interesting theoretical issue which will no doubt one day be argued in the highest courts. But, nevertheless, the infringement is at the door of the undertaking. There is no personal liability, and so forth. We are not contesting that Craft acted in the scope of his employment. Whether there will be any possibility of a civil action against Craft, or an action for civil conspiracy against Herbert Baggaley and Craft, these are mattes which are not at issue today.

The OFT do not go beyond that. What they have done is to mechanically apply the machinery of deterrence to the fact situation that is emerging here, and chose not to explore it any further.

The suspicions from the invoices themselves are, in our submission, eloquent. However, they are confirmed when one looks at the absence of any conceivable commercial motive for B&K to make a payment. What would have been in it for B&K? Mr. Hayes' own evidence was to the effect that the tender in question was very, very unattractive, flawed with potential problems and risks. May I take you briefly to Tab 4 of the bundle? If we pick it up at p.850, this is from the Decision. At the second paragraph, 2491, and this is Baggaley's own evidence - evidence which secured them leniency - a massive reduction in their penalty:

> "I have a vague recollection of going to the site at the Daily Telegraph and having a look around the job there with Chris Collison and perhaps expressing concern about doing that project, so we might have taken a cover on that one".

That is not in dispute. Then he goes on at para. 2492. It is worth reading.

> "... limited the job from my point of view ... very, very unattractive. It was flawed with potential problems and risks and we didn't need those kind of risks at this moment in time .. but, yes, there was a fee arrangement.. We stood down".

Then, at para. 2493, here we have the Office admitting it was a false invoice. So, they knew about it from Hayes. Paul Croft - we see the way he phrases it. "He would have been the person at Bowmer and Kirkland who gave me the help" which strongly suggests to us that they were the initiating part. He gave him the help. He gave him the cover price.

If we go over the page, at the top, Mr. Newell, again from Herbert Baggaley:

> "We may have done some work on it, but we wouldn't have submitted an active price effectively".

He is making the point which others had made before at Herbert Baggaley that this was a very difficult job. "We would not have submitted an active price."

PROFESSOR BAIN: If you look at para. 2497, Mr. Sharpe

> "The attitude was if there was an opportunity to recover bidding costs, it was something that would be done".

Is it B&K's view that £10,000 would be a reasonable estimate of the bidding costs for a £600,000 contract?

MR. SHARPE: It could easily have been around that, yes.

PROFESSOR BAIN: That is your view.

MR. SHARPE: That is what I am instructed to say, yes.

PROFESSOR BAIN: Could I just press you a little on that? How much of an estimator's time would you expect to be involved when much of the work was sub-contract work for something of this sort?

MR. SHARPE: May I take brief instructions on that? It is way beyond my expertise. (After a pause): I am instructed that Bowmer & Kirkland's costs of estimating would have been much higher than this. It was a very difficult, technically demanding job. Some of it would have been sub-contracting, but there was quite a lot of engineering work involved as well, which would have been done within the company. It is credible that this did cover the partial costs that they incurred. Their own evidence suggests that they did some work, but a long way short of getting towards a final tender price. The whole logic of this, in fact, was to avoid having to spend large sums of money simply to be seen as a credible bidder.

PROFESSOR BAIN: I think the issue is whether this is really compensation for bidding costs that had been incurred, or whether it was really compensation for not putting in a bid, and whether they would have or not may not be an issue if B&K wanted them, or Mr. Croft – Mr. Craft – wanted them not to put in a bid, he was arranging a payment to them for not doing it. That is the suggestion - that it is a compensation payment. What I am trying to get a feel of is whether £10,000 is a reasonable estimate of what it would cost you to pay estimators to do it. I understand that it might be about two months of an estimator's costs - £50,000 to £60,000 a year – £10,000 – about a couple of months. In relation to a normal £600,000 contract that would seem rather a lot of time. But, if there is a particularly

complex one I am not in a position to say whether it is or not. I take what is being told us - that that is a reasonable figure for this particular contract.

MR. SHARPE: We have obviously had a lot more ...** Their own evidence is not that they actually engaged in any serious work. They went and had a look at the job and came to a view that they did not want to do it. I will come back to that theme in a moment.

PROFESSOR BAIN: Thank you. I do not want to hold it up at this point.

MR. SHARPE: With respect, it is a very important point. The message I am getting is that it is perhaps on the low side for the nature of the job and less than Bowmer & Kirkland itself engaged in.

However, I have not quite finished with the Decision itself. I was going to take you to Herbert Baggaley's quote, which you helpfully took me to. This was a statement made generally by Mr. Richard Baggaley. It was not just in relation to this. These people were serial recipients of compensatory payments, and they managed to get leniency for it. They just thought that if there was money kicking around and they could get it, lying on the table, they would go for it. So, if there was an opportunity to recover bidding costs it was something that would be done.

If I can take you slightly forward, if I may, to p.853, to the point Professor Bain was alluding to, this is the Office's own analysis. At para. 2512,

> "According to some evidence provided by Herbert Baggaley, it was asked by Bowmer & Kirkland to submit a cover price in return for the compensation payment, and RH also stated in interview that Herbert Baggaley 'stood down'. However, in its response to the Statement, Herbert Baggaley stated that it had already decided it was unable to submit a tender by the return date and/or that it did not wish to win the tender due to the problems and risks identified with the job. Herbert Baggaley submitted that the compensation payment was, therefore, made in order to compensate it for its tender costs incurred, rather than in return for standing aside from a job that it would otherwise have pursued".

That is a very significant statement. We can pick up the OFT again over the page at 2514 on this vital question of whether or not this was in fact a compensation payment at all.

> "Both parties therefore maintain that Herbert Baggaley did not stand down in return for the compensation payment, and the OFT has not obtained documentary evidence from any other source to suggest that Herbert Baggaley 'stood down' from the tender process. Theft therefore makes no finding in this respect"

No finding.

"In any event, on either party's account, contacts took place between Bowmer & Kirkland and Herbert Baggaley which resulted in Bowmer & Kirkland giving a cover price and making a compensation payment to Herbert Baggaley ---"

It certainly was not a compensation payment as the term is understood anywhere else - in other words, to induce them to quit the competition - they had already decided internally to do that themselves, and in a thoroughly opportunistic and unprincipled way were able to inveigle Bowmer & Kirkland, unwittingly, to part with £10,000 in relation to a decision that they had already made.

At para. 2514 we see the matter repeated. There is no evidence that the compensation payment was factored into its final tender price. That is hardly surprising given the invoice appeared eleven months after the quantity surveyors in Bowmer & Kirkland had put in their tender.

PROFESSOR BAIN: If Mr. Craft did not see this payment as a payment for B&K standing down, why on earth would he agree to make it?

MR. SHARPE: We can but speculate on any private advantage that may have accrued to Mr. Craft as a result of this transaction. I wish I could be more helpful. The OFT, of course, have formidable powers of extracting information from people they interview. Each interview was prefaced by a warning: "If you tell lies you go to jail", none of these points were put to Mr. Craft, the OFT had ample opportunity to put them, to satisfy themselves of the true situation, they chose not to do so.

Of course, B&K's position did not regard Baggaley as a serious competitor in any event, because his own evidence says that. Baggaley did not have the competence to do the job, nobody at B&K would have dreamt of thinking of them as a competitor, let alone as somebody they needed to buy off.

Quite rightly, as I said, the OFT made no findings in the decision as to which party initiated the making of the compensation payment, or the compensation payment influenced Baggaley's decision not to submit a bid. There is no evidence that Baggaley was stood down in consideration of the compensation payment. It begs the question of whether this is properly a compensation payment at all.

What is clear, incontrovertibly, is the OFT has failed to identify any rational commercial motive for B&K to pay a sizeable sum to somebody else.

B&K's evidence to the OFT was that no one else within B&K knew of the real basis of the payment, and this is recorded in the decision, and for your note only it is at IV.2501, which is at tab 4, p.852.

THE PRESIDENT: I am just glancing at it. (After a pause) Yes. So that is Bowmer & Kirkland saying that it is very likely that this was a compensation payment, albeit no one else at Bowmer had any knowledge of it.

MR. SHARPE: Nobody in Bowmer, other than Mr. Craft, knew about this.

THE PRESIDENT: It seems to be accepted that it is likely that it was a compensation payment.

MR. SHARPE: Yes, on the evidence known to Bowmer & Kirkland at that time.

THE PRESIDENT: As now, the same evidence, I suppose, it has not changed, has it, particularly?

MR. SHARPE: It is admitted by Herbert Baggaley that this was a false invoice. The precise mechanism of the fraud, whether there was any personal reward for Mr. Craft or whatever is immaterial for present purposes, but it is clear the victim of the fraud was Bowmer & Kirkland.

THE PRESIDENT: But if it was done, albeit without the knowledge of anybody else, but if it was done for normal compensation reasons, whether it be tendering, or to make them feel better about standing down, if it was done for those reasons ----

MR. SHARPE: Well we know from Herbert Baggaley's evidence that they freely admit they were not going to bid at all, so there is no element of them being seen to be rewarded, bought off, as it were, so that is one side.

THE PRESIDENT: That depends what was known by Bowmer & Kirkland about that.

MR. SHARPE: Mr. Craft was not asked about this. All he was asked about in his interview, and this is amazing; "Oh yes, he remembered receiving the invoice, he remembered authorising it before he left". He was not probed at all what on earth this payment was doing, or why his name should appear "Croft" in Hayes' evidence, had he had any dealings with Hayes, or anything like that – it is extraordinary.

MR. CLAYTON: Also, the long period of 11 months I think you said at the point this invoice was actually submitted.

MR. SHARPE: Yes.

MR. CLAYTON: Had the contract actually been awarded by that time?

MR. SHARPE: The contract was awarded in January, the previous January. I have to rely upon the OFT for this, the OFT have not found that it was a compensatory payment as such. They have not made any finding that it was in respect of bidding costs, and although they say there was no evidence, there is no evidence that it was in consideration of Baggaley withdrawing. What went on between Baggaley and Craft we do not know.

Pausing there, and I am conscious of the time, how should this fraud affect the level of the fine. A fine has two functions – to punish and to deter – and neither of these objects has any application in the case of a fraud. Punishment, in our submission is inapposite. B&K is the victim not the wrongdoer.

THE PRESIDENT: It could be said that it helps people to exercise control over their employees, people feel sloppy about authorisations and payments.

MR. SHARPE: Respectfully, the OFT has made no such finding that B&K was sloppy.

THE PRESIDENT: No, no, I do not say they have, but it could be said that "*pour encourager*".

MR. SHARPE: The very words I am going to use in a moment, just allow me the privilege of doing that. We will come to that. The simple point is this: if a party is the victim of a fraud, when a person is deceived his acts do not truly represent the exercise of any free will on his part. The fact of the fraud trumps any free will on the part of the party being deceived and, as a result, a fine to deter somebody from doing what they did not know they were doing and parenthetically had taken steps to avoid, is inappropriate. I gave you one authority, this is the *HIH* case, which we have put in at tab 13. I am not inclined to take you to that, partly because I am worried about the time, partly because I have a suspicion you will have read it in advance of this hearing anyway. But may I just take you briefly to tab 10 of the bundle, which is in fact our skeleton and pick it up at para. 60. I know you have read this so I am not going to labour it, but the essential point in para. 60, fraud, according to Lord Bingham is "a thing apart". In commercial relationships, while not being casual or indifferent to the possibility of fraud, once it takes place it unravels everything – *fraus omnia corrumpit*. That is settled law, and it was law applied by Lord Bingham relatively recently in this case.

Its context is explained at para. 61, but the key point is the presumption, jealously protected, that the underlying assumption of honesty and good faith in commercial relationships is there and the law will not permit one party to assume, even by voluntary agreement the contractual risk of a fraud by his counterparty in inducing the agreement. That is the law as stated in relation to that case in the context of insurance.

If we begin with that House of Lords endorsed presumption, it is hard to see how the OFT can justify the level of B&K's fine by reference to the need for deterrence, and a policy of the law has set its face against one party having to assume the consequences of another's fraud. In *HIH* that was by voluntary agreement in contract, we would say *a fortiori* in relation to the situation we see in B&K. Not only has B&K been held to be liable for the infringement, it has been held for the *quasi* criminal consequences of the fraud, both in

terms of the higher starting percentage and, of course, the higher level of MDT applied by virtue of the so-called compensation payment.

Turning to deterrence itself, this has two aspects. My friend and I are in complete agreement, one is the specific to deter Bowmer & Kirkland ever doing it again, and then the general basis of deterrence. Specific deterrence surely does not arise. There is no need on any rational view of the world to deter an undertaking from doing something it never intended to do and would never have done had it not been deceived. So a deterrence fine on Bowmer & Kirkland itself is thoroughly inappropriate.

However, we do have this notion of general deterrence, "*pour encourager les autres*" but there is no sense in seeking to deter the general body of commercial undertakings to deter them from being the victims of deception. A party cannot be expected to plan for, still less assume the risk of an unwelcome and unforeseen fraud. It is impossible to see how a hefty fine could assist one way or the other in mitigating the risk of being defrauded in future.

Consequently neither punishment nor deterrence can justify a higher fine for a compensation that was induced by fraud.

I am conscious of the time, and I am conscious of fairness to my learned friend.

THE PRESIDENT: Can I just ask you one matter, Mr. Sharpe? In your skeleton the fraud point, as far as I could see, goes to the deterrence aspect rather than the uplift on ----

MR. SHARPE: Respectfully it really does go to both.

THE PRESIDENT: You say it goes to both?

MR. SHARPE: Yes, indeed, because – forgive me- it does not make sense to say we can add 0.7 per cent for compensatory payment which was induced by fraud. It should really be treated as if it were ----

THE PRESIDENT: I am not sure, it could be said that the deterrence is a slightly separate point because you are saying there is nothing you can do about fraud, as it were, whereas ----

MR. SHARPE: I think fraud unravels all, and by "all" I mean the punishment ----

THE PRESIDENT: So you intend it to apply to the uplift on the 7 per cent.

MR. SHARPE: Indeed, otherwise it would be punished twice. It was the victim of fraud and it should not really be treated as if it had brought that fraud upon itself. I repeat there was no evidence at all of any negligence or waywardness in B&K's internal procedures. I think we might have dealt with it – specifically, Sir, your point about para.64 of the skeleton.

THE PRESIDENT: Well all that section seemed to be dealing with deterrence, but maybe 64 is the one.

MR. SHARPE: There is a helpful and saving reference in the penultimate line at para.64.

THE PRESIDENT: You are absolutely right, yes.

MR. SHARPE: Almost certainly put there by my learned Junior.

THE PRESIDENT: Actually: "How is this heavy fine to be justified by the need for deterrence?" and so on. Anyway you have made it plain now that you intended it to be an argument for both, so that is understood.

MR. SHARPE: I was intending now to conclude by going through the six arguments of my friend, but I am wondering, Sir, whether it might be sensible and fair to him to sit down, hear what he has to say in defence and then I will come back in reply as briefly as I can dealing with those issues.

THE PRESIDENT: Professor Bain has a quick question for you.

PROFESSOR: It is simply that you draw our attention to the fact that some of B&K's turnover was not in the UK, and you talked about "significant", were we to find at the end of the day that we wanted to take account of the share that was outside we would need to have something a little more precise than that. I asked you for a round number figure yesterday in a different matter, a similar round number figure might be helpful.

MR. SHARPE: I will take instructions and, if I may, I will provide that later.

THE PRESIDENT: Mr. Unterhalter, we will just take a 10 minute break, is that convenient?

MR. UNTERHALTER: Indeed.

(Short break)

THE PRESIDENT: Mr. Unterhalter?

MR. UNTERHALTER: Thank you. Might I begin with the question of fraud which has taken much of my learned friend's address? The essential proposition, as we now understand it, is twofold. Firstly, that because B&K was itself a victim of fraud there is nothing to deter, and consequently there should be a reduction, perhaps no deterrence or penalty is due on that account. The argument is now, as we understand it, extended also to the Stage 1 and 2 calculation in respect of the 7 percent rather than the 5 percent because fraud, as my learned friend says, unravels everything, including the penalty at Stages 1 and 2.

If I could take you immediately to Tab 6 of the B&K appeal bundle? These are the submissions which were made by the undertaking to the OFT. There is an extended account that is here given as to what happened with Mr. Craft and how the payment was made. I would ask you to turn particularly to para. 54 to begin with. At para. 53,

> "The evidence strongly suggests that Herbert Baggaley initiated the request for a cover price precisely because it did not wish to win the job, and the subsequent request for payment represented (typical) opportunism on its part that Mr Craft

> would engineer a payment, the sort of behaviour described by Mr. Richard Baggaley. Here, with Mr. Craft, the opportunity had arisen to extract some money from B&K and they took it".

Then there is an account that is given as to what gives credibility to the submission that Mr. Craft was acting on his own is the sheer incredibility of B&K's management paying Herbert Baggaley any money. Then there are various reasons that are given:

> "First, the B&K evidence suggests firmly that its corporate culture did not allow such payments and they were unknown in the experience of those interviewed".

We will come back to that proposition.

> "Secondly, though regrettably the OFT never sought clarification on the point form B&K, B&K had no knowledge of how many tenders were invited and who responded".

Then, within that setting, one comes to a further explanation that is offered as to, "Well, why was this payment made?" One sees that flowing from the bottom of para. 54:

> "It would be very odd for B&K to pay money to neutralise what the senior management would have regarded as the weakest bidder, in the belief that there were also other bidders".

Then we have the explanation that is proffered by B&K.

> "An explanation which B&K thinks is what is likely to have occurred, is that Mr. Craft acted on his own in acceding to Herbert Baggaley's request for payment. He did not know that the Civils Division's future did not depend on winning the tender (as events proved) but he was prepared to assist in the process in the hope that it would help the Civils Division and him. If he had discussed this with Mr. Watson and other B&K management he would have been told that Herbert Baggaley would not have been regarded as serious competition (a view which Herbert Baggaley seemed to have shared) and that B&K was, by virtue of its success in phase 1 and familiarity with the difficulties of the job, in all probability the front-runner. But, as events proved, the Derby Daily Telegraph proved a tough bargainer; they were nevertheless prepared to reject a lower priced offer submitted after the tenders had been submitted, form Britcon Ltd."

So, the account on the probabilities that is offered by the appellant is to say that their employee - and no issue is raised that this employee was acting within the scope of his employment - conceived that it was important for the Division that he was involved in to

secure this contract and that it was relevant because - as is indicated elsewhere in this statement - this Division was threatened and potentially his redundancy was at stake.

So, there was an interest that was being pursued in this participation of Herbert Baggaley and the consequential payment that was made - albeit that it took place later - was part of an effort to secure this contract because it was sought to be important to the prospects of this Division of the company.

Whether *ex post facto*, had others in the company been consulted, Mr. Croft could have been put right as to the probabilities of winning the contract, and how much real competition was posed by Herbert Baggaley, or otherwise, in getting this contract is so much besides the point. The truth is on this account, as it is offered here on the probabilities, it is said that the employee of this undertaking had an apprehension as to its success in the tender. Whether rightly or wrongly is wholly irrelevant. That was his view at the time. He then entered into these arrangements so as to secure, or at least minimise, whatever risks he understood to arise in respect of that bidding process and was willing to pay a compensation payment, and it was done then by recourse to the elaborate deception, well, perhaps not elaborate, standard deception by which these things apparently are done where a false invoice is tendered for work that will never be done in order to cover the compensation payment that was made.

In our submission, on their own version this is an undertaking that has an interest in securing the contract is willing to engage in these arrangements and pay for them because Mr. Craft considered the threat to be strong enough that something was due by way of consideration for the arrangement that was struck. The fact that performance of this was done after the contract was entered into appears to be a practice that the Office of Fair Trading has found in many instances. You have to see that the outcome is achieved so that you have value for your money, as it were. Indeed, at least in the conception of this employee, he did so. Hence the payment was made.

In our submission, all of these efforts to try and understand what the true reasoning was for this payment from various parties' perspective is so much besides the point because (1) there is an admission that has been made that this is a compensation payment and a discount has been given to this appellant by virtue of that. It cannot now come, in the guise of an appeal in respect of penalties, to undo the consequences of its own admissions and seek now, as it were, to undo that admission by how suggesting that perhaps this was not a compensation payment at all, and if it was, it is hard to understand what the reasons were for it, given that it was inevitable that B&K would win the tender. On the reasoning here, it

is not at all clear in the apprehension of the person who was charged with this tender that it was a foregone conclusion. We submit that that shows very clearly that this was a payment made by the undertaking in the course of its business in relation to a tender that it was going to bid in with all the usual consequences that are harmful to competition.

One theme which runs through the skeleton - and this was developed somewhat today - was to say, "Well, if one seeks to reconstruct ex post facto what it was that the parties were going to do, they would have stood down anyway. We were going to win anyway. None of these appear to be the way in which those who were directly involved in the conspiracy conceived ... They thought there were risks that attached. Hence the arrangements were entered into. Otherwise, it is inconceivable that these sorts of arrangements would come about at all. The notion that a party may have sought to put in a non-winning bid and would have done so, and sought to do so, absent these arrangements does not really deal with the relevant question, which is how would a party act if it could not have got the cover price? The kinds of risks that attend upon tendering in a truly independent way, even if you had sought to put in a bid that you had hoped would be a non-winning bid, is hedged about with much greater risk and uncertainty. It is of a kind that is clearly explicated in the Decision before you, which is to say that if you act unilaterally, even if you do not want the job but you want to continue to have credibility in the eyes of the customer, then you may get it either far wrong or a little bit too right. That is the risk that you run if you act by way of unilateral conduct. Where you have the comfort of a cover price you know that you can retain your credibility in a substantial measure because you know exactly within the range where you are conceived of as being a legitimate commercial bidder, but with no risk that you will get the job which you do not want. It is to reduce that range of risk and secure the credibility pay-off in consequence of it which is exactly what these arrangements are intended to do to the disadvantage of the system as a whole because it encourages these arrangements and you do not get the kinds of bidding processes which would result from independent action where, if a customer learnt that this sort of behaviour was going on and an act of deception was being practised, one can be quite certain that the credibility yield which is being sought through these arrangements would be replaced by a banishment of this tenderer in all likelihood from future tenders because it is an act of deception.

So, if this were disclosed, then, of course, the customer would, in all likelihood, wish to replace this tenderer with someone who would put in an honest bid and not a bid that is the result of co-operation and conspiracy.

So, in our submission, this is a set of arrangements which are of the most serious kind, where an employee who certainly sought an advantage for the firm, for the undertaking, and was willing to pay for it, and did pay for it, and the fact that he flouted internal controls is simply a function of the fact that those controls were inadequate. This is where one comes to the ultimate oddity of the argument - because eventually my learned friend came to the part of his address where he had to explain how all of this impacted upon the consideration of deterrence. This is where he ha sought to press upon you the relevance of 'fraud unravels all.', but, 'fraud unravels all' not in the circumstance as between an employee of the company and the company itself, vis-à-vis the regulatory authorities. You cannot speak with two voices as if the undertaking is the victim and the perpetrator of the fraud is Mr. Craft and that is somehow a relevant difference for the purposes of determining whether deterrence is warranted. This employee was acting within the course and scope of his employment. The actions of the employee are attributable to the undertaking. They are the undertaking's acts, however much senior management may wish it were not the case. That is the consequence in law, and it is not disputed by the appellant.

The consequence of this is that there is nothing to unravel. These are the actions of the company. It has to take responsibility for those actions. Deterrence is properly due to the company, both specifically and for general purposes because it is required that companies that commit these acts must be deterred.

The notion is that senior management is horrified that this happened. Well, what has to happen is that a deterrent must be put in place which will motivate senior management to ensure that such things do not happen.

THE PRESIDENT: Is that the same degree of deterrence as is required in a case where, let us suppose, the senior management is aware, or is turning a blind eye to it and where they are genuinely horrified by what their employee has done, albeit with the aim of benefitting the company? Do you need the same degree of deterrence in those two cases?

MR. UNTERHALTER: In the case of senior management having been complicit in it, one would probably reflect it more at the level of seriousness. The conduct is even more egregious for that reason. The fact is that because the undertaking is responsible, and senior management cannot walk away from the responsibility of its employees, which is what is being sought to be done here, we would submit that from the perspective of deterrence there is every reason to take a similar view in the two cases because these are not gradations that matter for the purposes of trying to deter for the future. We would submit that what one has to ensure for the future is this: it never happens again, whether by intent or negligence. The difference

between those two does not matter. It may matter from the perspective of seriousness in a highly aggravated case. But, what one needs to secure by way of consequence is that this does not occur specifically.

As to general deterrence, again, it is not the case that the consideration is simply, "Well, you do not need to generally deter senior managers in other entities from the consequences of deception". It is the argument just writ against a larger canvas. The same proposition arises. Senior management must know that in respect of this kind of conduct there will be serious consequences if employees engage in it. Frankly, these efforts to distance management in this way is a very typical response to what in fact should be the correct response, which is to say, "We accept that our employee did this. It is not that we are the victims of this deception. We accept it. These things happen in companies. It is very regrettable. We own up to it. We accept that we will have to endure the consequences which includes a penalty that will deter us for the future, and others, because of what has occurred".

So, in our conception that 'fraud unravels all' principle is simply not of application. That is in a circumstance where, as between one party and another, where they are seeking to enforce performance of an agreement or the like, fraud will, of course, unravel such arrangements - but not as between the responsibility of the undertaking where there is no warrant to differentiate the conduct of the employee acting in the course and scope of his employment and the undertaking itself. They are indistinguishable from this perspective. Nothing is due by way of any reduction in respect of the argument that is raised.

There are also - and these go to some of the questions of seriousness that have been raised in the skeleton, but I should just perhaps very briefly mention it - two lines that are taken here: the one is to say that senior management rarely, if ever, conceived that there was any problem with cover pricing in the work that the undertaking did. But, secondly, it runs the line of saying, "We did not consider this to be unlawful and until the roofing decisions came down we really did not understand the illegality of these practices. After the roofing decisions came down, we really did not understand the illegality of these matters, and after roofing decisions were pronounced upon then we brought ourselves into line."

There is an odd tension between those two because if you think that cover pricing is lawful, what steps are you likely to be taking to do anything about it if you think the practice is permissible. The fact that this arose, and we point out in our skeleton that this is not the only infringement, there are three infringements, so this was going on within this undertaking. According to the account that is given by management they thought at the

time it was perfectly lawful, so why they should then have thought in any way that management would not have ever permitted practices of this kind it is hard to understand. If they thought the practice was lawful then one would ordinarily think there was a permissive, I think, culture in their organisation where the incidence of this kind of conduct would be a part of what employees do. So there is this odd tension between "We did not think it was a wrong practice, and we are now horrified at the consequences of what our employees have done in engaging in the practice." We submit that again that is a very unconvincing feature of the way in which this is put by the appellant.

As to this first element upon which this great emphasis has been placed by our learned friends, we submit that it avails them not at all for the purposes of getting some discount in respect of penalty.

If I could briefly return to the question of leniency which again arises in this case, but there are perhaps just one or two additional points to make concerning this. First, in the case of this party if I could ask you to turn up in the decision at p.249 one will see there that there were a number of parties – II.1452 – and this is where the treatment is being given of the searches under s.28 that were undertaken, and one then sees which of the parties were subject to the search procedure and B&K, as appears on p.250, was one of them. It then says: "Following these searches, the OFT received applications for leniency from the following companies…" and there one does not see that B&K's name appears.

So this is not an instance, even if one were to follow the reasoning that our learned friend offered to you yesterday to say "We did not even know they were indeed raided, and they did not apply for leniency." We have heard a slightly different explanation as to why that was so, but it is no more convincing in our submission than the explanations of yesterday, which is here they know that there are issues of bid rigging that are being investigated. They say that they were not certain that it was cover pricing which I suppose is consistent with the fact that they never thought cover pricing was unlawful, at least that part of it is consistent no doubt.

The clear point of it is that they were alerted to the fact that an investigation was underway and they do not bring leniency proceedings where others did, so it is hard to see why they are in a position that should be in some way preferred because they do not take the opportunity in this instance that they were quite clearly afforded, insofar as one applies that as a criterion and we submitted yesterday that it is not the appropriate criterion, but at least in this instance if one does here is what has happened.

We would also indicate that it is fundamental to the policy of leniency that it is intended to be an offer made to the world, as it were, for parties to come forward of their own volition with information that is relevant to either a current investigation or an investigation that might be relevant. It is not a consequence of an investigation that is under way that there is some accrued range of benefits which must flow to everyone. The simple point we would make about leniency is it is open to the willing who will come forward and confess of such matters as are new to the OFT and which is of utility to them in the investigation. This party, as every other party, suffered no difficulty whatsoever. The fact that leniency closes at a point seems to be a point of contention here, and perhaps I should just take you again to the relevant passage where that is dealt with. It is at p.260 of the decision, and para. II.1480. Much seems to turn on this for the appellant, if I could just briefly take you through this:

> "By the beginning of 2007 the OFT had, as stated above, obtained evidence of bid rigging activities in relation to many thousands of tenders throughout England. The OFT needed to focus its resources in order to produce an outcome that would provide the most effective deterrent to all companies, in as short a time as possible. If other companies applied for leniency they would have been likely to have provided evidence not only in relation to the tenders that the OFT had decided to investigate further, but in relation to many other tenders and companies. It would not have been possible to progress t he investigation in an efficient and sufficiently timely way due to the need to investigate all of these new tenders and make a fresh selection of tenders and companies for investigation. The OFT therefore decided that, at the same time as making the selection of tenders for investigation, it should close the door to further leniency applications in this case."

That is the explanation. So it is saying: "We have a great deal of evidence of this kind of activity, we are in the process now of selecting which matters are going to go forward. We do not want yet further evidence and in respect of what we have we have enough, we know where we are going and we close it out as far as those who are already within the net of investigation."

THE PRESIDENT: Mr. Unterhalter, as I understood Mr. Sharpe's point he was making yesterday on this, the point he was making was not so much that you should not have had a closure of it but that you should have reflected the extra advantage that some had in the fine of his (yesterday's) client and I think he makes the same point in relation to this one. I do not

think it was aimed at saying there was anything wrong with your procedure in closing leniency.

MR. UNTERHALTER: The question is then: what other benefit, because if this is simply about leniency, which is a pragmatic intervention in order to yield something which will be of advantage, the reasoning that is offered here suggests there is no more advantage to be had, we have progressed this to a point where we do not need any more, and that is a fundamental feature of leniency. If you do not have something more to come forward with that would allow for something new there is no advantage to it. So in a sense what is happening here, apart from the pragmatism, is saying we have covered the ground and we have covered the ground in respect of this appellant. The fact that you believe you could give more, there may be other infractions that you could highlight ----

THE PRESIDENT: I think it is more to do with equal treatment, and I think he relies in this regard by analogy on the decision of Mr. Justice Cranston. In other words, you need to consider whether these people have been disadvantaged vis-à-vis others in an analogous position who have had the benefit of leniency through whatever reason and it is appropriate, and he says it is appropriate in his client's case, to make a corresponding allowance. He said in this case 25 per cent was the ceiling and it should have been more.

MR. UNTERHALTER: In our submission, those who received leniency and those who did not were not in analogous situations. In the one category you have parties who have something to contribute to the investigation as it is progressing and the conception of the OFT as the masters of their investigative process, and those who come later who are not able to do so and they cannot simply because of the accretion of evidence that has arisen, partly as a result of the success of the leniency, and so they are simply not in the same position. They cannot do what others who have come before them can and the fact that those who have come before have had a lot more to say and perhaps have been implicated in many more wrongdoings does not alter the fact that they are, simply from the perspective of leniency not in equivalent situations.

THE PRESIDENT: I am not sure, because in a classic case you are absolutely right, you are investigating a cartel, and you reach the point where you have everything you need to know about that cartel, who is in it and what damage it has done, and you say, "Fine, we do not need any more help." But here what theoretically these people might have given would be new infringements.

MR. UNTERHALTER: There are perhaps two classes of case, just to seek to respond to the point. Is there information which touches upon infringements that are already the subject matter of consideration?

THE PRESIDENT: Yes.

MR. UNTERHALTER: In that event it is a very clear case they have nothing more to add and it is not clear that this appellant was coming forth with the matter of new infringements that they wanted to bring to the attention of the Office, so that is the one class of case, and from their statements they are saying "We actually had very little idea of what was happening and we could not really get to the bottom of any of the things that were put to us, and therefore we had very little to say."

It is very odd to learn from such an appellant that they were burning with such zeal to come and confess of their wrongdoings that they were guillotined at just the wrong point and therefore something more was due to them. They say "We have had the greatest difficulty understanding what this is all about and getting to the bottom of it", so they did not have the burning information that would assist any current investigation. In fact much of what they put up was all a disguised effort to distance themselves from the wrongdoings that had been highlighted in the investigation. The second class of case is wholly new infringements, and that is I think the thrust of where the question goes. In respect of those the rationale of the office is simply to say "We can cut off an investigation at a point". We can say: "Our resources are limited, we are not obliged to look at every single violation that we could conceivably pursue, we do apply a cut off, and we have." The fact that a party wants to come along and now confess to something in another contract in another tender, where the cut off has been applied is again, we would submit, not a complaint that they can make, which is to say "We must be able to tell you this, and we must be able to get a discount for those infringements which you do not mean to investigate any further", because the necessary consequence of holding that such parties' cases must be entertained is that there is some obligation to investigation as widely as any party would make admissions in respect of leniency, and we submit there can be no such obligation addressed upon an investigative agency.

For those reasons we continue t o submit that there is no warrant for any discount that is due in respect of the leniency proposition that continues to be persisted in and all the more so in this instance where they really seem to have had very little of any consequence to say.

If I might then very briefly come to the question of the turnover standard and the use of worldwide turnover, because the matter was very fully debated yesterday and I do not want

to cover ground unnecessarily, but there are just a few supplementary points to be made in the context of this case and one or two more general observations.

The first is that the specific submission that is being made to you today is that there an intermediate step that is missing in respect of how you would apply a turnover standard for the purposes of deterrence and that is that it should be on a form of incrementalism. Determine first whether Steps 1 and 2 suffice, if not go to a UK turnover level, if not go to a worldwide turnover, and by these gradations work out what level deterrence should be applied.

Under the methodology, as you will know, there is a concern and a consideration that is given at Steps 1 and 2 as to whether the penalty that is yielded by the applications of Steps 1 and 2 do give rise to sufficient deterrent and that is at the 15 per cent threshold which has been determined, so in a sense there is an incrementalism that is built into the process. Our learned friend suggested that a £1 million fine is a hefty fine, and that would do enough by way of deterrence, but beyond the assertion that that is so what is the rationale for it? What is the basis for making that claim? It is just a claim. It could have said £500,000, it could have said £2 million. This is in the range of submissions that you will no doubt hear frequently in these proceedings which just says: "but here is a number, that is the right number. Why is it the right number, I cannot tell you why it is the right number, it is just a lower number than the number that was imposed upon me, and the number that was imposed was too big." That is the so-called science that is being offered to you as the basis for making deterrence determinations.

What the OFT has sought to do is not to take an impressionistic a view of these matters but rather to apply a rationale. What it is trying to do, and again I will not repeat all the ground here, but it is trying to measure up the relationship between certain firms who, by reason of the definition of the relevant markets, which are very, very narrow markets, and you can get instances, and there are instances that are now before the Tribunal on appeal, where there are very significant turnovers that are generated at Steps 1 and 2, simply because of the concentration of certain firms' activities in very narrow markets in certain localised geographical areas.

So that is the one class of case that you have. If you were then simply to use that as the standard, which is to say in a sense as the appellant is suggesting, just use the turnover in the relevant market as the basic standard and see if there is anything more to be done, you would have no proportionality between small firms with extensive exposure in relevant markets and huge firms which are major undertakings with very slight exposure in those

markets relative to any other sense of the economic power and significance of that firm, so what the OFT is trying to do and ultimately, with respect, this Tribunal will have to do, is not to take the impressionistic case by case view that is suggested because it is simply, frankly, an effort to say I think it is too much without reason, but is to try and work out a global conception as between parties who have infringed, as to how deterrence should work. Now, the criteria that we have suggested are consistent ones in the sense that by applying the MDT in the way that it does it levels things up between those small firms in localised markets with extensive exposure, and the huge firms with major turnovers both in the UK and beyond its borders who would consider that if you simply stopped at the relevant turnover standard that this would be a trifle of no significance, and it is in order to get that sense of proportion and balance between ensuring that deterrence is felt to the same degree by undertakings of very great difference, by size and involvement, that one ends up with the methodology that is suggested. It is for that reason that we would urge upon you not to take the impressionistic view case by case, but to see how deterrence should work as a rational defendable policy of penalty position.

THE PRESIDENT: But are you not in a sense doing the same thing? I take your point about it is getting a handle on the size of the economic power of the company and you look at total turnover. What percentage you choose of that is equally an impressionistic straw in the wind, is it not? There is no rationale for 0.75 of total turnover other than you say that reflects 5 per cent of 15 per cent – so what? If it ends up with the wrong figure, or a figure which looks disproportionate to what is done or in the nature of the infringement, and the requirement from deterrence by other measures, by other impressionistic measures, then it is the wrong figure. You are still shooting in the dark, are you not?

MR. UNTERHALTER: We would submit that at least our system has this virtue, that it takes account of consistent treatment.

THE PRESIDENT: There is a constancy.

MR. UNTERHALTER: There is a constant tension in all of these hearings between a party that comes along, such as the appellant before you now, and says: “For me this is too much”, and I cannot exactly explain why but just says: “I know the management of this company are very good and honourable people, and £1 million means a great deal to them, and I can assure you that if they suffered that penalty they would take it very seriously.” One will hear that over and over again. The question though is the virtue of the system that the OFT has put together is, in our submission, twofold. It does seek to measure up proportionately as between wrongdoers, the impact that deterrence has upon the firm in a consistent way

across its turnover, that is the one virtue that it has, and it is an important virtue because consistency and proportionality between wrongdoers matters.

The second is that we agree, of course, 15 per cent could be 14 per cent, or it could be 16 per cent. I cannot speak to any deep science about it, but at least there is a rationale that lies behind it, and lies behind the European cases which is to say that you have to take some view about size and relative size, and how much, by reference to size, you mean to hurt the entity, to do the work of deterrence.

In the conception of the OFT that is 15 per cent of relevant turnover as a percentage of total turnover. There may be other standards, that is quite possible, but we have not heard them. The kinds of attacks that have been made on the system are almost always of the kind that you have heard this morning, "£1 million means a lot to the management of this company". They are not suggesting a better overall set of criteria that could be consistently applied, and that is the odd absence in the cases that are being brought before by the appellants.

PROFESSOR BAIN: Mr. Unterhalter, would the OFT concede that a lot of the problems that arise with the MDT arise because the OFT was over cautious in its selection of relevant markets, it went for very narrow ones and so it created huge problems later on. If you had gone for broader relevant markets, then it would be much easier to link what was needed for deterrence to the figures you got at your Stage 1. Would you concede that?

MR. UNTERHALTER: I am not certain that it is a concession so much as it is certainly it is relevant to the way in which MDT was constructed, which is undoubtedly the case, and I think I have made the submission that going for very narrow markets as perhaps it did not have to do, it means that then to have consistent treatment and do enough by way of deterrence, you have to then develop a methodology where perhaps if you had had a much broader market definitions there would be less to do, but I cannot say that there would be nothing to do, there may be quite a bit to do but you would not have so many orders of magnitude of difference of the kind that I have sought to illustrate.

PROFESSOR BAIN: The second matter is a comment, and that is that it does not seem to me fair to appellants to suggest that they should be providing a general scheme for fining which is what you seem to be suggesting in your last comments. They do not come to us with that, naturally it is not their job. It is your job to do that. It may be our job to make sure that any decisions we take are consistent across the board, but I cannot really see that it is the individual appellant's job.

MR. UNTERHALTER: We would submit, with respect, that we would not be in agreement with that, and for this reason, that one has, in one's attack upon the OFT's decision, to identify

the error. If the error is something fundamental about MDT then you have to identify it, and we have to explain why some system, if it is to take consistency of results into account could have done a proper job of proportionality. So of course, appellants are free to make such submissions as they wish, and many of them are exactly of the kind that you have heard this morning. For me, it is just too much.

PROFESSOR BAIN: Some of the submissions I would suggest do have clear implications for MDT even if they may not be couched in those terms.

MR. UNTERHALTER: In our submission whatever the problem that remains it is a problem that has these characteristics, and has to be dealt with not singly in the way suggested by many specific appeals, but it has implications for the system as a whole.

THE PRESIDENT: Interestingly, if one just looked at your guidelines you would not see much emphasis on the need for consistency as I recall it. What you would see a lot of emphasis on is the need to get the fine right in the individual case. The problem of consistency arises, as has been said, particularly in this case because of the very large number of people being dealt with in one decision, and it brings it very much into focus. I am not suggesting there should not be some kind of general consistency, but of course it is a particular problem here because of the nature of the decision that the OFT has taken, and the nature of the cases being dealt with, and the concern that we have to grapple with is whether case by case proportionality is being sacrificed at the price of consistency and that, it seems to me, has been one of the big problems…

MR. UNTERHALTER: Perhaps I could make two submissions as far as that is concerned. First, the volume of cases involved in this investigation and the consequences of the appeals that have come simply bring to the fore something that is there in any event, because one's duties to not impose penalties in one case that are out of all proportion to like circumstances in other cases, even if they are in a different investigation, it would be a duty that the OFT would be burdened with in any event. All that this does is that you have a wider canvas to consider comparability because it emerges out of the same ground, but the basic requirement is still the same.

THE PRESIDENT: The scale of it makes it very tempting for the persons doing the work, namely the OFT hitherto not to vary things very much as between individuals on the basis of their individual characteristics because of the sheer number of them.

MR. UNTERHALTER: That was really the second submission I wanted to make, which is simply this that the OFT has sought to do both. It has not simply sought to develop the rule for the sake of consistency, though that is one of the things it has needed to do in the

methodology it has adopted, but it has conscientiously, if one goes through the decision, sought to address the arguments of difference, and they were many and varied, and continued to be many and varied with many parties coming along to explain why they are in a different situation, and we have heard in the course of this week already, numbers of parties who have come to address issues of difference which they say were not adequately addressed.

We would submit that we considered those matters and we did not think that they were relevantly different, and consequently the standard rule applied that if the OFT was in error you will determine that. Many of these cases, such as a fraud was perpetrated here, is an issue of difference, we say it is not a relevant difference and that is the consequence. I In our submission those are our principal submissions. Could I just take instructions – there is something I may have left out of account. (After a pause) I am asked simply to make one further submission, just à propos of the involvement of senior management and their knowledge. That is treated as an aggravating factor at Step 4, and will be taken into account, and so it is within the matrix of decision making. It is simply not a matter that is considered at the level of deterrence.

THE PRESIDENT: Mr. Unterhalter, I think Professor Bain has some more questions.

PROFESSOR BAIN; Yes, I am afraid I have. I really want to follow up on the 5 per cent as the basic starting point for simple cover pricing. Can I really begin by clarifying for my own benefit really how you judge the seriousness in this context? In law, the assessment of mergers has moved on now to an effects-based analysis. There has been a change over the years. We are now in an effects-based analysis. As regard the Chapter 1 prohibition, is it the case that you can judge the seriousness of an offence simply by its object - for example, anything that can conceivably be labelled as bid rigging becomes inherently serious - or, does seriousness have to be judged by its effect? Mr. Sharp, in his written submissions, was making the point that really it had to be judged by effect. I want to be clear. Does the OFT agree with that - that we really are looking at the effect? I mean, I know you say a great deal about the effect, but do you agree that in determining seriousness one judges by effect?

MR. UNTERHALTER: In our sub, no. We would not make that concession and we would not make it because infringement by object is plainly one of the categories of infringement which is standardly considered to be in a category of the highest seriousness. The reason that infringement by object is of a high order of seriousness is because although it is not necessary to prove concrete effects in the particular case, it is really an instance of any rule-

following, which is to say that if by object you can identify the wrongdoing, where situated in its market that species of object is likely to be highly antithetical to competition, that is good enough and it is very serious. In other words, there are perhaps two concepts of effect - the one is that in the particular case, what effects do you need to show to make a judgment of seriousness? The second is, systemically are infringements of this kind of a sort that are likely to distort competition - not by reference to any particular set of effects that were felt in the particular case? The second category can be just as serious for the purposes of an appraisal than ----

PROFESSOR BAIN: So, as soon as something is identified as being contrary to the Chapter 1 prohibition by object, it is automatically serious.

MR. UNTERHALTER: Of this sort, yes. In other words, involved in bid rigging of this kind -- cover pricing as its principle ----

PROFESSOR BAIN: So, how then do we distinguish between, as I would say, at one end of seriousness by effect, the providing ships** case or the vitamins cartel (something of that sort) where there is a highly organised cartel acting in a particular way – that is one extreme. Then, somewhere lower down perhaps you have something like *Apex*, where Company A 'phones round B, C, D, E, and F and says, "We actually want this contract. Do you mind putting in a cover price and they all agree to do it". There is no finding of a multi-lateral arrangement, but that is the sort of thing that is going on. Then one might say you have simple cover pricing which has actually no direct effect on prices for the particular contract, but does have damaging indirect consequences that more than outweigh any reduction in costs that occur. Now, it did seem to me that if you were looking at this by taking account of these in deciding how serious the effect were, that you are treating, am I right in saying, the simple cover pricing as having the same sort of seriousness as an *Apex* situation? You put them both at 5 percent. Is that right?

MR. UNTERHALTER: We certainly think that the reasons to distinguish *Apex* and the circumstances of this case are not particularly availing because the very factors that were identified in *Apex* - the five systemic features of this kind of conduct - are just as applicable to this case as they were ----

PROFESSOR BAIN: So, you are basically saying that their fundamental characteristics are much the same.

MR. UNTERHALTER: Indeed - and that the *Apex* factors are just as availing here as they were there.

PROFESSOR BAIN: Right. That, of course, is being challenged by a number of the appellants who are saying that really it is quite different. I will not pursue that one any farther if that is the view you are taking. I was going to ask you where, on a scale of 1 to 10, you would put it. But, if you do not distinguish between the two, and you think they are fundamentally the same, then they are both at 5. That is the answer.

MR. UNTERHALTER: Just *a propos* that, there are two features. The one is that the *Apex* case identified the five features that were considered to be problematic which we think are just as implicated in the practice that we are here concerned with. Then there was the consideration that after the roofing decisions had come out, there was no apparent compliance that was exacted as a result of the clear recognition that cover pricing is unlawful.

PROFESSOR BAIN: I am glad you mentioned that. Are you then saying that if there had been such recognition, simple cover pricing would have warranted a lower rating?

MR. UNTERHALTER: It was quite the reverse. The temptation was to take it higher because the recognition of the seriousness at 5 was seemingly not having any consequence.

PROFESSOR BAIN: But you did not take it higher. You had this consideration of an additional need for a deterrence in mind. Does that not imply that implicitly you were putting it a bit lower?

MR. UNTERHALTER: Again, in our conception one should not confuse the seriousness dimension with the deterrence dimension. They do address different issues;

PROFESSOR BAIN: Okay. Let me move on from that. The damaging effects - I think you all agree - of the simple cover pricing are indirect. They are not immediately obvious to people who do not think through the indirect consequences of their actions. I mean, economists are trained to look at the indirect effects through markets. Probably competition lawyers are too. I would not know. But, looking at culpability, before the OFT's press announcement of the letters to companies concerning this investigation, is it the OFT's view that by and large the firms in the construction industry engaged in simple cover pricing, knowing that they were breaking the law, i.e. intentionally, or because they were ignorant of the law, i.e. negligently, if you like, because they should have known, or does the OFT simply have no view and regard the distinction as irrelevant?

MR. UNTERHALTER: It certainly does not matter for the purposes of whether the standard is met of intentional negligence as to the ability to impose ----

PROFESSOR BAIN: It is the culpability that goes with it.

MR. UNTERHALTER: Certainly I understand that there is a question of seriousness around that. There were many submissions, as you will have seen, from parties including the one before you now, that was to the effect that it was a practice not widely understood to be unlawful, figured in textbooks and the like. But, we have difficulty in accepting that there could have been such a state of ignorance even if one thinks ignorance of the law here matters to seriousness. We are not convinced that it does. But, in any event, if one thinks through the implications of what is happening and, with respect to the greater refinement of your profession there is also a very simple way of looking at what is happening in these circumstances, one knows that as a result of cover pricing bids are being put in which are the result of the collaboration that has taken place. Whether they alter the pricing or not, there is a deception that is involved. From the point of view of the tenderee, the customer, the bid is presented as if it were independently generated. That is the notion of the tender and the competitiveness which it is intended to engender. You know that your bid has now gone through a screen of co-operative relationships with the competitor.

PROFESSOR BAIN: In fact you are saying that they must have known they were breaking the law.

MR. UNTERHALTER: They must have known that there was something wrong about this. It is not that the textbooks told them how to do it. The textbooks did not say, "And it is a perfectly acceptable practice".

PROFESSOR BAIN: Thank you. I just wanted to be absolutely clear about the OFT's position on these matters. Thank you.

MR. UNTERHALTER: *A propos* of that, could I make one last submission, as I will now be trespassing into my learned friend's time? Just *a propos* this question of , "What is the point of cover pricing?" which is this accretion of credibility, the point that we would make about it is that it is by a practice of deception that you secure the credibility yield. Anyone who thinks about this has to know that that is wrong. Do it on your own bat by your own means, with your own calculations of risks and advantages as to what it does to your credibility.

PROFESSOR BAIN: Those are all my questions.

MR. SHARPE: If I could just give you a reference? In VI.38, and thereafter, there is a treatment of negligence, if that is of assistance. Those are my submissions.

THE PRESIDENT: Thank you. Mr. Sharpe?

MR. SHARPE: Sir, I shall be brief. May I start with where the exchanges between the Tribunal - and in particular Professor Bain - and my friend left off? Two or more parties enter into an

agreement to fix a price. They hit upon a price, unknown to them, which is exactly equal to the market price. That cartel had no economic impact at all. But, nevertheless, it would be condemned and rightly so because the intention of the parties was to rig the market. That is where object comes into our law - that you do something which is unlawful and if you attempt to do it, even though you are unsuccessful in that attempt, that is no reason why you should get off because the object of the exercise was to prevent, restrict or distort competition. The request for, and the giving of, a cover price in a situation in which one party has internally come to the conclusion that it does not wish to bid is not entered into with the intention of preventing, restricting, or distorting competition. Its intention, as I submitted earlier, was to remain a credible bidder so that the party is not cut out of the reckoning in the next round - indeed, as these relationships were formally undertaken.

THE PRESIDENT: You must be taken to intend the natural and probable consequences of your actions, must you not?

MR. SHARPE: Agreed, sir.

THE PRESIDENT: You might have a motive of wanting to remain in play, but you might still have the intention of ----

MR. SHARPE: I can readily agree to that proposition. What is the consequence of your action? The consequence of your action is to make your declared decision that you are not going to be a bidder known to one other party. Now, nobody, least of all me, is coming here to defend that deception. But, as my friend, I think in retrospect, somewhat unwisely made the point, he did not say that the deception prevented, restricted, or distorted competition. He is making a point - a perfectly valid one - that deception is wrong, immoral, unattractive, and heaven knows what. But, that is not the task. The task of the Office is to say, "Did that deception prevent, restrict or distort competition?"

PROFESSOR BAIN: Mr. Sharpe, have you not conceded that this is unlawful by object?

MR. SHARPE: Yes, I have. I am just engaging in the discussion which, respectfully, you precipitated. Now, where does it go? How did I use that submission? I said this was pragmatic resignation. I am not the only one to appear before you with that aim in mind. However, it does mean that to elevate it to the position of a cartel – a cartel is an obvious point. You know there is going to be at least an intention of increasing prices and you spare the courts, and the authorities, the evidential burden of saying, "Well, let us look at the effect". The Office here have attenuated the notion of object, almost to extinction.

PROFESSOR BAIN: Does that mean that you are challenging the view that anything that falls by object is automatically serious? That was the point which Mr. Unterhalter made at the beginning.

MR. SHARPE: No. With respect, if two or more parties enter into a price-fixing arrangement to rig an auction I regard that, and the law regards that, as an exceptionally serious situation because it is the sort of behaviour that may potentially - and is capable of - raising prices, restricting output, reducing consumer welfare and all the other things.

PROFESSOR BAIN: But, if this particular practice is unlawful by object, are you saying that it follows that if this is not serious then it cannot be the case that anything that is unlawful by object is automatically serious?

MR. SHARPE: Indeed. I accept that. Where it is reflected – there are many arrangements which have the object of sharing information. This is very near to that; it is essentially that. One would see that it has as its object the prevention, restriction and distortion of competition. But, its effect may be actually quite trivial, but nevertheless sufficient to engage under the heading 'Preventing, Restricting or Distorting Competition'.

PROFESSOR BAIN: I am trying to see whether you accept that all of these potential infringements are serious.

MR. SHARPE: Where I am going is that they are not serious - certainly not ----

PROFESSOR BAIN: You are challenging Mr. Unterhalter's statement and anything that can be found to be unlawful by object is necessarily serious.

MR. SHARPE: Necessarily serious, yes. But, there are agreements which have an intention to restrict competition which could be serious.

PROFESSOR BAIN: I fully understand that many of them may be serious. I am just trying to see whether the advice that we are getting is that they are necessarily serious.

MR. SHARPE: Exactly so.

PROFESSOR BAIN: You do not accept that.

MR. SHARPE: Of course not, no. The reflection of that, having accepted that there is an infringement, and having all the time accepted our responsibility that there is a hint that perhaps we were not, we have never denied responsibility. What we are coming to this Tribunal to achieve is a significant reduction in the penalty (1) because it is not as serious - and I think I have descried their attitude as hyperbolic; and (2) for the reasons I have expressed at great length in relation to the fraud, that it is nonsensical to impose a massive penalty on the basis of fraud in relation to compensation.

Before moving on, quickly, you will see what I was trying to say in my earlier submissions was that when there were other parties, especially when there were other parties to a tender, or when they have invited other parties to come into a tender process, the impact of the giving of a cover price or the payment of a compensation payment appears to be significantly less.

The Decision is, respectfully, deficient on this. The question of object is difficult. Partly it is an evidential matter. The courts and the authorities are spared the task in situations where it is so obvious that something is going to be anti-competitive, output restricting, and so forth, of which the classic example is the horizontal cutter. Cover pricing and information-sharing agreements do not fall into that category respectfully.

I will be brief from now on. I am sure my friend did not confuse you when he sought to add to the evidence that the OFT have got in the Decision. In particular, when we were speculating on the possible reasons for the payment in this case, he took you, properly, to our submissions which were submissions in response to the Statement of Objections before the Decision. All the evidence came through there. But, he lapsed into saying, "Well, look at the invoice. This was a very typical invoice". Well, I have not seen another invoice in this case. You may have, but I have not seen one. Nor have I seen anything in the defence to our appeal which indicates that this invoice is typical. The delay of nearly a year between the infringement and the payment, as he put it, is 'simply making sure you have got "value for money"'. Now, he may well be right - that this is a typical invoice. I do not think he is right. What I am saying is that the OFT did not find it was a typical invoice. We see nothing of that in their evidence, nothing of that in the Decision, and nothing of it in response to our appeal.

I think it was suggested earlier, because there was a vast volume of appeals by CAT standards, that we must somehow gloss over the niceties of evidence and argument, and we just smear the arguments and we take a broad brush view. It will come as no surprise to you that I resist that very strongly. I am here to act for Bowmer & Kirkland and I expect our appeal to be addressed in its detail and not to be told that it is somewhere in the Decision and that all this is terribly typical when in fact there is not the slightest evidence that it is typical or, indeed, is the perfect answer to the submissions I was making, having taken you to the invoice itself.

Moreover, I think my friend was inviting you to make findings on the question of whether or not there was indeed a *quid pro quo*. The OFT in the Decision, as I showed you, in terms, made no finding whatever that Herbert Baggaley withdrew as a result of this

payment - delayed or otherwise. No, they did not have the evidence for that. It was not Herbert Baggaley's own evidence - Mr. Hayes, Mr. Newell, and Mr. Richard Baggaley. Their evidence was that, "When there was a chance to get a bit of money back we took it". We cannot at this stage - at the appeal stage - add to the evidence as my friend, respectfully, was inviting you to do. You take the evidence as it was. The OFT could not find any and therefore quite properly made no findings.

As for the reasons for Mr. Craft's behaviour, we can only guess. We have put forward a theory after the Statement of Objections. We had hoped that perhaps the Office would have put these matters to him, to have asked him in more detail what he was up to. They chose not to. They cannot elaborate on the evidence at this very late stage.

There was a further point which my friend raised. I submitted that in relation to specific deterrence it is absurd to pile on to a fine a significant multiple of a penalty in a situation in which a party has been defrauded. You cannot deter people from doing things they did not know what was happening. My friend did not specifically address that point. But, he did elaborate to say, "Well, the general deterrence point is that we can somehow encourage companies to have better internal procedures". Now, that is not a point raised in the Decision itself. The Office of Fair Trading made no finding whatever regarding the quality of the internal procedures within Bowmer & Kirkland. Nor did it make a finding that they were in some sense negligent or careless as to the manner in which this invoice was processed. The invoice, on close examination, which we were able to share with the Office of Fair Trading, indicates all the evidence of a very carefully set out intention to defraud as between Baggaley and, unfortunately, Mr. Craft.

So, please, respectfully, do not be seduced by that submission. It formed no part of the Decision, and it is thoroughly inappropriate to raise it now. My friend was obviously raising it as a general position because he is dealing with lots of appeals. I am only dealing with one appeal. There was no finding of that in relation to Bowmer & Kirkland.

The oddity of all of this is that the Office has never challenged the basic facts that Bowmer & Kirkland was the victim of a fraud. Its position has been that it is irrelevant. Now, we heard some of the reasoning for that repeated in my friend's submissions. It was the constant confusion between Bowmer & Kirkland's liability for the infringement and Bowmer's liability for a very substantial penalty as a result of that infringement. It is not in contention - and I repeat - that Craft acted in the course of his employment and that he appeared to act with authority. We can say no other at this stage. We are not saying that because of his behaviour somehow the infringement which is visited only against Bowmer

& Kirkland as an undertaking then the company was not liable. We are not making that submission at all; we cannot.

THE PRESIDENT: Mr. Sharpe, just so that I am absolutely clear, your suggestion of the victim of fraud applies equally if your speculation in para. 54 of your response is the most plausible explanation.

MR. SHARPE: We do not know if it was the most plausible explanation.

THE PRESIDENT: No. No. But, assuming for the moment that it is, does your assertion that your client was the victim of fraud equally good?

MR. SHARPE: Yes, it does. Yes, it does. My friend made light of this. He said, "Oh, this is just an ordinary invoice, an ordinary transaction in the compensatory cover pricing world". But, there is no other case - none at all - where a false invoice is raised of which the employer knew absolutely nothing.

THE PRESIDENT: Let us assume they were horrified when they found out that the most plausible explanation is that he was doing it to try, as it were, to get the contract for the Civils Division.

MR. SHARPE: It was certainly the most plausible explanation at the time that submission was made in response to the Statement of Objection certainly. We now have a much better understanding of what was going within Herbert Baggaley. It seems now quite likely that there was a conspiracy, certainly, in which Baggaley was the prime mover. We have that from the mouth of the managing director of Baggaley - Richard Baggaley - who has said, "If there is money on the table, we will go for it. We will go for it. We might pretend internally it is a compensation claim. They might have misled Mr. Craft, for all I know. But, we have the deepest possible suspicion that he was not misled.

The thing is that we are speculating here on matters which it would have been open to the Office to have got to the truth. The Office, as you well know, have great powers to extract information and to extract the truth. We invited them to do this. They, at the time, said it was irrelevant - at least that is the inference - irrelevant for the purposes of not only liability, but the penalty It may well be relevant for the purposes of liability, but it is certainly in our view, highly relevant in relation to a massive penalty, especially in relation to deterrence. That is my submission on that point.

I am reminded that I should say that the answer to the question is, "Yes".

THE PRESIDENT: I assumed it was.

MR. SHARPE: I know. But, I am obliged to my friend - as always.

As to the responsibility of senior management, which my friend makes something of in his skeleton, there is a confusion here. We are accused of confusion, but, naturally, I am going to assume that the confusion is on the Office's side. On the one hand we have Bowmer & Kirkland's responsibility for the infringement. Let us take that as given. It is not denied. Acceptance of legal responsibility for the infringement is one thing, but the fair and just level of a fine is quite another. It is only the latter with which we are concerned.

t is interesting, if I may, to recall the exchanges between my friend and the Tribunal about the setting of a number. Our submission is that a 5 per cent start-off point is way too high for the reasons I have submitted. But, in relation to deterrence my friend came up with no answer save the possible one dealing with internal controls and culpability which forms no part of the Decision as to why a very significant deterrent fine should be imposed upon a company which has been defrauded We accept that if senior management (or, indeed, anybody other than Mr. Craft at any level in the company) had known of this, we would not be here. We would have taken our punishment like a man, as we have been told we should have done. But, it is the incidence of fraud here that marks this case out so very differently, I am afraid, from all the other appeals before you. If it was not fraud we would run the other arguments perhaps. But, certainly fraud, as I said at the beginning consistently, marks this case out differently. It seems, respectfully, to be establishing bad precedent, bad decisional practice, and perhaps bad law that if a company, through no fault of its own, is defrauded, it should bear the penalty as if it had wilfully intended to engage in anti-competitive conduct. If that were in the law reports it would be an unhappy development in the law because almost by definition with fraud there is a limit to how far one can guard against it. The House of Lords tells us that we must start off with a presumption to decency and honesty in commercial relationships. Taking reasonable steps, of course, but, a company such as Bowmer & Kirkland cannot be penalised for being defrauded, especially when its own internal controls were judged to be adequate, but which were skilfully sidelined in this case. This was a deliberate deception and the blame for that cannot be laid at the door of Bowmer & Kirkland, the undertaking. If my friend is anxious to repeat the points about better procedures and the traditional arguments in favour of greater compliance, which no doubt you will hear over and over again in these proceedings, I ask, not wholly rhetorically, what level of compliance could be introduced to stop somebody defrauding? By definition the fine is not going to be laid at the individual's door, it is the company. As we saw, Mr. Craft had departed two weeks after this invoice was paid. No level of compliance programmes is going to step somebody intent on defrauding a company

and with knowledge of how to do it. It is not an uncommon situation. But, to visit the consequences of that, doubly so, on the company is harsh and unjust.

Sir, unless there are any other matters, those are my submissions.

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

_____