IN THE COMPETITION Case No. 1128/1/1/09
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

GAJ CONSTRUCTION LIMITED
GAJ (HOLDINGS) LIMITED Appellants

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Watson Burton) appeared on behalf of the Appellants

Miss Kelyn Bacon and Miss Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Good morning, Mr. Robertson, good morning, Miss Bacon and Miss Ford.

MR. ROBERTSON: Sir, as you can see, I appear for the appellants, who are referred to collectively as GAJ. My learned friends Kelyn Bacon and Sarah Ford appear for the respondent, OFT.

On housekeeping, perhaps I could just run through what the Tribunal should have available. There should be one bundle with our notice of appeal.

THE CHAIRMAN: Yes, we will check it to make sure we have got the right one. Yes.

MR. ROBERTSON: The OFT's penalty defence.

THE CHAIRMAN: Yes.

MR. ROBERTSON: You should have our skeleton argument, and that was served together with a second witness statement of Mr. Harker dated 29th April.

THE CHAIRMAN: That is the additional witness statement.

MR. ROBERTSON: It is, yes.

THE CHAIRMAN: I read it last night.

MR. ROBERTSON: It is the one that exhibits the Experian Report. There is the OFT's skeleton argument and then, finally, a third witness statement from Mr. Harker replying to one aspect of the OFT's skeleton in relation to dividend payments.

THE CHAIRMAN: Just bear with me for one second, because these cases need to be kept in order.

MR. ROBERTSON: In relation to confidentiality, there are confidentiality issues relevant to this hearing. I have discussed those with my learned friend Miss Bacon and we propose dealing with them in the same way that I dealt with them in the hearing in the afternoon.

THE CHAIRMAN: Yes, obviously as much as possible in boxes, as it were, so that we can keep the public out for as short a period as possible.

MR. ROBERTSON: We propose to do the same as yesterday. In other words, I will deal with my confidentiality issues for about ten or 15 minutes, and Miss Bacon will deal with hers at the end of her oral presentation and then I will reply to those. We will have two separate sections in private. The submissions follow what is effectively my standard order, which is five headings – first of all, the impact of the penalty on GAJ; secondly, the Tribunal's jurisdiction; thirdly, the seriousness of the infringement; fourthly, the flaws of the OFT's penalty calculation; and fifthly, the factors that we advance to the Tribunal in mitigation.

Dealing first with impact of the penalty, the OFT has imposed a penalty on GAJ of £109,683 for a single infringement of the Act. We say that is a very severe penalty. It represents over three times GAJ's most recent annual profit. We compare that with the

penalties firstly agreed with *Sainsbury* in the *Milk and Cheese* case, and imposed on *Imperial Tobacco*, now on appeal, in the more recent *Tobacco* case where there penalties are 5 per cent of pre-tax annual profits for those companies.

The OFT says you cannot compare the cases. They do not explain why there should be such a disparity. We say those cases, because there is not yet a decision in the *Sainsbury* case and because the *Imperial Tobacco* decision has not yet been published, we cannot engage in a comparison, but it is incontrovertible, it has not been disputed that those penalties are only 5 per cent of pre-tax annual profits. The infringements that they are being fined for are much more serious than our infringements – they are essentially price fixing infringements – and the penalty on us does represent over three times our most recent annual profit. That is the context of the construction industry being hard hit by the recession. GAJ, and this will now be a familiar theme to the Tribunal, is no exception. The current financial, the current financial position is as set out in Mr. Harker's second witness statement updating the first witness statement that was served with the Notice of Appeal.

As these witness statements contain confidential information within the meaning of paragraph 1(2)(b) Schedule 4 Enterprise Act, I wish not to refer to that information in open court and therefore would like to go into a private hearing for the next ten to 15 minutes.

THE CHAIRMAN: Right. You agree that is appropriate, Miss Bacon?

MISS BACON: Yes.

THE CHAIRMAN: We will go into private hearing until notified. So would anybody who is not involved in the current case, or authorised to be present by one of the parties, please leave the room for a few minutes. Perhaps counsel and instructing solicitors would look around the court and see if there is anyone who should not be here. We will go public again as soon as possible.

(The hearing continued in private)

THE CHAIRMAN: I am sure your lay clients will be aware that some of the points you would make have already been made in other hearings which they were not present at yesterday, and they can be assured that those points will be taken fully into account. So they should not assume, just because you do not say it all, that we have not heard it all. Does that help?

MR. ROBERTSON: Yes, that confirms what I have been telling them this morning when we had a chat in advance of the hearing.

Throughout this process we have provided the OFT with complete cooperation and we accepted the first track offer. We have had no option to appeal because of the OFT's penalty calculations ended up with what we say is a disproportionate and unfair penalty.

We have set out in detail in our skeleton and Notice and Appeal what we say are the flaws in methodology and the matters that we rely upon by way of mitigation.

Turning to the second of our headings, the Tribunal's jurisdiction, this is ground that we covered yesterday. Your jurisdiction is a full appellate one and you are not inhibited by any margin of appreciation that the OFT seeks to reserve for itself.

As to seriousness of infringement, the third of my main headings, the OFT skeleton paragraph 14 starts off by referring to the "most serious types of infringements of competition law" and this is not that case, as recognised by the 5 per cent starting point. We do invite the Tribunal to consider justice of penalties in comparison with penalties imposed for serious infractions of criminal law such as corporate manslaughter.

Sir, you asked yesterday whether the corporate manslaughter and health and safety offence of causing death definitive guidelines replaced a previous guideline. The position was that prior to the Sentencing Guidelines Council coming into existence, the Sentencing Advisory Panel would issue advice to the Court of Appeal and then the Court of Appeal might take that advice into account in a judgment on an appeal against sentence. That is why, prior to the Guideline Council's guideline coming out, what you had was Court of Appeal authority which Sol in particular has referred the Tribunal to in its appeal, and to which we have also referred. So there was previously Court of Appeal authority, now there is Sentencing Guidelines Council definitive guideline.

We say you can draw comparisons with criminal sentencing and we explained why yesterday. The OFT says that you should ignore all of that because this is a case about economic harm – that is para.17 of their skeleton argument. We say there is no finding in the decision as to effect. We know why cover pricing is infringement by object. We have got the Tribunal's analysis in *Apex*, but there is no finding of economic harm caused by our infringement or indeed infringements generally.

Turning to the fourth of my five headings, flaws in the OFT's penalty calculation, this is covered in detail in our skeleton at paras.40 to 148 and I am only going to deal with the real points of difference between us or the principal points of difference between us. A feature of this appeal which the Tribunal did not see yesterday in this form is that GAJ's penalty was subject to by reference to the minimum deterrents threshold.

The OFT suggest in their skeleton at para.21 that we object to the minimum deterrents threshold in principle. We do not. We are not saying it is unlawful for the OFT to have a minimum deterrents threshold. You could not make that submission because the Tribunal

upheld it in principle in the *Makers* judgment, but what we do challenge is the imposition of an MDT uplift in this case – see para.35 of our notice of appeal.

Effectively, and perhaps if I start off by taking you to the penalty calculation, which is tab 1 to the notice of appeal, and the last page of tab 1.

THE CHAIRMAN: Do we have a version with the figures added?

MR. ROBERTSON: You will see that this infringement, which was December 2003, total worldwide turnover, that is of Holdings, they applied the 5 per cent to relevant turnover, came up with the penalty after step one. It remains the same in step two. As a proportion of total turnover it is 0.45 per cent, bearing in mind the historical profitability is 0.62 per cent, and then the MDT to apply, 0.75 per cent, so they substitute 0.75 per cent of total turnover for the penalty they would otherwise have applied as step two. That is how we arrive at £153,000. There is then a reduction for compliance of 5 per cent and then the fast track offer discount, which is how we arrive at £109,683.

We submit that the penalty at the end of step two was plainly not a nominal penalty or in effect a penalty insufficient to penalise and deter. There was no good reason for applying an MDT uplift.

The uplift is effectively an uplift because of our turnover earned for building maintenance in the other company owned by Holdings, GAJ Planned and Reactive Maintenance Limited. It is not a construction business, it is a building maintenance business.

The OFT point to the *Makers* case as the justification for imposing an MDT, but what the OFT have failed to appreciate is that what they have done in this case is different from what they did in *Makers*. *Makers* was a case of cover pricing in car park surfacing. I acted for Makers on the appeal to the Tribunal, I did not act during the administrative procedure. As with GAJ, they did not have a law firm acting for them during the administrative procedure.

Sir, *Makers* was a case of cover pricing in car park surfacing. It was engaged in Acton in West London. The 5 per cent step one calculation was based on turnover of £330,000, which gave a fine of £6,500. Makers is a national firm, it does car park surfacing nationally. The OFT, unsurprisingly, thought that £6,500 would not be sufficient to deter a national firm or to punish it properly. Therefore, the OFT applied an MDT of the same amount as in this case but crucially only to turnover in car park surfacing. Makers had a car park surfacing division. It was a part of its business, but it was not all of its business. You can see that – there is no need to turn it up – set out in the OFT's decision in that case at para.846.

THE CHAIRMAN: Can you give us a broad percentage as to what percentage of Makers' activity was compromised by car park surfacing?

MR. ROBERTSON: It is not set out in the decision or in the appeal to the CAT. I will see if I can obtain the figure and let the Tribunal have that later in writing.

THE CHAIRMAN: Are we talking about less than 50 per cent? I will not press you.

MR. ROBERTSON: From my recollection, Makers was quite a broadly based company doing a number of construction activities. The car park surfacing was carried out by a division of Makers. I do not know what other divisions it had, but I am sure I can find out and let the Tribunal have a note on that.

The key point is that the OFT took the turnover in car park surfacing and applied the MDT to that. It was national turnover in car park surfacing, it was not to turnover derived from activities unaffected by the infringement.

THE CHAIRMAN: Here it is group turnover.

MR. ROBERTSON: Here they are taking group turnover. As I said, I did not appear for GAJ during the administrative procedure. I did appear for other companies who had an MDT being applied to them where the same defect was evident in the statement of objections, so I made this submission in oral hearings, not on behalf of GAJ, but on behalf of other companies, to the OFT, but they seem to have disregarded. Miss Bacon no doubt will explain why.

Sir, that is MDT, and we say there is simply no justification. There was an obvious justification in the *Makers* case, but there is not one here.

Just to give you the full reference to the decision, I said it is para.846. It is to be found in the authorities bundle at volume 10, tab 128, p.211.

Sir, the other matters where we object to the OFT's penalty calculation were, by and large, dealt with yesterday and so I adopt those submissions on behalf of GAJ as they relate to tendered as against non-tendered work, high turnover and low margins, no effect on price, the *T-Mobile* case, and what appears to be an error of law, use of last year business and last business year turnover and financial hardship.

I have two supplementary points to make. The first is in relation to high turnover, low margins. Despite Mr. Beard's scepticism yesterday about the weight to be attached to Sir Jeremy Lever's article, 'Just Desserts', we do stand by that. That was not just a piece of paid advocacy. Sir Jeremy would not have published that in the Competition Law Journal if he did not stand by his views.

As regards the relationship of turnover and margins, my clients have asked me just to emphasise that much of their turnover is sub-contracted turnover over which they have no choice – that is to say, the client tells them either to deal with a particular sub-contractor or to choose from a list of approved sub-contractors. These tend not to be for small items, they tend to be for large items – for example, mechanical and electrical contractors. Someone like a university, for example, may have had their electrical systems installed by one contractor. When they extend a university building they will want the same contractor to deal with it. We deal with them and their bill is just a wash-through our book, we do not take a margin on it.

THE CHAIRMAN: The evidence we heard yesterday, as it were, and we have seen, suggests that sub-contractors, whether they are nominated by the client or not, amount to 60 to 80 per cent of turnover.

MR. ROBERTSON: That is correct.

THE CHAIRMAN: It will vary from contract to contract.

MR. ROBERTSON: Yes, for GAJ, 80 per cent, but the figures that the Tribunal has in the various appeals are in the order of 60 to 80 per cent. To give an example of a contract that we did a few years ago, building a hospital building which was to house an MRI scanner, the building cost £600,000 to build, the MRI scanner was another £300,000. We were told to procure that from Philips or Toshiba, the only two suppliers. That goes through our books, it appears as our turnover, but it is just a straight wash-through.

The second supplementary point I wanted to make was in relation to the *Uttley* case referred to yesterday. Mr. Beard relied on *Archer Daniels Midland* and my submission was that that was an inappropriate analogy to draw because we have a very different statutory procedure for calculation of fines. I drew your attention to s.38 of the Competition Act, which is our statutory procedure. The relevant statutory procedure at the time of *Archer Daniels Midland* was Regulation 17, and I have got a copy to hand up of the relevant article of Regulation 17. (Same handed)

You will see that under Article 15 the Commission's ability to impose fines, para.1 is not relevant to final decisions, it is para.2, and you see there that the Commission has a very wide discretion:

> "In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement."

There is nothing in there that is at all equivalent to s.38. There is nothing about publishing guidelines, consulting on them or, crucially, when imposing a fine doing so by where you must have regard to the guidelines.

THE CHAIRMAN: "Preceding business year" is the year prior to the infringement?

MR. ROBERTSON: Correct, and that is the approach the Commission has adopted. That is the approach the OFT initially adopted, and then changed in 2004. Although when you go to the April 2004 consultation document – I gave you the reference yesterday – you do not see any explanation by the OFT as to why they changed the basis for calculation at step one. It was a big change to make and completely unexplained. Sir, that is what I wanted to say about the flaws in the penalty calculation. On the final topic, mitigating factors, these are set out in our skeleton at paras.149-188 and I do not need to repeat them here. There are only two points to make.

First of all para.12 of the OFT skeleton complains that GAJ did not set out what an appropriate level of penalty should be. Actually GAJ did in the administrative procedure write to the OFT on 5th June 2008 with a calculated penalty offer of £10,791. The OFT rejected that offer and gave as its reason, in an email dated 16th June 2008, from Mr Sebastian McMichael, one of the case officers in this investigation, saying:

> "We do not consider that an agreement reached with one party or indeed a limited number of parties would at this stage generate sufficient procedural efficiency savings such that would justify a further offer of penalty reduction in this case".

So, we did make an offer, and it was rejected.

The second additional point I want to make is in response to the suggestion yesterday that, somehow the construction industry generally was turning a blind eye to competition law compliance. Our evidence to the OFT at the oral hearing was that we ceased regarding cover pricing as acceptable practice in early 2006. We heard about what is described in the oral hearing by Mr Harker as "the roofing case", sir, I think that is the first case that went on appeal to the Tribunal.

THE CHAIRMAN: *Apex*.

MR. ROBERTSON: Exactly.

THE CHAIRMAN: Yes.

MR. ROBERTSON: Mr Harker cannot now recall why he had heard of the roofing case. He thinks it is one of two reasons. He may have been alerted to its significance for cover pricing by a law firm; alternatively or additionally his children go to school with children of a director of Apex.

THE CHAIRMAN: Right.

MR. ROBERTSON: And that is how he got to know him. Whichever is the reason, as soon as it came to our attention, we drew it to a halt and we ensured compliance, and you will see that as the compliance documentation referred to, notice of appeal, tab.2 pp.108-109. It was supplied to the OFT in response to the statement of objections. Sir, unless I can assist you further, those are our submissions.

THE CHAIRMAN: No, thank you very much Mr. Robertson. I think we might have a ten-minute break. We will come back at a quarter to.

(Short break)

THE CHAIRMAN: Yes, Miss Bacon.

MR. ROBERTSON: Sir, before Miss Bacon ----

THE CHAIRMAN: I am sorry.

MR. ROBERTSON: I am sorry, I am trespassing on Miss Bacon's time, but it will only take 30 seconds. To answer your question about car park surfacing, what proportion the *Makers* work accounts for, the best that we can do is to be seen in the Tribunal's judgment in the *Makers* case which is Vol.4, tab.57, para.10 of the judgment at p.3 of the report. Makers is a private limited company that provides contract services in a specialist field of concrete repair and preservation and structural refurbishment. It also carries out other construction work involving specialist trades. The ultimate holding company of Makers is the Keller Group Plc. So Makers is not just a car park servicing and carries out a number of trades. Note also that it has had an ultimate holding company, Keller Group Plc, which is much larger. The point of that is that the OFT follow the MDT up the corporate chain, as it were, in this case to our ultimate holding company.

THE CHAIRMAN: Whereas they took only *Makers*.

MR. ROBERTSON: Only *Makers*.

THE CHAIRMAN: And they will be a part of *Makers.*

MR. ROBERTSON: Exactly. That point will be dealt with in much more detail in submissions to be advanced in client 7 before Miss Rose's Tribunal next week.

THE CHAIRMAN: Thank you. Miss Bacon.

MISS BACON: Sir, there are some similarities with the two cases the Tribunal heard yesterday in a number of material respects. The main differences for today's purposes are: the first, GAJ was fined for a single infringement rather than three infringements, so it does not have a multiple penalties point. Secondly, and in part because of this, also in part because of its low relevant turnover by comparison with the total turnover, GAJ's fine of £109,000 was in

absolute terms the lowest fine imposed on any of Mr. Robertson's appellants. In total turnover terms, it is also at the lower end of the fines imposed by the OFT overall in this investigation – 0.53 total turnover for the year end 2008 (which was the latest turnover figures provided by GAJ prior to the decision) set against the statutory maximum of 10 per cent of global turnover. By any standards this was a small fine.

I accept that GAJ has got specific arguments on financial hardship which must be set against that. I am going to deal with that at the end of my submissions, as we said at the start.

The third difference is that in GAJ's case the step one penalty calculation was, as Mr. Robertson said, sufficiently low that it required an MDT uplift at step three. The only one of Mr. Robertson's other appeals to raise that point is Seddon, as Mr. Robertson has just said. The MDT is going to be much more of an issue in that case. I will make a few comments on that today, but obviously in view of the limited time I am not going to focus on that to a great extent.

In regards to difference, for completeness, GAJ was not a leniency applicant, as Mr. Robertson said. It did not get the large leniency discount of 45 per cent that yesterday's appellants got. They got 25 per cent FTO discount for accepting all of the alleged infringements in the FTO. I will explain the relevance of these points, or most of them, in the course of my submissions.

What I want to do is to start, as with Mr. Beard yesterday, with some general comments. I am not going to repeat Mr. Beard's submissions. What I want to do is to pick up on his first theme yesterday, which was the Tribunal's role in this appeal, and amplify a little bit what he said yesterday. Secondly, I am going to comment on the seriousness point. Thirdly, I will come on to the specific clause in the OFT's penalty calculation alleged by Mr. Robertson and his clients, and I will turn to financial hardship at the end of my submissions.

Starting with the Tribunal's role in this appeal, I would like to make three specific points. The first concerns the role of the guidance. Mr. Robertson has repeatedly said, in his written submissions and particularly in the court yesterday, that the Tribunal is not bound by the OFT's penalty guidance. That is a matter of common ground as between the parties. Where we differ is what it means for this particular case. In particular, where we differ is the question of how to reconcile the fact that the Tribunal is not bound by the guidance with the fact that, as Mr. Beard said yesterday, the guidance is there, it has been promulgated by the OFT following the statutory scheme and it has been approved by the Secretary of State. So the Tribunal cannot simply ignore it.

Mr. Robertson's answer to this seems to be that the correct solution is for the Tribunal to ignore this and start with effectively a blank slate. It can decide for itself, he says, which criteria should have been taken into account by the OFT. In our submission, that is simply far too simplistic. Even if the Tribunal is not, formally speaking, bound by the guidance, it does still have to find the OFT's decision was wrong. The penalty guidance is a central part of the analysis of whether, in a particular case, the OFT's decision was wrong.

To illustrate that point it is helpful to consider the ways in which the Tribunal could find that the OFT reached the wrong result on penalty. First, the Tribunal might find that although the OFT purported to follow the guidance, it erred in doing so, either in its interpretation of the guidance or its application. Secondly, the Tribunal might find that the OFT has departed from the guidance when it was not entitled to do so. Thirdly, the Tribunal could find that although the OFT followed the guidance (the opposite case) it should actually have departed from the guidance, either because the guidance is wrong in principle or because the circumstances of the case warranted a departure from the guidance.

If you look at the matter that way and by reference to those examples, you can make some kind of sense of the fact that while the OFT is bound to have regard to the guidance the Tribunal is not. In the last of my three examples, when an appellant says the OFT should not have followed the guidance, that is not a submission that the party could have made to the OFT in the administrative procedure. A party cannot go to the OFT and say: your guidance in this respect is fundamentally flawed; you should not have any regard to it at all, or you should not have any regard to one particular aspect of it. That is something that a party can come to the Tribunal and say. In that respect, the Tribunal can depart from the guidance. That makes sense of the repeated comments in the judgment that the Tribunal is not bound by the guidance.

In this case the OFT has purported to follow the guidance and the appellant, Mr. Robertson's clients, are not saying that the guidance is wrong in principle, or that the OFT should have departed from it. So in that case, the question of the application of the guidance and whether the OFT properly applied it, is central to this appeal. It is the first of my three examples: the case where the OFT purports to follow the guidance and the only criticism the appellant can make is, it does not say that it should have departed from it and should have completely ignored one aspect of it, to say that in applying that guidance you erred, you did not apply it correctly or you did not interpret it correctly.

THE CHAIRMAN: If following the guidance produces what the Tribunal considers to be an unjust result, does that involve a departure from the guidance? Could not the OFT have

come to the conclusion that: we followed guidance (which is everyone's legitimate expectation, as it were) but at the end of the day the result is unjust so we now adjust the result whilst not departing from the guidance?

MISS BACON: If the Tribunal concluded that the result was unjust, the Tribunal would have to identify (and this is a point to which I will come later) in what respect the OFT went wrong. The Tribunal cannot simply say: we think there is something wrong but we cannot identify it. What the Tribunal would have to say is: yes, the OFT purported to follow the guidance. The guidance provides, for example, that the OFT has to have regard to all relevant considerations. Here is a consideration that was relevant in the context of applying the guidance. For example, the Tribunal could say in considering the deterrent effect, the factor the OFT should have taken into account. It is part of the guidance but the OFT did not. That would be an error in the application of the guidance rather than the interpretation of the guidance.

But at the end of the day, the Tribunal has to identify what it was that was wrong, otherwise it would not be exercising an appellate function.

THE CHAIRMAN: I understand.

MISS BACON: The second point I wanted to make concerns the margin of appreciation, because that was also a point that Mr. Robertson amplified on a number of occasions, including yesterday. I want to explain a little bit more what the OFT means by a margin of appreciation, so it is not subject to confusion, that we are saying there is a margin of error. We are not saying that there is a margin of error.

The reason that cases such as *Argos* and *Achilles* (to which we have referred in our skeleton) refer to a margin of appreciation is that, as Mr. Beard said yesterday, the guidance does not prescribe a mathematical formula that can be followed in each case. Instead, it sets out a broad parameters for the penalty calculation. That does not mean that we are saying that the Tribunal can only intervene when the OFT has acted irrationally. We are not saying that. The Tribunal can intervene when it considers the OFT was wrong.

The effect of the guidance setting out broad parameters rather than a single correct result that could be reached is that in some aspects of applying the guidance, there maybe a range of possible correct outcomes rather than a single correct outcome. So that is what is meant by the OFT's margin of appreciation. The result is that the Tribunal has to assess the correctness of the decision against a range of possible correct values rather than by reference to a single binary right/wrong analysis.

The third general point of principle that I want to make concerns Mr. Robertson's submission that the Tribunal should not analyse each step of the guidance precisely, but should make a broad brush analysis on the justice of the case. Sir, this helps also to answer the question that you just put to me. Put another way, he says, the Tribunal needs to look at the matter in the round. This is a variant of his argument that the Tribunal should start afresh. He refers to *Argos* in support of his submission. *Argos* is a case where the Tribunal did refer to considering the penalty in the round. But, as I want to show you, it was making a slightly different point. It was not saying you should just start from scratch. *Argos* is at bundle 4 of the authorities bundles, tab 49. The relevant paragraphs start at paragraph 169 page 51 at the bottom. At 169:

> "The *Guidance* is published with the laudable objective of providing an outline framework for the calculation of penalties by the OFT. In our view, however, it would not be appropriate to analyse each individual "Step" in arriving at the penalty in isolation from the other Steps. (171) … the *Guidance* contains, rightly in our view, a number of subjective areas of judgment which necessarily play a part in fixing the final penalty. (172) … In our view, provided that the OFT has remained within its margin of appreciation in applying the *Guidance*, the Tribunal's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT … The criticisms by the appellants in this case directed at Step one should not overlook the fact that, had the OFT taken a different starting point at Step one, a different calculation could have been used in Step three, for example."

In our submission, when the Tribunal talks about looking at the overall justice of the case, it is not saying we did not put a finger in the air and pick a figure that we think is just; we do not have to have regard to the Steps. What it is saying is that you cannot simply say that if there is an error in one step that necessarily means that the overall penalty should go down. If it goes down on one step, it might be that at step three the penalty is increased, for example. That is all that is meant by saying one looks at the penalty in the round. The Tribunal cannot engage in a minute comparison of each individual step and say that necessary an amendment to that step would have an amendment to the overall penalty. That is what is meant by that. Those were the three points that I wanted to make in relation to the role of the Tribunal.

My second point was on seriousness. I do want to spend a little bit of time thinking about the way that Mr. Robertson puts his argument. As far as I understand it, Mr. Robertson puts

his argument in two ways. The first is to adopt Sol's comparison between the scale of the fines here and the fines imposed for offences such as corporate manslaughter. As a matter of principle, that was fully dealt with by Mr. Beard yesterday, and I am not going to say anything more about that. But there is one further point on that comparison as it is made in GAJ's appeal. That is that these comparisons with the level of fines imposed for corporate manslaughter are plainly misconceived on the particular facts of GAJ's case, in circumstances where GAJ's fine was not one of those fines running to hundreds of thousands of pounds. It was £109,000.

It is quite true to say that some of Mr. Robertson's other clients do have fines running into hundreds of thousands of pounds, and in some cases even over £1 million. Francis has a higher fine than GAJ, which we will hear this afternoon, but GAJ's fine simply was not in that order of magnitude. So, sort of "cut and paste" submissions relating to corporate manslaughter apply to some of Mr Robertson's clients, but not really to GAJ.

But, even leaving aside that point, the second way that Mr Robertson puts his case, and it does apply to GAJ, is to say "Well, even leaving aside criminal comparisons, the Tribunal needs to stand back and look at the end result, and if you do that you get a fine that is disproportionate to the gravity of the offence".

The problem with that submission as a general submission is that it simply begs the question "Disproportionate by reference to what?" And, as all of these appeals show, it is always possible to find some examples of cases where by reference to one or other measure the fine is lower than in a particular appeal case. And the appellant and Mr Robertson point variously to absolute levels of fines, fines by comparison with total turnover, fines by comparison with profitability. But, ultimately, the fact that you can use the statistics in so many different ways to give very different results is a straightforward function of the fact, that the fine methodology is quite sophisticated and involves consideration of a number of different factors rather than being a crude percentage of profits, or percentage of turnover, or even a cruder flat rate fine by reference to absolute value as I understand was canvassed yesterday in Hallam. And the European court itself has emphasised consistently that the penalty should not be a simple calculation based on turnover, and that is the *Musique Diffusion* case which is at Vo.5, tab.69 of your authorities bundles at paras.120-122. Now if the OFT had completely departed from the penalty guidance, completely departed from the approach adopted by the European Commission and approved by the European court and had simply said, "Well, right, we are just going to do a flat rate turnover percentage", no doubt it would then have been easy to say, for someone to say "We have had exactly the

same percentage turnover, but there are other factors which you should have taken into account", and they would have said exactly the opposite. They would have come along and said "Well that is far too crude, and it does not reflect the circumstances for you in your case".

THE CHAIRMAN: Speaking for myself, Miss Bacon – and I only speak for myself – I find some of these analogies very crude indeed. I think Mr Beard referred in one context to "apples and pears" yesterday. Comparing a criminal penalty and these fines seems to me more like comparing apples and an obscure vegetable. There may be very very broad analogies, but I am not sure how far it gets us. Circumstances alter cases so much that in a corporate manslaughter case this might be the appropriate fine. On the other hand it might be the equivalent of a Health & Safety at Work fine. But the general point is a fair one, is it not, that it has to be proportionate?

MISS BACON: Absolutely. My submission is you cannot assess proportionality by slicing a cake in different ways, using statistics and saying some undertakings were penalised, or by reference to a particular standard, because all that does is tell you there are different elements in the fining methodology and the out-turn result is a result of undertakings having different circumstances, different relevant profits, different relevant ----

THE CHAIRMAN: We may have to set a standard.

MISS BACON: Yes.

THE CHAIRMAN: In this Tribunal. Yes.

MISS BACON: But at the end of the day, in my submission, what you need to do in looking at seriousness is, rather than trying to make comparisons of that nature, is to actually identify what the OFT has done wrong, and part of that involves considering what the OFT should have done instead. This gets back to the point I made a minute ago, that at the end of the day it is not sufficient simply to say "The fine is this or that level". The Tribunal needs to identify the error. And in that respect Mr Robertson said yesterday that at the end of his submissions in Hobson Porter, that it was not his job to tell the OFT what it should have done, how it should have assessed the penalty so as to better reflect what he says was the seriousness of the infringement. But, with respect, identifying what alternative approach the OFT should have adopted is part of the task of an appellant who comes to the Tribunal and says that the OFT's approach to penalty was so badly wrong that the penalty fell outside the range of possible correct outcomes, even having regard to the OFT's margin appreciation. If the appellant cannot say how the OFT should differently have carried out that assessment, then the appeal simply becomes an exercise, as I said, in waving one's

finger in the air and trying to find some different methodology or different outcome that in an individual case might have produced a different result. In my submission that is not an approach that the OFT could have adopted. It had 103 parties to fine. It had to adopt a fair methodology across the board. Neither is that an approach that the Tribunal could adopt. The Tribunal cannot simply say in an individual case, "We think overall that the fine is too high". The Tribunal has to say why it is too high, what the OFT has done wrong and what the OFT should have done better that would be correctly reflected across all of the cases.

So, can I turn, then, to the specific flaws in the penalty calculation. Some of these were dealt with more briefly by Mr Robertson this morning and yesterday, so I will try and reflect that.

The first is the tendered and non-tendered point which incorporates also the MDT point because that is the way that Mr Robertson puts his case. Mr. Robertson puts his case on tendered and non-tendered in two ways. The first is a common argument which runs across all of his appeals, which is that for the purposes of step one, the turnover should only have been a turnover in tendered work and not non-tendered work. But Mr. Robertson's argument in this respect is quite confused because although he does not actually challenge the relevant product market, he seems to be saying that the OFT should have departed from the penalty guidance and based its penalty calculation on a subject-set of that product market, and certainly that is what he was saying yesterday in relation to Hobson & Porter. And the reason for using only a subject-set is that he says only single stage tenders were capable of being the subject of cover pricing. But this misses the point that the reason for using the relevant product market is that the OFT is looking, not at the individual products which were or could have been subject to the infringement, but rather at the products which may reasonably be considered to have been affected by the infringement, in particular as to the prices charged.

Now, I was going to take you to the *Umbro* case which I do not think that Mr Beard cited yesterday. In view of the fact that Mr. Robertson did not make much of this point this morning I think it would be better just to give you the references to that. The *Umbro* case is at Vol.4, tab.50. Just to explain what happened there, that was a case concerning the price fixing of shirts, which I am sure everyone recalls. And the issue was whether the relevant market for penalty purposes was just the market for adult shirts or whether it was the market for all replica kit including socks and shorts as well as junior and infant kit. The Tribunal went on to find that the OFT was entitled to take account of not only a relevant defined product market, but also neighbouring product markets where they could be said to have

been affected by the infringement. The relevant paragraph references are paras111 and 113-116, and the Tribunal ultimately found that the definition of the relevant market properly included all replica kit for the purpose of penalty, and in *Argos*, that was a combined appeal from the replica kit case -----

THE CHAIRMAN: I can help you to this extent, Miss Bacon, that reflecting on yesterday's hearings I think that if anyone has an uphill struggle on this point, it is Mr. Robertson.

MISS BACON: I am very grateful.

THE CHAIRMAN: Not the OFT. On this point.

MISS BACON: On this point.

THE CHAIRMAN: It does not mean we have reached a conclusion on it.

MISS BACON: I am very grateful. Sir, I will not say anything more about that. The other way that Mr. Robertson put his case is not specific to GAJ, and that is the MDT point. Now, I am not going to go into an enormous amount of detail as to why the MDT was correctly applied. Mr. Robertson actually says he is not challenging the imposition of an MDT itself. What he seems to be saying is two things in relation to that.

One is that the MDT should have only been imposed where the fine would otherwise have been nominal, and for the reasons set out in the decision in detail, the MDT was not designed to redress only a nominal fine, it was designed to achieve sufficient deterrence, and it had to be applied across the board. So the whole purpose of the MDT, which Mr. Robertson accepts is a correct methodology in principle, was not about redressing a nominal fine. In that context Mr. Robertson also says, "Well, *Makers* was doing something different, and in *Makers* the fine was not applied to the parent company, the ultimate holding company, in this case it was. The reasons for that, I will not take you to the decision, I will just give you the reference, paras.VI.241-244. The OFT explains why in *Makers* the fine was not imposed on the ultimate holding company. What happened in that case was that *Makers* (sic) was imposed on total turnover of Makers. The fine was not imposed also on the turnover of the holding company, and that is because the holding company Keller, was not an addressee of the decision. So, it was a very simple point.

MR. ROBERTSON: Sir, my submission was that it was not imposed on the total turnover of Makers. It was imposed by reference to the -----

THE CHAIRMAN: On behalf of the turnover -----

MR. ROBERTSON: – car park and the surfacing division turnover -----

THE CHAIRMAN: Yes. I think that was the substantive point.

MISS BACON: Sir, I will come on to that if I may, in particular, on the statistics -----

THE CHAIRMAN: I mean, I think the substantial point, Miss Bacon, that Mr. Robertson is making about the application of the MDT is that by the application of the MDT, it takes the penalty after step three to a very high figure indeed, which has unfairness all over it.

I summarise what he is saying, but it has unfairness all over it because of its proportionality to total turnover and of course relevant turnover.

MISS BACON: In the GAJ case, the substantive answer to that is that actually, the MDT was imposed because the proportion of GAJ's relevant turnover to total turnover was quite small. That was why it had an MDT uplift, and that was one of the points that I made in opening, that it was one of the few cases among Mr. Robertson's clients where there was an MDT because the relevant total turnover was quite disproportionately small, and that was the overall aim of the MDT. But in cases where the relevant total turnover was a small percentage, the MDT was designed to correct that. Now, of course, that means that it was substantial uplift, and that was the reason the MDT was imposed, to ensure deterrence on a fair basis across the board, because otherwise you would have had cases where certain companies had very large fines but because of their relevant turnover being a greater percentage of their total turnover, and other cases had comparatively much smaller fines.

So, one correction was to uplift the second group's fines by relation to the MDT; the other correction was the overall capping mechanism. So, those companies who had very large fines by comparison with their total turnover, the outliers, were capped, and we saw the operation of that yesterday. I do not want to take up too much time on MDT because there are a number of other issues I need to cover today.

The second point of principle is the high turnover and low margins in the construction industry, and from the comments yesterday I perceive that the Tribunal is troubled by this point. Now, the starting point in responding to that is to consider why the OFT adopted a turnover-based approach in the first place. The reasons for this are set out in the decision at para.6.70-77, and I think it would be helpful if the Tribunal could turn those paragraphs up.

THE CHAIRMAN: Page -----?

MISS BACON: In my volume it is p.1643 of the decision. It should be the third volume of the decision if you have got it in three new files. Paragraph 6.70.

THE CHAIRMAN: Yes.

MISS BACON: Rather than reading it out, could I just ask the Tribunal to read from there down to 6.77.

THE CHAIRMAN: We shall do that. (After a pause) Yes.

MISS BACON: The decision addresses in detail why a turnover model rather than a profit model is appropriate. Presumably Mr. Robertson accepts in large part those reasons because he has emphasised, and correctly, in my submission, that he is not asking the Tribunal to substitute profit for turnover as the reference point in the penalty calculation. What he is saying is that he thinks that this Tribunal, in its discretion, perhaps at step one or perhaps at step three, or some other point in the penalty calculation, should have undertaken a further adjustment to take account of low profitability. The difficulty is that carrying out that kind of adjustment is fraught with exactly the same kinds of problems that would beset any attempt to calculate the penalty primarily by reference to profits. So he runs into precisely the same points as are made by the OFT in this section on a crude profit rather than turnover methodology. For example, and these are not exhaustive examples but just a few problems that would be highlighted if you tried to adjust by reference to profits, do you adjust by reference to the individual firm or do you adjust by reference to the profitability of the industry as a whole?

Secondly, if you adjust by reference to the individual firm then what is the reference point in terms of years? Profitability may vary wildly from year to year depending upon particular events in the year. That is something that we will see this afternoon in relation to Francis.

Thirdly, how do you correct the fact that a measure of profitability is very susceptible to manipulation, or even genuine variants for genuine reasons, such as the relative proportions of salaries to dividends in a family undertaking. Whether you take out salary will have an effect on the profitability baseline, if you take out dividends it may not.

Fourthly, what measure of profitability do you use? Do you use pre-tax profits, do you use post-tax profits or something else?

Fifthly, if you do adjust according to individual profitability, are you going to be punishing efficient undertakings which have a relatively higher profit over inefficient undertakings? Do you then create a perverse incentive?

Finally, if you are making an industry wide comparison, how do you make that comparison fairly by reference to the points I have just made about individual profitability. How do you take account of the fact that higher profits in one industry may reflect specific circumstances of the industry, such as higher risk? Mr. Robertson, in saying that there should have been some unspecified adjustment to take account of the low profitability of this particular industry, or his particular client, has not answered any of these questions,

which would have to be answered by the OFT if it were to make an adjustment of this nature.

So I come back to the point that Mr. Robertson and the Tribunal have to identify not only what the OFT has done wrong, but what it could have done better. All of this does not mean that it is absolutely impossible to construct a methodology that would allow an adjustment based on profitability. What it shows is that it would be extremely difficult to do so on a fair basis, and that the OFT was not wrong in its decision in this case and this investigation not to try and construct this very kind of complex methodology in the present case. In this case the OFT considered, and we submit reasonably, that the best way of dealing with claims to low profitability was by an assessment on a case by case basis of financial hardship. Mr. Robertson's submissions on financial hardship in fact highlight why you do need to look at this on a case by case basis in that context, because it is in that context that you can ascertain whether an individual undertaking genuinely is struggling and is struggling on a consistent basis rather than simply showing in its accounts on one year a particularly low profitability margin.

That was what I wanted to say about the high turnover/low margins point.

The next argument of principle is the impact on price point. Mr. Beard took in response to that to the ruling of the General Court in *Archer Daniels Midland* to explain the point that this case, as with the *Degussa* case, which is the other case cited by the appellants, was decided under the old penalty guidelines, which required the Commission to take account of actual impact on the market. The reason why those cases were looking at actual impact was that it was mandated by the old guidelines.

I should say, I have looked in vain for a decision taken under the new guidelines which has been appealed to the court to get some idea of how the court would view this now, and we have not been able to find any. One point I would make is that even in the cases decided effectively under the old guidelines which mandated consideration of impact on price, if it could be measured, the court was very circumspect about the relevant weighting to be given to that. If I can just give you the references in *Degussa*, it is volume 8, tab 99, para.251. The court emphasised that the impact on the market was not a conclusive criterion and that the object of the infringement was more important.

Similarly in the *Archer Daniels Midland* case, the ECJ case, volume 8, tab 112, the relevant paragraphs are paras.72, 73 and 95, all of which emphasise that there is no binding or exhaustive list of relevant criteria in determining the gravity of an infringement and that the profits from the cartel are something that are capable of affecting the gravity assessment,

and para.95 said that the actual impact may be taken into account. So even in the old world, so to speak, the court was very circumspect about the importance to be attached to the actual impact on the market.

In the present case, the OFT have set out in detail in the decision its approach to the analysis of the effects of the infringements and the relevant paragraphs are VI, paras.127 onwards. If you look at that, that was far more detailed reasoning than the reasoning that was approved by the Tribunal in *Apex* as being a sufficient statement of effects. In particular, at VI, 139 to 142, the OFT sets out the specific consequences of cover pricing on the tenderee and competitors, and I can take you to those. Those are essentially at paras.139 to 142 the *Apex* propositions. Nothing in the penalty guidance requires the OFT to go any further in considering the effects of the infringement on the market.

Fourth, is the point about discrimination against SMEs. Again, this was not a point that Mr. Robertson particularly impressed this morning. I do want to respond to one particular point, and that is because this is another of the cases where the simple replication of submissions from one client to another falls down. Mr. Robertson's submission is that in some cases by applying this methodology you will have a very large part of your relevant turnover as a percentage of total turnover. Actually GAJ offers a case. GAJ is a case where the relevant turnover, as compared with total turnover was actually very small, and it therefore required an MDT uplift. So GAJ is a very good example of the fact that this point about the geographic market division is not a point about discrimination against SMEs, it is simply a function of the differences between relevant and total turnover, and there are some small companies that have that difference, and there are some large companies that have that difference too. So the geographic market definition did not work systematically in favour of one side of an undertaking rather than the other.

I should add that, of course, that Mr. Robertson has not specifically challenged the geographic market definition which is set out in detail in the decision.

Last business year: the only point I want to make on that before I get into financial hardship is that Mr. Robertson says that the OFT did not explain in its guidance why it was changing its methodology. That is a fair point. This point was not set out in detail in the guidance and with hindsight it may have been preferable for the OFT to set that out in more detail. So it is a completely fair point to say that this was not explicit in the guidance. That does not change the point that we have made in this case and in many of the others, that this was a legitimate approach for the OFT to adopt, and it does not result in the imposition of a

retroactive penalty. The *Uttley* case is the answer to that point, and I know that Mr. Beard took you to that yesterday afternoon.

Sir, with that, can I get into financial hardship, and I think we need to clear the court.

THE CHAIRMAN: Right. Just on the last point, before we get into financial hardship, the *Uttley* point, we will call it, what is the importance, if any, of the legitimate expectation that a contractor might have that there would not be a change of approach, but that the existing methodology would have applied?

MISS BACON: We would say that there is no such legitimate expectation.

THE CHAIRMAN: Why not?

MISS BACON: The OFT can change its guidance from time to time and can change its approach. The same has been made in the European Court. What an individual contractor may legitimately expect is that the result of changing that guidance will not be to push the penalty above what could possibly, under the old ----

THE CHAIRMAN: That is the *Uttley* point.

MISS BACON: That is the *Uttley* point. The point is that this does not do that. If you get into trying to assess what could have been done under the old guidance, leaving aside the *Uttley* point and, as Mr. Robertson says, trying to look at on what basis the penalty could have been imposed, one gets into the realms of speculation. That does not give you a concrete answer because if the approach to last business year had been different, let us say, under the old guidance a different part of the penalty calculation might equally have been different. That brings us back to my third general point made in opening in that it is not possible to look at an individual error in isolation, but look at the penalty in the round. That is why, in my submission, *Uttley* is the right answer. You look at what could have happened, not what might conceivably under a different methodology have been applied under the old guidance.

THE CHAIRMAN: Thank you. Mr. Prosser?

MR. PROSSER: Could I have a bit of clarification. I am afraid I am going back to the *Makers* point. I did not quite follow your argument. When we look at the decision under 6.72, the opening sentence is:

> "Secondly, a calculation based on relevant turnover reflects the size of the effective market."

In the penalties on GAJ, the MDT applies on the total turnover. We have had the explanation of their turnover, but in *Makers* it does not apply, so we have been told. It is only applied to the Makers' turnover. Can you explain why, in a company like Makers, which is part of a large organisation, you only take the small part of Makers, part of the

whole, whereas in this particular company you now place the MDT on their total turnover, not just the effective market turnover.

MISS BACON: I think I have to come back to you in writing on what actually happened in *Makers*. I would like to take further instructions. It may be that we can respond this afternoon. In relation to why the MDT was applied to total turnover, that was a policy decision taken by the OFT. It was that has been mandated by the European Court in cases such as *Archer Daniels Midland* itself, in cases such as *BASF*. The court approves a methodology where you look, for deterrent purposes, not for step one purposes, at the total scale of the undertaking, because, as the court says, if you only look at the relevant turnover that may have a disproportionately low deterrent where an undertaking does have interests in multiple industries where it is not simply one undertaking but part of a large group.

So the OFT's policy in this case, because it was addressing the decision not only to the individual infringing undertakings, as in *Makers*, but also with respect to the ultimate parent company, there are some issues, particularly in one case, as to whether the parent company should have been involved. Leaving aside that, that is not challenged in GAJ. In this case the OFT was applying across the board the penalty to the infringing company and the ultimate parent company, and its policy was to apply the MDT to the group as a whole in order that the penalty had a sufficient deterrent effect on the group as a whole. But that was the approach adopted in this case.

I am not saying that in every single case the same approach would be warranted. The question is: is that a fair and reasonable approach to adopt? In our submission it is, particularly in circumstances where applying some kind of deterrent uplift to the group as a whole rather than just the individual undertaking has been expressly approved by the European Court.

MR. PROSSER: Even if a company such as GAJ just works in the small regional only that has been chosen, whereas Crest Nicholson, for the sake of example, works in the national market and has only had a proportion.

MISS BACON: It is precisely the point that some undertakings may have a small relevant turnover and GAJ was one of those. The idea is that the penalty should deter and should serve as an effective deterrent to the undertaking as a whole, when the undertaking as a whole has been the subject of a decision and is an addressee of the decision.

THE CHAIRMAN: Right we will go into closed session again now, please. Would everybody who is not a representative of or authorised by one of the parties please leave the court for a few minutes.

(The hearing continued in private)

LATER

THE CHAIRMAN: Yes, carry on.

MR. ROBERTSON: I think there are eight points on which I need to reply – a minute per point!

THE CHAIRMAN: You can have two minutes per point!

MR. ROBERTSON: The first point is Miss Bacon started off by making plain the fact that we were not a leniency applicant and therefore did not get a further reduction for leniency, which I think she infers we could have got. The first we knew about this investigation was when we received the fast track offer letter from the OFT in March 2007. It is exhibited in the Notice of Appeal tab 2 page 4. The decision to make the fast track offer by the OFT was taken at the same time they had decided to close the leniency process. You will see that explained in the decision at paragraphs 2.144-148(o), particularly 148(o). We never had an opportunity to apply for leniency.

Second point: role of the guidance. We set out our submissions on the Tribunal's jurisdiction on our Notice of Appeal at paragraphs 17-21. We have identified what we say the flaws are in the OFT's application of its guidance, why the result it comes up with is so disproportionately high.

We cannot go through the process of saying what the fine would have been for all 103 addressees. We do have to limit ourselves to things within our own knowledge – that is us. That, I should say, is why I submitted at the end of yesterday morning's hearing that it is for the Tribunal to substitute a view, if it comes to the view that the application of the guidance is flawed, having regard to the position of all 25 appellants, or those appellants which it thinks may have success on appeal. That is a task for the Tribunal, not a task for us. We did put together a reasoned case as to what the penalty should be to the OFT, and the OFT so far appears to have been oblivious to that and it was rejected out of hand.

Thirdly, Miss Bacon, and what she kindly referred to as my cut and paste submissions on corporate manslaughter! I bear in mind your observations about the difficulty of comparing apples and any other type of vegetable, but I would draw your attention to the Court of Appeal's observations in the *Patchett* case, authorities bundle volume 2 tab 28 paragraphs 19-20. The Court of Appeal, sentencing for a health and safety offence, did take into account considerations which we say this Tribunal should take into account in relation to GAJ. Yes, a different legislative context, but the same basic point of justice.

Fourthly, tendered as against non tendered turnover. Again, I appreciate your Lordship's observations that I am facing an uphill struggle here, but the point we make is Miss Bacon says we are saying the OFT should depart from its guidance. Our point is the OFT did depart from its guidance to exclude turnover in PFI and Public/Private Partnership construction work. Having departed from its guidance, there is no good reason why it should have also excluded turnover in other types of construction procured by processes which were not and could not be affected by cover pricing.

As I said yesterday morning, if the OFT had taken that single adjustment into account in its guidance, I, in my personal view, do not think any of the appellants would be here, because they would have ended up with overall much lower fines, in the order of about a third to a half of the current level of fines.

In relation to *Umbro*, this is a point that I addressed at a number of oral hearings in the summer of 2008. In *Umbro* the reason why the Court of Appeal said you could take into account turnover, not just in shirts which were affected by price fixing, but also in shorts, socks and goalkeepers' jerseys, was because the price of those pieces of replica kit could be expected to have been higher as a result of the fact that the shirts were higher due to the price fixing. So there was finding of effect. Here, there is no finding of effect.

Fifthly, MDT, the *Makers* case. My learned friend referred to the decision at paragraph 6, 241-244. Sir, there is your answer as to why we only looked at *Makers* and not at Keller Group, its ultimate holding company. The reason they give there is that the decision was addressed only to *Makers*. The point is: why was it not addressed to the Keller Group? On the logic of this case, it would have been addressed to Keller Group. The reason we submit that the OFT did not go after Keller Group in that case was because it was only applying MDT in relation to turnover in the activity affected by the cover pricing in that case, *Car Park Surfacing*, and that was carried out by the *Makers* car park servicing division. There was some car park surfacing work being carried out elsewhere in the Keller Group.

Sixthly, high turnover and low margins. My learned friend said there are a whole lot of problems using profitability as a basis for fines. I repeat once again, we do not say you fine by reference to profitability; you fine by reference to turnover. We have not challenged the guidance. But you have got to use turnover intelligently. In this industry there is evidence from addressee after addressee on the statement of objections that margins are, in the good times, in the region of 1-3 per cent. The OFT regard a minimum fine as being 0.75 per cent of turnover. If your margins are 1 per cent you are going to be getting fines of the level of three quarters of a year's profits. That is astronomical!

Look at *Sainsburys* and *Imperial Tobacco* where the fine was only 5 per cent of pre tax annual profits for very serious infringements. This is not a very serious infringement by GAJ. So you have got to use turnover intelligently; you just cannot take the approach that turnover is turnover is turnover, no matter what industry you are in. You have to have regard to overall level of margins. You do not have to worry about micromanaging looking at the margins of inefficient versus efficient. But you can look at the industry as a whole. Then seventhly, SME. Yes, we say it is a flaw in the approach. It has not done us detriment in this particular case.

Eighthly, last business year. Your Lordship's question to Miss Bacon was; would not someone have a legitimate expectation of being fined on the previous approach? It may be a legitimate expectation, but it is more than that; it is a right. Under section 38 the OFT can only fine having regard to its guidance, it must have regard to its guidance. So part of the change at the end of 2004, the OFT could not lawfully have used the last business year approach; it could only lawfully have used the last business year before date of infringement approach. It is different from EU law. EU law does not have the equivalent of section 38. That is why in *Archer Daniels Midland* the court talks about a legitimate expectation. It had to be run in that way. But here in the UK it is different. Section 38 establishes a right only to be fined by the OFT having regard to its guidance then in force.

That was eight points in nine minutes.

THE CHAIRMAN: You have done very well. Do you want to say anything in addition? You can have another eight minutes if you want them?

MR. ROBERTSON: No, only to thank the Tribunal for the opportunity to put in further submissions in writing to deal with the additional point that we discussed in private.

THE CHAIRMAN: Thank you both very much for your clarity and promptitude. We will adjourn and hear the other case at just after 2 o'clock. We will rise promptly at the latest at half past four.

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