IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1137/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

HOBSON AND PORTER LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Watson Burton LLP) appeared on behalf of Hobson and Porter Limited

Mr. Daniel Beard and Mr. Philip Woolfe and Miss Kelyn Bacon (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Yes, Mr. Robertson.

MR. ROBERTSON: Good morning, sir.

THE CHAIRMAN: Good morning.

MR. ROBERTSON: This is Hobson and Porter's appeal against the penalty imposed on them by the Office of Fair Trading. I appear for the appellant, Hobson and Porter, my learned friends Mr. Daniel Beard and Mr. Philip Wolfe appear for the Office of Fair Trading. I also see in the Tribunal this morning sitting behind them Miss Kelyn Bacon, who is not appearing in either of the appeals this Tribunal is hearing today, but is appearing tomorrow.

THE CHAIRMAN: Miss Bacon is always very welcome. I can see where she is.

MR. ROBERTSON: Sir, if I can first check housekeeping matters. You should have for this appeal one bundle consisting of the Hobson and Porter Notice of Appeal?

THE CHAIRMAN: Yes.

MR. ROBERTSON: You will have the OFT's penalty defence:

THE CHAIRMAN: Yes.

MR. ROBERTSON: You should have the appellant's skeleton argument together with the second witness statement of Mr. Watson?

THE CHAIRMAN: Yes.

MR. ROBERTSON: You have also got the OFT skeleton argument?

THE CHAIRMAN: Yes.

MR. ROBERTSON: And then, finally, and I think this has probably been put at the end of the Notice of Appeal bundle, the third witness statement of Mr. Watson served towards the end of last week.

THE CHAIRMAN: That is TP16, and we have seen these some days ago.

MR. BEARD: I apologise, I was just going to check, does the Tribunal have a full copy of the decision as well?

THE CHAIRMAN: Do we have a full copy of the decision in court. We can have some more copies of the decision brought in. I am afraid I did not bring mine with me.

MR. BEARD: It is a light read and a light carry. It may be that it is not necessary in due course to refer to it, but I just wanted to check, whilst we were doing housekeeping matters.

MR. ROBERTSON: Confidentiality – there are certain matters in the skeleton and second witness statement in particular of Mr. Watson, for which we have made a claim that they be treated as confidential. For the purposes of this hearing, where I will refer to confidential information I can do that by referring the Tribunal to the relevant passage without reading it out, so I will not need to apply to have any part of the hearing held in private.

Sir, in accordance with the Tribunal's indication as to timing, I would hope to be less than 50 minutes on my feet.

THE CHAIRMAN: You can take it, Mr. Robertson and Mr. Beard, that we have read all the basic documents in this case and in the other cases we are hearing, and there are many common issues, though not entirely common issues, between the cases. So we are familiar with the background, and it is a matter for you which issues you concentrate on.

MR. ROBERTSON: Thank you, sir. In my oral submissions I am going to deal with my submissions under five headings, and this mirrors the line that we have taken throughout. So that is impact of the penalty on Hobson and Porter, the Tribunal's jurisdiction, thirdly, the seriousness of the infringements, fourthly, what we say are the flaws in the OFT's penalty calculation, and fifthly, mitigating factors that we invite the Tribunal to take into account.

Sir, to deal first with the impact of the penalty. The penalty imposed on Hobson and Porter is £574,607. That, on any analysis, is a highly severe penalty. It represents some 83 per cent of Hobson and Porter's pre-tax annual profit for 2008, that being the year taken by the OFT as the basis for the penalty calculation; or put in another way, 2.1 per cent of Hobson and Porter's total turnover. That, as Mr. Watson set out in his first statement annexed to the notice of appeal at para.24, 2.1 per cent of total turnover is well above the average final penalty imposed in the decision on all the addressees of the decision, which worked out 0.6 per cent.

THE CHAIRMAN: So their net pre-tax profit runs at something under 3 per cent?

MR. ROBERTSON: That is correct. In fact, I will come on to the level of profit and margins when I address what we say are the flaws in the OFT's penalty calculation.

So 83 per cent of pre-tax annual profit, and of course penalties are not deductible from tax, so it actually comes out at post-tax annual profit, we have pointed out that in other decisions by the OFT, and there are not that many fining decisions adopted by the OFT, but in a couple of recent cases, the milk and cheese case in which Sainsbury agreed early resolution, the actual final decision has not been yet adopted, and more recently in the tobacco case where the decision has been adopted but the decision itself has not been published, we have only got a press release to go on, but in those cases the penalties that were agreed to be paid by Sainsburys and imposed upon Imperial Tobacco, now appealed to this Tribunal, those penalties were at the level of 5 per cent pre-tax annual profit.

Those cases involved fixing minimum resale prices at their heart, so trying to stop discounting in the tobacco case and in the *Sainsbury* case imposing price increases, as it

appears from the press release in that case, in relation to milk and cheese. We say they are much more serious infringements than the current case. In any event, the penalty as a percentage of pre-tax annual profit is tiny compared to the penalty as a percentage. Now the OFT just simply have not responded to this in their skeleton argument. At paragraph 26 of their skeleton argument they just say there are different cases on different facts. Yes, but it is the same fining guidelines that were used in those cases which form the basis of the calculation in this case. So it is quite striking that the OFT is unwilling and unable to explain why there should be such a disparity in treatment between the two cases.

Even within the decision itself, the OFT's case is; we have adopted a methodology that was intended to be fair as between all the addressees, but when you look at what has resulted, the results are very strikingly unfair.

Sir, can I take you to our Notice of Appeal paragraph 72.

THE CHAIRMAN: Bear with us for a moment because we all tend not to bring our papers with us, because of the size of the bundle.

MR. ROBERTSON: It is page 17 of the Notice of Appeal. Paragraph 72 we set out our comparison with the penalty imposed on another addressee, Herbert Baggaley, who are not appealing to the Tribunal. The reason why we focused on Herbert Baggaley is they seem to us to be comparable in a number of respects, save for the fact that they were fined on the basis that they had been engaged in compensation payments, thereby justifying a starting point in compensation bonus cases of 7 per cent rather than 5 per cent which was the starting point for our fine.

If you look at the decision, it records a very similar number of infringements between us and Herbert Baggaley – 12 for Herbert Baggaley, 11 for Hobson and Porter. We were both leniency applicants and received the same unit discount of 45 per cent. Herbert Baggaley had a higher total turnover than we did: £31 million as against £27 million, yet Herbert Baggaley the penalty is only one third of our total penalty.

THE CHAIRMAN: They were involved in compensation payments?

MR. ROBERTSON: Exactly. So, as we say there, the less serious intention and behaviour by an undertaking with lower turnover (us) has resulted in a penalty on us which is two times higher. So that is a striking disparity and just illustrates essentially the arbitrary results that you come up on the OFT's fining methodology. That, we say, is illustrative of really why it has gone wrong.

As regards where we are now, because obviously the decision was adopted two years ago, the construction industry has been hard hit by the recession and Hobson and Porter are no

exception to that. We have set out the details of Hobson and Porter's current financial position in Mr. Watson's first statement at paragraphs 14-23. I do not ask you to turn those up. The current financial position is explained in his second witness statement which we served with the skeleton argument in April, so that was five months after his first witness statement. That updates the first witness statement. Again, I refer the Tribunal to that without reading out the details of it. You will see that conditions are pretty bleak. Mr. Watson tells me that as of today Hobson and Porter are now tendering for contracts at negative margins. It is the first time Hobson and Porter have ever done that. They have been doing it in the last six months. Mr. Watson does not mind me saying that in open court, because it is common knowledge in the industry that pretty much most construction firms, certainly of the nature of Hobson and Porter, are having to do that. That means tendering for work – and not necessarily securing it either, because everyone is doing this – at rates which do not enable you to cover your overheads. The reality of the situation is that if you do secure the work, then it is a question of trying to negotiate with sub-contractors to get lower amounts for the sub-contracted work, and also working with clients to try to engineer cost savings into the tendered work, sometimes referred to as "value engineering".

THE CHAIRMAN: Sub-contractors representing what percentage of turnover in round figures for this company?

MR. ROBERTSON: For this company 80 per cent. In the industry generally you see figures between 60 per cent and 80 per cent. So as we have explained in Mr. Watson's statement, the penalty will hit Hobson and Porter's balance sheet hard with the consequential knock-on effect on Hobson and Porter's ability to tender for more substantial projects. That is specifically addressed at paragraph 27 of his first witness statement. That is an adverse effect that simply has not been taken into account by the OFT. If you do not have a strong balance sheet, you are ruled out of the running for the bigger projects. This point about the balance sheet again is dealt with at paragraphs 7 and 8 of Mr. Watson's second statement updating his first statement.

In relation to the financial position that Hobson and Porter finds itself in, the only substantive response that we have had in the OFT's skeleton is a criticism of dividend payments previously made, and that is at para.61 of the OFT's skeleton, and that is the point that is answered in Mr. Watson's third statement exhibiting a letter from Hobson and Porter's accountants and business advisers. They are not the auditors, they are accountants. We say there is no good reason for objecting to dividend payments of that nature.

We feel aggrieved by the level of penalty because throughout this process we have provided the OFT with complete co-operation, we were granted leniency. We have had no option but to appeal because the arbitrary nature of the OFT's penalty calculation methodology has ended up clobbering us with disproportionate and unfair penalty. We have sought to explain in our notice of appeal and skeleton argument the reasons why the OFT's penalty calculation methodology came unstuck, as it were, and came out with such a high penalty for us, and we put before the Tribunal in writing the matters we rely upon in mitigation. You have got the parties', as you have already said, submissions in writing, and it is not the purpose of this hearing to repeat those submissions. I want to concentrate in this hearing on the principal substantive points of difference highlighted by the OFT's skeleton argument for this hearing, which seemed to us to merit further comment. To the extent that I do not comment orally on submissions advanced in writing by the OFT, that is not to be interpreted as any acceptance of them. It is just that simply we think the Tribunal has got the respect of written submissions, and it is over to you.

Moving on to my second heading, the nature of the Tribunal's jurisdiction, this is dealt with in our skeleton argument at paras.7 to 25. I only want to make one short observation. Your jurisdiction is a full appellate jurisdiction. You are not inhibited in exercising that jurisdiction by anything that the OFT has done by way of penalty calculation, and in particular you are not bound to respect any so-called margin of appreciation which the OFT purports to arrogate to itself. It seems to us that actually the OFT is finally to accept that as being correct – that is para.7 of its skeleton argument. That is all I want to say about the Tribunal's jurisdiction.

Moving on to the third topic, the seriousness of the infringement, this is dealt with in our skeleton argument at paras.26 to 39. We wish to emphasise that this is not a case of the most serious type of infringements of competition law. The OFT's skeleton at para.15 refers to the need to impose sufficiently deterrent fines for the most serious infringements of competition law. This is not such a case. The OFT accepts that, because in the decision they set, as their step-on starting point, 5 per cent on the 0 to 10 per cent scale that they have. We did not appeal that. I think in the various appeals that are coming before the Tribunal over the next couple of weeks, I think only a couple of parties have disputed that. We do not, we think that is, in the light of the previous case law of this Tribunal, and in particular the *Makers* case, that was the correct starting point reflecting the degree of seriousness of the infringement.

We do invite the Tribunal to consider the justice of the penalties in comparison with penalties imposed for serious infractions of criminal law, such as corporate manslaughter. It is a point which is run in the *Sol* appeal, and we make those submissions in support of Sol's grounds advanced in their notice of appeal.

At para.18 of their skeleton the OFT attempt to distinguish penalties in criminal cases by arguing that the penalties under competition law are, to use their word, incommensurable with criminal fines. Having looked that up in the dictionary it means "impossible to compare".

They then say of their skeleton argument that those penalties are not line with the regimes. If the penalties in competition law were truly incommensurable they would not be able to make that submission because that is a process of comparison. They are saying they are not in line but they are making the comparison. In practice, criminal courts are asked to impose fines in situations which are comparable with competition law – white collar crime such as offences of insider dealing which similarly distort and disrupt the proper functioning of markets. The whole point about being a sentencing advisory panel and sentencing guidelines council is to ensure, so far as that can be done, a degree of consistency or commensurability in court imposed sanctions. There is no reason why, uniquely, competition law sanctions should be incommensurable and out of line with other sanctions.

The OFT say at para.18 that there is justification for having a, as they say, unique system for competition law which is that it is all about imposing penalties for economic harm. Fine, but in reality there has been no finding of any effect resulting from the infringing behaviour in our case or in the vast majority of appeals coming before the Tribunal.

As we have set out in our written pleadings, cover pricing, although accepted to be an infringement of the Act meriting a 5 per cent starting point on the 0 to 10 per cent scale. It is much less serious than corporate manslaughter or breaches of health and safety legislation resulting in death or serious injury. The level of fine that we have got in this case might be appropriate for a corporate manslaughter case, but we say that is at least twice as serious as what we have actually done.

THE CHAIRMAN: Nobody has ever thought that corporate manslaughter was an acceptable practice in an industry, have they?

MR. ROBERTSON: No, I do not think anyone has ever set out to instruct people how to do it in textbooks or at lectures at night school.

THE CHAIRMAN: Unattractive as cover pricing is and how one looks at it with hindsight, I understand that lectures have been given about it and indeed textbooks written about it.

MR. ROBERTSON: Yes, the first textbook we have turned up – it is not really a textbook, it was a series of articles in the Architects' Journal published in the 1920s and then collected under the title "The Honeywood File", published in 1929, and it seems to have been an accepted practice then because the author instructs people, "This is cover pricing, this is what haps". So it really has gone on from time immemorial. The position appears to be that it was much more prevalent in the past. Once you get to the 1990s it was becoming less prevalent, and, as we have set out in our written case, one of the reasons for it becoming less "fashionable" – I do not know if "fashionable" is the right word – was that there was a move to more negotiated work being appointed under framework agreements. It was not simple stage tendered work and therefore there was no cover pricing.

Sir, we are now back to, overall, 20 of the addressees of the statement of objections the OFT sent out. It sent out 112 SOs, or the SO to 112 companies. I have had numerous clients tell me that they were "taught it at the tech", people doing basically surveying courses and evening courses. In one of the cases, and the appeal will come before another panel early next month, the evidence taken by the OFT on a so-called dawn raid included lecture notes which are printed on methods of procurement, and then in manuscript someone has added – and they were obviously just taken down at lectures – number 4, "It is not on a printed sheet, but you need to know about this anyway, number 4, cover pricing", and then instructing people how to do it. That is how prevalent it was.

Sir, that is all I wanted to say about seriousness of the infringement. As with all of these topics, it is well covered in the written pleadings.

Fourthly, the flaws in the OFT's penalty calculation, and this is the bulk of our skeleton argument, paras.40 to 157. The OFT essentially seeks to defend their penalty calculation methodology as being the only way in which they could have come with a fair outcome giving equality of treatment amongst the large number of companies caught up in this investigation. When I say a "large number", I have mentioned the figure of 112 addressees, the statement of objections, ultimately 103 addressees of the decision. Of course, we want to make it perfectly clear that the line was only drawn there. The OFT could have gone on and on and on with its investigation because the practice was endemic. It was not an epidemic, but it was endemic. The OFT stopped where they stopped because to go any further would have been unmanageable. That is understood but we do think it is rather unfair to be forced to carry the can for a practice which was industry wide.

When you look at their methodology, they have obviously set out to try to be fair but the end result is not, as the *Baggaley* example that I have already taken you to demonstrates vividly.

We have explained in our written pleadings why the methodology was flawed.

The following points are really in response to what the OFT said in their skeleton. Firstly, the tendered against non-tendered work: as I have just mentioned, cover pricing could only affect single stage tenders. It could not affect bilateral negotiations, negotiated work, it could not affect work awarded under framework agreements. The OFT say, "Look, you have not challenged our market definition". They say that at para.23 of their skeleton. That is a misleading way of attempting to restate our case. We could not have been clearer in stating throughout in response to the SO and then in our appeal that cover pricing could only affect single stage tendered construction work. The OFT identified in their decision six examples, they said, where cover pricing took place outside single stage tendered work, but, as we have in our notice of appeal you look at each of those six examples, in fact they are genuinely single stage tenders.

The point where we take issue with the OFT is that the OFT has excluded turnover from certain types of construction work based upon the type of procurement, namely PFI, private finance initiative, and other public private partnerships. They say we have excluded that turnover from the basis on which we do the penalty calculation. PFI and Public Private Partnerships, yes, they are large scale construction procurement methodologies, but the things they are procuring: schools, hospitals, are just the sorts of way in which they are also awarded under single stage tenders. So the OFT's made a distinction based upon certain types of procurement, and we say if the same logic should apply to exclude turnover it could not have been affected by cover pricing. So the OFT should have asked us only to provide turnover in construction single stage tenders.

I have to say, overall, if the OFT had accepted that submission, it would have had the effect, we think in general terms, of reducing the penalty by half to two-thirds across all appellants as far as we can see, based upon our knowledge of the industry.

THE CHAIRMAN: Can I ask, the contracts exercise can be done more simply in other things, can it not? For example, by taking a lower percentage of turnover?

MR. ROBERTSON: There are a number of ways of skinning this cat, yes.

THE CHAIRMAN: Exactly the phrase that is going through my mind!

MR. ROBERTSON: Yes, but if they had done it this way, if they had accepted this argument I do not think we would be here and I suspect a large number of other appellants would not be here.

The second point is, if I turn over, low margins in the construction industry. Construction is indisputably high turnover/low or even negative margin work. At paragraph 25 of our skeleton, again the OFT refuse to engage with this point. They refer to the low margins in this industry as not being exceptional. That is not correct. These are, on any analysis, very low margins indeed, compared to *Tobacco* and compared to *Sainsbury*. They obviously enjoy much larger margins. I know the OFT at the moment is carrying out a Competition Act investigation into supermarkets, and suppliers of certain drugs to supermarkets, and I know from that (and I know from evidence my clients have put in) that the margins the supermarkets enjoy are ten times larger than the margins we were enjoying in the good times.

We say that the failure to appreciate that this is high turnover but low margin, and just simply to apply the standard fining guidelines methodology means that you end up with results which are disproportionately severe. We are not a voice in the wilderness on this. This is precisely the objection that Sir Jeremy Lever made to turnover as a basis for penalty calculation in his article "Just Desserts" [2008] Company. Law 123 which we cited to the Tribunal.

The OFT say there is no justification for departing from a turnover-based approach to penalty calculation. That is not our submission. We have not invited the OFT or the Tribunal to depart from the turnover basis, but you have got to understand how turnover operates in this industry and its relationship to margin in this industry.

The third flaw in the penalty calculation, we say, is they did not take account of the fact that cover pricing has not been found in the vast majority of cases to have any effect on price. The OFT say in paragraph 28 of their skeleton argument that effect is not relevant to penalty calculation because this is an infringement by object. So cover pricing has as its object the prevention, restriction or distortion of competition; we do not need to go on and make any finding as to effect. Correct when it comes to establishing infringement. We do not dispute that the OFT was entitled to find that this was an object infringement. But incorrect when it comes to penalty calculation.

The OFT refer, in their skeleton at paragraph 28, in a footnote to the Commission's horizontal calibration guidelines as a justification for their approach. For your note, that is in the OFT's bundle volume 12 tab 168. I do not ask you to turn it up now. Quite simply,

the paragraphs referred to have got nothing to do with penalty calculation; they merely reflect the test for finding infringement by object rather than effect. The same goes for the OFT's footnote reference also here as a justification for ignoring the fact or lack of it to the GlaxoSmithKline case (paragraph 55 of the judgment in that case). Again, only for your note, that is the Authorities bundle volume 8 tab 117.

Basically, that is a case about what is necessary to establish infringement; it has got nothing to do with whether a fact is relevant to establishing a correct level of a fine or a penalty. We have referred in our Notice of Appeal to the case of *Archer Daniels Midland v. Commission* [2006] ECR II-3225 to which the OFT has not actually responded substantively. More recently the *T Mobile* case which is authorities bundle 8 tab 115 paragraph 31. That makes it clear that effect is relevant to penalty calculation. I will just read out a quote from paragraph 31. I do not think there is a need to get the authority. The passage we rely upon is a Court of Justices statement that:

> "In order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages."

May I move on to the next two flaws that we identify: the multiple penalties and arbitrary choice of infringements. The OFT dismiss our submissions at paragraph 34 of their skeleton argument as being thin, but they have not made a substantive response to our arguments. The OFT simply say they have to make a choice of which infringements to find against us and as to the number of infringements to find against us. We were a leniency applicant and we provided evidence of 11 infringements.

As to the number of infringements, why should we receive three penalties for three infringements when other addressees of the decision have many more than the 11 infringements in respect of which we applied for and were granted leniency? To take a comparison, and it is a point which is going to come up in an appeal not to your panel but to the President's penal in GMI (which is the case being heard on 12th and 13th July – it is one of the appeals against liability as well as against penalty), in that case the evidence that is before that Tribunal and will be addressed in the oral hearing concerns a company that was

found by the OFT to have taken a cover from the appellant GMI. That company is a company called Irwins. The evidence that is before that Tribunal is that Irwins had taken cover on 130 occasions over a seven year period up to the date when Irwins then applied for leniency.

We say we have provided evidence of 11 infringements; Irwins provided evidence of 130 infringements, over the same seven year period, yet we both got the maximum three infringement penalty. If the one to three scale had any sense, it would have been for the OFT to look at companies, perhaps, that engaged in cover pricing sporadically or occasionally; those who did it on a regular basis; those who did I consistently.

THE CHAIRMAN: I think you said Irwins, GMI?

MR. ROBERTSON: Yes, it is the first of the two infringements, infringement 14, that is being appealed against in that case. The evidence that the Tribunal will actually see is a document that was prepared by Irwins as part of its leniency application, the occasions on which it took over, and was based upon the original document which will be before the Tribunal in that case.

The point we are making is for various reasons this is used by a number of other companies such as *Thomas Barrowman* where the evidence before the OFT is of large scale infringing activities, tens, even hundreds, of covers being taken or given, but the top of the scale is three infringements. We committed 11. That is nowhere near the same scale of infringement as some of the other addressees, yet we receive a three penalty fine.

THE CHAIRMAN: They, of course, receive no deduction for leniency under stage 5, do they?

MR. ROBERTSON: Irwins were a leniency applicant who were granted leniency. They volunteered the tender register which shows 130. So it was 130 out of something like 450 invitations to tender being received over that period.

THE CHAIRMAN: So how do you say that the OFT should reflect this difference?

MR. ROBERTSON: We object to the three penalties. We say that it is basically arbitrary. You could have seen a sense in the OFT distinguishing between different levels of infringing activity and choosing three infringements for those who were consistent, regular infringers. If that was a one to three scale, we are 11 over a seven year period, we think we are down at the single penalty level. We just picked a choice of infringements. As we set out in writing, there was no need to have multiple penalties to punish and deter. You only need a single penalty anyway.

The other objection we have got to the choice of infringements, the reason why we say that is arbitrary, we have provided evidence of 11 and we were fined on the three most recent.

That was the basis on which the OFT selected the infringements which we admitted to as a basis for fines. Unfortunately, two of those three were infringements in the education sector where Hobson and Porter's turnover rose from just over 9 per cent of its total turnover in 2000 to 62 per cent of its total turnover in 2008, the year on which the OFT based its fines. The infringements in question were committed in 2005. The evidence pursuant to this was given by Mr. Watson in the oral hearing before the OFT, and you will find the relevant passage in the Notice of Appeal at tab 2 page 162. If the OFT had fined on the basis of turnover in the year of infringement, not last business year, and I am going to come to that in a moment, education only accounted for less than 30 per cent of our total turnover. You can see that figure in the Notice of Appeal, tab 2, p.146.

We say it is just simply a matter of chance that there is such a high starting figure for turnover adopted by the OFT. It results from the fact that two of the three most recent infringements took place in the education sector, and our turnover had been rising in the first decade of this century and was almost two-thirds of our total turnover in 2008 which just happened to be the year that the OFT based its penalty calculation on, because it did not adopt a final decision until the year 2009.

Moreover, most of the turnover in education, in fact, was derived from contracts awarded under other procedures other than single stage tenders. Most of our education turnover was not actually derived from the construction procured under the procedure that cover pricing affected, and you will see the reference to that is explained by Mr. Watson in his first statement which is at tab 3 of the notice of appeal, and that is at para.12(f).

Discrimination against small and medium sized firms: here the basis of our objection is that the OFT divided the country, by which I mean England, into nine administrative regions for the basis of penalty calculation. One region, the south-west, escaped entirely. They stopped before they got down to the south-west. They divided the country into nine. All of our turnover comes from the area in which we operate. We are based in Hull. Yorkshire and Humberside was one of the administrative regions, so all of our turnover comes from Yorkshire and Humberside.

The starting of the penalty calculation was 5 per cent of the relevant product and geographic turnover. That was, for us, 5 per cent of all our relevant product turnover, because we did not derive turnover anywhere else in the country.

By contrast, a national firm, one of the large major contractors, would earn its turnover in each of the nine administrative regions into which the OFT had divided up England. The OFT say, "We use the minimum deterrents threshold, the MDT, in an attempt to even things

up". The minimum deterrents threshold only captured 0.75 per cent of total turnover. In our case, the penalty was based on 5 per cent of 62 per cent of our total turnover, 62 per cent being the proportion accounted for by education. So the penalty came in at 3.1 per cent of total turnover. We received two penalties in education, so that is actually 6.2 per cent of total turnover, not 0.75 per cent, which would have been the MDT for a national firm.

So we say that what the OFT has done by dividing the country up into administrative regions is to introduce a bias against small and medium sized firms, such as ourselves, in breach of the principle of equal treatment.

Moving on, discrimination by comparison with undertakings involved in compensation payments. I have already covered this point with *Herbert Baggaley*.

Director involvement: again, this was covered in writing. The OFT assert that they are entitled to impose a 5 per cent uplift in penalty calculation because of the involvement of directors. Our case is that for the smaller companies there is a greater ----

THE CHAIRMAN: They are run the directors, big firms are run by the managers, what is the difference – that is your real point, is it not?

MR. ROBERTSON: Yes.

THE CHAIRMAN: I think we understand that point.

MR. ROBERTSON: Use of last business year turnover: as far as anything in this case leads us to smile, para.43 of the OFT's skeleton, this objection is based on undisguised self-interest. We will hold our hands up to that. That is why we are here. They say, "There will be winners and losers, if we reverted to our former practice of taking the year of infringement as the basis for penalty calculation not last business year". Winners and losers, but 16 out of the 25 appellants appearing before this Tribunal argue for a change of basis. The problem is that the last business year, 2008, coincided with the peak of what turns out to have been a construction boom, particularly in the public sector, and, yes, reversion to year of infringement would inevitably lead to lower overall penalties. As I say, I have acted for 20 companies during the course of this investigation and I have not seen anyone whose turnover was declining. There was a great growth in turnover in the first decade up to 2008. Northern Rock happened at the end of 2007 and we know where we are now.

The OFT say at para.44 of their skeleton, "Look, if we had done this, there would be practical difficulties in obtaining historic turnover figures". There is no basis for that assertion because the OFT actually asked for and was supplied with historic turnover figures going back to 2000 during the administrative procedure, and you will find the request, which was a standard request, sent to all addressees of the statement of objections.

For us it is exhibited at tab 2 of the notice of appeal, pp.38 to 39, and the figures that we have supplied are at tab 2, p.146.

The OFT undoubtedly had a discretion to use its former approach as the basis for penalty calculation, and it seems to us that the fact that they requested the figures, it would appear that they were considering exercising that discretion. We say that the length of the investigation would have merited it because it was a long time between the opening of the investigation originally back in 2004 and the adoption of the decision, because at the time the decision came to be adopted the construction boom had obviously just peaked and we were plainly entering into recession.

One final point on the OFT's change of basis in 2004: I would invite the Tribunal to look at the OFT's consultation on the change of basis. They issued a consultation document in April 2004. It is in the authorities bundle, tab 11, p.134, and there is not a single reference in that document to any reason for the change in basis at step one, still less is there is any sort of big red hand saying, "Watch out folks, things are going to change potentially quite dramatically".

Our final point on flaws in the penalty calculation is in relation to financial hardship. I am not going to go into financial hardship in any detail, it has been set out in writing and I have referred you to the witness evidence that deals with that.

I do want to be clear: if this appeal were to fail and the fine were to be upheld at its present level, Hobson and Porter can pay the penalty. We do not risk going out of business. That is really thanks principally to the prudent way in which the shareholders have built up the business over the years. We do say that as things currently stand, we are in exceptional circumstances. We referred in our notice of appeal to the *Northern Ireland Livestock Auctioneers Association* case, a decision of the OFT in 2003, where the OFT found that the Association had adopted essentially a price increase, had announced it publicly and that was a breach of the Chapter I prohibition. No penalty was imposed, firstly, because it had been announced publicly; and secondly, because that industry was facing difficulties as a consequence of, first of all, the BSE issue in the 1990 and then the 2001 foot and mouth disease outbreak.

We say that the financial crash and the way in which the bottom has dropped out of the construction market are at the very least comparable to the BSE and foot and mouth difficulties which justified no fine in the *Northern Irish* case. We are not arguing for no fine here, but we do think it is a relevant factor to take into account and it is comparable.

Finally, on financial hardship, at para.58 of their skeleton the OFT argue in their skeleton that the Tribunal should be slow to permit any further financial hardship adjustment by reference to material that was not provided to the OFT prior to the decision. That cannot be right. First of all, there was only the briefest of references to financial hardship in the statement of objections; and secondly, this is a full appeal. The Tribunal has to consider matters as they currently are here in 2010, not as they were in the period running up to the adoption of the decision. In point of fact, the OFT only explained how it had approached financial hardship in its defence, so prior to its defence we did not know on what basis the OFT were considering financial hardship submissions.

Finally, submissions as to the appropriate level of the penalty: this is well set out in writing at paras.158 to 195 of our skeleton argument. The only additional point to make is that we are surprised at para.13 of the OFT's skeleton complaining that Hobson and Porter has failed to set out what an appropriate level of penalty should be. It seems to us a somewhat bizarre reversal of roles. That is for the Tribunal to decide having regard to all relevant circumstances, not only in this appeal but of course in the other appeals, because if the Tribunal does decide that it is going to revisit the penalties imposed by the OFT then the Tribunal itself will have to ensure that it does so in a way which does not operate in breach of the principle of equal treatment as between appellants.

The only other development that we would wish to draw to the Tribunal's attention is the publication of the European Economics Report at the beginning of June. That confirms our view that education of the construction industry was the way forward here for the OFT, not draconian penalties. It makes it perfectly clear that there is no need for a high penalty to ensure a deterrent, because one thing is sure, the industry plainly is well apprised of the illegality of cover pricing.

Sir, unless I can assist you further those are our oral submissions at this stage.

THE CHAIRMAN: That is most helpful, thank you. Thank you very much, Mr. Robertson. I think the timetable provided for a short break and it may be helpful to you to have a five or ten break at this stage. I doubt if we are going to use up 20 minutes of Tribunal questions at the end because the issues are becoming clear, so perhaps we will break until just before 11.40?

MR. BEARD: Certainly, sir. There is a table in the decision to which I will want to refer so if, during the course of the ten minute break, it was possible to equip the Tribunal with, effectively, the last section of the decision, but you may want all of it for reference.

THE CHAIRMAN: Perhaps you would have a word with Mr. Lusty.

(Short break)

THE CHAIRMAN: Yes, Mr. Beard.

MR. BEARD: Mr. Chairman, members of the Tribunal, the Tribunal has of course seen all of the written submissions in relation to this case, and so in the time available I will not try to cover all of the matters raised in the level of detail dealt with in the pleadings. However, it may be of assistance that we have prepared a navigation table to plot a way through the thicket of paper. (Handed)

THE CHAIRMAN: Thank you very much.

MR. BEARD: It may be of use in due course. It essentially extends what was the table at the back of the consolidated defence, which indicated which parts of the consolidated defence pleaded to which bits of the Notice of Appeal in this case. It has been extended to cover the appellant's skeleton and then the OFT's skeleton.

Turning to Hobson and Porter's appeal, I will try to deal briefly with a number of the principal arguments raised, but before doing so, it is perhaps appropriate in this first case to highlight briefly three themes which are relevant to a number of aspects of this challenge.

The first is the contention that the guidance that is used by the OFT in relation to the setting of penalties can effectively be set to one side and the Tribunal can start afresh, unconstrained by it. If that is the position being contended for, it is simply the wrong approach and not one that this Tribunal has ever adopted.

Of course we accept that this is an appeal on the merits, but you do not simply ignore guidance, which is required to be promulgated by statute, to which the OFT is required to have regard. It has been consulted upon and approved by the Secretary of State. But as noted in the *Achilles Paper Group* case (for your notes that in volume 4 tab 53 and is quoted at paragraph 5 of our skeleton) the Tribunal scrutinises the way in which the guidance is applied by the OFT. If it is unlawful, the Tribunal can say so, but if not, then the Tribunal should, as it has said, afford the OFT a margin of appreciation when applying it. The Guidance is not a mathematical formula; it is a set of principles.

Trying to set this out in a concrete example, the Tribunal can, of course, look at the way in which the step 1 calculation is undertaken and say that the percentage applied to relevant turnover is, in its view, too high or too low, given the nature of the infringement. It is not limited to saying: is it rational, as would occur in a judicial review challenge. But when it comes to decide that question: whether or not the OFT got that percentage of relevant turnover right or wrong, it must give the OFT some latitude. That is what the margin of appreciation is all about here. You cannot just pretend that that guidance does not exist, and

the lawfulness of the guidance is nowhere challenged on this appeal or indeed, I think, in any of the appeals.

Second point: fairness and justice. The appellant makes much of the injustice of the penalty, but there is a great vagueness as to how justice is to be assessed in a case such as this. It seems to be, in the light of this morning's submissions and the skeleton approach, that one picks out selected comparators and says: we were soft on those, that makes it unfair. That is not the right approach. The OFT's approach is to adopt fair and rational principles for the assessment of penalties which take into account both the seriousness of the infringement and deterrents, both specific deterrents and general deterrents. It has adopted a sensible structure through its guidance, and a fair process for applying that guidance in reaching penalty decisions. If you adopt fair principles and a fair procedure, there is no good reason to think that the outcome itself is unfair or unjust.

Of course, part of the assessment to ensure that the relevant specific factors are taken into account, but not all the factors raised make a party special. In this context it is well worth remembering what the principle of non-discrimination, the principle of equality, actually requires. Like cases must be treated alike, unless there is objective justification for doing otherwise. Similarly, different cases must be treated differently unless there is objective justification for doing otherwise. Actually, what is being done in a number of these comparisons that are being highlighted is a game of comparing apples with pears. For example, in the Herbert Baggaley case, the reason why we get a different outturn penalty (and this can be seen at page 1770 of the decision, the table for Herbert Baggaley together with its ultimate parent and how the penalty process is set out in summary) is that in relation to Herbert Baggaley there was a very different relevant turnover that was considered at step 1. The OFT says that is a relevant difference. The two cases are therefore not alike in that regard. So the fact that they turn out with different end penalties is in no way a suggestion of unlawful discrimination, a lack of equality. The OFT has applied the proper principles and it has recognised relevant differences.

This, perhaps, comes to deal with a related theme: the contention that has been repeatedly made, particularly in written pleadings, that the approach of the OFT is mechanistic. The OFT understands this criticism to be saying that in its application of the guidance the OFT has not taken sufficient account of the specific circumstances of the particular case in question. That is just wrong.

There are effectively two types of specific circumstances which the appellant is relying on. Firstly, there are those which make all the cases in the decision, all the cover pricing cases,

different from other sorts of cases and therefore warrant special, particular treatment under the guidance. Then there are those aspects, circumstances, which particular appellants suggest are features of their case which distinguish them from other apparently similar cases dealt with under the decision.

Hobson and Porter mainly raise the former type of concern. So, for example, the suggestion that the penalty should be set by reference to turnover only in respect of tendered work, i.e. not non-tendered work, is not a matter which is specific to Hobson and Porter; that is a matter that, if it were a relevant difference, would apply across the board to construction companies.

The second category is actually more difficult to identify because, for example, if one talks about financial hardship submissions (which are obviously specific to a particular appellant) even in relation to those sorts of issues there is a significant element of the argument which is not just about Hobson and Porter alone, but the way in which the OFT approaches the assessment of the particular facts that are put before it by Hobson and Porter. That is something I will touch on a little more later in briefly dealing with financial hardship matters.

The point is that the OFT has made decisions about what sort of features of construction cover pricing make particular incidents special or relevantly different. Those decisions are applicable to all of the cases in question. Indeed, if the OFT were to have applied one standard to one group of cases and another to another, it would be castigated for acting unfairly, for discriminating. So when it comes to considering things like an adjustment for non-tendered work, the OFT has taken a decision to reject that approach. But the argument is the same for all cases, and so if rejected once it must be rejected for all. That is not mechanistic; that is taking a decision and applying it consistently across similar cases.

Of course, Hobson and Porter does not like that decision and many of the other decisions that the office has taken in relation to identifying what is relevantly comparable and what is relevantly different, but that disagreement does not suggest that there has been a breach of the principle of equal treatment.

That takes me to a third point, the partiality of the appeal. As Mr. Robertson rightly said, nothing less should be expected of an appellant but that they are partial in the way that they approach an appeal. The appellant and his representatives are here to fight the appellant's corner, as hard as possible, without fear or favour. But it is also without consideration of why or what the ramifications. That is a flaw in this and many other appeals. In reaching its decision, which covers the infringements in a number of cases – 103 cases – the Tribunal

must recognise that the appellants represent only part of the picture. Their attempts to maintain that particular decisions in relation to them were wrong and unfair must be considered against the wider backdrop of the consistent decision making by the OFT. The OFT had to consider how to impose appropriate penalties on all of these parties in accordance with the guidance. Obviously, discretion had to be used in applying the guidance. As I say, it is not a mathematical formula. But the decisions it took did have to be applied consistently. That means that where a particular factor is relied upon by an appellant in his interest as potentially reducing his penalty, it has to be borne in mind that the OFT would need to have been able to consider whether it should raise or lower other penalties on the basis of that factor.

With those observations in mind, I turn to the particular grounds of appeal that have been set out. Firstly, some general points are made about the seriousness of cover bidding. In common with a number of appellants, Hobson and Porter suggest this is an endemic approach that has been adopted in the construction industry. Initially, they seemed to suggest that that was borne out by the Europe Economic Report. That does not appear to be the position now. In this connection, however, when assessing the seriousness of the infringement, it is well worth recalling the judgment of the Tribunal in *Apex*. For your notes that is at volume 3 tab 46, but I would take you to our Defence, if I may, at paragraph 41 onwards. It may well be separate from other documents. I have got a copy here and I have purloined from those behind me two further copies.

THE CHAIRMAN: Excellent.

MR. BEARD: I cannot promise that there are no markings on them, but please do ignore them. (Handed) It is paragraph 41. It is just a matter of putting this in context slightly. This is to do with starting points and seriousness. It is noted that the same approach has been adopted in a number of roofing and construction cases, and that is further noted in 42. Indeed, these were the subject of appeals in *Apex* and *Makers*. Then I would direct the Tribunal's attention to the part of 43 which sets out the judgment of the Tribunal in *Apex* at 208 through to 213, and on through paragraphs 44 and 45.

THE CHAIRMAN: I do not understand the 5 per cent starting point to be an issue between the parties. Mr. Robertson said that.

MR. BEARD: No, I will come on to deal with that further. It is the nature of cover pricing that is the point that I wish to draw from this authority. It is effectively summarised in paragraph 47:

"As noted by the Tribunal in *Apex*, cover pricing is a serious infringement of competition law whose object is to prevent, restrict or distort competition. It involves a process by which undertakings that are supposed to be competitors of one another decide to share confidential information as to the price which one of them will bid for a particular contract. That enables the recipient of the information to submit a bid so as to appear to be submitting a bona fide response, whilst ensuring that the undertaking which has provided the information does not face genuine competition from the recipient in the relevant contract."

If one turns on then to paragraphs 50 and 51, starting halfway down 50:

"As a result, the recipient is deceived in relation to the number of bona fide independent bids he has received from rival firms competing for work. The bids therefore convey a false impression of both the degree of competition for the work and of the willingness and ability of one or more particular undertakings to bid for it, this being relevant to credibility. Credibility is in turn relevant to the likelihood both that clients will seek additional tenders in respect of the same project, or request bids from the same bidders for future projects. (51) It is no answer to these points for an appellant to say that the relevant recipient was not interested in winning the contract but was simply seeking to protect its own credibility as a tenderer. A bidder has no legitimate interest in protecting a rival undertaking's bidding credibility. Further, to the extent that bidding credibility is an important quality for undertakings in the construction industry, the protection of such credibility is properly to be regarded as an aspect of competition between such undertakings and therefore is a factor which constrains their behaviour. Reducing that aspect of competition by sharing information therefore represents a serious infringement and one that has an anti-competitive object."

THE CHAIRMAN: Are we to treat the building industry and the roofing industry as being really the same industry for this purpose, because there is evidence before us, not just in this case, that cover pricing, however undesirable a practice, was a practice (maybe "endemic" exaggerates it) that was fairly common in the building industry. Was that the case in *Apex* as well?

MR. BEARD: Yes. The position has been maintained by construction companies that cover pricing has gone on.

THE CHAIRMAN: Just pause for a moment. I am concerned about this, because first of all, the 5 per cent starting point is not in issue, so I am not quite sure for the moment where this is getting us. Secondly, I think it is quite important to be certain that in the roofing industry the same point was being made. Certainly in the parts that you quoted in your defence there is no reference to cover pricing being endemic, as it were, in the roofing industry. I think Mr. Robertson wants to come in.

MR. ROBERTSON: I acted for one of the leniency parties in a West Midlands case, and that certainly was not my client's evidence to the OFT that the practice was endemic, or widespread, or common.

MR. BEARD: There are two points to be made. First of all, it is understood that these sorts of points were being raised in those cases, because of course the cases that are at issue are not just roofing, but they involve construction. Second of all, and I will come back to this, the fact that unlawful practices were, it is said, endemic – one has to be cautious about the term that is being used because the idea that endemic means that all tenders were subject to cover pricing is not, I think, what Mr. Robertson is seeking to suggest. Merely that this was a practice that had been accepted in the construction industry over time and had been used. But that does not vary the extent to which it is unlawful, nor the extent to which significant penalties should be imposed in relation to this conduct. Indeed, the very fact that there were substantial numbers of undertakings who, in the course of investigation, were found to have engaged in cover pricing was one of the factors that caused the OFT to have particular concern that substantial penalties should be imposed.

It is interesting, as I say, that Mr. Robertson has sought in his skeleton previously to rely on the draft report from Europe Economics, but the final report is before the Tribunal, and it is notable that in that report the reference to the significance of penalties being imposed in the course of this investigation is something that is particularly noted in the findings. So actually the fact that something is endemic, if it is true, militates in favour of higher, not lower, penalties in these circumstances.

But just to step back to the position that, sir, you were raising about the no contest at the 5 per cent starting point, that is accepted. I will deal with that a little more now. The point about *Apex* and the seriousness of cover bidding is that if one is trying to step back and approach the notion of justice *in abstracta*, in those circumstances the seriousness of the conduct must be taken into account. The suggestion that this really does not matter is something that must properly be ignored by this Tribunal: it is wrong.

Turning, then, to the 5 per cent starting point, it is right that 5 per cent is not challenged, but then Hobson's position is that the penalty imposed does not reflect the degree of seriousness. It is slightly difficult to start with this assertion, but perhaps the best place is actually in the guidance itself, which is at volume 11 tab 135. The point we make here is that the step 1 calculation, with which the Tribunal will no doubt now be relatively familiar, is not a process whereby one takes an abstract percentage; it is a percentage of relevant turnover that is treated as the starting point indicative of seriousness. It is a percentage on a scale that is applied to relevant turnover because that is turnover in the relevant market. That is made clear at paragraphs 2.3, 2.4, 2.5 and onwards through the remainder of the Step 1 Starting Point Analysis.

Relevant market definition is not something that is arbitrary. It is a definition of a group of products or services which are sufficiently closely substitutable on a demand or supply side that they act as competitive constraints on one another. By definition, having an impact on some of those products or services can impact on the dynamics of that market. So it is not a random selection of turnover; it is a sensible and appropriate one, knowing the learning of what defines a relevant market and how the exercise of market definition is undertaken. The guidance on market definition is not included in these bundles, but obviously there is guidance from the Office and indeed the Commission, and indeed it is echoed by guidance from the Competition Commission as the value and importance of relevant market assessment and market turnover. Therefore, in a market where the conditions of competition are sufficiently homogenous, in those circumstances one can look at the impacts sensibly from an economic point of view.

So it is not open to Hobson and Porter to say: I like 5 per cent, but I do not like what it is applied to. Five per cent of relevant turnover is the measure of seriousness that is being applied at step 1. If we were not to use relevant turnover as the quantum by reference to which the starting point percentage was applied, OFT could not just assume that the starting point percentage range should continue as it is. It has to reconsider the whole of the step 1 calculation. In other words, if a different turnover measure were to be applied, then the use of the zero to 10 per cent scale would need reconsideration to ensure that step 1 fulfilled the policy aim of capturing some notion of seriousness.

Furthermore, Hobson's analysis of step 1 and the criticisms of the application of the percentage to relevant turnover failed properly to consider the totality of policy considerations here. He says you should reduce the turnover measure to which the 5 per cent is applied, but fails to recognise that part of what the scheme penalty setting is intended

to do is ensure that specific and general deterrents exist. That is not just in relation to step 3. By imposing penalties of, say, 5 per cent of relevant turnover on infringements the OFT sends out a clear signal that they and other companies which commit such infringements will be penalised severely. In other words it is a "Watch out, if you cover price, 5 per cent of your market turnover could go in penalty payments". Steps 1 and 2 of the guidance and the penalty setting regime contribute to the deterrent policy that the OFT is seeking to achieve.

Of course, it is right that in some cases, in particular where you have got companies that are heavily diversified across a range of markets, there is a concern that the measure of penalty that you achieve as steps 1 and 2 does not deliver adequate specific or indeed, and perhaps more importantly, general deterrents to those who might be minded to engage unlawful activity. That is why at step 3 you consider adjustments for the purposes of deterrence. You introduce the minimum deterrence threshold. It is important to bear that in mind. MDT is merely the minimum deterrent threshold. If the process of steps 1 and 2 have achieved the relevant specific and general deterrents, you will not need to have the MDT operating. That happens to be the situation in this case. To summarise, the general point is: step 1 methodology does reflect seriousness, using rational criteria to reflect both the seriousness aspect and a deterrence component.

Hobson and Porter are trying to say: we are being reasonable by accepting a percentage, and then attacking what it is applied to. But you cannot salami slice this analysis in the way they seek to do. To turn round and say: the outcome is extremely harsh, may well be the subjective feeling of Hobson and Porter, but that outcome does reflect the seriousness as calibrated by reference to relevant market turnover.

I will move on to deal with how Mr. Robertson tries to chip away at that turnover analysis, which is really the essence of his criticism of the OFT's approach. Before doing that, it is just important to look at how the penalty was in fact imposed in this case. Could the Tribunal could look at the decision at page 1772.

THE CHAIRMAN: Just before you come to that, can I ask you a question about minimum deterrent threshold? The minimum deterrent threshold may be as low as nothing, presumably, if the mere fact of the OFT making a determination in cases such as this is in itself, in an extreme case, sufficient deterrence. We heard mention of the Northern Ireland farmers case.

MR. BEARD: Yes, but I do not think the suggestion there is that --

THE CHAIRMAN: No, I understand there was a huge amount of litigation. Sorry, it is a bad example, but there may be an industry in which the mere fact that the OFT intervenes to put a stop to a practice which is endemic in an industry might be enough in itself, yes?

MR. BEARD: The proposition has to be accepted as a theoretical proposition, although I think the Office would be clear that as a matter of policy, applying a zero penalty would not be a rational approach.

THE CHAIRMAN: It would be very unusual. It starts from zero, does it not? You do not make the assumption that the minimum deterrent threshold is N per cent of turnover. You have to make a judgement, the OFT has to make a judgement as to what minimum deterrent threshold is required to deter people from performing this practice?

MR. BEARD: Yes. That must be right, and the mechanisms by which a threshold could be achieved and imposed may vary. It does not have to be an MDT.

THE CHAIRMAN: It is not formulaic.

MR. BEARD: No, it is not formulaic. I think there is sufficient explanation in the defence as to how the MDT was adopted in this case, and drawing on previous cases which have been before this Tribunal and so on, and I will not rehearse that. But it must be right that there are a range of ways that deterrence may be considered. Different mechanisms can be used. It may well be that in many cases it is considered that penalties are too low and therefore you want higher thresholds imposed, whether or not those are by reference to turnover is a separate matter.

THE CHAIRMAN: I should read that, it came from Miss Bacon.

MR. BEARD: Yes, it must be the answer!

THE CHAIRMAN: Sorry, Miss Bacon! Thank you very much. We are on page 1772.

MR. BEARD: Yes, just working through the table, I do not believe any of this material is confidential. If one works through from the top one can see the delineation of the three infringements, and then the dates of the infringements, the product market, the geographic market assessments, the total turnover to year end that is used, and of course the total worldwide turnover is the same for all three infringements. Then one looks at the relevant turnover, in other words the turnover in the relevant market. That again is the same year end.

THE CHAIRMAN: I should say to you that we do have this table with all the figures inserted.

MR. BEARD: Yes, that was what I assumed was the case and that was the reason why I was checking.

THE CHAIRMAN: I have the completed table in front of me.

MR. BEARD: Yes, I was rather hoping so. The submission, as a matter of abstraction, was rather difficult.

THE CHAIRMAN: Do carry on, Mr. Beard.

MR. BEARD: Just to work through the penalty, one identified the relevant turnover in the relevant market and that is the £2 million figure and then the £17 million figures, because the latter infringements are obviously in the same product and geographic markets. Then we have got the step 1 starting point percentage, which is applied to the figure just above, which results in penalty after step 1 (which is in bold). You have then got a duration multiplier which adds nothing. Penalty after step 2 – so this is the consideration of the step 2 – we have not added anything by way of duration multiplier, so effectively it is step 1 that has acted as a driver of the penalty figures. Then, after the bold line, penalty after step 2, penalty as a percentage of total turnover. One can see the relevant per cent ages; 0.4, 3.08, 3.08 for each of those relevant penalties.

Then the question of the application of the MDT is identified at 0.75 per cent. Then the penalty after step 3 is considered. Because the penalty as a percentage of total turnover after step 2 exceeds the MDT, there is no variation here by reason of the MDT. So you get the penalty after step 3 remaining the same as after step 1. But then something happens. This is what has been referred to as the capping mechanism. The OFT looked at the totality of the penalties that were to be imposed on Hobson and Porter, and looked at the totality of the percentage of total turnover. Obviously here it would be around 6.5 per cent, because one accumulates the figures of 0.4, 3.08, 3.08. As the Tribunal knows, and as we describe at page 1688 for your notes, a mechanism was applied whereby, considering all of those cumulative penalties, it was assessed whether or not they exceeded 4.5 per cent of total turnover. It does not take advanced maths to work out that 6.5 is bigger than 4.5. In those circumstances, a reduction, a significant reduction, was then imposed. That can be seen in the line adjustments, where what was done was a 45 per cent reduction was imposed on the largest penalties. That results in a drop overall in the penalty of around 40 per cent. So what you have got is a situation where the seriousness consideration at step one generated penalties because of the concentration of turnover in particular relevant markets that were higher than the capping mechanism that the OFT had decided upon. Therefore, it drew them down.

As far as we understand it, Mr. Robertson and Hobson and Porter do not really make anything of this fact that the OFT did look at the level of turnover that was being generated by the step one process and substantially reduced the total penalty, so that one can see when

one looks up a penalty after step four that we are looking at a penalty of under 4 per cent in total, and this is prior to leniency.

What you got was a situation where after step one you were looking at a penalty of £1.8 million or thereabouts, and after step three with this significant adjustment you were looking at a penalty of just over £1 million, and then leniency comes in and so the final penalty you end up with is £574,000. Just bearing this in mind, Mr. Robertson's concern is that the penalty overall does not reflect the seriousness of the infringement, but he takes into account not one iota the fact that a 40 per cent discount was given in relation to this penalty in the course of these matters.

We heard today that Mr. Robertson says that if one of his ways of chopping up the turnover had been taken into account the penalty would have dropped by 50 per cent or two-thirds. We are not quite sure what the basis of that is, but assuming that is the case in fact what you had was a very significant reduction here, and no credit is being given by Hobson and Porter in relation to that in respect of their case. It is a fundamental flaw in his generalised suggestion that one considers the justice of the case. In fact, the capping mechanisms, the systems that the OFT put in place in considering the outturn penalties that should be imposed did reduce the overall penalty.

One other point in relation to the general approach to comparison: Hobson seeks to draw comparisons between its own penalty on the one hand and the penalty imposed on *Balfour Beatty* in relation to the Hatfield Rail disaster, and says that we are failing by not recognising that manslaughter is a serious matter and the penalties that could be imposed on a company for manslaughter are much lower than those that would imposed here. The OFT has set out in writing in its skeleton argument precisely why that is wholly wrong. You have a system here, a dedicated, discrete system of penalties that has been developed whereby there is a statutory scheme that has a particular cap imposed by reference to global turnover which is vastly different from the sorts of order of penalty that one can have imposed in accordance with the criminal sentencing guidance in cases involving corporate manslaughter or other such criminal offences. In those circumstances, to try to draw any sensible comparator is of no material assistance to this Tribunal. The OFT, the regulator in the UK, the regulators across the Community, the legislature in the UK and the legislature in the Community, have recognised that cartel violations and breaches of competition law constitutes forms of economic harm that are to be punished within that dedicate regime focusing on incentives that are relevant for firms acting in particular markets. There is a discrete and different regime. It does generate severe penalties. No apology is made for

that. It is wrong to draw comparisons with circumstances where people die because of corporate actions. It is recognised that those are very serious criminal infringements. No suggestion is made otherwise by the OFT but it is wrong to bring to bear that sort of comparison.

THE CHAIRMAN: In the criminal context, there is nothing remotely as sophisticated as the guidance, is there?

MR. BEARD: No.

THE CHAIRMAN: For example, correct me if I am wrong, but I do not know of any sentencing guidance that relates sentence to a percentage of global turnover.

MR. BEARD: There is nothing like that, no scheme that has been put in place which has statutory backing, has Secretary of State's approval, that fits with an economic analysis in relation to a field of work where the consideration of matters such as relevant market and turnover in it are relevant to the overall consideration. There is nothing.

THE CHAIRMAN: My recollection, and I may be wrong about this, but it is only a recollection, is that the Sentencing Guidelines Council, or whatever is now called, only published guidance on corporate manslaughter this year.

MR. BEARD: Undoubtedly, they did publish guidance on corporate manslaughter this year, and Mr. Robertson has quoted from that in his skeleton argument. Whether or not there was no guidance previously, I would not want to go quite so far as that. I think that was probably right, and looking at the case law of *Balfour Beatty* and subsequent cases, it does appear that there was a sense of not quite an exercise done without any guidance, but broadly speaking that appears to be the case.

THE CHAIRMAN: There are very few cases on it.

MR. BEARD: Very few cases, and very, very different circumstances. I will try and accelerate, I am conscious of the time.

Traditional and non-traditional: this is another attempt to salami slice the turnover. Mr. Robertson says, "Oh, well, the OFT's approach referring to relevant market turnover is not relevant here, you can use relevant market turnover but you should still be making adjustments". As I have said, that is not the correct approach. There is a rational basis for the conjunction of the percentage and the relevant market turnover. The authorities that they seek to rely on in support of this suggestion that, in fact, one can sub-divide the relevant market turnover are not authority at all. I would ask the Tribunal to turn up volume 5, tab 69, *Musique Diffusion Française*. If one turns on in this copy to p.1908, you have got

a sideline section which is the part that Mr. Robertson has referred to. In particular, he has emphasised paras.120 and 121:

> "In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.
>
> It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement."

So two components, precisely the two components that feature in the scheme of the domestic guidance. Mr. Robertson relies on this as a proposition that suggests a flaw in the calculation because he relies on this and emphasises it as a basis for sub-dividing relevant market turnover. What is interesting is that if one turns back a page to para.116, what was being said in that case by Melchers and the other appellants apparently was that they wanted the Commission to focus only on relevant market turnover in the hi-fi market. The idea that this is authority for the proposition that you can salami slice the relevant market turnover is just plain wrong.

A further point to emphasise here is that this is a decision taken by the court in June 1983 which in terms of the development of competition law is not quite the dark ages, but it is long, long ago, and it was at a time when there was, in fact, no guidance at the Community level in relation to these matters. So in those circumstances, the Commission was feeling its way and so was the court, and the idea that in these circumstances *Musique Diffusion Française* provides any assistance to the appellant is quite, quite wrong.

So the authority is no authority, and then Mr. Robertson goes on – I was not going to refer to any other parts of *Musique Diffusion Française* – in the notice of application, para.41, to say that the OFT has no basis for saying that findings of cover pricing had been made in relation to anything other than single stage tendering. I will just provide the reference. It is decision, section II, para.1682 to 1684, make clear that that submission is entirely beside the

point. In fact, what the OFT was doing was looking at a range of factors which might be considered as bases for chopping up the relevant market assessment that it had undertaken and considered these issues in relation to tendered and non-tendered pricing, and concluded that there was no good basis to separate out non-traditional methods of procurement because it recognised that in fact those methods, even if they were different from the traditional open tendering process, still involved a pricing element and indeed were part of a relevant market where, as I have already indicated, the effects of the cover pricing would properly be felt if it is to be analysed in that way.

Mr. Robertson also tries to take issue with the particular finding at decision, section II, 1680, where the OFT said that there are six infringements which it has made findings on which took place in non-traditional procedures. It says that if that is the case, that is the end of the argument. Mr. Robertson says, "No, those six particular examples, they are not actually non-traditional procedures". We do not accept that, and in particular if one looks at infringement 104 and 135, those were not simply matters of single stage tendering and the arguments put forward by Hobson and Porter do not deal with those issues at all. Nonetheless, the key issue is that Mr. Robertson has only focused on one particular aspect of the OFT's decision which, as I say, is set out in II, paras.1682 to 1684.

Turning on then to the next attempt to chip away at the notion of relevant market turnover that is used, is the high turnover, low margin argument being applied entirely to the construction industry, and it complains that there should be some sort of unspecified adjustment to the penalty calculation. Hobson and Porter asserts that the high turnover and low margins result from the fact that the industry is highly competitive and turnover includes payments due to sub-contractors. I will leave aside the highly competitive assertion, given what has been said about endemic cover pricing, but the important point here is that neither of these characteristics is exceptional. Evidence from Mr. Robertson from the Bar is not a good basis for contending that actually there are high margins in other industries where comparisons are being drawn. Furthermore, the idea that the simple fact that there is a substantial component of cost in the form of sub-contracting in any assessment of relevant market turnover is not material, it is not a distinguishing factor in and of itself for the purposes of assessment of relevant market turnover. It is noted that in authority bundle 8, tab 112, *Outokumpu v. Commission of the European Communities*, it was stated at para.82 that it must be held that there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out there are in all industries costs inherent in the final

product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which therefore cannot be excluded from its turnover when fixing the starting amount of the fine. In this regard the OFT says that the approach of the court and the Commission – this was a decision that was reinforced by the General Court in the case at volume 8, tab 118, under a similar name, para.77. It is precisely the same approach as should be applied here.

The attempts to compare with the milk and tobacco investigations take one no further. It is not right to make assumptions about what constitutes high and low profitability in an industry. There is not sufficient evidence in order to make these sorts of comparative assessments. Indeed, using profitability as a mechanism is fraught with difficulty. One of the reasons why turnover is used instead of profitability is because identifying what relevant profit is in any circumstances is much, much more difficult, and much more susceptible to adaptation or manipulation than turnover.

Furthermore, in relation to penalty setting it has a perverse effect. Those that are efficient in a market and therefore generate relatively high margins are actually penalised more severely than those that are inefficient, and there is no good policy reason why that should be adopted.

So, quite contrary to Mr. Robertson's assertions that one draw from the cases in milk and tobacco and the summaries of those cases in press releases are found at volume 11, tab 148 and 151, where a press release is given that there has been early resolution agreement, so a final decision has not had to be taken. Comparators can be drawn from that that it is not useful. There is not a one size fits all approach. There is an importance in seeing consistency across a single decision, such as this, but in circumstances where different decisions warrant different penalties because of the particular circumstances of the infringement, the settlement, the manner in which the parties have acted, one cannot read across from one case to another.

Of course, this exercise ----

THE CHAIRMAN: Is there any relevance, do you say, in the percentage of net profit margin as against turnover, because in some industries – it is said here building – the net profit margin is very small as against turnover, whereas one might cite industries – off the top of my head, say, advertising – in which the net profit margin is very high compared with building as against turnover.

MR. BEARD: One would have to do a much broader comparison in order to get this sort of analysis where one could compare one industry against another and draw relevant

comparators, but the answer is, no, the OFT does not accept that the level of net profit that was coming out of the construction industry over the relevant period is a material factor that means that in these circumstances there should be a reduction in the levels of penalty or an adjustment in that regard.

THE CHAIRMAN: If the net profit before tax as against turnover is, for the sake of argument, 4 per cent, and the effect of the fine is to remove 50 per cent of that net profit after tax because it is not tax deductible then that is just bad luck for being in a low net profit margin business?

MR. BEARD: It is not so much bad luck for being in a low net profit margin business, it is your own fault for committing an infringement, and the luck is not to do with your level of profitability, it is to do with your level of culpability. If the question is really, does the OFT accept that companies in those circumstances will suffer significant pain, the answer is, yes, the OFT does accept that companies in that situation will suffer relatively significant pain.

THE CHAIRMAN: So you may suffer disproportionate pain in a low net profit business.

MR. BEARD: We do not say it is disproportionate, there is no reason to consider it was disproportionate. If the Tribunal's question is, should a higher level of penalty be imposed in an industry with a higher margin, that is a matter that would have to be considered in all the circumstances, but these comparisons are very, very difficult to draw, because it is very difficult to make relevant controls for the circumstances in which the comparisons are being made.

THE CHAIRMAN: Thank you.

MR. BEARD: Turning then to no effect on price, I reiterate the points I made at the outset in relation to *Apex* and the seriousness of cover pricing. The fact that this is an object case is not the sole and only reason why the OFT says no reduction here because no putative effect on price. The OFT says it is not necessary for the OFT to go on and carry out an analysis of impacts on pricing in circumstances where it is an object case and the assessment has properly been made in line with the *Apex* analysis. In other words, Mr. Robertson is essentially enticing the Tribunal to try and carry out an effects analysis here in circumstances where that forms no part of the infringement and it is not necessary for the purposes of ascertaining an appropriate penalty. In particular, Mr. Robertson relies as authority in support of the contention that the OFT must take into account a lack of effect on price various European cases, including *Archer Daniels Midland*, which is to be found at volume 7, tab 92. There is only an extract from that case in the current bundles, and I want to refer the Tribunal just to some preceding paragraphs, so I have got copies of the full

version here. They are hole punched so that they can be slotted in behind tab 92 in volume 7. (Same handed)

The paragraph upon which Mr. Robertson relies is para.80 which is found on p.3294, which says:

> "In any event, the mere fact, relied on by ADM, that the fine imposed exceeds turnover through sales of that product in the EEA during the period of the cartel, or even exceeds it significantly, is not sufficient to show that the fine is disproportionate. It is necessary to assess the proportionality of that fine by reference to all the factors which the Commission must take into account when determining the gravity of the infringement, namely, the actual nature of the infringement, its actual impact on the relevant market and the scope of the geographic market."

He says, that just makes it absolutely clear beyond peradventure that you must take into account impact on the market when you are considering the relevant penalty.

The first thing to note is that this case is a case applying guidelines that were promulgated by the Commission in 1998, and those guidelines structured the guidance for imposing penalties very, very differently from the OFT guidelines and indeed the current Commission guidelines. They are found at volume 12, tab 167, for your notes, and in those guidelines what you will see is that the process the Commission had to adopt was identifying whether or not a particular infringement fell within one of three categories. Those categories that it referred to were to be delineated according to the specific terms of the guidance by reference to impact. So it actually says that in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market where this can be measured and the size of the relevant geographic market. So the guidelines placed a requirement on the Commission to carry out this actual impact analysis, but it was only for the purposes of this very, very broad brush assessment of allocation between minor infringements, serious infringements or very serious infringements. So it was a very different exercise that was being undertaken there and the guidelines mandated reference to impact.

It is also, therefore, worth referring to the way in which this matter had been argued and what the court was in fact deciding in this case. If one turns back to para.62, which is on p.3289, this is again a case where the complainant is saying, "You, Commission, have failed to have regard, or sufficient regard, to relevant product turnover", in other words, the

relevant market turnover. Then the court rehearses the submissions of ADM through to para.72. What is notable at para.71, which is 3291:

> "In ADM's submission, the economic impact, whether on competition or on other operators may be assessed only by reference to the amount of effective product sales. Only by taking these sales into account is it is possible to assess the scope of the potential harm to consumers or competition in terms of anti-competitive surcharge or illegal benefit.
>
> Consequently, in failing to take account of relevant product sales the Commission applied its own guidelines incorrectly."

In other words, what is being said is that relevant market turnover is the way that you identify a putative impact on competition here, and ADM was coming along and saying, "You should focus only on that and because you did not focus only on that you failed to look at the impact on competition which you were mandated to do under the terms of the guidelines". That does not assist Mr. Robertson at all here, because the very exercise that has been carried out by the OFT here is to focus upon relevant market turnover in relation to these matters.

The same point can also be made in relation to the *Degussa* case that cites. I will not take the Tribunal to it, that is at volume 8, tab 99. The same points can be seen from paras.214 to 216 and 247 in that case.

The third authority relied upon is *Apex*, which is at volume 3, tab 46, and he relies upon para.266 in that where he says, "The Tribunal is saying is you must take into account impact here". Actually, what the Tribunal in *Apex* said in adopting the way in which the OFT had dealt with the penalty in that case was simply to say, "When you were setting the initial percentage that applied to relevant turnover you took those factors into account". So it is precisely consistent with the European case law. Nothing in relation to horizontal guidance or *Glaxo* is of any assistance to Mr. Robertson at all. Those materials were cited simply to illustrate that this is an object case and you should not start this collateral effects and impact exercise just in relation to penalty matters.

Briefly then on multiple penalties, Hobson characterises what the OFT has done as multiplying penalties, which he says is contrary to the intention of the Competition Act 1998, which applies a statutory cap and does not provide for treble penalties. This argument assumes precisely what it is trying to improve. The intention of the Competition Act 1998 is plainly not that the OFT should be prevented from imposing separate penalties in relation to separate infringements, and there have been separate infringements here. The

instances of cover pricing are properly regarded as such. There is nothing mechanistic about the way this has been dealt with. The fact that there are individual cases which warrant individual sanction has not meant the OFT has been blind to the fact that there are multiple sanctions being applied. I refer to two particular factors here. The MDT, it is applied only once in relation to the sanctions that are applied in relation to three infringements, it is not applied three times. In other words, the OFT is having regard to the totality of the penalty being imposed on a particular undertaking; and secondly, and particularly relevant to this case, total ignoral of the capping mechanism, the 4.5 per cent of step three. That is applied to the totality of the global turnover that is affected by the infringement. It is applied to all three infringements. So the OFT was alive to the cumulative impact. It is quite wrong to say that the Competition Act suggests you cannot impose multiple penalties. Yes, of course Hobson and Porter would rather we only imposed one penalty, that is entirely understandable, but it is also entirely beside the point.

THE CHAIRMAN: I think the point Mr. Robertson was really making was why should they have three penalties against 11 infringements when somebody else has three penalties against 100 infringements.

MR. BEARD: That is slightly different because those are leniency applicants. You have in the decision at pp.246 to 288 a very detailed exposition of how this massive investigation had to be streamlined. There are some cases where people effectively came clean and said, "We have been doing a lot of this". It would be perverse if they had vast numbers more in terms of total infringements imposed on them as sanctions than people that did not admit anything. The OFT would have had to expend vast amounts of resources investigating further and at that point had said, "No, we are going to streamline it, we are going to focus it down", and so these comparisons of 11 and 130 and 10 and 13 with *Herbert Baggaley*, and so on, they are not material. Those are the leniency statements, or admissions under FTO, they are not the way in which the OFT proceeded with the entirety of the investigation. If someone has committed three infringements, it is entirely proper that they are penalised in relation to those three infringements and that the approach is systematically correct. You cannot make the generalised comparison that Mr. Robertson makes of saying, "Someone actually committed vastly more infringements", save in relation to the leniency applicants, and to penalise leniency applicants substantially more would plainly be wrong. It may well be that people that did not come forward for leniency committed vast numbers of infringements, but we could not possibly commit the sort of resources to assessing it. The OFT at no point has said, "We have comprehensively investigated cover pricing in this

industry over the relevant period". It cannot draw those comparisons. The comparisons Mr. Robertson draws are not relevant.

As to the arbitrary choice of infringements, it is very difficult to see quite what is arbitrary about the approach that the OFT has adopted. As I say, there is a lengthy exposition as to how the OFT went about narrowing down its investigation which was necessary, the way that it carried out the selection process and of course Hobson says, "It is arbitrary", because it would like us to select one infringement or perhaps the three infringements where it had the lowest relevant turnover. Of course those selections would not be arbitrary, but they are obviously not justified. The way in which the OFT selected the three infringements, the fact that they happened to be in markets where there was a significant relevant turnover for Hobson and Porter is neither here nor there in this analysis.

The same sort of point can be made in relation to discrimination against small and medium sale enterprises. This is a wonderful example of selective blindness on the part of appellants. If one looks at p.288 to 338 you have got a detailed exposition of the market definition exercise that was carried out in relation to this case. Of course, the primary purpose of defining the relevant market is to assist in the calculation of penalties, something noted specifically at II, para.1600. That has, of course, been recognised by the Tribunal and the Court of Appeal, that it is not necessary to carry out a very detailed and formal analysis, because you are only doing the relevant market exercise for penalty purposes. The OFT in fact adopted a cautious approach to relevant market. You can see that in the decision at II, 1696 and 1730.

So the OFT effectively erred on the side of adopting a narrower market definition in relation to each of the markets it was dealing with. That cautious approach meant that infringing parties got the benefit of a doubt in terms of the relevant turnover that was then to be considered at step one, because if your market is more widely drawn you catch a potentially more relevant turnover. If it is more narrowly drawn, less relevant turnover.

THE CHAIRMAN: Mr. Beard, just looking at the clock, we have everything more or less in writing and you might like to just focus on any principal additional points because we would like to give Mr. Robertson an opportunity to respond.

MR. BEARD: I quite understand, I am sorry I have taken substantially longer than the intended time. I anticipate that this may be a function of the first case, but ----

THE CHAIRMAN: I understand that completely.

MR. BEARD: Just to finish off on the SME discrimination point, if I may, what is being said now is that you define the market narrowly, small companies have a larger proportion of

turnover in these narrower markets than larger companies and that is terribly unfair – in other words, the benefit of the doubt that we have in relation to relevant turnover, that is not enough, now you have to turn it round and say, "We have suffered terribly compared to others". Actually, this notional unfairness, which of course only arises after steps one and two, because in steps one and two you are dealing with relevant turnover, is not material because what you have got is a situation where specialist companies may have turnover in a particular relevant market whether they are small or large, and in those circumstances they will get a larger starting point. If you have a large diversified company rather than a specialised one, when it comes to assessing the relevant penalty you are going to get a situation where you are not comparing like with like, because, of course, when you are looking at a relevant market, what you are doing is saying what was the business in which you were trading, to what extent were you present in the market. If you are a relatively small company but with a high profile in a particular market it justifies you having a higher relevant turnover at starting point, and in any event the appellant wholly ignores the MDT and capping mechanism, which of course means that larger and diversified companies in the case of MDT have an uplift, and indeed you will be hearing appeals where that is the sort of grand gnashing of teeth that the MDT took these things too far because they only had tiny relevant turnovers in a particular market, and of course in relation to the capping mechanism it works in the other direction. It always meant that there was a reduction.

The matters in relation to discrimination vis-à-vis compensation payments are dealt with in writing. I will not go further in dealing with those. I have touched on *Herbert Baggaley*. Effectively, this is a protest that the 7 per cent is not high enough as a starting point, if one looks at it.

Director involvement: again, *Ready Mixed Concrete* does not take Mr. Robertson anywhere, and in relation to last business year again the matters have been set out in writing in relation to this case. I will not amplify here, they will come up in different forms in other cases.

Then one turns to financial hardship. What you have is a situation where frankly the entirely reasonable criteria that were applied by the OFT were not met by the particular appellant, were not even close to met. To Hobson's proper credit it does not say that it would not become viable. I refer the Tribunal to *Sepia Logistics*, which is at volume 4, tab 58, in particular paras.94 to 101 in relation to that case, which sets out both matters in relation to the consideration of evidence and why it is that in fact this Tribunal is dealing with the decision as it was taken at the time, and in those circumstances the extent to which

the burden of proof can properly be met by an appellant by subsequent evidence is something that this Tribunal should at least be extremely circumspect about. In those circumstances, you have a situation where you should not afford a special measure by reason of financial hardship simply in circumstances where there is no suggestion that the company would become unviable following the OFT's approach.

In the circumstances, I will not go through and deal with particular matters highlighted that are supposed to set out a rubric as to how the OFT should deal with this penalty setting exercise. I think those are covered by the submissions already dealt with.

Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRMAN: You have been most helpful, Mr. Beard, thank you. Mr. Robertson, what do you want to do? Do you want to make a reply now? I do not know how much time you want to take up, or do you want to leave it until after the lunch adjournment. It is really a matter for you?

MR. ROBERTSON: I will make a reply now. I will deal with the things which are specific to Hobson and Porter. Other matters that Mr. Beard has addressed, I can then address in this afternoon's appeal.

THE CHAIRMAN: You are both in this afternoon's appeal?

MR. BEARD: Yes, we are.

MR. ROBERTSON: So there will be a sort of rolling reply. The things which are specific to Hobson and Porter: firstly, I think there are essentially four points I want to make. The first is this: Mr. Beard suggested that we are submitting that cover pricing did not matter and that we are taking a dismissive attitude. I want to be absolutely clear about this, as soon as my client learned that cover pricing was an infringement of competition legislation it was brought to a prompt and effective halt and a compliance scheme was put in place. We take compliance with our legal obligations very seriously.

Secondly, I submitted that the penalty was harsh. Mr. Beard said, "Of course they would say that, wouldn't they, it's just a subjective view". No, it is not a subjective view, it is objective by comparison with criminal cases and by comparison with recent decisions by the Office of Fair Trading in *Milk and Cheese* and in *Tobacco*.

The reason why I cannot address the Tribunal with a detailed comparison with either of those cases is because in the case of *Milk and Cheese* the OFT still has not adopted its final decision. Mr. Beard referred to the press release and I think implied that there need not be a final decision in a case of early resolution. That is not correct, there will have to be a decision. The investigation is ongoing. The OFT was forced to drop part of its case against

one of the other multiple retailers being investigated. There was a press release earlier this year about that. It is still ongoing, but there will be a final decision.

MR. BEARD: Yes, I can confirm that. If there was any indication to the contrary that was not my intention.

MR. ROBERTSON: Thank you. In the case of *Tobacco*, there is a final decision, it is confidential. The non-confidential version is still not available on the OFT's website. Quite frankly, to suggest that a comparison between margins is not helpful, we submit that is just nonsensical when you look at the evident impact of the penalty on the parties. For us in a good year it was 83 per cent of pre-tax annual profit. For *Sainsbury's* and for *Imperial Tobacco* it is 5 per cent of pre-tax annual profit. Those figures are not in dispute.

The third point I wanted to make is in relation to the capping mechanism. I would invite the Tribunal to read the paragraph of the decision where the OFT explains how it approached capping fines. It is VI, 273 on p.1688. You do not need to go to the OFT's defining guidance to have an explanation of the capping mechanism because there is not one. It is unique to this case. It appears to us that it was brought in simply because the OFT realised that fines were spiralling out of control and they were coming up with ludicrous figures, and so it was a bit of *ex post facto* rationalisation. It certainly does not reflect any declared statement of policy that one can find in published guidance from the OFT.

This is not the only case where the figures just spiral out of control. The method comes up with madness. The classic example of that is a fine that we have referred to in a notice of appeal on another party, party 101, where the fine on p.1831 of the decision, the three fines on party 101, para.6.655, are in ascending order – this is after step one, £86, £3,785 and, wait for it, £739,881. Any process – Mr. Beard is asking you to have confidence in a process – that comes up with fines that diverge between £86 and £740,000 seriously requires questioning.

The fourth and final point I wish to make by way of reply that is specific to this case is this: Mr. Beard said there is no good reason for the OFT adopting profitability as the basis for fining. We did not submit that they should. That is not our case. You do need to have regard to profitability when you are adopting fines on the basis of turnover. Just to deal with your question, sir, about the Sentencing Guidelines Council, their corporate manslaughter guideline, as I understand it from their website that was the first time that body had issued guidance. They issued that guideline after receiving advice from the Sentencing Advisory Panel. It is set out in footnote 15 on pp.9 and 10 of our skeleton argument, but the Sentencing Advisory Panel said that it believed that turnover was a fairer

and more stable measure of monetary resources of an organisation, profits can fluctuate and can also be redirected to fund activities and awards are not a fundamental requirement of the business operation". All the evidence is that previous profits from us have been ploughed back in to strengthen the balance sheet of the business, because that is how you are able to grow your business and tender for larger contracts. They observe that turnover is much more difficult for a company to manipulate:

> "However, although the Panel continues to take the view that annual turnover should be the primary measure of an organisation's ability to pay, where the defence is able to demonstrate that the organisation operates in an industry with genuinely and endemically low profitability rather than profits that can fluctuate or have fallen after the events, this may be taken into account in order to avoid injustice."

That is essentially our case.

Sir, there are other points of reply, but I can deal with those in this afternoon's hearing by reference to arguments being submitted this afternoon.

THE CHAIRMAN: Thank you, Mr. Robertson. I know there is time pressure in these cases, and the parties will understand the pressure the Tribunal in its various forms is under in these cases. I want to make it clear that although we are seeking to impose a fairly rigid timetable, if there are any issues that have not been adequately dealt with in the view of the parties we will of course receive timely written submissions as long as they are characteristically, if I may say so, short and to the point.

Miss Bacon – that has brought Miss Bacon to her feet.

MISS BACON: On that point, the Tribunal will be aware that tomorrow I am taking the baton from my learned friend Mr. Beard with the cases of *GAJ* and *Francis*. Can I take it as read that the Tribunal does not want a "Groundhog Day" and does not want me to repeat everything that Mr. Beard has said today, particularly his opening half an hour or so setting out the broad policy justifications in this case, or do you want me to cover the same ground again?

THE CHAIRMAN: You can so take it.

MISS BACON: I am very grateful.

THE CHAIRMAN: We will adjourn until about two o'clock.

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