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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1126/1/1/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

2 July 2010

Before:

LORD CARLILE OF BERRIEW QC  
(Chairman)

ANN KELLY  
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

**ISG PEARCE LIMITED**

Appellant

- and -

**OFFICE OF FAIR TRADING**

Respondent

- and -

**CREST NICHOLSON PLC**

Intervener

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**HEARING**

## **APPEARANCES**

Mr. Paul Lasok QC and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Appellant.

Mr. Daniel Beard and Mr Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

Miss Marie Demetriou and Mr. Nigel Parr (instructed by Ashurst LLP) appeared on behalf of the Intervener.

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1 THE CHAIRMAN: Mr. Lasok?

2 MR. LASOK: Sir, the penalty issues are clearly set out in the pleadings and the skeleton  
3 arguments, which you have read. I think I have got two introductory observations. The  
4 first relates to the remarks made by the Chairman this morning about step 1. We do dispute  
5 the 5 per cent at step 1 – see, for example, para.3.30 of the notice of appeal. As Mr. Beard  
6 pointed out today at 18 minutes past noon, according to my watch, the 5 per cent figure at  
7 step 1 feeds into the MDT issue. So if there is an alteration in the 5 per cent figure that has  
8 an impact on MDT.

9 The second introductory observation concerns a submission made by Mr. Beard towards the  
10 end of his address to the Tribunal before lunch, when he submitted that if the OFT had  
11 properly complied with its guidance, and so forth, the Tribunal did not have the ability – I  
12 am of course paraphrasing what Mr. Beard actually said – to alter the fine. The Tribunal  
13 may or may not have observed that when he uttered those words my eyebrows fluttered  
14 somewhat, because it is one of the most extraordinary submissions that I have ever heard  
15 anybody ----

16 THE CHAIRMAN: I thought it was your eyelashes, Mr. Lasok!

17 MR. LASOK: They might have fluttered for a different reason!

18 In our submission, there just is no basis for that submission. It is clearly contrary to  
19 authority, but if Mr. Beard does wish to press it in this case then I would be extremely  
20 grateful if he were able to cite a case to support the proposition.

21 Today, orally, what I am going to concentrate on is primarily one issue in the penalty aspect  
22 of the case, and that concerns Crest's admission of liability. After I have dealt with that, I  
23 will some, I think, relatively short submissions on the excessive and disproportionate nature  
24 of the penalty, having regard to the gravity of the infringement because my learned friend  
25 Miss Demetriou has already made submissions on that, and I do not propose to repeat them,  
26 but I have some additional submissions of my own.

27 So far as Crest's admission of liability is concerned, in our skeleton argument we identified  
28 three main points. Two of them go to the substantive unlawfulness of treating Crest's  
29 admission as benefiting Crest alone; and the third one is a matter of procedural unfairness.

30 What I am going to do orally is to take the two points concerning the substantive  
31 unlawfulness of the treatment of the Crest admission first, and then I will deal with the  
32 question of procedural unfairness.

33 Beginning with the problem of the substantive unlawfulness of limiting the benefit of the  
34 admission to Crest alone, the starting point, in our submission, is that an undertaking is an

1 economic concept. Therefore, logically, if an undertaking compromises more than one  
2 person, and one of those persons makes an admission justifying a reduction in the fine, it is  
3 the undertaking that benefits from the reduction, because the admission is necessarily an  
4 admission as to the involvement of the undertaking in the infringement.

5 The OFT accepts that that general proposition is correct. For example, in its skeleton  
6 argument at para.39(b) it refers to cases like Barrett and Francis, which I think actually is  
7 Francis and Barrett, in which an admission was made by one company, and it benefited all  
8 the other companies forming the undertaking. We can go to the decision to the Barrett and  
9 Francis case, if you have the decision, and go to section IV, para.2145, p.792 of the  
10 decision. Paragraphs 2145 to 2147 record the fact that, this is in relation to infringement 69,  
11 the OFT had written to Francis offering a 25 per cent reduction, and you see at the end of  
12 2145 that Francis was unable to make the admissions as it had been unable to find any  
13 evidence that it had been guilty of the alleged bid-rigging activities.

14 Then in 2146 you see that the OFT subsequently wrote to Francis's ultimate parent at the  
15 time of the infringement, Barrett, and at the end of that paragraph you see Barrett's  
16 response, which was that Barrett had nothing to add to the comments that had already been  
17 made on behalf of Francis, but later on in the response to the statement of objections Francis  
18 stated that it did not contest the OFT's findings of infringement against Francis  
19 Construction.

20 Then you go to section VI, para.474, p.1754, paras.474 and 475 deal with party 30, which is  
21 Francis together with its ultimate parent company, Barrett, and you see in 474 a recital of  
22 the fact that "This party" – I think for general purposes the use of the word "party" is  
23 actually quite important –

24 "… did not apply for leniency or accept the OFT's fast track offer ... however it  
25 made fresh admissions ..."

26 The "it" is clearly a reference to the party which was Francis together with its ultimate  
27 parent company, Barrett. What you actually see is that the admission made, as we have  
28 seen, by Francis, was attributed also to the ultimate parent company, Barrett. When you  
29 look at the table, you see there were three infringements, 69, 208 and 234. I drew your  
30 attention to infringement 69, but what you see in relation to infringements 208 and 234 is  
31 exactly the same as what you see in 69, because the process was exactly the same. Francis  
32 initially did not make an admission. Barrett followed suit and then Francis indicated that it  
33 was not contesting. The cross-references to infringement 208 and 234 are IV-5791, which  
34 is the starting point of infringement 208, and the cross-reference to infringement 234 is IV-

1 6544. Then if you look down the table on the left hand column and get to step 4, you have  
2 got the aggravating mitigating factors, and the last of them is co-operation and you see there  
3 is a 15 per cent deduction. That went to the liability of the party which was Francis,  
4 together with its ultimate parent company, Barrett.

5 In that connection, because I have emphasised the word “party”, I suppose that one ought to  
6 refer at this stage to VI, para.323, p.1700, which deals with “Co-operation – New  
7 admissions”, and it refers to parties making admissions and 324 says that the new  
8 admissions did warrant a discount at step 4. It says, “These Parties made the admissions”.  
9 What the OFT means by a “Party” is defined at the beginning of the decision. If you go all  
10 the way back to p.29, this is part of the glossary, nearly half way down the page you have  
11 got a definition of the word “Parties”:

12 “**Parties**’ means the undertakings listed at paragraph I-1 of this Decision (each a  
13 party.”

14 Then if you turn the page you have got I.1, which sets out the undertakings in question.  
15 That is the explanation why Francis, together with Barrett, was taken to be a party because  
16 it was an undertaking. If you go to Party 71 on p.32, towards the bottom of p.32, you see  
17 that the party, that is to say the undertaking, relevant to the present case is Pearce  
18 Construction (Midlands), together with its parent, ISG Pearce, which is the present  
19 appellant, and their former ultimate parent company, Crest Nicholson. So what we have got  
20 in the decision is quite a clear indication from the OFT as to what it thought was going on –  
21 that is to say a party as defined would make an admission through one of the companies that  
22 formed part of the undertaking, and that admission would then benefit the whole of the  
23 undertaking. What the OFT decided to do in the present case was something inconsistent  
24 with that basic position, and it is the legality of this idiosyncrasy, shall we call it, in the  
25 decision that we are examining at the moment. The starting point, as one can see from the  
26 Barrett and Francis example is the OFT’s acceptance of the general proposition that when  
27 an undertaking makes an admission through one of the persons compromising the  
28 undertaking then that admission goes to the fine imposed on the undertaking, and therefore  
29 the reduction in the fine benefits all the constituent parts of the undertaking. That is  
30 common ground.

31 Why does this not apply in the present case? Why did the OFT do something different? An  
32 explanation appears in the OFT’s skeleton argument, para.39(b). That is p.11 of the  
33 skeleton argument. Can you have that in front of you, because I will come back to  
34 para.39(b). What is said here in para.39(b) is that the point of distinction between the

1 appellant and that of cases like Barrett and Francis is that by the decision Crest and the  
2 appellant were no longer part of the same undertaking. It is said in the second sentence of  
3 para.39(b), “there was therefore no reason why the benefit of Crest’s discount should be  
4 extended to Pearce”. What one then has is a rather odd sentence to follow that one, which is  
5 as follows:

6 “As noted above in relation to the liability appeal, the assessment of penalty was  
7 made in relation to the entirety of the undertaking which was guilty of the  
8 infringement as it was constituted at the time of the infringement.”

9 What you have is a situation, which we would respectfully describe as “schizophrenic”, in  
10 which the assessment of penalty is made in relation to the entirety of the undertaking guilty  
11 of the infringement, but then when one looks at the admission made by Crest, which goes to  
12 the assessment of the penalty, the OFT suddenly does something completely different. It no  
13 longer assesses the penalty in relation to the entirety of the undertaking guilty of the  
14 infringement. As I have pointed out, not merely is it doing something which is internally  
15 inconsistent, it is also doing something which is completely different from what it does in  
16 other cases, like Barrett and Francis.

17 At the end of the day, what we have got is the OFT trying to have it both ways. It chooses  
18 to ignore the fact that Crest and the appellant were separate undertakings at the time of the  
19 decision when it wants to decide how big the liability for the fine must be. Then, when it is  
20 confronted with a mitigating factor, it changes its position, and says, “Now we do rely on  
21 the significance of the fact that at the time of the decision the component parts of the  
22 undertaking have been split”. So you ignore it when you want to increase the fine, and you  
23 take it into account when you are confronted with a mitigating element.

24 There is actually nowhere that one can find any reason, any justification, why an admission  
25 made by one company forming an undertaking, or forming part of an undertaking, should  
26 have different effects. So far as the liability to a fine or the calculation of the penalty is  
27 concerned, depending upon whether or not the component parts of the undertaking at the  
28 time of the decision are under the same ownership or under different ownership. We cannot  
29 find anywhere any rationalisation of why this is a relevant factor.

30 In either event – that is to say whether the admission is made – when the component parts  
31 remain under common ownership, and therefore form a single undertaking, or whether the  
32 admission is made when they are separated and under separate ownership, the admission is  
33 the same. It has the same effects. So this point of difference identified by the OFT, namely  
34 whether or not the original undertaking still exists, is an immaterial, irrelevant point of

1 difference. From the perspective of the application of the principle of equal treatment, it  
2 cannot justify the difference in treatment.

3 Let us move on for a bit and ask the question, “Is there some rational basis for the approach  
4 favoured by the OFT? Does it lead anywhere to a result that is sound? It does not. It  
5 produces nothing other than a situation full of difficulties, anomalies, unfairness and not  
6 least intellectual confusion. For example, what do you do when the admission is made  
7 while all the companies are under the same ownership, but they are separated after the  
8 admission and before the date of the decision.

9 The OFT takes as the relevant point in time apparently the date of the decision. Why is that  
10 relevant? Surely, if at the time when the admission was made the component parts of the  
11 undertaking were still part of the undertaking, is it not an admission made by the whole  
12 undertaking? Why does it matter if, after the admission is made but before the decision,  
13 they are divested? Why is it relevant?

14 Think of another situation. What do you do when the component parts of the undertaking  
15 are sold off the day after the decision is made? Is it not a bit rum to take the day of the  
16 decision as being material because then all that you are going to do is incentivise people, if  
17 they can, which they probably cannot do, to defer a divestment until after the decision has  
18 been made, the day after the decision has been made, instead of doing it earlier, because if  
19 they do the divestment earlier then they will be caught by this approach followed by the  
20 OFT. So what they should do is defer the divestment. This is just playing games.

21 The intellectual confusion arises under the OFT’s approach because there is no consistency.  
22 There is no consistency as to what the undertaking is or ought to be. The OFT is chopping  
23 and changing from one part of the fining process to another without any objective reason or  
24 justification for doing so, for being inconsistent. For example, we have got this calculation  
25 of the fine by aggregating the turnover of the separately owned component parts of the  
26 original undertaking, Crest’s turnover and the appellant’s turnover, which they have made  
27 through their own separate efforts and aggregated to produce a big figure. The figure taken  
28 is the one in the year before the decision is made.

29 The apparent object and effect of doing this is to re-create the original undertaking. Of  
30 course it is a fictitious re-creation, but by putting the turnover together you are seeking  
31 effectively to re-create the original undertaking for that part of the fining process. That is  
32 effectively what the OFT says in para.43 of their skeleton argument in the second sentence.  
33 We do not need to look at that. That is what effectively it says.

1 Of course, the OFT goes back to the original undertaking for the purpose of determining  
2 who lies under joint and several liability because joint and several liability works by  
3 reference to who composed the original undertaking. The OFT is then confronted by  
4 Crest's admission. What does it do? It abandons both the idea of the undertaking as it was  
5 originally constituted and also the fictitious recreation of the undertaking that it has carried  
6 out in order for other purposes relating to the fining process. What is the result? It is  
7 actually a partial abandonment of the principle of joint and several liability that the OFT is  
8 employing. In fact, by limiting the benefit of the reduction in the fine to Crest alone, the  
9 appellant is made solely liable for a part of the fine.

10 The abandonment of joint and several liability is partial only, but not only because there is  
11 joint and several liability for the rest of the time, it is partial only because when you look at  
12 that 15 per cent for which the appellant is solely liable, that is derived from a combination  
13 of turnovers of both the appellants and Crest. What is it? It is a sole liability form of joint  
14 and several liability which immediately brings to mind a well known passage in an episode  
15 from the American television series "Star Trek" in which Dr. McCoy says to Captain Kirk:  
16 "It's joint and several liability, Jim, but not as we know it!" In other words, it is an alien  
17 form of joint and several liability encountered only in works of fiction! (Laughter)  
18 The OFT blithely seeks to justify this in its skeleton argument paragraph 39(b) in the last  
19 few sentences. If you would be kind enough to go back to 39(b), I have already read out the  
20 first three sentences. If you go back to the beginning of the third sentence, the third line  
21 from the bottom of page 11 of the skeleton it says that the penalty was assessed in relation  
22 to the entirety of the undertaking which was guilty of the infringement as it was constituted  
23 at the time of the infringement.

24 Then we get this:

25 "It would be contrary to the basis upon which admissions were invited and  
26 considered if their impact were broader than impacting upon the subsisting  
27 undertaking as it stood at the time of the decision."

28 I have read this sentence several times. To be absolutely frank, I have no idea what it is  
29 supposed to be saying. Nor do I have any idea what is the process of reasoning that leads  
30 up to this sentence. What, after all, is the subsisting undertaking as it stood at the time of  
31 the decision? The undertaking that infringed did not exist at the time of the decision; it had  
32 been replaced in the sense that you had Crest (which no longer owned or controlled Pearce  
33 Midlands), and you had the appellant which did own, at the time of the decision, Pearce



1 Midlands. Of course, by this stage Pearce Midlands is dormant and has been dormant and  
2 non trading since something like 2003.

3 What is the subsisting undertaking in the singular? Let us suppose that the subsisting  
4 undertaking is Crest. The curiosity is that Crest's admission did not relate to Crest. It does  
5 not relate to the Crest undertaking at all because Crest's admission was an admission as to  
6 the liability of Pearce Midlands. I think you have seen the admission. It is in the document  
7 that is in the Crest trial bundle 1 tab 29. The admission was on the last page in paragraphs  
8 4.2-4.4.

9 THE CHAIRMAN: It specifically relates to Pearce Midlands.

10 MR. LASOK: Pearce Midlands. If, after all this time, the OFT is unable to articulate its case in a  
11 way that is coherent and intellectually comprehensible, then that is a reliable indication that  
12 their case is fundamentally flawed. That sentence which I read out a moment ago is not the  
13 only sentence that is relevant. The last sentence of paragraph 39(b) of the skeleton  
14 argument says this:

15 "To approach the matter in any other way would be to fail properly to  
16 incentivise those controlling the relevant undertakings *now*."

17 What is the incentive? I do not know what the incentive is. I can identify an incentive  
18 arising out of the OFT's policy. The incentive is, as I pointed out earlier, to postpone, if  
19 you can, any divestment until at least the day after the adoption of the decision, because if  
20 you do that, on the OFT's approach you will get the full benefit of the reduction justified by  
21 the admission. That is the only incentive I can identify. Maybe Mr. Beard has got some  
22 explanation as to what the incentive is.

23 Let us suppose that what the OFT is thinking of is this: that incentives to cooperate with the  
24 OFT by making an admission are needed only when component parts of an undertaking  
25 come under separate ownership. When they come under separate ownership if one of them  
26 makes an admission the other might not. They might wish to challenge the finding of an  
27 infringement and you want to incentivise them also to make an admission.

28 Why does not that apply, however, when these component parts are still part of the same  
29 undertaking? Why does it not apply? Let us suppose that you have got a group – we will  
30 take the present undertaking and go back in time to the point in time at which the  
31 undertaking comprises Crest, the appellant and Pearce Midlands, all three of them under  
32 common ownership and under the control of Crest. Crest makes an admission. Why is  
33 there no need for an incentive at that stage directed at the other component parts of the  
34 undertaking to get them to make an admission, why? Because, true Crest exercises decisive

1 influence over the appellant and Pearce Midlands. That was the finding made in the  
2 decision. But the problem is that the directors of each of the appellant and Pearce Midlands  
3 have fiduciary duties. They cannot just do as Crest dictates, if that is contrary to their  
4 fiduciary duties. If they were confronted with a situation in which Crest had done  
5 something and to go along with it would have imperilled the finances, for example, of the  
6 appellant or of Pearce Midlands by exposing them to a fine and they did not have a proper  
7 basis on which to go along with what Crest was doing, they would be obliged to take a  
8 different view.

9 So I do not know what this incentive referred to in the last sentence of paragraph 39(b) is,  
10 but if this is an attempt at substantiating a difference between companies that form part of  
11 the same group at the time of the decision and companies that are under separate ownership  
12 at the time of the decision, it does not run because the incentives, if they are acquired at all,  
13 are requiring component parts of an undertaking (where they are limited companies/legal  
14 persons) to make an admission apply irrespective of whether they are under common  
15 ownership or separate ownership, because fiduciary duties stand in the way of a subsidiary  
16 simply acting as a puppet to the dictates of a company in the position, let us say, of Crest,  
17 which wishes to make an admission. So that ground of distinction, in our submission does  
18 not apply.

19 Another extremely odd thing about this last sentence is the fact that in the present case the  
20 appellant was never told in advance that the OFT was going to take this course. So in the  
21 present case the idea of there ever being an incentive to the appellant also to make an  
22 admission on the basis of this line of reasoning was simply inapplicable. In our submission,  
23 any sensible person would have known that if an admission is made by a component part of  
24 an undertaking, it is an admission of the undertaking's liability. Therefore, if the admission  
25 justifies a reduction, it is a reduction in a fine imposed on the undertaking. It is not a  
26 reduction in that part of the liability to pay which is allocated to the person making the  
27 admission. So far as I know, the OFT's position on this point is unprecedented. If they are  
28 going to run an incentive argument, the very least they have to do is to say that they told  
29 everybody in advance that this is what they were going to do and that created the incentive.  
30 I also ought to add, in this connection, that before lunch Mr. Beard went on and on and on  
31 saying that to be deterrent the fine must reflect the size of the undertaking at the time of the  
32 decision. Of course, what we are actually talking about here is proportionate deterrence.  
33 That is the correct legal formulation of the deterrent aspect of the fixing of the penalty. But  
34 in a situation such as the present, what is actually happening is that it is disproportionate

1 because you are loading on to one part of what used to be a single undertaking a liability  
2 that is determined by reference to the turnover of what is now an independent part. So you  
3 are fining the component parts as if they were bigger than they actually are. That is  
4 inconsistent with the case that Mr. Beard was advancing before lunch. The upshot is, in our  
5 submission, that the OFT's approach was wrong in law and also discriminatory.

6 I am going to come now to the procedural unfairness point. In relation to that, the OFT  
7 makes two submissions in its skeleton at paragraph 39(c). I will deal separately with those  
8 two points. The first point in 39(c) was that (this is basically the second sentence) the  
9 appellant was given an opportunity to admit liability and chose not to do so. The OFT is  
10 really conspicuously silent on what actually happened in the present case.

11 Crest did not take up the OFT's fast track offer, and it did not make an admission when it  
12 saw the statement of objections. It ended up judicially reviewing the OFT and then, six  
13 weeks before the decision was published, Crest made an admission. The OFT, of course,  
14 knew that the appellant was not owned and controlled by Crest, and we have seen that the  
15 OFT had been told by Crest that there was a lack of cooperation between itself and the  
16 appellant reflecting a conflict of interest between them. So that was what was going on at  
17 the time.

18 Despite all that, the OFT did not inform the appellant of the admission. It did not give the  
19 appellant any opportunity to react to it. The appellant first knew of the existence of the  
20 admission when it saw the decision. It did not even know the terms of the admission until  
21 some time after that, when it was given them by Crest. The OFT has simply given no  
22 explanation whatsoever to explain why it conducted itself in that way.

23 This kind of conduct, and it is not limited to this particular instance, risks converting the  
24 process of encouraging admissions into a game orchestrated by the OFT which has got  
25 perverse incentives. The purpose of the process, in our submission, ought to be to  
26 incentivise the making of true admissions. But the way it has been operated by the OFT  
27 produces bizarre results. So that, for example, if you succumb to the blandishments of the  
28 OFT and tell a lie, namely you make an admission when you have no evidence justifying an  
29 admission (you just take a commercial view of it and you say: I do not actually believe that  
30 I was involved but I will just make an admission) what you get is 25 per cent if you do it at  
31 the right time.

32 If, on the other hand, you wish to be truthful (and it is a bit old fashioned to say so, but  
33 some of us were brought up to be truthful and it is said that those times have now passed,  
34 but anyway) you look at the material that you have, and you say; can I, in truth and justice,

1 make an admission? If you cannot, you cannot. But then you get penalised and the OFT  
2 thinks that that is all right. Other people might think that that was contrary to the public  
3 interest, but maybe that will be regarded as a forensic point.

4 At all events, we undoubtedly have a situation in which the public purpose of achieving  
5 proper fining is producing perverse incentives that are not necessitated by the system; it is  
6 just the result of the way the OFT has decided to run it. If you look at the situation in which  
7 both Crest and the appellant were confronted, we see the dangers of these perverse  
8 incentives at work.

9 Let us take the position of the appellant. The appellant simply did not know what had  
10 happened. Crest did not know what had happened. The appellant was therefore in a  
11 difficult position so far as the making of an admission was concerned, because it might be  
12 admitting something that was not true. It was bound to decide what it should do by  
13 reference to its feel of the situation and what it could see others who could be expected to be  
14 in a position to know what the position was were doing. In other words, it could look to  
15 Crest (which was the ultimate parent) and see what Crest was doing.

16 That problem, the problem confronted by the appellant, was particularly acute because what  
17 had happened was that the appellant had actually been disposed of by Crest in 2003 and  
18 then had been the subject of a second sale in 2007. More importantly perhaps, Pearce  
19 Midlands had been run down in the latter part of 2002 before the management buy out in  
20 2003. I am not asking you to look at it now but I will give you the reference. In the bundle  
21 of witness statements adduced on behalf of the appellant, there is a witness statement from a  
22 Mr. Leigh. In paragraph 5 he gives undisputed testimony that actions to close down Pearce  
23 Midlands were being taken from November 2002. It actually ceased trading completely in  
24 2003.

25 The OFT had been told of the appellant's inability to get evidence in June 2009, and that  
26 was even before Crest's admission. So it knew exactly what the position was. Actually, it  
27 could see that there was a risk that these perverse incentives would come to operate. At all  
28 events, when Crest (the appellant's parent at the time of the infringement), does not take up  
29 the fast track offer or make an admission in the light of the statement of objections, what is  
30 the appellant to conclude? The appellant does not know what information Crest has got. It  
31 does not know who Crest has been talking to. It observes Crest not making an admission.  
32 So the appellant can reasonably infer that Crest has reason not to do so. The appellant has  
33 no material on the subject.

1 Then Crest reverses its position, after the judicial review proceedings, Crest reverses its  
2 position. The appellant did not know that at that stage; it knew that when the decision was  
3 released. At that point, the appellant can see; if Crest has reversed its position prima facie  
4 Crest must have reason to do so. Had the appellant known, at the time of Crest's admission,  
5 that Crest had made an admission, what could it have done? It would have to have  
6 acknowledged that admission and acted upon it. After all, if you were once a component  
7 part of an undertaking and another component part makes an admission, how can you take a  
8 different position, unless you have got in your possession strong evidence showing that the  
9 admission is completely wrong?

10 If it is the case that you are in possession of strong evidence showing that the admission is  
11 wrong, you can say: the person making the admission has made a mistake, maybe they have  
12 made a commercial judgment, but I know my position and I have got my fiduciary duties  
13 that I as a director owe to the company, I have got evidence in front of me that enables me  
14 to ascertain what the position of the company is, I can make a decision. But if you do not  
15 have that, and the OFT knew that the appellant did not have that, what can you do? You are  
16 in a very difficult position because you have got nothing, absolutely nothing, to contradict  
17 or weaken the effect of the admission made by the other company.

18 Mr. Beard says that he relies on it. He relies on this state of affairs because at nine minutes  
19 past noon today (according to my watch) he said that making admissions assists the OFT  
20 (among other things) by enabling it to pin liability on the other associated undertakings.  
21 That is how the OFT is operating. If you are in the position of the appellant what can you  
22 do? You cannot do anything; you are stuck.

23 That puts in context the remark made by the OFT in its defence at paragraph 234 page 80  
24 (but you do not need to go to it; I will just mention it). The remark was that when presented  
25 with the same information as Crest and the statement of objections the appellant did not  
26 make any admission. But the appellant acted exactly as Crest did, because the appellant  
27 was in exactly the same position as Crest. Neither of them had any relevant evidence. The  
28 only difference between them was that the appellant did not judicially review the OFT.  
29 Apart from that, the appellant did exactly what Crest did. The allegation that when  
30 presented with the same information as Crest in the SO the appellant did not make any  
31 admission (which is the point made in the defence) is a completely bogus point. All that  
32 happened was that at the time the appellant acted in exactly the same way as Crest did for  
33 effectively the same reasons.

1 Of course, the appellant's position, since it had no evidence, in terms of not making an  
2 admission was rendered untenable. When the other component part of the undertaking  
3 made an admission the appellant could not guess why it had been made; it could only work  
4 on the assumption that Crest must have been acting reasonably. If that were so, the  
5 appellant had nothing to contradict the admission.

6 THE CHAIRMAN: This is very similar, is it not, to making admissions of fact in multi party  
7 actions, whether civil or criminal, where Party A may not have the relevant facts in his  
8 possession, but once Party C admits, for example, a series of communications that is all you  
9 can rely on? It is pointless contradicting.

10 MR. LASOK: That is right. So in our submission, the OFT's approach to the particular situation  
11 in which both Crest and the appellant were in is unfair and it is unjustified.

12 That brings me to the second point made in paragraph 39(c). The last sentence of 39(c)  
13 says:

14 "Indeed, given that Pearce [the appellant] continues to contest liability even  
15 post-Decision, it is simply not credible for it to suggest that it might have  
16 admitted liability earlier."

17 But in our submission that is just lacking in credibility as an argument. The problem that  
18 both Crest and the appellant had was the absence of evidence, and they were subjected to  
19 these perverse incentives. It is unfortunate for the OFT to rely upon the perversity of its  
20 approach in order to penalise people, but that is what it is doing.

21 But more to the point perhaps, we have to bear in mind that Crest's admission was not an  
22 admission of Crest's involvement in the infringement; Crest's admission was that Pearce  
23 Midlands was involved. In fact, Crest restricted itself only to not contesting that it was  
24 jointly and severally liable as the historic parent. The appellant's position was exactly the  
25 same. The appellant does not dispute that Pearce Midlands was involved in the  
26 infringement, and the appellant does not contest its liability as an intermediate parent, but it  
27 makes the point that intermediate parents are not being fined, which is a different point.  
28 The appellant is merely disputing the OFT's decision to pin liability on and fine the  
29 appellant as being directly involved in the infringement and that is an entirely different  
30 matter. So there is no inconsistency so far as the position of the appellant is concerned, and  
31 the position of Crest.

32 Finally on this point, the OFT also failed to tell the appellant that this is what it was going to  
33 do: that it was going to take what we would say is the remarkable step of limiting the 15 per  
34 cent reduction to Crest and not applying it to the fine as a whole. That meant that it failed

1 to give the appellant an opportunity to defend itself on that point. We have no idea why the  
2 OFT thought that it was appropriate to treat the appellant in that way, so unfairly. No  
3 explanation is given anywhere in the defence. The skeleton argument is also notably  
4 lacking in any kind of plausible explanation for the conduct of the OFT.

5 I pass on to the disproportionate nature of the fine. In our submission, it is relevant when  
6 one looks at the nature of the fine, to make the observation (although it is a repetition of  
7 what Miss Demetriou submitted) that this is a huge fine for one infringement in 2001,  
8 before there was any relevant case such as *Apex*. I have mentioned the appellant  
9 specifically because of course Crest is now out of the construction business as a provider of  
10 current construction services. So far as the appellant is concerned, it is still active in the  
11 sector. There is no evidence and no finding of fact indicating that it was necessary or  
12 thought necessary to impose a deterrent sanction of this level on the appellant, given the fact  
13 that after the infringement in 2001 the position had radically changed because we had the  
14 *Apex* case and everything else. Then people really knew what the position was.

15 I can understand that if the appellant had been engaged in infringements after the date of  
16 *Apex*, that would be different. If it was cover pricing after then, I can understand because  
17 that would have shown that the case law that had developed was inadequate to deter.

18 THE CHAIRMAN: You are making a greater concession than some have been in this court room  
19 this week.

20 MR. LASOK: I am being particularly kind to the OFT! (Laughter)

21 THE CHAIRMAN: You will have your turn on the bridge in due course, Mr. Beard!

22 MR. LASOK: Sir, one of the problems about this is that there is a legitimate argument for saying  
23 that the classic example of cover pricing is, if anything, a rather anodyne infringement of  
24 the competition rules, and nothing like the kind of problem that the OFT thinks. But I want  
25 to focus on one particular thing. All I am saying at the moment is that if you are thinking  
26 about deterrence and you put a whopping great big fine on somebody, that seems to be  
27 justified if you are looking at a situation in which everybody knew what the position was  
28 and they still carried on doing it. This was not the case because we had one infringement in  
29 2001.

30 THE CHAIRMAN: Deterrence is not necessarily aimed just at the undertaking in question, is it?  
31 It is aimed to deter others too.

32 MR. LASOK: Yes, but if you have got a whole range of infringers and you have got some people  
33 who are infringing, let us say, after *Apex*, or around the time of *Apex*, then you would say  
34 that these people are in a different position from those who were infringing years and years

1 and years ago. It is proportionality. You can say the deterrent message will get through. In  
2 the egregious cases yes, you should take the circumstances into account and you should fine  
3 appropriately. But when you are talking of other cases you would not necessarily take the  
4 same approach. After all, if you think back to *Musique Diffusion* and the reference to taking  
5 into account the circumstances of the case, it is a commonplace when you are looking at  
6 gravity or seriousness that you have to look at all the circumstances and you make a  
7 judgment. What you do not do is what the OFT did, which was to pigeon hole everybody,  
8 to say these are object infringements and therefore we do not need to consider anything else.  
9 Furthermore these are object infringements which we will call bid rigging, and then we put  
10 them in this particular pigeon hole and whop everybody in exactly the same way without  
11 taking account of the circumstances of each case. That is the wrong approach. It is wrong  
12 in principle, the authorities are all against it. That is why, ultimately, the OFT's approach is  
13 unsustainable.

14 Furthermore, certain aspects of the OFT's approach are, in our submission, clearly contrary  
15 to authority. The examples that I am going to go to now are the *T Mobile* case and the  
16 *Peugeot* case. *T Mobile* is directed to a point that surfaced in the OFT's defence where it  
17 was suggested that if you got an object infringement then you just do not bother with  
18 anything else. *T Mobile* is in bundle 8 of the authorities bundle tab 115. It is an instance of  
19 an object infringement. I will not go through the details of the case. If you go to  
20 paragraphs 30 and 31.

21 THE CHAIRMAN: We have been referred to this paragraph in another case too. We have it  
22 marked.

23 MR. LASOK: You will see that in paragraph 30 the Court of Justice recites settled law. They are  
24 there referring to a concerted practice, but they point out that there is no need to consider  
25 the effects of a concerted practice where its anti competitive object is established. In the  
26 last sentence of 31 they point out that: "anti competitive effects can only be of relevance for  
27 determining the amount of any fine and assessing any claim for damages." In other words,  
28 what happens is that it is not relevant to the findings of an infringement but there is no rule  
29 of law anywhere that says that one bars consideration of the effects of the infringement  
30 when one comes to the determination of the fine. Obviously, the gravity of an infringement  
31 is always relevant, the circumstances of the infringement are always relevant. Those cannot  
32 be glossed over by engaging in a pigeon holing exercise.

33 THE CHAIRMAN: Can you just pause for a moment. I am re-reading the last sentence. (Pause)  
34 Thank you.



1 MR. LASOK: That is why my submission is that there is no rule that excludes taking into  
2 account the effects of an object infringement when calculating the fine. That clearly  
3 follows from the last sentence of paragraph 31. In any kind of fining exercise, because you  
4 have to look at gravity, you have to measure seriousness. So you cannot, in our submission,  
5 engage in this pigeon holing exercise that the OFT engaged in.

6 In our submission, the position is even worse than that for the OFT because what the OFT  
7 did, both in the decision and in the defence, is to ascribe certain features or consequences to  
8 the infringements that it found. Once you do that, then, in our submission, you have to  
9 prove your case. You cannot say: we do not need to prove our case; we just rely upon the  
10 fact that the infringement is an object infringement. Once you have embarked upon saying  
11 that this type of infringement has the following features, it has the following consequences,  
12 then you have to show that those features do apply in relation to the particular infringement  
13 that you are fining.

14 An illustration of that is the *Peugeot* case which is in the same bundle. I think it is 108. My  
15 copy is in French.

16 THE CHAIRMAN: Moi aussi!

17 MR. LASOK: This is not done in order to annoy the Tribunal. I only discovered this a short  
18 while ago. Yesterday, I went on the European Court's website in order to get the English  
19 version and I discovered that this judgment is available in every known language other than  
20 English! (Laughter) It is not available in English. So far as I can tell, it is not reported in  
21 the Common Market Law Reports. I do apologise for this, but we are stuck with this.

22 THE CHAIRMAN: It gives you an opportunity to show off, something that you would never do  
23 otherwise! (Laughter)

24 MR. LASOK: That is absolutely right. If you go into the decision, this was also an object  
25 infringement. It is a judgment of the Court of First Instance, now known as the General  
26 Court. What happened was that the applicants to the Court of First Instance contested the  
27 Commission's approach to the gravity of the infringement on the ground that they had made  
28 an error so far as the assessment of the actual impact of the infringement on the market was  
29 concerned.

30 THE CHAIRMAN: Is this the case about price fixing of cars through distributors, something of  
31 that kind?

32 MR. LASOK: Yes. You can get this at paragraphs 287-292. That is the only passage that we  
33 need to concern ourselves with. I do not know whether you have got the page with 287 on  
34 it?

1 THE CHAIRMAN: Yes.

2 MR. LASOK: 287 immediately follows a heading that says “On the evaluation criterion for the  
3 gravity of the infringement relating to the actual impact or concrete impact of the  
4 infringement on the market”. Then there is a summary of the argument in 287, and in 288 it  
5 is reported that the Commission disputed this criticism of its decision stating that in any  
6 event the grave character of the infringement was found to a sufficient degree in the  
7 challenged decision on the basis of the nature of the infringement. Even if it had made  
8 mention of an effect or impact in the reasoning behind its assessment of the gravity of the  
9 infringement, that [that is to say the decision] was not in any event founded on the effects of  
10 the infringement.

11 In 289 the Court of First Instance says we have got to reject that argument because in 290 it  
12 says whatever the Commission says, it did not in the decision qualify or describe the  
13 infringement as very grave by reason only of its nature. Then at 292 it says it is necessary  
14 therefore to examine if the Commission, in the challenged decision, proceeded to findings  
15 that were such as to allow it, in its assessment of the gravity of the infringement, to take into  
16 account the existence of considerable effects.

17 In other words, if you have got a situation like the present case in which what the OFT  
18 actually does is to attribute to the infringement certain features, or certain factors, or certain  
19 consequences, then you have to prove them, and you have to prove them in relation to each  
20 individual infringement. If you are basing your assessment of the seriousness of the  
21 infringement upon this description of the infringement in which you have taken into account  
22 a number of features, what you are doing is bringing into the exercise allegations of fact,  
23 and ultimately they have to be proved.

24 What has happened in the present case is that we have a sort of Technicolor description of  
25 cover pricing in an early part of the decision which describes all of the horrible things that  
26 arise in cover pricing cases, such as for example the disclosure of commercially sensitive  
27 information, yet when we come to the description of infringement 75 we do not find any  
28 finding of fact that enables one to conclude that any of these horrible things actually arose  
29 in the case of infringement 75.

30 I will give you an example. Let us take commercially sensitive information. In some of  
31 these cases in the decision the cover pricing exercise seems to have taken place in two  
32 stages. Firstly, a sort of general cover price was given, it was a single figure. Then later on,  
33 the person who was taking the cover price came back and said: look, I have got to justify  
34 this; they want a breakdown, can you give me a breakdown. So a breakdown was given. It

1 is entirely possible that if a breakdown was given, that might reveal commercially sensitive  
2 information because that might reveal or give the person taking the cover price a better idea  
3 of how the person giving the cover price was pricing certain things.

4 But you see you cannot draw the conclusion that commercially sensitive information was  
5 being passed if the only thing that happened was that the person giving the cover price gave  
6 an inflated figure. In other words, an unreliable, single figure. Because then you could  
7 never take that figure and track it back to any reliable indication as to what the person  
8 giving the cover price might be charging for the contract, you could never trace it back to  
9 any way in which the person giving the cover price was actually pricing for particular  
10 things, you could never do it.

11 That does make a material difference if the OFT's case is as set out in the decision that  
12 cover pricing situations have these factors. One can go on and elaborate the point, and it is  
13 simply a case of comparing (as we have done in the written pleadings largely by cross  
14 reference) the description of what the Commission says is going on with the findings  
15 actually made in relation to infringement 75. There has been no attempt by the OFT to  
16 justify the seriousness of infringement 75 by reference to the facts and circumstances of  
17 infringement 75.

18 One is therefore left, in our submission, with a fine that is out of all proportion, both  
19 intrinsically it is disproportionate; it is also disproportionate to the penalties imposed on  
20 other parties and Miss Demetriou has already made submissions on that point. Therefore,  
21 the short conclusion is that the fine is unlawful and excessive and should either be quashed  
22 or reduced. Unless there is anything further on which I can assist the Tribunal, those are my  
23 submissions.

24 THE CHAIRMAN: Thank you very much. We will have a short break, Mr. Beard. Let us say  
25 twenty five past.

26 (Short break)

27 THE CHAIRMAN: If anyone, like us, was too hot earlier, we have cooled it down a bit so please  
28 tell us if it is too cold.

29 Secondly, we have set aside Monday as well for this case. I think Mr. Lasok may be more  
30 in control of this than you, Mr. Beard.

31 MR. BEARD: Mr. Lasok's junior has actually sent through a letter to the Tribunal setting out a  
32 timetable for Monday and the liability appeal. Unless things have changed, certainly the  
33 Office is content to proceed on that broad basis. That timing, as I recall, takes us just until  
34 after lunch and gives us plenty of leeway.

1 MR. LASOK: The only thing, sir, if I may add a little bit at that stage, is that what we hope is  
2 that we should be able to finish the liability side on Monday morning, but it may well be  
3 that if the Tribunal were prepared to, if you would be agreeable to rising later than one  
4 o'clock, if need be, because I would have thought that the greater likelihood is that we  
5 would be virtually over by one o'clock and may go for a further 20 minutes or half an hour,  
6 or something like that. It might be more convenient for the Tribunal and for everybody if  
7 we could finish the whole shoot before lunch or by lunch.

8 THE CHAIRMAN: Since our lunch has been reduced to sandwiches it makes no difference!

9 MR. LASOK: I sympathise, but ----

10 THE CHAIRMAN: Thank you! Mr. Beard, your turn on the bridge.

11 MR. BEARD: Before I deal with the two grounds that have been pursued by Mr. Lasok I was  
12 obviously concerned about him batting his eyebrows and/or eyelashes at the Tribunal or  
13 perhaps me in relation to my submissions relating to the jurisdiction of the Tribunal. Just to  
14 be absolutely crystal clear, we know this is an appeal. We have made that repeatedly clear.  
15 The position is set out in our defence, paras.25 to 28 for your note, skeleton, 30 to 38. If I  
16 refer to ability, and I mis-spoke we will see on the transcript. I imagine when I said  
17 "ability", what I meant was that in the light of the fact that the OFT had done a proper job in  
18 relation to the penalty, then there was not going to be an ability for this Tribunal to provide  
19 reasons why it had got it wrong and to impeach the decision. If I said anything differently I  
20 am sorry.

21 THE CHAIRMAN: I did not take it as such. It was merely a Lasokian swipe!

22 MR. BEARD: I have sadly risen to it!

23 Turning then to the grounds, dealing, first, with the OFT's approach to Crest's post-  
24 statement of objections, first, to start off with, it is accepted and indeed part of the OFT's  
25 general approach throughout the decision that parents and subsidiaries form part of the same  
26 economic undertaking, and there is no resiling from the definition that is used in the  
27 decision that "party" means "undertaking".

28 Secondly, when it came to setting penalties, the combined turnover of the undertaking used  
29 was the appropriate turnover to use in penalty assessment.

30 Thirdly, each legal person within the undertaking can be held jointly and severally liable for  
31 the infringements. However, none of these propositions means that where legal persons  
32 who formed part of an undertaking at the time of the infringement and then separate, that  
33 those separate legal entities and their separate legal identity must be ignored in relation to  
34 admissions and the credit given for them.

1 There is no schizophrenia on the part of the OFT in relation to these submissions. It is  
2 wrong to say that the OFT somehow imposed a higher penalty on Pearce Group and Pearce  
3 (Midlands) than it did on others. It did not. What it did was it reduced the penalty for  
4 which Crest was liable. It reduced that penalty because that is what a reduction for  
5 admission does. It recognises the benefits to the OFT of admissions being given even after  
6 the statement of objection stage. It is co-operation, recognised under step 4 of the penalty  
7 process.

8 It is true, normally when legal persons who form part of the undertaking at the time of  
9 infringement are subject to imposition of liability there is no problem, they are all part of a  
10 same undertaking at the time the admission is made. Normally, they will make explicit that  
11 the admission is on behalf of the relevant legal persons in the undertaking. If they do not,  
12 then theoretically an issue could arise, but in practice it would be presumed that since in  
13 order to be part of the same undertaking they would be needed to be treated as a single  
14 economic entity that would not be an issue.

15 It is worth noting two things: first, in no cases in this decision did the parent company  
16 accept an infringement and a subsidiary not, or vice versa, save for this case. Crest  
17 Nicholson and Pearce Group are the only example in this case of inconsistent approaches.  
18 The second thing to bear in mind is that Mr. Lasok referred to the Francis and Barrett  
19 position and took the Tribunal to VI, para.2145. It is worth noting two things. Francis are  
20 Barrett are currently part of the same undertaking; and second, they made joint  
21 representations in relation to the statement of objections. So quite where Mr. Lasok thinks  
22 this takes him in relation to the analysis is very difficult to understand because both of them  
23 said, "We admit", which is why, naturally, they will end up both getting credit.

24 The situation is different, however, if at the time of an admission the legal persons who  
25 formed part of the undertaking were no longer part of that same undertaking. That is the  
26 crucial difference. Each then has an independent decision making structure. It decides  
27 whether or not to make an admission. Each takes its own decision and, in taking that  
28 decision, gets the benefit of any assistance that it provides to the OFT by way of that  
29 admission. In this case, that was going to be after the SO, either 10 per cent or 15 per cent it  
30 was subsequently decided by the Office of Fair Trading.

31 The difficult issue here is that you cannot simply impute an admission to a separate legal  
32 person. The separate legal person has not made an admission. So the OFT cannot see how  
33 it is lawful and fair to treat that separate legal person who has made no admission in the  
34 same way as a person that has. It is possible that one legal person which had previously

1 formed part of a single undertaking with another at the time of the infringement might make  
2 an admission along the course of an investigation after they had become separate. The other  
3 might strongly disagree and contend that there was no liability. For instance, if the matter  
4 was an issue of law, you could have a situation where independent legal persons took a  
5 different view. The OFT does not see how in those circumstances it should be imputing the  
6 admission of one party – I am sorry, I will not use the term “party” given the emphasis  
7 Mr. Lasok placed on it – independent legal entity that is no longer part of the same  
8 undertaking as committed the infringement, why the admission should be imputed to both.  
9 In those circumstances, if the non-admitting legal person were bound by the admission of  
10 the other it would seem to leave it in a rather impossible position in relation to any putative  
11 appeal on liability. If you disagreed with the legal analysis, you would end up turning up  
12 before this Appeal Tribunal saying, “I am imputed with an admission, but actually I deny  
13 the infringement. In those circumstances it is difficult for the OFT to understand why it  
14 should be treating both in the same way when only one, as an independent minded entity  
15 following the separation, has made the decision to admit the particular infringement.

16 THE CHAIRMAN: Then are you not expecting the other company to admit something of which  
17 it may have absolutely no knowledge? If so, how can it be fair that that company should be  
18 in a worse position because it no longer retains the knowledge than the company that has  
19 taken the knowledge away with it?

20 MR. BEARD: I am sorry, I was taking it in two stages. I was not moving to the procedural  
21 fairness point immediately. I see that the procedural fairness point needs to be dealt with,  
22 the third of Mr. Lasok’s arguments. I was here dealing with the first of them, that, as a  
23 matter of law, the admission is imputed from one legal entity to another, even though they  
24 are independent at the time the admission is made. Mr. Lasok says that must be right, that  
25 must be the way it works. We say we just do not see that, you have got independent legal  
26 entities who are making independent decisions. How can we immediately say an admission  
27 is made by one, that admission is to be commuted to the benefit of the other, or indeed  
28 potentially to the problem for the other if they wanted to challenge the matter.  
29 Of course, we do in this case, I should note, have an appeal against liability by Pearce  
30 Group so it is claiming the benefit of Crest’s admission, but it is also appealing. I should  
31 say that that is a slightly different situation because what it is doing is trying to extract itself  
32 from the middle of the chain of entities that formed part of the original undertaking when  
33 the infringement was committed. The relevant comparator would be if Pearce (Midlands)  
34 was also challenging liability here. If you have a situation where Pearce (Midlands) wanted

1 to challenge liability for any particular legal reason, for example, but Crest had made an  
2 admission, you can see how the difficulty arises. That difficulty is a reflection of a legal  
3 approach which is not founded in any authority, and it is not inconsistent with the broader  
4 approach that is being adopted, which is we focus on the undertaking as it was at the time of  
5 the infringement, and we say, “What were the legal components of that undertaking then?”  
6 If they then separate we still want to capture the relevant turnover and the group turnover of  
7 those entities subsequently for the purposes of fair penalties for reflecting seriousness for  
8 deterrence, as has already been adverted to. There is no contradiction there.

9 It is a different matter when one is talking about admissions which are matters, of course, of  
10 coming to the OFT and saying, “We have done something and we want some sort of  
11 reduction”. If you are going to get a reduction for doing nothing then obviously there  
12 would be a problem in terms of fairness. The point I make is that none of the examples  
13 cited by Mr. Lasok are counter-examples at all, because there are no cases where there is a  
14 different approach adopted by any of the legal entities, whether or not they continue to form  
15 parts of the same undertaking or have divided at some point during the investigation. I can  
16 answer one of the rhetorical questions at least that Mr. Lasok posed, which is, what happens  
17 if, for example, a leniency party – because the same sort of issue will arise in relation to  
18 leniency applications – comes along with a number of undertakings, seeks leniency and then  
19 separates? The answer is, because at the time when the leniency application was made all  
20 of those legal entities formed part of the same undertaking applying for leniency they all get  
21 the benefit of it. There are two examples of that, just for reference, Irwins and Propensity  
22 are specific examples of the way in which the OFT approached it – in other words, they  
23 were leniency parties with ex parents by the time the decision came to be made, but they  
24 were all part of a single undertaking at the time when the leniency application was made,  
25 and indeed, of course, at the time of the prior infringement.

26 The fact that we talk about separation of legal persons for the purposes of admissions does  
27 not have anything to do with assessment of turnover. That is a complete red herring in  
28 relation to this issue. There are separate considerations that apply to admissions as  
29 compared with the consideration of the penalty structure that one wants to put in place, and  
30 the principle of deterrence is in no way inconsistent with this approach. We want to deter  
31 all entities which were responsible for the infringement, even if they separated out after the  
32 infringement, which is why we capture all of their turnover in the assessments and in this  
33 case, that of Crest, Pearce Group and indeed Pearce (Midlands).

1 There was one point that Mr. Lasok raised about the operation of fiduciary duties as if this  
2 problem would arise within already integrated or continuing to be integrated undertakings,  
3 so that if this is a problem of imputing the admission between two separate undertakings,  
4 the same problem must arise within an undertaking. This is a novel excursion into company  
5 law, which has not been developed in any of the submissions and has formed no basis of the  
6 appeal to date. It is not accepted that that is in any way the correct analysis, but in practice  
7 in this case it did not arise at all, and since the application being made before you is that  
8 there is an inequality in the approach no issue arises in this case, and it is a matter that  
9 would have to be considered if it arose in some other case. In practice, it does not seem to  
10 arise, and the Francis and Barrett example is a good one, that when it comes to making  
11 admissions all the components of a relevant entity tend to make them together, they tend to  
12 make leniency applications together, and if they do not do it immediately then they rapidly  
13 confirm to one another that they are indeed doing so.

14 In the circumstances, that submission that has been developed does not impact upon the  
15 way in which the analysis of admissions should be properly considered.

16 That then takes me on to the second point, the so-called unfairness or inequality point. I  
17 have effectively covered this. In relation to the various parties that are set out in tabs 20 and  
18 21 of the notice of appeal, and it might just be worth turning these up ----

19 THE CHAIRMAN: Yes.

20 MR. BEARD: What this is is a table which is seeking to point out that where discounts were  
21 awarded for co-operation for post SO admission of liability, there are relevant comparators  
22 to Crest and that they have been treated differently because both entities was granted the 15  
23 per cent discount. The point here is that even in relation to those cases – for instance,  
24 Crown Point – where the entities are no longer part of the same undertaking, the admission  
25 was made by both of them.

26 If one turns over the page and looks at the next schedule, tab 21, this is a similar sort of  
27 table, but in relation to fast track offer reductions and leniency reductions. Here again the  
28 point is being made, I think, is here you have got examples of groups of companies, they are  
29 not necessarily still part of the same corporate group at the time of decision, but nonetheless  
30 here we have a situation where they are all given the benefit of either the fast track offer  
31 acceptance or the leniency application, as the case may be. The point in relation to all of  
32 those is again that all of them were cases where, at the time of the relevant acceptance of  
33 leniency application they formed part of the same group.



1 The unfairness or inequality point takes Mr. Lasok nowhere. Then we are into the third of  
2 his arguments, procedural unfairness. Mr. Lasok says, "It is terribly difficult, we were left  
3 in an invidious position, because we did not know that Crest Nicholson was going to admit  
4 anything post-SO". One needs to take this in stages. First, it is absolutely clear that post-  
5 statement of objections co-operation may be taken into account in penalty setting. It has  
6 been said before that this is part of a step 4 adjustment, and parties know this. It is  
7 obviously well understood. As was made clear in the hearing this morning, in fact there are  
8 13 cases apart from Crest where a party came forward after the SO and said, "Okay, we are  
9 not going to contest various components, we accept various findings in the SO". For your  
10 notes and for the transcript, those are B&A, Bowmer and Kirkland, Connaught, Crown  
11 Point, Dukeries, Francis and Barrett, Hill, Interserve, Stainforth, T Denman, Thomas Long,  
12 William Sapcote, William Woodsend and Willmott Dixon. All of them got post-statement  
13 of objections co-operation discounts. That is, of course, in addition to Crest. There was  
14 nothing to stop Crest doing the same. For Crest to turn round and say, "We were in a  
15 terribly difficult position", there is a degree of irony about this, because of course Crest's  
16 contention has always been that it was one removed from Pearce (Midlands), so it could not  
17 do anything about it. Pearce Group was of course the direct parent of Pearce (Midlands) at  
18 all material times. So the idea that it is somehow in a worse position than any other party in  
19 looking at the SO and saying to itself, "Do we accept, do we not accept the infringement  
20 that is being proposed to be made against us in circumstances where the evidence has been  
21 set out" is simply a submission that does not face the reality of parties who have received  
22 this lengthy statement of objections, know that they can get potential benefits if they make  
23 admissions and, in many cases, did so.

24 I should stress of course that the 13 that we are talking about who came and made post-  
25 statement of objection admissions, that is after of course many parties had made leniency  
26 applications, many parties had accepted the FTO and therefore we are talking about a much  
27 smaller sub-set of the 103 total parties that were alive enough to this issue that they came  
28 along and said, "We will accept what is being proposed to be made against us".

29 If it had wanted to, of course, Pearce could have spoken to Crest if that was an issue. There  
30 is not an issue here. It had been made clear in the FTO process that the two companies  
31 could communicate, so that was well understood. To go to the core of what Mr. Lasok is  
32 saying, there is no obligation on the Office to be telling other parties whether proposed  
33 infringements that are being made in the SO are being accepted.

1 THE CHAIRMAN: There may be no obligation, but is it not a self-evidently sensible thing to do  
2 that might reasonably be expected by one of two formerly connected parties?

3 MR. BEARD: Let us just pause there. You can have situations where an SO makes all sorts of  
4 findings which may relate to multi-party arrangements. In this case, a lot of the  
5 arrangements were bilateral, but that is not universally the case. There are instances where  
6 more than one cover bid was involved in a particular tender process, so an infringement  
7 involves more than just two parties. So you can get a situation where there are all sorts of  
8 parties making all sorts of admissions in the face of the SO. They make all sorts of  
9 representations as to why the SO does not make any sense, why it is wrong, why it is  
10 inadequate, but nonetheless you have a situation where there are all sorts of admissions  
11 being made. Those admissions do not form part of the central reasoning of the Office. The  
12 Office sets out in its statement of objections the basis of its case. The fact that someone  
13 comes back and says, "I am not challenging that particular case" is not something that the  
14 Office is required then to put back to any other parties. If that were the sort of obligation  
15 that fell upon the Office post the statement of objections, one can envisage how you get a  
16 series of iterations of the statement of objections having to be put back to parties. If  
17 someone admits something it is contended that that something is relevant to any other  
18 parties who may be affected in relation to the assessment ----

19 THE CHAIRMAN: I am sorry, Mr. Beard, forgive me for interrupting you again, let us just  
20 pause for breath for a moment. Here you have what are now two legal entities which used  
21 to be one legal entity.

22 MR. BEARD: Yes.

23 THE CHAIRMAN: One of those two legal entities makes an admission, because it is the legal  
24 entity that has the relevant information, or is more likely to have the relevant information  
25 because it contains a relevant component of the former parent.

26 MR. BEARD: Miss Demetriou might well take issue with that analysis since her case this  
27 morning was that Crest, as the ultimate parent, had no information and was in a much worse  
28 position, but beyond that ----

29 THE CHAIRMAN: I am sorry, I will start again. You have a former parent which is divided in  
30 two. I will keep it simpler. One of those two makes an admission to the OFT. The OFT  
31 knows that these are two formerly connected parties. Is it not a matter of common sense  
32 and good administration and indeed a reasonable expectation that the OFT will tell each of  
33 those two formerly connected parties whether the other has made admissions in the real  
34 world?

1 MR. BEARD: In the real world of an extensive investigation having been carried out, and  
2 extremely lengthy statement of objections having been prepared, 103 parties making  
3 representations to it where in many of those representations you are getting opposition and  
4 admission or no challenge. The circumstances in which the OFT must decide that actually  
5 it must put back the non-challenge or admission to another party because it might be  
6 affected by it are very difficult to delineate. The concern in particular that the Office has, of  
7 course, is that one ends up with a slippery slope of trying to identify ----

8 THE CHAIRMAN: What is the difficulty in this case?

9 MR. BEARD: Understood that this may well be an extreme case and that here, if the Tribunal  
10 was considering that actually in these very particular circumstances where you have a  
11 particular undertaking that had separated and that subsequently one part of that undertaking  
12 had made a specific admission, one can see that you are not necessarily opening the  
13 floodgates. That must be accepted if it is sufficiently delineated in that way. The point that  
14 the Office would make is that as an incident of the rights of defence for principles of  
15 fairness, it does not accept that an admission or a non-challenge to a part of the SO is  
16 something that must be put back, otherwise this process will become unmanageable. You  
17 have a situation where the evidence is provided to the parties, they have the opportunity to  
18 comment, they can admit, not challenge or challenge. That is where we get the 103 screeds  
19 that come back at us in relation to responses to the SO. If the Office is supposed to work  
20 out which components of those particular parts must be put back that would make the  
21 exercise unmanageable, and it is not part ----

22 THE CHAIRMAN: Manageability is in the OFT's control. They choose how many parties, they  
23 choose how many infringements, they choose the period of years over which it is done. All  
24 those are their choice.

25 MR. BEARD: Of course, but there is a degree of irony here. This is a situation where the OFT  
26 has sought to narrow down the scope of this investigation. I adverted earlier to the scope of  
27 it initially, and the OFT has tried very much to manage that and narrow it down still. In the  
28 circumstances given the scale of the suspected infringements, there are a lot of parties. But  
29 it is the iterative process that is highly problematic here. Here you have a situation where  
30 Pearce clearly could have made admissions. The fact that Crest did not is beside the point  
31 for these circumstances. On that basis there is no procedural unfairness in circumstances  
32 where Pearce, having received the substantial SO, understanding the evidence against it,  
33 just as Crest did, made an independent decision not to admit. It made that choice, it must

1 stick with it. Whether or not Crest did or did not admit is neither here nor there, and in the  
2 circumstances Mr. Lasok's third argument does not assist him either.

3 Unless I can assist the Tribunal further in relation to those matters, I will move on to  
4 seriousness of the infringement.

5 Seriousness of the infringement: I will deal with this in four points. First of all, can I take  
6 you briefly to the consolidated defence. At p.15 of the defence one sees the start of the  
7 Office's outline case in relation to the seriousness of infringement. Mr. Chairman, I realise  
8 that you have been taken to some of these passages previously, but it is important to note  
9 what is said here by the Office in relation to the nature of the infringements at issue here. In  
10 particular, moving on through to para.41 on p.16, it is worth noting that the approach to  
11 seriousness that was adopted in this case is similar to that which has been adopted in a  
12 number of cases concerning cover pricing. For your notes, those cases are found variously  
13 in volume 9 tab 123, 125, 126; volume 20 tabs 127 and 128. Of course, some of them were  
14 subject to appeal and the cases that are relevant are *Price* at volume 4 tab 47; *Apex* volume  
15 3 tab 46; and *Makers* volume 4 tab 57.

16 In paragraph 43 of the defence, the Office sets out the approach that was adopted in *Apex*. I  
17 would invite the Tribunal to read through paragraphs 43-45 which set out relevant quotes  
18 from *Apex*. (Pause)

19 Then if one turns on the page to paragraph 50, the Office draws together the points from  
20 *Apex* and indeed the *Roofing* decisions.

21 "The client who puts a construction job out to tender in almost all cases will not  
22 be (and, in the case of all infringements penalised in the present infringement, in  
23 fact was not) informed of this secret arrangement and takes the bids as genuine  
24 competing bids. As a result, that person is deceived in relation to a number of  
25 bona fide independent bids he has received from rival firms competing for  
26 work. The bids therefore convey a false impression both of the degree of  
27 competition for the work, and of the willingness and ability of one or more  
28 particular undertakings to bid for it (this being relevant to 'credibility').

29 'Credibility' is in turn relevant to the likelihood both that clients will seek  
30 additional tenders in respect of the same project, or request bids from the same  
31 bidders in future projects. (51) A bidder has no legitimate interest in protecting  
32 a rival undertaking's bidding credibility."

33 THE CHAIRMAN: I have also read the footnote referring to the case I am hearing next week.

1 MR. BEARD: Yes. Then in paragraphs 52 through to 54 it sets out how these matters were  
2 considered and approached in the decision. If I may, I will just briefly take the Tribunal to  
3 the decision itself in this regard, because there seems to be some suggestion being made that  
4 these matters were not the subject of any substantive consideration and that is simply  
5 wrong.

6 The section of the decision I am going to take the Tribunal to begins at page 1644. It is  
7 VI.78. This is all to do with the step 1 calculation. At 79 one can see that there is a  
8 consideration of what constitutes relevant turnover – it obviously draws on the substantive  
9 analysis earlier in the decision about relevant markets. Then there is consideration of issues  
10 relating to business year which I will not rehearse but have been the subject of appeals.

11 There are various submissions in paragraph 94 onwards about non trading businesses and  
12 how that should affect the business year. The section I particularly want to draw the  
13 Tribunal’s attention to begins at paragraph VI.102, the Nature of the Infringement. I invite  
14 the Tribunal just to read paragraphs 102-104. (Pause)

15 Sir, the OFT here is recognising that cover pricing is a serious matter. It would be worse if  
16 it were part of some grand scheme, but as indicated at 104, because they are individual,  
17 discrete infringements that is a factor that is taken into account in assessing the overall  
18 seriousness. Then at 105 there is a summary of various submissions that are being made by  
19 the parties, including that submission that it was all a legitimate practice. I turn onward.

20 Compensation payments are dealt with at paragraph 113 onwards. Then, echoing the  
21 language of the guidance, if one turns on to page 1655 paragraph 120 under the heading  
22 “Nature of the product, structure of the market, and the effect on customers, competitors  
23 and third parties”, this section is where the OFT considers the way in which, in the light of  
24 the submissions that are being made, matters should be assessed for the purpose of step 1.  
25 Of course, it is focusing on not the question of the relevant turnover, but the percentage that  
26 is going to be applied to it.

27 At 122 and 123 what the OFT does is take into account the nature and structure of the  
28 markets in question. At 123 it notes:

29 “Had the infringements been part of a wider cartel scheme, the OFT would  
30 almost certainly have adopted a higher starting point closer to the upper end of  
31 the possible range.”

32 That is because here it is said the infringement fell in the mid to upper range. Then it looks  
33 at issues to do with values of tenders, how material was that to the question of seriousness?

1 The OFT notes that there was a vast range of tenders and trying to distinguish in those  
2 circumstances is not something that would assist in assessing seriousness.  
3 Then there is a section from 127 onwards in relation to the analysis of effects. Specifically  
4 at 128 the OFT concludes, rightly, that it is not required to carry out an effects assessment  
5 here. Mr. Lasok has referred to cases in that regard. The first is *T- Mobile* and all that *T-*  
6 *Mobile* says is that you can take into account effects. The second is *Peugeot*. It is not really  
7 appropriate to make submissions in relation to an authority which is not in English in  
8 relation to this case. Nonetheless, it is notable from that case both that it was a case  
9 concerning object and effect in the infringement, and secondly that the Commission had  
10 made findings in relation to effect and then was saying; we do not actually have to have  
11 proved anything in relation to our specific findings in relation to effect.  
12 Indeed, it would be remarkable if the only judgment that could be pointed to for such a  
13 radical proposition that you had to consider the individual effects of individual  
14 infringements was to be found in a 2009 judgment of the European Court of Justice which is  
15 not in English. None of the other authorities suggest anything like that radical proposition,  
16 and it is not made out in that case or any other case. It would plainly turn the whole  
17 exercise on its head if, in an object infringement case, in order to set a penalty you had to  
18 carry out a detailed and specific effects analysis. That is just plain wrong and there is no  
19 authority for that proposition.  
20 Then one turns to paragraph 130 onwards to “Impact on building costs and taxpayers”, so  
21 there was consideration of various submissions that were being made in relation to that.  
22 Then over the page, purported lack of adverse effects, which is a common theme amongst  
23 many appellants that these deceptions were not actually very serious; they did not have any  
24 real impact. It is worth noting at paragraph 137 onwards:  
25 “The OFT considers that, whilst not all of the Infringements described in this  
26 Decision will necessarily have had the actual effect of preventing or restricting  
27 competition, as a minimum all of the Infringements had as their object the  
28 distortion of competition and, contrary to some Parties’ suggestions, none of  
29 them can be expected to have had a benign or positive effect. [That was an  
30 ambitious submission being made.] The starting point at step 1 has been set to  
31 reflect this distortion.”  
32 Then in paragraphs 138-141 what one sees is a quotation from *Apex*, and then identified  
33 serially the key elements of that *Apex* finding that is cited in the defence and which the  
34 Tribunal has already read. The Parties deliberately deceived, parties deprived of obtaining

1 an alternative bid, a potentially more efficient bidder that wanted the job may have been  
2 deprived of an opportunity, the company submitting the cover price was in no position to  
3 know whether the remaining bidders were submitting genuine bids (142). So these matters  
4 were specifically considered.

5 Then the effect on consumers of compensation payment arrangements – that is not relevant  
6 today. Super competitive profits – that was a suggestion that you could not make any  
7 finding or impose a penalty where there were not super competitive profits. Alternatives to  
8 cover pricing – some contended that customers had relevant knowledge. As I say, there  
9 were some ambitious submissions that are outlined at 153 onwards: the purported positive  
10 effects of cover bidding, there were points taken about the non award of tenders, other  
11 arguments then in relation to seriousness from paragraph 162 onwards.

12 Then at 167:

13 “Taking into account all of the above factors, the OFT has set the starting points  
14 for the Infringements within the middle to upper end of the scale (the maximum  
15 being 10 per cent of an undertaking’s relevant turnover [in line with the  
16 guidance]). The starting point for those Infringements involving compensation  
17 payments is set at a higher level ...”

18 At 168 5 per cent for those not involved in compensation payments. Then 172:

19 “The OFT also considered whether the starting points in this case should be set  
20 at a higher level than in its previous roofing cases, given that a number of the  
21 Infringements took place after the OFT issued those decision ... and there was  
22 no evidence that the construction industry as a whole reduced its involvement in  
23 cover pricing to any significant extent between the OFT’s roofing decision and  
24 the issue of the Statement in April 2008.”

25 THE CHAIRMAN: Where, apart from possibly by implication in paragraph 173 on page 1659,  
26 do we find any consideration of the percentage being set at the lower level?

27 MR. BEARD: The question that was being considered in the round was where the percentage  
28 should be.

29 THE CHAIRMAN: They seem to have taken 5 per cent as the starting point, because of *Makers*.

30 MR. BEARD: No, I think the question is what should it be, and taking into account *Makers* and  
31 what had been done in other decisions, that was obviously a sensible benchmark. Whether  
32 or not there was anything that distinguished these cases systematically from the position in  
33 relation to the *Roofing* decisions and so on is considered earlier: there is no basis for that. If  
34 there is no basis for considering them systematically differently from those *Roofing*

1 decisions, there is not any basis for moving it downwards. Therefore, that is implicit in that  
2 consideration of those cases.

3 THE CHAIRMAN: Forgive me for interrupting you once more, I apologise for it. Reverting to  
4 paragraph VI.137 – and you have to help me with this because there is an awful lot of paper  
5 in these cases, are there any examples at all in these infringements which are demonstrated  
6 to have the actual effect of preventing or restricting competition?

7 MR. BEARD: There are no findings of actual impact.

8 THE CHAIRMAN: I thought so.

9 MR. BEARD: That is not the way in which this decision was structured. It was structured solely  
10 around the analysis of whether or not cover pricing had the object of preventing, restricting  
11 or distorting competition.

12 THE CHAIRMAN: Just remind me, in *Makers* was there a finding of actual effect on  
13 competition?

14 MR. BEARD: No.

15 THE CHAIRMAN: Thank you, forgive me.

16 MR. BEARD: It may also be worth noting, sir – we have checked this – there have been cases  
17 where nominal or no fines have been imposed in infringement fining cases by the Office,  
18 and there are cases where there have been early settlements that have reached that  
19 conclusion. For instance, the private school fees cartel was such a case where a nominal  
20 penalty was imposed that was then paid to charity, as I recall. Where a percentage has been  
21 used, there has never been a percentage applied lower than 5 per cent. They have been 5  
22 per cent or higher.

23 Going back to para.172 and 173, 172, the situation was that in the light of all of the  
24 submissions that had been made, bearing in mind the approach that had been adopted  
25 previously, given the lack of apparent response from the construction industry post 2004,  
26 the OFT considered that here, in fact, a higher percentage might well be appropriate, but  
27 instead at 173 it says:

28 “The OFT has given consideration to the parties’ arguments to the effect that many  
29 of the infringements occurred before the OFT’s roofing decisions and that there  
30 was general widespread ignorance about legality. Whilst such arguments do not  
31 excuse the practice of cover pricing since ignorance of the law is no defence,  
32 taking these submissions into account along with the other factors referred to in  
33 this section, the OFT has determined on balance that it would not be appropriate in



1 this instance to apply a higher starting point than that used in previous roofing  
2 cases.”

3 So the OFT had reached the conclusion not that there was any good basis for actually  
4 moving it below 5 per cent, but there may be a range of good reasons for moving it above 5  
5 per cent. On balance it decided not to. It then sets out a very clear warning in 174:

6 “It should be clearly noted that in future the OFT may well consider it appropriate  
7 to apply a significantly higher starting point in any future cases involving cover  
8 pricing.”

9 Then in paras.175 onwards, there are further considerations of the particular suggestions  
10 and submissions that were made, including that there should be an individual starting point  
11 for each party, which is rejected. It is not inconsistent, there is not a good basis for  
12 differentiating them. Then at para.181 we move on to step 2.

13 However, it seemed appropriate that the Tribunal got a full flavour of the fact that contrary  
14 to the impression that may have been gained from some of the submissions, actually a rather  
15 detailed consideration of these matters was taken into account but bearing in mind all of the  
16 circumstances and bearing in mind the principle of consistency it was appropriate in cover  
17 pricing cases to apply a 5 per cent starting point to the relevant turnover, and that in  
18 compensation payments it should be higher at 7 per cent. So, in the circumstances, it is  
19 quite wrong to say that the level of seriousness was inappropriately set. It was properly set.  
20 It was the right level, and in those circumstances this Tribunal should not disturb that level.  
21 I will not go on to deal with any of the other matters that were touched upon. They are dealt  
22 with in skeleton arguments and submissions.

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

24 THE CHAIRMAN: Thank you very much, Mr. Beard. Mr. Lasok?

25 MR. LASOK: I think I have got five points. The first is this: so far as Francis and Barrett is  
26 concerned, I wrote down what Mr. Beard said as a submission that both Francis and Barrett  
27 had said they admitted their involvement. That may be true, but it is not what the decision  
28 says. The decision says that Francis admitted its involvement. There is a quotation of what  
29 was admitted. I think the paragraph is 2147 in section IV.

30 Secondly, I may have misunderstood Mr. Beard, but I thought that he was saying that there  
31 was no other case in which a parent had made an admission and a subsidiary had not. In our  
32 submission, that is irrelevant because it does not matter which of the component makes the  
33 admission and which did not. The basic principle is that if one of them does then it is an  
34 admission that goes to the undertaking as a whole, and that approach should be followed

1 whether the different component parts remain under the same ownership or under separate  
2 ownership.

3 The third point I have some difficulty with. I think the submission made was that one  
4 cannot impute an admission to a separate legal person. In our submission, the verb  
5 “impute” ought to be avoided. This verb is normally used in the context of the imputation  
6 of liability, and it is a term that appears to have acquired a technical meaning in the case law  
7 of the European Courts, and also in the context of competition law decisions in this country.  
8 It is much better to use ordinary language. If we deal with that, what we would do is to first  
9 ask the question, does an admission made by one person bind in law another person? The  
10 answer is no, and that is so whether or not the two persons are legal persons under the same  
11 ownership or different ownership.

12 If you ask a different question, does an admission made by one person potentially or  
13 actually adversely affect the position of another position, the answer is, it may well do – it  
14 may actually do it, it may potentially do it. There is a difference between a legal  
15 consequence of an admission and a factual consequence. My submissions have been  
16 directed on the assumption that we are talking about factual consequences, hence my  
17 submissions about the disadvantage that the appellant lay under. The main point is that it is  
18 far from obvious that there is a legal rule anywhere that says that as a matter of law an  
19 admission binds in law other persons within the same group of companies, but does not bind  
20 in law separate independently owned legal persons. No authority for any such proposition  
21 has been put forward. We would submit that that does not really matter, because at the end  
22 of the day the question is, what is the admission and in the present context it must be an  
23 admission of liability of the undertaking, and consequences follow from that, but the  
24 admission is always an admission of liability of the undertaking. In fact, that is the  
25 admission that is at issue here. It is no other admission.

26 The fourth point is this: my learned friend criticised one of my illustrations, which was the  
27 one about the oddity of the divestment occurring after an admission had been made, and he  
28 said if it was leniency you would get the benefit even if the companies were separated after  
29 the leniency application had been made and dealt with. I understood him, therefore, to say  
30 that the critical question is not as he has argued it in his skeleton argument, the state of play  
31 at the date of the decision, but it is, in fact, the state of play at the time of the admission. If  
32 that is his case then the lunacy argument that I am putting forward is even stronger, because  
33 it means that the incentives now set by the OFT are incentives simply to defer a divestment  
34 until the day after you have made an admission. In our submission, it is a ludicrous

1 situation to be in in which the effect on a fine of an admission as to the liability of an  
2 undertaking will shift radically depending upon the timing of a divestment. It is not logical.  
3 In fact, no submission has been put forward today that presents any kind of justification for  
4 that approach.

5 Fifthly, my learned friend said in relation to the fiduciary duty point that I had advanced  
6 that that question, the question of fiduciary duties, did not arise in the present case. It must  
7 be borne in mind that my point about fiduciary duties arose from the line of argument that  
8 was being advanced more particularly in the skeleton argument in which the OFT was  
9 simply coming down, or appeared to be coming down in the last sentence of para.39(b) of  
10 the skeleton argument, to saying that its approach was necessary in order to incentivise  
11 those controlling the undertaking now. I was making the point that the incentive must also  
12 be there even in the case of members of the same corporate group, because you cannot  
13 assume that members of the same corporate group must toe the party line merely because  
14 the holding company says so. So I was not making an assertion about the facts of the  
15 present case, I was attacking a particular point that was being advanced by my learned  
16 friend in his skeleton argument. He says he does not accept the point. So be it, but I still  
17 make it. There is a fiduciary duty upon the directors of a company. They cannot act as  
18 puppets of somebody else.

19 That brings me to my last point which concerns the seriousness. My learned friend spent a  
20 great deal of time going through the decision. In our submission, he made eloquently the  
21 basic point that this is a one size fits all approach, you do not look at the circumstances of  
22 the individual infringement, because it is obvious from the way he went through the  
23 decision that that was the approach followed by the OFT. A particular manifestation of it,  
24 which I am going to turn to now, is in the defence at para.43, which is a passage that he  
25 drew your attention to. It is p.17, and in the second line of para.43 it says:

26 “... the Tribunal noted that when an undertaking (which for whatever reason does  
27 not wish to win a tender) opts to put in a cover bid rather than declining to bid, it  
28 deprives a genuine bidder of the opportunity to take its place and put in a  
29 competitive bid.”

30 This is one example of a whole series of things that are said about cover pricing. It is  
31 obvious that this situation is capable of arising in a cover pricing case. It is equally obvious  
32 that this is a scenario that is capable of not arising in a cover pricing case. It all depends on  
33 the facts.

1 In our submission, this is a classic example of what has gone wrong in the present case, and  
2 it is useful that my learned friend drew this bit, among other passages, to the attention of the  
3 Tribunal, because it exemplifies the basic problem. All kinds of bits and pieces have been  
4 attributed to the cover pricing phenomenon, but the OFT has used those things in order to  
5 ramp up the seriousness of the infringement without checking to see whether all these things  
6 that it is saying were actually true in relation to – here we are talking about infringement  
7 75.

8 In our submission, you simply cannot carry on like that. If you wish to use elements in  
9 order to demonstrate the seriousness of an infringement you have got to show that those  
10 elements apply to that infringement. If you do not do that what you are doing is  
11 determining the seriousness of the infringement without regard to the circumstances of the  
12 case.

13 This is not limited to effects, and that is to say actual anti-competitive effects, it covers all  
14 these different things that the OFT has been saying feature in cover pricing. We can see  
15 some of them may do, some of them may not, it depends on the facts, but you cannot gauge  
16 seriousness accurately in that kind of way. Pigeon holing is wrong, it is unlawful, you have  
17 to determine the seriousness by reference to the evidence that you have got, and that was  
18 never done.

19 THE CHAIRMAN: You say this was contrary to the guidance as well?

20 MR. LASOK: This is contrary to everything, because gravity, seriousness, is something that can  
21 only be determined rationally by reference to the circumstances of the case. I am using that  
22 phrase, it is a nice general phrase, but it encompasses all the normal things that you ought to  
23 be looking at. In this particular instance, if the OFT says that, for example, this particular  
24 bit at the beginning of para.43 is relevant, so be it, but then you make sure that that feature  
25 exists in the case. You do not proceed on the unfounded assumption that it applies. You  
26 have got to be sure that it does apply.

27 Unless there is anything further on which I can assist the Tribunal, those are my  
28 submissions.

29 THE CHAIRMAN: No, thank you. Thank you very much. We will resume at 10.30 on Monday  
30 morning. We wish everyone a good week-end.

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