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

Case No. 1140/1/1/09  
1141/1/1/09  
1142/1/109

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

26 July 2010

Before:

THE HONOURABLE MR. JUSTICE ROTH  
(Chairman)  
MICHAEL DAVEY  
DR. VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) HAYS PLC  
(2) HAYS SPECIALIST RECRUITMENT LIMITED  
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED  
(2) CDICORP.

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

HEARING

(DAY ONE)

## APPEARANCES

Lord Pannick Q.C., Mr. Mark Brealey Q.C. and Mr. Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

Mr. Paul Harris (instructed by Addleshaw Goddard LLP) and Mr. Mark Clough Q.C. (of Addleshaw Goddard LLP) appeared on behalf of Eden Brown Ltd.

Ms Ronit Kreisberger (instructed by Blake Laphorn) appeared on behalf of CDI AndersElite and CDI Corp.

Mr. David Unterhalter S.C., Ms Maya Lester, Mr. Alan Bates and Mr. Gerard Rothschild (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 THE CHAIRMAN: Before we start, Mr. Brealey, may I raise a few introductory matters? We  
2 understand from the timetable which has been provided to us that each appellant wants to  
3 make a short opening statement - about half an hour each. We suggested that it would be  
4 helpful also to have a short opening statement from the OFT. We understand that invitation  
5 has been accepted. So, on that basis, there will be about two hours of short openings. We  
6 propose then to break at that point for lunch. So, it might be slightly earlier than one  
7 o'clock. We can then have a clean start with the witnesses in the afternoon.

8 Secondly, as regards confidentiality, there are, as is usual in these cases, a number of  
9 matters on which various appellants have claimed confidentiality. A lot of them are figures  
10 or percentages. We do not think that presents any problem. It is, however, important in  
11 particular when cross-examining a factual witness. It is much easier for counsel to be alert  
12 to the confidentiality of particular points than a witness, however experienced he or she may  
13 be in the witness box. So, please, draw the attention of the witness you are cross-examining  
14 to any issues of confidentiality. As I think you all know, one can refer to, as it were, 'the  
15 figure in paragraph such-and-such', or 'the figure that one sees in line such-and-such'  
16 without actually mentioning the figure in open court.

17 However we have seen that Hays, Mr. Brealey, has claimed confidentiality for other matters  
18 - in particular the management structure of Hays as at late 2004/2005 and the reporting lines  
19 of Robert Smith is said to be confidential. We find it very hard to understand why that  
20 should be confidential. Secondly, Hays standard terms of contract, both with their clients  
21 and, indeed, with temporary workers of which there must be a huge number in circulation. I  
22 do not think the other appellant that has referred to its standard contracts has regarded them  
23 as confidential. Again, we find it very hard to understand how those can possibly be  
24 confidential. It will cause some practical difficulties for the cross-examination of at least  
25 one of the Hays witnesses and of the experts. So, we are not going to rule on that now, but,  
26 Mr. Brealey, if you and your team can consider that over lunch and let us know after lunch  
27 whether that is maintained. If it is, we will have to rule on it. We will leave it there.

28 MR. BREALEY: I will take instructions.

29 THE CHAIRMAN: Can I then move on to timetable. We have had this morning, very helpfully,  
30 a joint statement the experts which we have received and briefly looked at, and we are  
31 grateful to Mr. Hall and Mr. Allen for producing that. That, no doubt, as indicated in the  
32 covering letter, should assist with regards to time needed for cross-examination of experts.  
33 I will come back to that.

1 As regards closing submissions, these appeals do raise quite a number of points of principle  
2 and points of law on which there are a number of authorities that are referred to. We do  
3 think that one day would be too short and that one and a half days is appropriate for closing  
4 submissions – that is to say that the closing submissions should therefore start at two  
5 o'clock on Wednesday at the latest.

6 Working back from that, as it were, this afternoon we expect that both the Hays' witnesses  
7 should be completed. We think that two and a half hours, Mr. Unterhalter, should be quite  
8 sufficient for those two witnesses. It may be slightly more than two and a half hours if we  
9 come back at a quarter to two.

10 Tomorrow we propose to start at ten o'clock, and that should enable the other witnesses of  
11 fact to be completed in the morning. We note that Mr. Ballou has to come first. That will  
12 mean that after lunch tomorrow Mr. Hall can be called. We think half a day with Mr. Hall,  
13 particularly in the light of the agreed statement, and then on Wednesday, at most half a day  
14 for Mr. Allen will be sufficient. If the appellants complete their cross-examination of Mr.  
15 Allen a little earlier than one o'clock they will have a little more time for closing, but it  
16 must be completed by one o'clock.

17 Not only do we now have the helpful agreed statement by the expert but our view on the  
18 issues that the experts address in this case, the gross net issue, is that where there are  
19 questions of what generally accepted accounting principles, expert evidence is both  
20 admissible and helpful. When one gets beyond that expert evidence is, it seems to us, of  
21 doubtful relevance in this case. It may be that we will have to consider, under the paragraph  
22 in the Schedule to the 2000 Order, what is meant on the facts of this case, by amounts  
23 derived from the provision of services. Unless that is an expression that is given meaning in  
24 generally accepted accounting principles, and from what we have seen of the reports it is  
25 not, then that is a matter of interpretation and a question of law for the Tribunal. No doubt  
26 distinguished accountants have opinions, and a lot of people will have opinions on it, but  
27 that is not something where expert opinion evidence is going to assist us or indeed be  
28 relevant. In just the say, by analogy, it has long been an issue in tax law under what was  
29 Schedule E, whether monies or benefits in kind received by an employee are to be treated as  
30 derived from their employment. Whatever views accountants may have on that, that is not  
31 something on which expert accountancy evidence is called. It is a matter of interpretation  
32 for the court. So it is, yes, of relevance in this case, but it is of limited relevance to one  
33 particular area, and that expression of view may assist in constraining the cross-examination  
34 to half a day.

1 That, I hope, deals with general timetable. We note there is a particular issue that has been  
2 raised for us on the gross net fee issues as to in which order the appellants will speak and  
3 who goes first. I have to say that in all my years at the Bar and my brief experience now on  
4 the Bench it does not make the slightest difference to the outcome of the case who speaks  
5 first. What is important is that everybody should have a fair chance to speak and we note  
6 that CDI wants to have a fair opportunity and must have a fair opportunity to put its point  
7 on the *Endesa* application and the point of law, and we think CDI should be allowed 30  
8 minutes for that point because it is an important point, indeed it is to the benefit of all  
9 appellants. Having said that if you cannot agree on who speaks first we think Hays should  
10 go first having put in the expert evidence, but, as I say, we do not really think it makes any  
11 difference, we think the important thing is CDI should have sufficient time and you should  
12 include 30 minutes for that point.

13 That, as it were, is the list of items that we have identified that need to be addressed at the  
14 outset unless somebody else wishes to raise any other point.

15 MR. BREALEY: Thank you, Sir. I suppose formally I should introduce the cast.

16 THE CHAIRMAN: Well we have a very helpful list, Mr. Brealey and as it is a large and star-  
17 studded cast I do not think you need run through all the names.

18 MR. BREALEY: What I shall do is try to finish around about 10 past, quarter past 11; I am going  
19 to speak for about 20 minutes and then Lord Pannick is going to speak for 10 minutes on the  
20 MDT. Given the time we have just made some points of emphasis in writing and I wonder  
21 if I can hand those up, please. (Same handed) It will speed things up, I promise! We are  
22 trying to distil the main points and what we regard as the key points within the main points.

23 THE CHAIRMAN: Yes, we have of course read your very, very full skeleton.

24 MR. BREALEY: Of course, so I shall be brief, but I think it is worth just emphasising some of  
25 these points.

26 The Tribunal will know from para. 1 how the fine is imposed on Hays. Step 1, the fine of  
27 £12.1 million, that is 9 per cent of relevant turnover of £134.8 million and is going to be a  
28 key issue in the case. Step 2 it was increased, the duration, Step 3, the fine of £15.1 million  
29 was considered small by reference to the worldwide turnover of £2.5 billion and was  
30 increased to £41.3 million, and then at Step 4 the fine was increased even more by 10 per  
31 cent as the OFT considered that Mr. Simon Cheshire was senior manager. It was then  
32 reduced by 5 per cent for compliance, reduced by 30 per cent for leniency and we had the  
33 resulting fine of £30.3 million.

1 At the outset it is necessary for me to put that fine into perspective, and the Tribunal have  
2 seen this from para. 1.16 of the notice of appeal, but the proportions are quite staggering.  
3 Hays UK Construction property business post-tax profits for 2008/9 was £12.4 million.

4 THE CHAIRMAN: Yes, you can take those as read. We have seen that, you have emphasised it  
5 in the notice of appeal. We notice the point you make.

6 MR. BREALEY: If I could emphasise it one more time just in a different way. If the Tribunal  
7 would take NCB 4 vol. 1, and it is a graph that is set out in Hays' accounts, and it is at p.118  
8 of this bundle, just to show the impact that this fine has had. "Areas of specialism" we  
9 employ 6,933 staff operating from 345 offices in 28 countries across 17 specialisms. So  
10 this is Hays' worldwide network. If you mark the "Construction & Property", which is the  
11 second column down, alongside the UK and Ireland -- So, there is that one dot there -- that  
12 one square, the infringement occurred in a part of that dot. It did not include all temporary  
13 workers in construction. It did not extend to Ireland. The person responsible for the  
14 infringement was responsible for the south-east of England, as the Tribunal will have seen.  
15 So, it is a part of that dot. However, for the current year the fine wipes out all of the profit  
16 made in all of those dots. For all of those specialisms in all of those countries the fine wipes  
17 out all of those dots. That is the extent of the fine on Hays and why our overall submission  
18 is that this fine has been exaggerated and is disproportionate. It gives you some idea.  
19 Wiping out legal services in Australia, for example. All the profit in all those dots have  
20 been wiped out for the time being.

21 Turning back to this note, as the Tribunal know, Hays has five main grounds of appeal. The  
22 first wrongly included - and this is an important figure - the £1.7 billion worth of temporary  
23 workers' wages when assessing the fine at Step 1 and Step 2. So, that is essentially the net  
24 fees issue. Secondly, the OFT wrongly concluded that the infringement should be classified  
25 as 9 per cent. Thirdly, the increase for deterrence was disproportionate. Fourthly, it was  
26 wrong to increase the fine by a further 10 per cent for senior management. Fifthly, we have  
27 a compliance programme and we say that 5 per cent is not sufficient. Those are the five  
28 grounds of appeal which we have.

29 If I could summarise the submissions on the net fees which I tried to do from para. 5  
30 onwards. The OFT considered the Hays' relevant turnover for the purposes of Step 1 was  
31 £134.8 million. That comprises the fees paid by the clients for Hays placing permanent  
32 workers, the fees paid by the clients for placing temporary workers, and then the temporary  
33 workers' wages (as we know by virtue of Regulation 12) Hays is obliged to pay the  
34 temporary worker. The effect of this is at para. 6. If it was just (a) and (b) - so, if the fees

1 were just considered, the relevant turnover would be just over £33 million whereas, as I  
2 have just said, it is £134 million. So, in broad terms it makes £100 million worth of  
3 difference and 9 per cent of that is £9 million. So, at Step 1 Hays is being fined £9 million  
4 for passing through the workers' wages. We say at para. 7 that that is wrong for three  
5 reasons. The first reason we submit is that it is contrary to the fining policy objective (Step  
6 1). Secondly, it is disproportionate. Thirdly - something which the Tribunal has flagged  
7 up - are these amounts derived in any event? That is a question of law.

8 Taking the first reason first - contrary to the objective of Step 1 - I take this in three stages.  
9 First of all, identifying the object of identifying relevant turnover. Essentially it is common  
10 ground that the objective at Step 1 is to identify the relevant activities. So, how has the  
11 infringement impacted on the relevant activities? That is the Court of Appeal in *Argos* and  
12 the OFT in the Decision refer to it. You look at the particular trait which has been affected.  
13 Now, here, what are the activities which have been affected? What services are included?  
14 The OFT sets this out at para. 5.25 of the Decision. They define the activities as the supply  
15 by recruitment agencies of candidates with professional, managerial, trade and labour skills  
16 required by the construction industry in the UK. It is helpfully set out at Annex A - the  
17 various types of candidate which are included, for example, engineering, architectural. At  
18 para. 5.44 the OFT says what activities have not been impacted by the infringement - so,  
19 clerical, secretarial. Paragraphs 12 and 13 are important because we submit it is quite clear  
20 that Hays does not actually provide to the client for service that is provided by the  
21 temporary worker. It assigns the worker to the client. It supplies the worker to the client,  
22 but it does not actually provide that service. It is not providing architectural services. It is  
23 not providing engineering services. So, the example we give at para. 13: if Hays assigns  
24 paralegal professionals Hays is not undertaking to provide that legal service. It is the  
25 temporary worker who is self-employed providing that service as a matter of form and  
26 substance. Hays is simply not liable if that paralegal is negligent. That is a big distinction  
27 between this set-up and sub-contracting, for example, in the construction industry. At  
28 para. 14 we set out how we believe the OFT has back-tracked a little bit. It says it was  
29 misunderstood. It says that Hays is managing a workforce. We set out para. 37 of their  
30 skeleton. Essentially, they say that managing a workforce is in the limited sense of engaging  
31 and paying for the services of temporary workers. So, those are the services that are being  
32 provided. They are essentially placing these temporary workers with candidates.  
33 Now we come to the crucial part: what is the appropriate financial metric that measures  
34 these activities. This goes to the scale and magnitude. We say - and obviously the

1 evidence will have to be adduced - that the evidence shows that net fees is the true  
2 measurement of the scale and magnitude of Hays' business of supplying both permanent  
3 and temporary workers. It is net fees. Over at p.6 we set out - and I will not go to it in the  
4 time available, but evidence will be adduced - broadly the evidence which establishes that  
5 net fees measures the scale of the business of Hays in this area.

6 The OFT, as the Tribunal knows, takes turnover. It accepts that turnover, as a concept, is  
7 vague and imperfect. Yet, it refuses to adopt a financial metric which properly measures  
8 the scale and magnitude of Hays' activities. So, the question is: why? What is the reason  
9 given in the Decision for refusing to take net fees as opposed to turnover which is in the  
10 accounts. It says, at para. 5.126 of the Decision, that it is required to follow the 2000 Order  
11 at Step 1. It is required to follow the 2000 Order at Step 1. On that basis, it continues, "net  
12 fees are not material to the consideration of turnover at Step 1". At para. 5.126 ----

13 THE CHAIRMAN: I think it is better that we do not turn up the arguments because that will slow  
14 us down. You have given us the reference.

15 MR. BREALEY: The other reference, Sir, is 5.135. That is the second quote, 5.135. Required to  
16 follow the 2000 Orders, that is Step 1, and net fees are therefore not material, not relevant.  
17 We say that is a legal error. That is the OFT misdirecting itself. It is plain that the 2000  
18 Order imposes a statutory cap at Step 5. The Order does not require the OFT to adopt an  
19 accounting for turnover at Step 1 or Step 3. The guidelines are merely guidelines, and  
20 certainly do not bind this Tribunal. If this Tribunal considered that net fees was the  
21 appropriate financial metric it could take it. Illegal error is saying, "I am bound to take  
22 turnover because that is in the 2000 Order". It has, simply on that basis in the Decision,  
23 said, "I am going to look at net fees".

24 That is the first reason why we say the OFT has erred.

25 Secondly, disproportionate and arbitrary: again, there have been suggestions in the  
26 skeletons advanced by the OFT disputing that these sums are not passed on, and yet in the  
27 OFT's own words para.5.72 of the statement of objections and para.5.123 of the Decision,  
28 the OFT itself recognises that the revenues relating to temporary work as wage costs are  
29 passed through to the temporary worker. And that is where we get the words "passed  
30 through". It is in the Decision itself.

31 We say taking revenues that are simply "passed through", to use the OFT's own words, it is  
32 disproportionate, when we are looking at the magnitude of the sums that are simply passed  
33 through as an instance of the application of Conduct of Employment Agencies and  
34 Employment Business Regulations 2003. Here the accountancy evidence is, to a certain



1 extent, relevant because, as the Tribunal knows, we say that the accounts could have been  
2 drawn up using net fees as opposed to the turnover figure, including the wages.  
3 The last issue on this net fees ground of appeal is amounts derived, and the Tribunal is alive  
4 to that issue, as I know, and we will develop that in closing. Suffice it to say, we submit  
5 that the wages of the temporary workers are not derived by the services that Hays provides.  
6 The second ground of appeal, it is here. It concerns seriousness. We say this was not a *BA*  
7 type price fixing cartel. We have set out the factors why we say it is slightly short of 9 per  
8 cent, and at the back of the skeleton argument we have also set out a comparison of  
9 previous cases. *Imperial Tobacco* did not get 9 per cent. The Tribunal will be alive to these  
10 issues and I will not repeat them at the moment.

11 Compliance, I think, speaks for itself. I will skip over MDT because Lord Pannick is going  
12 to deal with that.

13 Paragraph 36 on ground four, senior management: can I flag the two points here. As I have  
14 said, the fine is increased – this is the fine based on worldwide turnover, so this is the fine  
15 which is based on this £1.7 billion in workers’ wages – by 10 per cent because Mr. Simon  
16 Cheshire was allegedly a senior manager. We say that is wrong for two reasons: first, on  
17 any sensible view, he was not a senior manager. He did not have responsibilities as a senior  
18 manager. He was responsible for the South-East of England, and if he was a senior  
19 manager in Hays, there are about 70 senior managers, which we say is ridiculous.

20 Secondly, even if he was a senior manager, he was only a senior manager, according to the  
21 OFT, of the construction and property division, not even of a limited company, but of the  
22 construction and property division. We say it is quite perverse then saying he is a senior  
23 manager of that lower division to then increase it by 10 per cent based on worldwide  
24 turnover. He was simply not a senior manager at the highest level of Hays Plc . If he was  
25 the chairman of Plc, he would be a senior manager of Plc and you could take an increase  
26 based on the worldwide turnover. There is a complete disconnect between saying he was a  
27 senior manager at this lower level and then taking a whole chunk of worldwide turnover.

28 THE CHAIRMAN: Can I just ask: when you say Hays had about 70 senior managers, which of  
29 the Hays’ entities are you referring to, Hays Plc?

30 MR. BREALEY: The Plc. I will pass over to Lord Pannick to deal with deterrence.

31 THE CHAIRMAN: Thank you very much.

32 LORD PANNICK: Thank you very much, members of the Tribunal, my submissions on behalf  
33 of Hays are directed at the MDT via Step 3 of the analysis. As the Tribunal knows, in the  
34 case of Hays, the application of the MDT under Step 3 has had a very substantial impact on

1 the penalty. Prior to Step 3 the penalty was £15.1 million, and Step 3 increases it to £41.3  
2 million. So there can be no dispute about the care with which the MDT needs to be  
3 considered and assessed in the imposition of this penalty.

4 We have three main points about the application of the MDT, which I will develop later in  
5 the week, and they echo points which various constitutions of this Tribunal have heard in  
6 the past few weeks in the construction cartel cases. The points are set out in the note which  
7 Mr. Brealey handed up, starting at para.31. Can I just identify them at this stage. The point  
8 is that we do recognise of course that the penalty may include an element for deterrence.  
9 That is specific deterrence for this company, and general deterrence for companies like it of  
10 course. Our complaint is about the means which the OFT are using to achieve this deterrent  
11 effect. Our complaint is that having identified, as they do, a figure based on culpability  
12 under Steps 1 and 2, and that figure is then replaced by a Step 3 figure, which is designed to  
13 secure the deterrent effect, and the Step 3 figure has no links to the culpability figure. Steps  
14 1 and 2, assessment of culpability, are not the foundation stone of the penalty, they are  
15 simply replaced by another method of assessment designed to secure deterrence.

16 We accept that it may, depending on the facts of the individual case, be appropriate to  
17 increase the Step 2 figure, the culpability figure; and it may be appropriate to increase it in  
18 some cases by 50 per cent or 100 per cent, or in some rare exceptional cases by more than  
19 100 per cent.

20 What we will submit is impermissible, and what is disproportionate, is to use the MDT  
21 methodology so that the penalty at Step 3 is fundamentally dissociated from the original  
22 assessment of culpability under Steps 1 and 2, and what you have under Step 3 is simply an  
23 attempt to identify a penalty which is going to have the desired deterrent effect. We say, as  
24 the OFT themselves say in their Guidance, one has to have twin objectives here, one has to  
25 link culpability and deterrence. That is the first point which I will develop.

26 The second point that we make is that the OFT have failed to ask themselves, as they must,  
27 whether the figure they arrive at under Steps 1 and 2 is sufficient for deterrence in the  
28 circumstances of this particular company, and others like it. We have here a Step 2 figure  
29 which results in a fine of £15 million at Step 2. The OFT do not ask themselves “Is that  
30 sufficient for deterrence in the circumstances of this company and others like it?” The only  
31 analysis is to assess and conclude that the figure is small compared with a figure derived  
32 from world turnover. They do not look at the circumstances of this company and others like  
33 it and ask whether the Step 2 figure is, in fact, sufficient to secure deterrence in the  
34 circumstances of this company and others like it.

1 The third point, which is closely linked to the second is that having applied Step 3, based on  
2 worldwide turnover, they do not then step back and look at the proportionality of the result  
3 derived from Step 3 in the light of this company and others like it and ask themselves do we  
4 really need a fine of £41 million, nearly three times the Step 2 figure in order sufficiently to  
5 deter.

6 We have three particular factors which we want to draw attention to under both the second  
7 and third points that I am making, which we say the OFT have not looked at, at all, or  
8 sufficiently, and we draw attention to these three factors because MDT is focusing on  
9 deterrence and that requires an assessment of the practical reality of this company and  
10 others like it. The economic situation of this company, and others like it, an assessment not  
11 carried out by the OFT. First, the profits of the company, which Mr. Brealey has already  
12 referred to, we say this is a highly relevant factor in assessing the sum needed to serve as a  
13 deterrent. We are not suggesting that profit is determinative. We are not suggesting that  
14 turnover is irrelevant, we are saying that profit must be relevant to an assessment of the true  
15 economic situation of the company and so relevant to what is needed for deterrence.

16 The second factor of the three which we say must be taken into account is that the Step 2  
17 figure is already the product of the gross turnover figure – a point Mr. Brealey made. If he  
18 is right in his criticism under Step 1 this point plainly does not have the same force. But if  
19 the Tribunal were to reject his point then it is striking indeed that Step 2 and Step 1 already  
20 proceed on the basis of a wholly unrealistic assessment of the economic situation of Hays,  
21 and we say this is highly material to whether you really need to increase under Step 3.

22 The third relevant matter, ignored by the OFT under Step 3 is the compliance programme  
23 adopted by this company for the future. There is no dispute here, the OFT accept under  
24 Step 4 that this is a company which introduced effective compliance measures to ensure that  
25 wrongdoing does not recur. We say that it necessarily follows that there must be a lesser  
26 need for deterrence of this company and others like it under Step 3. All three of these  
27 points under our second and third arguments, and our first argument, all go to the  
28 proportionality of the penalty which the OFT has imposed in this case, and I look forward  
29 after cross-examination to developing these points for the Tribunal.

30 THE CHAIRMAN: Thank you. Yes, Mr. Harris?

31 MR. HARRIS: Sir, Members of the Tribunal. On behalf of Eden Brown I would like to address  
32 you briefly in opening – I may not take the full 30 minutes, which I hope will be of benefit  
33 later on in the hearing. I have three sets of brief introductory remarks, and then I will touch  
34 very briefly upon the individual grounds of appeal that Eden Brown takes.

1 My first introductory remark relates to disproportionality and excessiveness. Indeed, our  
2 principal point in this appeal is that the OFT has used the highest conceivable metric for  
3 turnover, that is to say, gross turnover. That metric is of very questionable proportionality  
4 for two reasons.

5 The first is that on any sensible view of the economic substance and reality of the  
6 recruitment agencies in this case, they are only acting as conduits for the wages of the  
7 temporary workers. Indeed, if one takes a step back and asks why it is they are called  
8 “wages” the answer is obvious. They are called “workers’ wages” because they are  
9 provided to the worker in consideration for the work that is done by the worker. We simply  
10 pass them through our accounts.

11 Secondly, it is of very questionable proportionality because those wages that are passed  
12 through our accounts are such a huge proportion of the metric that the OFT has chosen.  
13 That is my learned friend Mr. Brealey’s point about effectively the £100 million pass  
14 through leading to £9 million for Hays with the corresponding effect on Eden Brown.

15 THE CHAIRMAN: Yes.

16 MR. HARRIS: So principal point first limb, very questionable proportionality to use this highest  
17 conceivable metric but then, and this is where our complaint really lies, it is then that same  
18 metric that is used by the OFT at the deterrent stage (known, as we know, as Step 3). The  
19 OFT asks itself the question; what proportion of that gross turnover is required for  
20 deterrence? We say that disproportionality is an inherent feature of using gross turnover at  
21 the starting point, and then that disproportionality is very substantially aggravated by asking  
22 oneself what proportion of it should be used at Step 3 for deterrence. In other words, to  
23 echo a point my learned friend, Lord Pannick, made a moment ago, there is, if you like, two  
24 levels of disproportionality – a double disproportionality – that is where we say the OFT has  
25 gone so very badly wrong. They have never taken a step back and asked themselves the  
26 question does this company, on the facts of its infringement, require a double  
27 disproportionality, the highest conceivable metric at Step 1, and then a proportion of that at  
28 Stage 3.

29 We say that where the OFT have gone wrong is that they have become wedded to their  
30 formula and lost sight of the need to tailor it to the specific circumstances of the infringing  
31 undertaking, so again I adopt Lord Pannick’s point that it has become dissociated from an  
32 assessment of the culpability on the individual facts of the particular case. We know from,  
33 amongst others, the case of *Lindsay* in the Court of Appeal, cited both in my skeleton  
34 argument and that of Hays, and if you want the reference to it, it is tab 53 of the authorities

1 bundle, volume 4. We know from the Court of Appeal that it is not lawful to have regard  
2 only to the wider policy objectives and, in so doing, lose sight of the individual  
3 circumstances of, in that case, the smuggler, in this case the competition law infringer. That  
4 is my first introductory remark, it is double disproportionality leading to excessiveness.  
5 My second set of introductory remarks very briefly relate to jurisdiction. We are  
6 disappointed that the OFT is not taking heed of the representations that we made at the  
7 various stages about disproportionality, but we are heartened in the knowledge that this  
8 Tribunal has full jurisdiction to review the penalty on its merits, and to correct what we  
9 regard as this very significant major flaw in the OFT's approach. Indeed, we go so far as to  
10 say that the Tribunal has a duty to give full and effective independent judicial scrutiny by  
11 reference to the particular circumstances of Eden Brown.

12 Notably in this regard, the OFT invites the Tribunal repeatedly and at a number of different  
13 Steps, effectively to defer in large measure to what they call variously "discretion" or  
14 "margin of appreciation". I accept, of course, that in writing they accept that the *Argos*  
15 jurisdiction is open to this Tribunal and they can review it but in a number of different  
16 places, particularly at Step 3, their basic case is, "We have a margin of appreciation. We  
17 have acted well within it. With respect, you should not interfere".

18 We see this rather differently. We say that one of the principal flaws, as a matter of law in  
19 this Decision, is the OFT's use of its margin of appreciation or discretion. In a nutshell it is  
20 far, far too broad. A discretionary practice or rule, which is applied inconsistently, resulting  
21 in unforeseeable and arbitrary outcomes -- That approach deprives a litigant of effective  
22 protection for its rights and is inconsistent with the requirement of lawfulness. My  
23 authority for that proposition - there are a number, but the one I rely on is in the skeleton - is  
24 the case of *Carbonara*, the human rights court case, at Authorities Bundle Volume 3, Tab  
25 33, in particular, at paras. 62 to 69. In light of the time available I do not invite the Tribunal  
26 to turn that up now, but that was a case in which there expropriations of property by the  
27 Italian government, and they were done in an arbitrary and unforeseeable manner. The  
28 Human Rights court in Strasbourg said that was unlawful and therefore amounted to a  
29 breach of Article 1 Protocol 1. The paragraphs that I have referred you to set out the need,  
30 in order to comply with the requirement of lawfulness, to have foreseeable and non-  
31 arbitrary outcomes. However, where our complaint lies, in particular as regards Step 3, is  
32 that it has not been possible for these appellants (obviously including Eden Brown) to  
33 foresee what the OFT was going to do as regards deterrence, and the outcome has been  
34 arbitrary. One way in which this could be put, for example, is that in the case of Eden

1 Brown the percentage of its relevant turnover which is represented by its fine at Step 3 is  
2 19.2 per cent. Hitherto that was regarded as confidential, but for today's purposes and  
3 hereafter it is not. But, one could replace that figure of 19.2 per cent with, frankly, any  
4 other figure - be it 15 (which is the case of Hays) or 25 or 35, or, frankly, any other figure -  
5 and not change any other word in the entire Decision. What that goes to prove is that the  
6 OFT has, to put not too fine a head on it, plucked that figure out of the air. It is not  
7 grounded by reference to the individual circumstances or facts of Hays, or by reference, for  
8 example, to particular evidential considerations. It is an arbitrary figure. We say, with  
9 great respect, that this Tribunal is going to have a difficult job subjecting that to what it is  
10 required to have - namely, full and effective judicial scrutiny for that very reason that I  
11 have just given. It could have been any other figure.

12 THE CHAIRMAN: Just to be clear, you are referring to the 15 per cent - not your client's 19.2  
13 per cent.

14 MR. HARRIS: No. I am referring to the 19.2 per cent. The exact same submission can be made  
15 about the 15 per cent. Indeed, the complaint of arbitrariness is made by Hays. But, it  
16 applies to the 19.2 per cent as well.

17 THE CHAIRMAN: Yes. That was not applied as an a priori percentage, the 19.2 per cent. You  
18 were not subject to the MDT.

19 MR. HARRIS: Not subject to MDT. That is correct. But, the same point about arbitrariness  
20 applies to the 15 as it does to the 19.2 per cent.

21 Thirdly, by way of introductory remarks, I echo the point made by Mr. Brealey that these  
22 infringements need to be seen in their context. Our major point under this heading is that  
23 the Construction Recruitment Forum was not simply one degree less than the most serious  
24 conceivable cartel offence. Yet, that is how it has been treated by the OFT - at a 9 per cent  
25 starting point. Frankly, we are baffled by how the OFT could have come to the view that it  
26 is only one degree less than the most heinous of cartel offences. We say that they have  
27 reached that view because they failed to take into account relevant considerations. It is  
28 clear that they have failed to take them into account from the way in which they express  
29 their view of seriousness in the defence. It was manifest from that document that the points  
30 we say are relevant considerations, which are similar in many respects to those that are  
31 advanced by Hays, simply have not been taken into account by the OFT.

32 I adopt the points so far as they relate to Eden Brown in Mr. Brealey's document, but in  
33 respect of Eden Brown I would just like to make two other additional points to put these  
34 infringements in context. The first is that Eden Brown is not one of the big players in the

1 market. On the contrary, we are a small player in the market. One just has to compare the  
2 relative levels of net fees of the respective appellants in order to see our relatively small  
3 size.

4 Secondly, the point is taken by a number of appellants that this was a relatively small  
5 market share percentage. That is the 13.6 per cent that you will have seen in the various  
6 notices of appeal. But, another figure - and the reference for this figure is non-core bundle  
7 1, Tab 3, page 383, para. 18 - is that at about the time of these infringements there were  
8 over 10,000 recruitment businesses active in the UK, of whom seven are implicated in the  
9 CRF.

10 So, by reference to those three sets of introductory remarks, our basic point is that in context  
11 this fine on Eden Brown has lost touch with proportionality and ended up being excessive  
12 for infringement of this nature by a company of this size. We put our particular points  
13 under three further headings. If I can, I will just address those briefly. Sir, do you wish the  
14 reference again.

15 THE CHAIRMAN: No, I have that.

16 MR. HARRIS: The first ground of appeal is obviously common to the three appellants. I will not  
17 duplicate anything Mr. Brealey said in opening. It is the gross / net. But, very, very briefly,  
18 we say in opening four things about gross / net. First of all, there are two fundamental flaws  
19 in our submission: Flaw A is that the OFT has simply not understood the true factual nature  
20 of the activities in this sector; Flaw B is that the OFT has focused far too much on form as  
21 opposed to substance. My second point is that the fine on Eden Brown would be less than  
22 one-quarter of the fine that we ended up with had the OFT not made the two flaws that I  
23 have just identified. So, it is of very considerable importance to the effective judicial  
24 protection that we come to this Tribunal in order to seek to secure. The figures for the  
25 quarter, if you want to note them down, are in our Notice of Appeal at core bundle 2, tab 4,  
26 page 11, para. 5.5. Thirdly, we say: Can it sensibly be said that Eden Brown are worthy of  
27 over four times as much punishment and deterrence than we would otherwise receive  
28 simply because we pass through the wages of temporary workers? Obviously I ask the  
29 question rhetorically, but we say the answer is self-evident. Then, fourthly, if I could just  
30 draw your attention, and I would like to turn this case up briefly, to the Decision of the  
31 French Competition Commission in the case of *Manpower* (authorities bundle 7, tab 84). I  
32 am only going to take you to two paragraphs. This was a case in which three of the largest  
33 recruitment consultants in the world engaged in extremely serious anti-competitive  
34 behaviour, largely in the French market. They were then fined for that infringement by the

1 French competition authorities. One of the issues in that case was the gross / net issue  
2 which confronts this Tribunal today. Can I take the Tribunal, please, to the section on  
3 sanctions at the back of this rather lengthy translated Decision. You have to bear with it, if  
4 you delve into the detail, that it is a translation. It is rather hard to follow in French. In  
5 places it is extremely difficult to follow in translation. But, be that as it may, the gross / net  
6 issue is identified precisely at authorities bundle 7, tab 84, page 63, para. 164, Section 5 on  
7 sanctions. It is about six or so pages in from the end.

8 THE CHAIRMAN: I think it is p.63.

9 MR. HARRIS: Thank you. I am grateful.

10 “The companies blamed all put forward that the base of possible sanctions should  
11 not be the sales turnover mentioned in the tax bundles of the companies or groups  
12 concerned, because this includes the wages and direct and indirect charges related  
13 to the use of temporary staff, amounts which go directly to the workers and social  
14 or public organisations. Only the ‘gross margin’ of the TEAs [temporary  
15 employment agencies], i.e. in substance the price of the services invoiced to the  
16 UC [that is the final client there - I cannot remember exactly what the ‘UC’ stands  
17 for (it is identified at the beginning at page 3, para 3)], reduced by these wages and  
18 charges, which would correspond to the actual activity of the TEA, should be  
19 used”.

20 There they are making the same argument that we all make. What happens over the page, at  
21 para. 168, is that they prevail on this gross net issue.

22 “The arguments put forward by companies will thus be taken into account by the  
23 Council in the calculation of the sanction ----“

24 This next clause is rather opaque, and I confess I cannot follow it.

25 “-- not legally by dividing their ‘the base’ mathematically as interested third  
26 parties wrongly claim, but in fact [and this is the key passage] to ensure that the  
27 sanction is in proportion to their ability to pay, with this being a better reflection  
28 of the circumstances and taking into account their very specific activity, with their  
29 gross margin being factored in rather than their sales turnover”.

30 So, what has happened on this specific issue is that the French Competition Commission  
31 has been persuaded that it is (a) proportionate to use net fees rather than gross turnover, and  
32 why is that? It is because that takes into account their actual circumstances, and their very  
33 specific activity. It also says it takes into account their ability to pay.



1 I do not put this authority on any higher pedestal than it merits. I am not suggesting that it  
2 is anything other than persuasive. It is certainly not binding, and there are differences in the  
3 manner in which fines are calculated under the French system than there are under the  
4 domestic system. But, nevertheless, what I do say is that it is highly illustrative that on this  
5 critical question that goes so very much to the heart of proportionality, in the context of  
6 fining as well - because we see some of the points that the OFT rely on at various stages  
7 relate, for example, to merger control -- But, when it actually comes to fining, what the  
8 Conseil has said in the French case is that it is proportionate to base your fine on net fees.  
9 Although I should perhaps have shown it to you - and I do not invite you to turn it back up -  
10 the numbers are set out on the final page of the Decision. I will come back to them in  
11 closing because it is illustrative, again, to see how the percentages work out when one looks  
12 at the actual fines in that case.

13 Moving on then from net fees, our next ground of appeal is at Step 3, the deterrence step.  
14 Very briefly in outline, our central point is as follows: It is common ground between Eden  
15 Brown and the OFT that the figure reached for Eden Brown after Steps 1 and 2 was  
16 excessive. That is exactly what it says in the Decision at Core Bundle 1, page 286, para.  
17 5.254. The OFT's case is that that Step 1/Step 2 resultant figure was greater than necessary  
18 in order to achieve deterrence. Well, so far, we completely agree. Something significant  
19 needs to be done to that figure because it was far, far too high. It was excessive. It was far  
20 greater than was needed in order to achieve deterrence. Our appeal on this ground is really  
21 very simple. We say that although the OFT did reduce the fine at Step 3, because it was too  
22 high, it did not reduce it sufficiently. In particular, the problem with where the fine ended  
23 up on our case after Step 3 is that it remains disproportionate, it is discriminatory vis-à-vis  
24 the other parties to the cartel and, as you heard me say a moment ago, it is arbitrary. Very  
25 briefly on disproportionality and discriminatory nature, this can be assessed by reference to  
26 three figures. They are all effectively mathematical expressions of the same point. I will  
27 tell you what they are. If you would like to turn it up - it is perhaps not essential, but in the  
28 Decision at para.5.283 - I will invite you to turn that up, the Decision at Core Bundle 1,  
29 page 291, para.5.283, there are two confidential boxes in this Decision, and there is a cross-  
30 reference.

31 THE CHAIRMAN: Can you just explain, the ground of appeal that you are addressing at the  
32 moment, you say that it was not reduced sufficiently for Eden Brown?

33 MR. HARRIS: Yes.

1 THE CHAIRMAN: I understood from your notice of appeal that what you say on ground three is  
2 really contingent on the minimum deterrence threshold being set aside generally. You say,  
3 if it is warranted then it should be reduced. If the 15 per cent should stand as a minimum  
4 deterrence threshold then Eden Brown's fine should be reduced?

5 MR. HARRIS: No, Sir, we complain that what has happened to us at Step 3 is disproportionate  
6 irrespective of what view you take of the MDT. We say it is disproportionate and  
7 discriminatory. What we do say, however, is that if the Tribunal takes the view that the  
8 MDT is unlawful and a different approach should have been taken, and in particular that  
9 that would result in a much lower set of proportionality adjustments for the other parties –  
10 take Hays, for example – then we would pray that in aid. The point that I am just about to  
11 make is that we have been disproportionately and unfairly treated by reference to other  
12 parties. This is the case if they get fined at 15 per cent, but if they get fined, for example, at  
13 stage 3 at, say, 5 per cent, then we have been even more unfairly and disproportionately  
14 treated. There is no justification for treating Eden Brown as requiring a deterrence level at  
15 step 3 that is higher than that of any of the other parties given that it has been involved in  
16 the exact same infringement in the same way. Therefore, if their deterrence levels come  
17 down, including because you are persuaded, for example, by Lord Pannick's submissions  
18 on MDT, then their fine will be lower at Step 3 and ours should likewise be lower at Step 3.  
19 We put it two ways: a free-standing complaint and, if you like, a piggy-back complaint. As  
20 to the free-standing, there are, as I say, three mathematical expressions of effectively the  
21 same point. The first arises from Core Bundle 1, page 291, para. 5.283. As I say, there are  
22 two red boxes in 5.283, and the details are set out in footnote 894. The figure for Eden  
23 Brown is no longer confidential, and that is, you can see this in the footnote, 10.9 per cent  
24 of Eden Brown's net fees. So the penalty expressed as a proportion of Eden Brown's net  
25 fees is 10.9 per cent. I do not know whether the other figures remain confidential, but it  
26 does not matter, you can see them. You can see that Eden Brown's figure is the highest of  
27 all of them. That is my point. That is mathematical expression number one.

28 Effectively the same point can be put into two other different ways, which is that as a  
29 proportion of total worldwide turnover, Eden Brown's fine at this stage has ended up being  
30 2.3 per cent. If you want the reference to that it is Decision Core Bundle 1, page 312, para.  
31 5.392. When you compare that proportion with everybody else's, again Eden Brown is  
32 significantly higher.

33 Then the third way of putting it is the point that you, Sir, just put to me, which is effectively  
34 in the case of Hays and the other appellant, CDI, the proportion of relevant turnover

1 expressed as a percentage of worldwide turnover is 15 per cent for them, but for us it is a lot  
2 higher, it is 19.2 per cent. In effect, what we say is that there is no justification for us being  
3 treated more harshly by way of deterrence at Step 3 than these other parties.

4 So, Sir, that just takes me in the couple of minutes remaining to the last two discrete  
5 grounds of appeal, which are extremely brief. There is, as you know, a dispute about the  
6 year of relevant turnover, it is a discrete dispute, it applies only to Eden Brown. The issue  
7 is whether or not the phrase “last business year” for the purposes of Step 1 should be  
8 interpreted either as meaning the last business year preceding the end of the infringement,  
9 which is my case; or the last business year preceding the Decision, which is what the OFT  
10 now says. This is an issue of interpretation. I will deal with it in closing. What is  
11 interesting, just in opening, about this case is, of course, that one thing certainly is clear:  
12 the interpretation that I advance is certainly capable of being the correct interpretation,  
13 because it is the very interpretation that the OFT used to use. Sir, that is all I have to say  
14 about that issue.

15 Then very briefly and finally, the mitigation: in our case it is extremely brief and  
16 straightforward. We did receive a 5 per cent discount for compliance but the OFT has  
17 singularly failed to address the fact that we had more mitigating factors than simply  
18 compliance. We say that they ought to have been given a modest level of credit and they  
19 have not been.

20 Sir, unless I can assist those are my submissions.

21 THE CHAIRMAN: Thank you very much. Yes, Miss Kreisberger.

22 MISS KREISBERGER: Last but not least, Sir, and I think that may well be throughout this  
23 hearing, I appear for CDI. CDI received a fine of £10.861 million, and for convenience the  
24 penalty calculation is set out at the back of our skeleton argument. That is at core bundle 2,  
25 tab 9, and it is at the last page. The CDI has five grounds of appeal which are listed at  
26 para.4 of the CDI’s skeleton. That is at p.289 of the same bundle, tab 9. Sir, with the  
27 exception of ground 4, which is the ground that raises a very specific point on the way in  
28 which the OFT sought information from CDI. The other four grounds for each aspect of  
29 CDI’s core challenge, which is that a final penalty, pre-leniency discount of almost £11  
30 million is manifestly unfair and out of all proportion with the nature of CDI’s role in the  
31 infringement. It results from serious errors in the OFT’s approach.

32 In particular, Sir, there are two key aspects of the methodology which we say by their  
33 combined effect are flawed. The first is the inclusion of temporary wage costs, which we  
34 have heard much about already today. In CDI’s case relevant turnover, as you will see from

1 the summary of the calculation, was just under £92 million for Anderselite. Anderselite is  
2 the UK subsidiary of CDI, the infringing subsidiary. Of that sum, temporary wage costs  
3 account for £73 million. So we say it is the inclusion of temporary wage costs in relevant  
4 turnover, along with a fine which is predicated upon 9 per cent of that figure which we say  
5 is inflated.

6 A third failing is manifest, and here I am echoing the words of Mr. Harris. At no point did  
7 the OFT stand back and ask itself whether a sum amounting to almost 9 per cent, of almost  
8 £92 million, represented a fair overall turnover to penalise CDI for its subsidiary's role in  
9 the infringement.

10 So just turning to ground one of CDI's appeal relating to the temporary wage costs, 80 per  
11 cent of that figure of almost £92 million represents temporary wage costs. So the inclusion  
12 of those costs has produced a fine almost five times greater at Step 1 than it would  
13 otherwise be. That is £8.3 million rather than £1.8, if one stripped out those costs. So it has  
14 a dramatic impact on the level of the fine. The Tribunal will appreciate that this is the  
15 mainstay of CDI's appeal.

16 I am going to do my best not to duplicate the arguments we have already heard this  
17 morning, and I am going to just touch on five aspects, they are really the five headings on  
18 which we make submissions under this ground. The first is the purpose for which relevant  
19 turnover is assessed. The second is why a proper understanding of the purpose of the  
20 assessment means that temporary wage costs should be excluded and that relates to the  
21 nature of the services supplied by Anderselite in the market. The third is the relevance of  
22 the intermediary principle. Then the OFT's mistaken belief that CDI's accounts viewed in  
23 isolation provide the answer. Finally, the fifth heading is the relevance of obligations under  
24 employment law on Anderselite.

25 Turning to the first heading, purpose, we say, and here I am echoing the words of  
26 Mr. Brealey, that the OFT lost sight of the purpose for which it was defining relevant  
27 turnover. Purpose is, in this context, critical. The purpose of defining affected turnover,  
28 turnover in the affected services, is to give an indication of the scale of the infringement.  
29 Sir, we get this from an authority *Musique Diffusion Française*. I will not turn that up now,  
30 but the reference is authorities bundle 4, tab 57, p.1909, para.121. Those are the words of  
31 the Court of Justice. That is why one looks at affected turnover.

32 The requirement that there be a correlation between scale of the infringement and the fine  
33 imposed is at the very heart of the penalties machine. It is the requirement, one of the twin  
34 objectives, that the penalty reflects the seriousness of the infraction. It is really a very

1 simple precept. The greater the scale of the infringement, the more serious the  
2 infringement, the higher the fine. I would just refer the Tribunal there to the OFT's own  
3 penalty Guidance at para.2.9, which says that the starting point is assessed for each  
4 undertaking in a multi-undertaking infringement to take account of the real impact of the  
5 infringing activity of each undertaking on competition. This is why the OFT go about this  
6 exercise.

7 Just to be clear, there is very good authority from the Court of Justice that in fixing the  
8 amount of the fine purpose is critical. I will be developing this submission in closing, so I  
9 will just give the Tribunal the reference for now. The case is *Britannia Alloys*, and that is  
10 authorities 2, tab 32, p.4456, and I refer here to paras.21 to 25 and, in particular, para. 25,  
11 where the court held that:

12 "… the Commission must assess, in each specific case and having regard both to  
13 the context and the objectives pursued by the scheme of penalties created by  
14 Regulation No. 17 . . ."

15 with which they were concerned:

16 "… the intended impact on the undertaking in question, taking into account in  
17 particular a turnover which reflects the undertaking's real economic situation  
18 during the period in which the infringement was committed."

19 - purpose is everything. So when one talks about defining turnover at Step 1 of the  
20 calculation, the concept of turnover, relevant turnover, must be understood through the  
21 prism of penalty assessment, which means that turnover, as assessed, must reflect the scale  
22 of the infringement.

23 Whilst we accept that in the ordinary course the OFT is entitled to rely on turnover as  
24 reported in the undertaking's accounts for these purposes we say there are exceptions to this  
25 rule. In circumstances where reported turnover does not reflect the scale of the  
26 undertaking's infringement, which is the purpose of the exercise, which we say is the case  
27 here.

28 The problem here is that over £70 million of temporary wage costs, which are included in  
29 reported turnover and so counted as relevant by the OFT do not correlate CDI's activities as  
30 a recruitment agent, and here I am not going to repeat the submissions that you have already  
31 heard today, simply to reiterate the temporary wage costs are, of course, remuneration for  
32 employees, paid in consideration for labour services, which are supplied by those  
33 employees to the construction company not by AndersElite. So AndersElite we say is  
34 effectively a middleman, it supplies recruitment services both for temporary and permanent

1 workers, notwithstanding what we say are differences of detail in the arrangements as  
2 regards temporary and permanent workers – the two categories. We say the true measure of  
3 turnover corresponds to the Commission element of CDI’s turnover. This is where the  
4 intermediary principle is helpful to the analysis. I will not go through the authorities now  
5 but we will rely in closing on paras. 157 to 160 of the Commission’s jurisdictional notice,  
6 that is at authorities vol.1, tab.19, p.35.

7 THE CHAIRMAN: That is in “Mergers”?

8 MISS KREISBERGER: In Mergers. The interpretation of that notice in the *Endesa* case, and  
9 that is the judgment of the CFI as it then was, that is authorities vol.3, tab 38.

10 We say that those authorities confirm that even in the merger context exceptions apply to  
11 the general rule, that a competition authority can simply rely on a figure of reported  
12 turnover without making deductions to reflect economic reality.

13 So really the keystone of CDI’s case is that it was incumbent on the OFT to consider the  
14 economic reality of AndersElite function in the market and we will rely on the evidence of  
15 Mr. Ballou, the President and CFO of CDI Core on the substance of the service provided,  
16 which is recruitment, temporary or permanent. We say which of these two boxes any  
17 particular vacancy falls into is essentially arbitrary and it makes little practical difference,  
18 aside from the question of on whose payroll the worker is placed.

19 The OFT refused to give any serious consideration to the economic reality, the reality on the  
20 ground because of its insistence that it was sufficient to rely on the fact that CDI includes  
21 temporary wage costs in reported turnover in its accounts. The OFT say that was all that  
22 was required. We say that is an improper approach by a competition authority with  
23 extensive power to impose fines. If the purpose of the assessment is to reflect the gravity,  
24 the scale of the infringement, it was incumbent on the OFT to do that by reference to basic  
25 market facts, indeed the facts set out in its own Decision. I should be clear here, I am not  
26 suggesting that the OFT was required to perform some sophisticated economic assessment  
27 of recruitment services. On the contrary, the facts are all there in the Decision. This is not  
28 an onerous burden which we are suggesting. All we say is to shut its mind to the nature of  
29 AndersElite offering whilst imposing a fine of £11 million we say was a basic abdication of  
30 responsibility, not considering whether the Commission was the appropriate measure. I  
31 would draw the Tribunal’s attention to para. 160 of the notice which I will be referring to in  
32 detailed submissions which says that the underlying legal and economic relations have to be  
33 carefully analysed, the accounts are not sufficient.

1 There is a single paragraph in the Decision which refers to what it claims to be differences  
2 in the placement of temporary and permanent workers, and that is a matter that I will be  
3 addressing in detail after we have heard the evidence, but in short at this stage I would just  
4 draw attention to the fact that the cited differences, paragraph V.140 of the Decision, are  
5 differences which arise out of the obligations under employment law on AndersElite, such  
6 as the risk of non-payment, for instance.

7 We say at a level of basic principle, it is unfair to penalise CDI so much more heavily, five  
8 times more heavily for matters which, as Mr. Ballou explains in his witness statement, are  
9 effectively matters of detail imposed by legal obligation, but they do not alter the nature of  
10 the basic recruitment services supplied by AndersElite. That is all I propose to say on  
11 temporary wage costs.

12 I will now turn to our submissions on the minimum deterrence threshold. Here I can be  
13 brief, because no minimum deterrence uplift was in fact applied to CDI's penalty. There is  
14 consequently no discussion of any increase at Step 3 to CDI's penalty in the Decision at all.  
15 In fact, the only reason why this was included as a ground of appeal by CDI is because of  
16 the somewhat Delphic comment at para. 5.113 of the Decision, I will just read that to you,  
17 Sir. It says:

18 "Were it [OFT] to exclude Ad Hoc Supply from an assessment of relevant  
19 turnover . . ."

20 - that is an issue which does not arise now –

21 ". . . it would be necessary to increase certain of the penalties at Step 3 in order to  
22 arrive at a sum that represents, for each Party, a sufficient deterrent, having regard  
23 to the seriousness of the infringement and the Party's total turnover."

24 This concerns CDI. We say that if the Tribunal is with us on temporary wage costs, in our  
25 respectful submission the penalty should be adjusted downwards so as to be in line with the  
26 penalty predicated on relevant turnover excluding temporary wage costs. We say that the  
27 additional £6.5 million at Step 1, which flows from temporary wage costs, should not be  
28 reintroduced by virtue of a specific MDT methodology, which would be calculated by  
29 reference to CDI's worldwide turnover (group turnover) a methodology as regards CDI,  
30 which is not set out in the Decision, nor are we even give why such an approach should be  
31 applied in the circumstances of CDI's case. We say it is improper for a competition  
32 authority to seek to uphold a fine imposed, if the Tribunal is with us, in error of £11 million  
33 inflated by reference to temporary wage costs, to uphold that fine by reasons not found in  
34 the Decision as regards CDI.

1 I make this point because the OFT's written submissions on this are somewhat conflicting  
2 as to whether they do seek to impose the MDT on CDI were we to succeed on ground 1, or  
3 not, after the event where they seek to justify the £11 million by reference to the MDT.  
4 First, the OFT attempts to get around this in the skeleton by saying it does not seek to apply  
5 the MDT methodology to CDI, this is at para. 27 of the OFT's skeleton. It only seeks to  
6 uphold, it says, the ultimate level of the fine by reference to the reasons set out in the  
7 Decision.

8 Then we see, only a few paragraphs later, at para. 32, the OFT appears to contradict itself  
9 arguing that if temporary wage costs are in fact excluded it would be appropriate to the  
10 Tribunal to then reapply the MDT analysis based upon what the Tribunal would have found  
11 to be the correct way of calculating CDI's turnover to see if any Step 3 uplift is required. It  
12 seems to us the OFT is undecided as to what the position on the MDT is, but we wish to be  
13 clear as to our stance. Of course, CDI does not contend that the Tribunal must close its  
14 mind to deterrence in assessing the fairness of the overall level of the fine, but we say a fine  
15 reduced to strip out temporary wage costs would be sufficient in the circumstances, but we  
16 also say that the notion that this very specific MDT tool which we are now told is based on  
17 15 per cent of the undertaking's worldwide turnover maybe applied to CDI's fine so that it  
18 is kept at its original level, £11 million, notwithstanding a finding by this Tribunal, if that  
19 were the case, of deficiencies in the OFT's methodology. In our respectful submission this  
20 will not do.

21 THE CHAIRMAN: Are they just saying Miss Kreisberger, that we are not, as it were, operating  
22 like a Court of Cassation if we have complete jurisdiction as to the fine, if we find in your  
23 favour and the other appellants' favour on the gross/net issue, but against those appellants  
24 who have raised the MDT issue, so that we were persuaded that the 15 per cent is  
25 appropriate, then in looking at the fine on your client we must be consistent and therefore  
26 apply that methodology with which we have, on this hypothesis found to be fair and  
27 appropriate. That is how I understood the OFT's position.

28 MISS KREISBERGER: We make two submissions in response to that. We say first that the fine  
29 cannot be based on what you find in the Decision, there would have to be a dramatic  
30 recalculation because worldwide turnover – there is a table in the Decision – which sets the  
31 percentage of relevant turnover as 15 per cent of CDI's worldwide turnover. If we are right  
32 on ground 1 it would be appropriate to strip out temporary wage costs from that calculation,  
33 so we simply do not have the figures in front of us to do that at the moment, that is the first  
34 point.



1 The second point is we say that what the OFT is then saying is it is appropriate to apply a  
2 one size fits all approach. It takes a blanket uniform approach, 15 per cent, and applies it  
3 across the board. We say that is improper because penalties is always about fairness on the  
4 facts.

5 THE CHAIRMAN: That is the point that Lord Pannick has addressed us on, and which you  
6 adopt.

7 MISS KREISBERGER: I adopt that point.

8 THE CHAIRMAN: So you say it would not be appropriate.

9 MISS KREISBERGER: We take that point a step further, and we say not only is this another  
10 example of the mechanistic approach on which Lord Pannick has already addressed you, but  
11 we say they take it a step further because they have not given reasons to justify that  
12 approach in the Decision as against CDI, so it is the apotheosis of the mechanistic approach,  
13 on what basis do we take 15 per cent here.

14 We make one other substantive point on this. If the OFT took the view that a penalty based  
15 on 15 per cent of CDI's overall turnover however calculated is appropriate, 9 per cent of the  
16 15 per cent, it should have set that out in the Decision. The OFT has done that in other  
17 cases. The OFT has set out alternative methodologies, clearly reliance on temporary wage  
18 costs is highly controversial and those submissions were made in response to the statement  
19 of objections. So if that is what they wanted to do in the alternative they should have said  
20 so. I would propose then to move on to our last three grounds, that is all I propose to say on  
21 the MDT. I can be very brief on the remainder.

22 Ground 4, which is the error in calculation point which we make, this ground, specific to  
23 CDI, relates to a mistake made by the OFT by which it overstated AndersElite's relevant  
24 turnover by £3.74 million, 9 per cent of which, rounded up, is £337,000. The OFT does not  
25 dispute that the error was made - only that the fine should not be subject to a downwards  
26 adjustment, even though the figures on which it was based in this respect were flawed. In  
27 essence, the OFT says the mistake is on CDI's head. We say as a matter of law that is  
28 wrong. We have cited in our skeleton at para. 61 *Roquette Frères*, where the court held  
29 that even if the mistake is attributable to the undertaking it does not justify taking the wrong  
30 turnover into account when determining the starting amount of the fine. If there is time I  
31 will take the Tribunal to that in closing.

32 However, here we say the mistake is not fairly attributable to CDI, but to confusing and  
33 inconsistent statements on the part of the OFT. In exercising its extensive fining powers,  
34 we say it is incumbent on the OFT, before arriving at the final amount of the penalty, to set

1 out clearly and unambiguously by formal notice the elements of turnover (which here were  
2 supplied by reference to individual candidate roles) which CDI was required to supply. We  
3 say inconsistency in a s.26 notice, which I will take the Tribunal to later cannot be cured by  
4 subsequent informal correspondence. The short point is that CDI's solicitors provided  
5 figures in response to the s.26 notice - the information request - which were composite  
6 figures. They related to three categories of candidate. The first category is candidates  
7 which were placed with non-construction companies - other types of client to do  
8 construction work; the second was candidates required for the maintenance of existing civil  
9 engineering structures; the third was candidates required for rail safety critical roles. The  
10 short point is that CDI provided composite figures for those three groups of candidates.  
11 Ultimately, at the stage of the s.26 notice in issue here the OFT was undecided as to  
12 whether those three categories were going to be in or going to be out. In the end it decided  
13 that Category 1 - non-construction companies - were in and the other two were out. It  
14 therefore needed to go back to CDI and ask for those composite figures to be broken down.  
15 That was clear to the OFT in the correspondence. It did not do that. So, the calculation  
16 could never be correctly performed. Mr. John Mitchell of Blake Laphorn, CDI's  
17 instructing solicitors, gives evidence on this point.

18 Moving on, I would like to just touch on what are our Grounds 3 and 5. I will take them  
19 together because they are overlapping in their subject matter. These grounds relate to the  
20 level of the starting point on which you have heard Mr. Harris, and the overall level of the  
21 fine, which we say is unfairly high and out of all proportion to the infringement committed.  
22 The point here - and the reason why I take them together - is, as I have already said, that it  
23 is the combination of a starting point of 9 per cent at the very upper end of the scale -  
24 applied to a measure of turnover which includes temporary wage costs which we say has led  
25 to an unfairly and dramatically inflated fine. You have been addressed similarly by Mr.  
26 Harris this morning. We say that the 9 per cent starting point and the resultant £11 million  
27 fine are out of all proportion to CDI's role in what was an ineffectual, short-lived cartel.  
28 The infringing conduct lasted just over one year. It failed to achieve its goal of excluding  
29 Parc and collapsed of its own accord. Crucially for CDI, the only external manifestation of  
30 the infringing activity in terms of CDI and of the linked conduct, I should say, was  
31 termination of contractual arrangements with one single customer, Taylor Woodrow. We  
32 are looking here at very limited effects on the market. We say a fine of almost £11 million  
33 is out of all proportion to the effect on the market.

1 The OFT's mistake, in our submission, is that it has failed to have regard to what is known  
2 as the totality principle in criminal law and the proportionality principle in Community law.  
3 Even if - which is vigorously denied - a starting point of 9 per cent could be justified, or, as  
4 is also vigorously denied, the inclusion of temporary wage costs could be justified. The  
5 cumulation of those approaches is a manifest infringement of the proportionality principle.  
6 At no stage did the OFT attempt to cure the dramatically over-stated fine to which its  
7 methodology led by taking a step back and asking itself whether, in the light of all the  
8 circumstances pertaining to CDI, £11 million was a fair penalty, one which was capable of  
9 justification. Given the nature of CDI's role in the infringement, we say it patently was not.  
10 Those are my opening submissions.

11 THE CHAIRMAN: Just on that last point, so that we are clear how you put it, I take your point  
12 about the totality principle. You referred to CDI's role. You criticise the 9 per cent, as  
13 everybody does from the appellants' side. Are you suggesting that a different percentage  
14 should apply for CDI as from the other two appellants?

15 MISS KREISBERGER: We say that the OFT should not take the view that it must apply the  
16 same starting percentage to each of the undertakings. We say that each one has to be  
17 approached on the facts. We say that either 9 per cent is too high -- I do not make the  
18 submission in a comparative basis.

19 THE CHAIRMAN: That means we have to look in detail ----

20 MISS KREISBERGER: No, we do not make it on that basis. All we say is that on the basis of  
21 the findings of fact in relation to CDI, the cumulative effect is disproportionate.

22 THE CHAIRMAN: Thank you very much.

23 MR. UNTERHALTER: In opening we would want to address three main issues. The first  
24 concerns the typology of errors which we say the various challenges fall into. The second  
25 is a somewhat broader reflection upon the different calls that are made to you, partly to  
26 intuitive judgments that are asked of you by the appellants; partly to a theory of consistency  
27 which I shall seek to briefly outline in these opening remarks. The third is to simply reflect  
28 upon the typology which we will set out in the first section in relation to some of the major  
29 substantive themes that have already been developed before you in the openings of our  
30 learned friends.

31 If I might then begin with the typology? This is an appeal. Whilst it is common ground  
32 between the parties that the Tribunal has a jurisdiction to make a determination on the  
33 merits of the appeals that are now brought before you, it is central, in our submission, to  
34 understand what is the kind of error that is being identified for your consideration.

1 The first kind of error which does not arise in these proceedings is that there is no challenge  
2 by any of the appellants to the Guidance as being in any way unlawful. Therefore, a good  
3 deal of what you are being asked to consider is how the Guidance was applied rather than  
4 whether there is anything problematic about the Guidance itself.

5 The second category of error is an error about the interpretation of the Guidance. What,  
6 indeed, is the concept of relevant turnover? What does it mean to speak about something  
7 being derived in the requisite sense that the turnover order refers to that language. That is a  
8 question of the proper interpretation of the Guidance. It is a question of law. It is one in  
9 respect of which there is a right or a wrong answer. It will be for the Tribunal to determine  
10 what that answer is and whether there has been any error by the OFT.

11 The third category - and it is probably the largest category of error that is relied upon -  
12 really deals with various kinds of application errors which are alleged. It is said in a  
13 variety of contexts, but most obviously perhaps in respect of the determination of  
14 seriousness, that in determining a 9 per cent starting point the OFT has wrongly applied the  
15 Guidance which is set out in Steps 1 and 2.

16 The last category of error is one which would say that the OFT was required to depart from  
17 the Guidance and failed to do so, or the converse of that which is that the OFT did depart  
18 from the Guidance and should not have done so. There is some flavour of at least that last  
19 kind of error when it is said that even if a strict application of the meaning of relevant  
20 turnover would lead one to apply what is to be found in the statutory accounts of the  
21 appellants. Nevertheless, there is warrant to depart from that view because it would lead to  
22 disproportionate results and the like.

23 We would submit it is important then to categorise these errors and understand what they  
24 stand for. It is so for a particular reason which has little burden to the appellants, but, in our  
25 submission, is an important consideration for the Tribunal. That is that at least in respect of  
26 issues of application it is now well-established that the question of application is one in  
27 respect of which there is a margin of appreciation that is due to the OFT. One of the  
28 questions which is seldom answered with any clarity by the appellants is, "Well, why is it in  
29 respect of, say, a determination of seriousness, that some other figure - 8, 8.5 - is somehow  
30 the right figure?" What we have heard little of from the appellants is either what those  
31 benchmarks are or what better supports adherence to those benchmarks. Thus, we do submit  
32 that on some fundamental questions around applying the Guidance and applying judgment  
33 to the Guidance there is a margin. Very often the calls that are made in respect of re-  
34 adjustments are either simply calls to intuitive judgment or simply unreasoned by the

1 appellants simply to say, as they frequently do, that it is disproportionate in some general  
2 way, but without an apparent set of reasons which show how the discretion has been  
3 exceeded in a manifest fashion. We submit, therefore, that that is an important question in  
4 trying to determine the species of error and the consequence of that error for the ultimate  
5 merits-based determination that the Tribunal is required to make.

6 THE CHAIRMAN: On that particular kind of error that you refer to you, what is relied on, of  
7 course, is consistency with other Decisions, which is a form of benchmark.

8 MR. UNTERHALTER: Yes. Undoubtedly it is one way of getting one's bearings in relation to  
9 where seriousness lies. We do not suggest otherwise. But, it really comes to the second  
10 theme that I wanted to address in opening, which is that there is an almost constant tension  
11 in the arguments that have been addressed to you already, and will no doubt be developed in  
12 due course, that, on the one hand, there is a call to a highly individuated form of justice  
13 which is sought. It is said that there is some fine-grained metric which one can determine  
14 simply by looking at the facts of a particular case. It is that judgment which is called in aid.  
15 It is a highly intuitive judgment which is asked of you.

16 The second is a call, as we heard our learned friend Mr. Harris make, to the requirements of  
17 consistency and non-arbitrariness – in other words, a call that there should be clear and well  
18 developed principles which are consistently applied. So for various reasons, the attack is  
19 sometimes upon what is said to be a mechanistic approach that is adopted by the OFT, part  
20 of the criticism that is offered of the MDT is said to be simply its mechanistic application.  
21 At other points, the call is quite different, which is to say, as my learned friend Mr. Harris  
22 pointed out, “We are not being brought into line for the purposes of deterrence, too much is  
23 being done to us for the purposes of doing deterrence, we must suffer a burden no greater  
24 than any other party for that purpose”. In our submission, what the Guidance is it seeks to  
25 set out a number of principles in respect of which there is no dispute between the parties,  
26 but it does so for an important reason, which is that it seeks to create a framework within  
27 which the OFT can then apply reasoning and judgment for the purposes of arriving at a  
28 proper penalty. In respect of the MDT where deterrence is at the heart of that particular  
29 enquiry, it is again a principled effort to come to terms with what deterrence requires.  
30 Here, as Lord Pannick has indicated, there is a root and branch challenge, at least as we  
31 understand the challenge made, to MDT. It is not just a question of application, but it is  
32 said that in adopting the MDT as a policy, that strays entirely from the permissible bounds  
33 of what deterrence allows for under step 3 Guidance. So at least as to that challenge it

1 appears to be a challenge as a matter of law; and then there are some questions of  
2 application as well.

3 We will submit on that score, and I shall come to it in a little detail in due course, that, in  
4 fact, MDT is cast upon a particular principle, and it is properly applied. That principle is  
5 that deterrence requires one to have proper regard to the size of the undertaking and its  
6 ability to cause harm in relevant markets for competition law purposes. What the MDT  
7 does is it properly accounts for how size is relevant to what must be done by way of the  
8 work of deterrence. Either principle is right or it is wrong, but we submit that it is a  
9 perfectly justifiable principle, and indeed it is a rational basis upon which deterrence can be  
10 thought about and considered. We submit that that is a far preferable view around how to  
11 structure thinking concerning the issues of deterrence, rather than, as we have heard in  
12 various permutations, this call to, “Some number of millions is enough to do deterrence, the  
13 work of deterrent is adequately by a fine numbering £2, £3, £4, £10 million, but not more”.  
14 What is that a call to? It is simply a call to some intuitive set of judgments that seem to  
15 have no foundation in any justificatory reasoning. We submit that that invitation is an  
16 invitation that the Tribunal, upon reflection, should decline.

17 Can I then proceed from that second consideration as to how intuition and principled  
18 considerations of penalties might work in the thinking ultimately of the Tribunal to the third  
19 topic, which concerns the different major subject matters that will now be determined by  
20 you in this appeal.

21 Can I begin, firstly, with the question of seriousness, because here there is a very significant  
22 difference between the approach the OFT and the approach that is taken by our learned  
23 friends for the appellants. It has been said that whilst recognising that the infringements  
24 here are of some consequence they simply do not warrant a figure of 9 per cent because that  
25 is wholly disproportionate in ascertaining a proper sense of this infringement. In particular,  
26 what is said about this is that the OFT has simply failed to have proper regard to what Hays  
27 in its skeleton refers to as six factors, the six factors being that this did not concern mass  
28 consumer goods, there was a fragmented market, the market share of the appellants is 13.6  
29 per cent, there were low barriers to entry, and there was no evidence of damage. It is said  
30 that had proper regard been had to those factors – I do not ask the Tribunal to turn this up, it  
31 is at para.26 of Hays’ skeleton – then a very different account or result would have come  
32 about.

33 We want to make two broad submissions which we will develop ultimately on this score.  
34 The first is that this is not a proper account of what the Decision has to say about those very

1 factors. These were the very matters that the parties raised before the OFT in response to  
2 the statement of objection, and they were fully dealt with by the OFT in the Decision. One  
3 can see that from para.5.203 of the Decision and thereafter. It is simply not the case that  
4 these factors upon which Hays and, to some degree, the other appellants place such reliance,  
5 were considered at all. On the contrary.

6 The second proposition is what were the factors that were relevant to the determination of  
7 seriousness. Here might I just sketch in the round why the infringements here are of such a  
8 high order of seriousness. We are in this case concerned, as the Decision makes plain, and  
9 the Decision, when it comes to the question of seriousness refers to the entire content of part  
10 4 of the Decision. So it refers back to all the evidence that was assembled carefully for the  
11 purposes of deciding upon the infringements, but here are some crucial features of what  
12 happened here. Parc was a particular kind of intermediary, a neutral vendor, which was of  
13 relatively recent origin, which came into the market in the construction industry in around  
14 2003. It was perceived by the appellants as threatening to their business model and the  
15 margins that they sought to procure from the work that they did. Why was that so?

16 Because, as the Decision makes plain, entities such as Parc stood as an intermediary to  
17 manage the way in which recruitment companies dealt with their clients, the construction  
18 companies; and in particular were concerned to ensure that the rates at which workers were  
19 offered were indeed proper and competitive rates.

20 Shortly after the intervention of Parc, and its agreements with Taylor Woodrow on the one  
21 hand and Vinci on the other, there was the constitution of the CRF precisely and  
22 deliberately to deal with the threat that was posed by Parc. This was not, as it were, some  
23 rather loose and ineffectual effort to meet a competitor threat in the market, it was a very  
24 direct co-ordinated effort by the parties to the CRF to get together and seek to formulate a  
25 strategy to meet a threat to their margins in the market. Instead of, therefore, either yielding  
26 to the potential competitive introduction of rate reduction through the scrutiny that  
27 intermediaries such as Parc would offer, and deal with it or not as the case may be  
28 individually, they decided to get together to do two things. The first was the collective  
29 boycott of Parc so as to seek to disintermediate that company and reach over it directly to  
30 the clients that had previously dealt with the recruitment companies. That disintermediation  
31 was intended for one purpose and one purpose only, which was to ensure that the kinds of  
32 rates that Parc was seeking to put upon the recruitment agencies, and you will see those  
33 figures – there is a particular figure, I am not sure if it is confidential, that was being offered  
34 by Parc, but it was precisely to avoid having to be pegged at that figure that they sought to

1 disintermediate Parc and secure higher margins and indeed they did so. That was the first  
2 thing.

3 They did so precisely through the collective boycott action that was taken so as to ensure  
4 that they made it plain to the construction companies that they would not deal with Parc.  
5 The construction companies said that they must, but nevertheless the collective boycott was  
6 put in place.

7 That comes to another aspect of the matter, which is that it is said that this is a highly  
8 fragmented market in which the barriers to entry are extraordinarily low and so this must  
9 necessarily have been an ineffectual effort to meet the competitive pressures that Parc and  
10 other intermediaries of that kind might offer. On the contrary, the constitution of CRF was  
11 deliberately built around the biggest players, as it referred to. They worked out where they  
12 would be most likely to have an impact. We know that there is a stratification in this  
13 industry because there are preferred suppliers and, generally speaking, those are the parties,  
14 as is explained in the Decision, that are given the first opportunity to tender to construction  
15 companies. So as we see both from the dealings that Vinci had with the construction  
16 companies and also in the constitution of the CRF, there was a targeting of those that were  
17 biggest and best placed to supply skilled workers to the construction company. That needs  
18 to be seen against a background in which there was skills shortage in the construction  
19 sector. Further, in circumstances where the construction industry is a major – or certainly  
20 was at the time and no doubt remains so – part, a major industry, within the economy of this  
21 country constituting something of the order of 6 per cent of the GNP of the country.

22 These are, therefore, very significant interventions that are sought to be utilised for the  
23 purposes of frustrating competition in significant ways where there was much constraint  
24 from the prospective of the construction companies as to how to source the skilled workers  
25 in what was a construction boom that was taking place.

26 The collective boycott was one feature of the conduct that was undertaken. The second  
27 feature of it was that there was a targeting of margins, a blatant form of price fixing, and  
28 these two interventions were intended to work in concert, one with the other, so as to ensure  
29 that margins could be maintained. It was done not simply by virtue of one meeting, but by a  
30 number of highly formalised meetings that took place over a period of about a year and a  
31 half, and it was supplemented by extensive bilateral discussions that took place outside of  
32 the formal meetings that took place within the forum itself.

33 We submit, and I will come back to some of the aspects of this, that this is extremely  
34 serious behaviour. It is blatant price fixing. It is aimed to secure margins in a major sector



1 of the economy with very serious implications for the competitiveness with which  
2 construction companies could secure skilled workers under conditions of shortage. That is,  
3 in our submission, an extraordinarily serious set of circumstances, and whether one  
4 compares it to mass consumer goods industries, or whether one simply says this is a vitally  
5 important sector of the economy it has highly serious implications.

6 One last feature on this before I move to some general reflections on MDT, and that is that  
7 it is said very often in these circumstances that where there is an infringement by object,  
8 somehow there is a discount of seriousness because specific effects are not proven. They do  
9 not need to be proven, although Part 4 of the Decision is replete with the effects that were  
10 felt by this co-ordination that took place, but it is actually an inversion of the proper order  
11 within which these matters should be considered. It is precisely because this kind of  
12 conduct is so self-evidently wrongful and potentially problematic that no effects need be  
13 determined, they are in this sense the *per se* infringements, the seriousness of which speak  
14 for themselves. There is simply no discount to be had for the seriousness that flows from  
15 object infringements of this kind. We submit, and we will expand further on this, that the  
16 seriousness that was found was wholly warranted in these circumstances.

17 If I may come to the second major question in which there will be a plethora of evidence  
18 before you. It nevertheless comes down to a number of very basic points. The first is, as I  
19 have indicated, simply a question of law, which is what does relevant turnover mean? And,  
20 within the scheme of the turnover order, what does it mean when one says “amounts derived  
21 by the undertaking from the sale of products and the provision of services?” In our  
22 submission there will be very little dispute as to what the legal meaning of the provision of  
23 services is, the only question here is whether these appellants do provide services of a kind  
24 that allows for the wages that are ultimately paid over to workers to be accounted for as part  
25 of the turnover of the companies.

26 In our submission a proper inquiry begins with what services do these appellants provide?  
27 We will endeavour to show you that it is perfectly plain that the appellants provide services  
28 by way of providing the workers to the construction company, they contract to do so, and  
29 when they then receive consideration for the provision of those services that consideration  
30 then includes what is reflected in the turnover figure, and it includes an amount which is  
31 partly the fee, commission, and it includes an amount in respect of the cost to the appellant  
32 of providing the service, and that cost is what they have to procure themselves by way of  
33 contracting with the workers, so that they can themselves provide the service. All of that  
34 will be dealt with in great detail on the facts that are yet to come.

1 We will submit that on a proper assessment of those facts taken both from the financial  
2 statements which you will see, and also from what is to be derived from what is actually  
3 provided by way of the contracts that it is quite clear what is being done by providing  
4 services.

5 The only consideration it is then said that even if you can utilise the turnovers reflected in  
6 the financial statements, and that definition of turnover is more or less consistent with the  
7 meaning of “relevant turnover” for the purposes of the legal definition of the turnover order,  
8 nevertheless there is some warrant not to apply gross turnover, but net fees because that has  
9 some relevant implication for the scale of the undertaking in the relevant market. We will  
10 submit in due course that that is simply a different way of invoking the notion that one  
11 should apply some species of profitability standard at the level of relevant turnover, and we  
12 would submit that that is not the correct approach to these matters. What one is concerned  
13 about when one is concerned with the impact of the infringement is that one is concerned  
14 with market based transactions that have taken place, because it is there that the  
15 infringement occurs, in the market in respect of the transactions that these undertakings  
16 engage. Those infringements, and those transactions are exactly the transactions in respect  
17 of the provision of services, and there is simply no warrant to take some portion of that  
18 because it is a better measure of performance as to profitability and the like. We submit for  
19 the purposes of Steps 1 and 2 there is simply no warrant to apply that notion of net fees as a  
20 better reflection of impact which is transaction based, as we have submitted.

21 If I might then briefly come to the question of the MDT. Our learned friends, and  
22 particularly Lord Pannick for Hays, say on this score that the first objection, and this  
23 appears to be the legal challenge is that the MDT is a methodology. It is a means by which  
24 one seeks to do the work of deterrence, but it is a means which is simply not legally  
25 permissible under the Guidance, and it is not so – it is said – because it has lost its moorings  
26 and its moorings must be grounded in culpability, that is the central proposition that is  
27 advanced and seemingly it is a proposition of law that is advanced on that score. We will  
28 submit that that is not a proper way of conceptualising what MDT is because it does not  
29 lose its moorings in the way suggested. What happens in the way that MDT has developed  
30 is that it looks firstly to see what has happened at Steps 1 and 2. That is concerned, of  
31 course, with seriousness and the impact of the infringing behaviour within the relevant  
32 market. But for many purposes that will suffice. In other words, nothing more needs be  
33 done by way of deterrence and, indeed, the position of Eden Brown is a good example of  
34 that. There is nothing more that needs be done. The question of MDT is an intervention of

1 a different kind and for a very specific purpose. It is when what is achieved by way of  
2 Steps 1 and 2 arises in circumstances where the amount of market activity and the relevant  
3 market is small in relation to the size of the undertaking as a whole, and it is only in those  
4 circumstances that MDT comes to be of application.

5 It is not a methodology that simply floats unconnected to what happens at Steps 1 and 2, it  
6 is a methodology that is applied in specific circumstances, and that is where the rationale for  
7 MDT becomes important. Why is size of consequence to deterrence? It is of consequence  
8 to specific deterrence, because one is concerned to determine what is the scope for this kind  
9 of an undertaking to do harm of this or other kinds in the future? If a fine is so trivial  
10 relative to the size of the undertaking, that it could be discounted then there is every reason  
11 to take account of how big the undertaking is because it is its economic power and its  
12 potential for power in the future that must be deterred. That is the point of MDT. It is  
13 comprehending the size of the entity, the seriousness of what it has done in the past and the  
14 future or forward looking consideration of how it should be deterred, given its size, and  
15 what it has done, for the future. We submit that is a perfectly defensible proposition and  
16 one which is reasonably of application to Hays as was the case here.

17 We do submit that those are the large issues over which the matter will be joined. There  
18 are, of course, a large number of subsidiary matters, but I shall not deal with them at this  
19 stage. That gives you, I hope, some sense of the overall terrain of the dispute.

20 THE CHAIRMAN: Yes, thank you very much, that is very helpful. Can I raise two matters, Mr.  
21 Unterhalter? We have had this morning, appended to the Hays' speaking note that we  
22 received, a table of I think six previous Decisions under Chapter I giving the percentages. I  
23 think it is helpful for us to have a simple schedule. If there are any other previous cases on  
24 Chapter I that the OFT think we should have, I think to have a complete schedule would be  
25 quite useful or, indeed, when you have had a chance – I imagine you have only just received  
26 that this morning – to have a look at it for any comments on what is said there, I would have  
27 thought that this purports to be just a summary of previous Decisions that a neutral version  
28 could be agreed. I have not had a chance to read through it yet, but I think that would be  
29 helpful.

30 MR. UNTERHALTER: We can do that, certainly, Sir.

31 THE CHAIRMAN: If that can be produced perhaps by Wednesday. Secondly, we have had  
32 reference, and no doubt will have more, to the Decision of the French authority, which is  
33 relied on by at least some of the appellants. I think you say in the Decision and repeat in the  
34 relevant skeletons that the penalty regime in France is materially different in various ways

1 from that which the OFT has to apply. I think in the Decision there is just one illustration of  
2 the difference that is set out. I think we would find it helpful to have a slightly fuller  
3 explanation of what the difference is if that is being relied on and, maybe again by  
4 Wednesday it would be possible to produce I think no more than two pages at most, just a  
5 summary of how the French fining regime operates. Thank you very much.

6 As we indicated, we shall take our lunch break now and come back at a quarter to two, and  
7 Mr. Brealey, if you and your team could look into the confidentiality matters and let  
8 everybody else know. If, as we hope, some of what is claimed to be confidential is no  
9 longer claimed as confidential then you will need to arrange for the other appellants other  
10 than the OFT, to have copies in due course, with those redactions removed.

11 (Adjourned for a short time)

12  
13 THE CHAIRMAN: Mr. Brealey?

14 MR. BREALEY: Sir, the answer is, "Yes" - we do not assume confidentiality for those two  
15 categories of document that you requested. We will endeavour to get you pages which are  
16 unredacted.

17 THE CHAIRMAN: Yes. Thank you very much. I am sure that is very sensible.

18 MR. BREALEY: That takes us into the evidence now. The first witness who is being called on  
19 behalf of Hays is a Mr. Robert Lawson.

20 **Mr. ROBERT ARTHUR LAWSON, Sworn**

21 **Examined by Mr. BREALEY**

22 Q Mr. Lawson, there should be a bundle CB3 in front of you?

23 A Indeed, there is.

24 Q Could you go to Tab 2. You see there a statement. If you just flick through it, is that your  
25 statement?

26 A Yes, it is.

27 Q Go p.46 of the bundle. Is that your signature?

28 A Yes, it is.

29 Q Can you confirm to the Tribunal that the facts and matters set out in this statement are true  
30 to the best of your knowledge and belief?

31 A Yes, I can.

32 Q Mr. Unterhalter will have some questions for you. I am told at the back that sometimes they  
33 cannot hear. Can you keep your raised up a little bit, please?

34 A Will do.

1 **Cross-examined by Mr. UNTERHALTER**

2 Q Mr. Lawson, I wonder whether you would go to your witness statement, to para. 13. You  
3 are referring there to what is said to be the introduction of a comprehensive new  
4 competition law compliance programme. Do you see that?

5 A Yes.

6 Q That indicates, or certainly implies, and elsewhere in the statement I think this is clear, that  
7 prior to the new competition law compliance programme you had some sort of programme  
8 that pre-existed it; is that correct?

9 A That is correct. The previous programme was essentially around induction of new people  
10 into the company and when people were promoted.

11 Q Yes. That presumably is why at para. 8 you say, speaking of Mr. Waxman in the second  
12 sentence, "Mr. Waxman considered that any disclosure to competitors of confidential  
13 information relating to Hays, its pricing, or its customer relationships was simply  
14 unacceptable and he felt that all Hays employees should have known this".

15 A That's correct. That's why -- that's exactly why

16 Q Yes. We have to accept then that the first programme was a failure.

17 A Clearly the fact that it didn't work effectively, yes, and that's why we had to upgrade it. We  
18 had no reason to upgrade it until these events occurred. We had no evidence to suggest that  
19 we should.

20 Q What it does show you is that compliance programmes, no matter how well intentioned,  
21 fail?

22 A No, I don't think. I think that the previous programme was probably inadequate, in that it  
23 didn't have sufficient repetition and reinforcement to it, which is perhaps the big learning  
24 for us out of this incident.

25 Q I want to suggest to you that although compliance programmes are helpful and reinforce  
26 messages with relevant employees, they are simply educative in nature. What they do not  
27 go to are the incentives that sometimes employees have to breach competition law?

28 A I think it's deeper than that. I think education is part of the activity, but much more  
29 importantly is the culture of the company and its ability to reflect that culture throughout its  
30 organisation. That's infinitely more important than anything else.

31 Q Yes, but culture or not, the fact is, as we have seen in this case, there were incentives that  
32 Mr. Cheshire had in his business dealings over a period of more than a year to engage in  
33 cartel behaviour, and that you accept, do you not?

1 A Mr. Cheshire had the same incentives as every other manager of his level in the company.  
2 Mr. Cheshire obviously chose to disregard the instructions that he had received in terms of  
3 the Competition Act.

4 Q Who gave him those instructions?

5 A They would have been given to him as part of his normal induction and when he was  
6 promoted to area manager for the South-East.

7 Q “Would have” – you do not know that?

8 A I don’t know that, no, but that was the normal practice.

9 Q So notwithstanding all of that, he found that there were incentives that overrode the  
10 programme that he had been exposed to by way of the initial compliance programme –  
11 correct?

12 A No, I don’t think so. I think he had the standard form of incentives that all our people had.  
13 Mr. Cheshire was an exception in that he then transgressed the law in trying to enhance his  
14 own revenue level.

15 Q He was really trying to enhance Hays’ revenue level, and in particular – you are not  
16 suggesting this was self-enrichment – he was trying to increase the revenue level of his  
17 division, the C&P division?

18 A Correct, on which he was incentivised.

19 Q Yes, but those incentives still exist in your business?

20 A Of course.

21 Q So the incentives are there to push the margins in the division for which he was responsible  
22 and he saw opportunities to do so by way of infringements of the competition legislation?

23 A The incentives did not in any way suggest that someone should transgress the law. The law  
24 is over-arching above everything you do. There is no incentive that in any way should  
25 suggest to an individual within the company that they should go and break the law. That is  
26 not the purpose of incentives.

27 Q I think perhaps we are at cross-purposes. The point I am making to you is that Mr. Cheshire  
28 is an example of someone who was incentivised to maximise margins – you accepted that?

29 A Correct.

30 Q He found that one way of doing so was to breach the law. I am suggesting to you that that  
31 is a constant temptation that must exist?

32 A Again, I think – it is a temptation, of course it is, but if the culture of the company is  
33 sufficiently strong then the temptation is irrelevant. People do not break the law merely to  
34 achieve their sales objectives.

1 Q I am not certain what you mean by “the culture of the company”. What is the culture of the  
2 company?

3 A The culture of the company was to be ethical, law abiding and operate to the highest  
4 principles in business.

5 Q But apart from that culture there is also the need to make margins, make profits and  
6 sometimes cut corners, and that is a constant temptation. Are we at one on that?

7 A We are at one on it being a temptation but that is how you manage a business, to avoid those  
8 temptations becoming the way that business is conducted, and hence Denis Waxman’s  
9 reaction on hearing of these events, and mine.

10 Q You see, I want to put to you a simple proposition, Mr. Lawson, which is this: that whilst  
11 education may be a good thing to inculcate in people in the company at various levels, the  
12 inducement not to give in to unlawful schemes of the kind Mr. Cheshire engaged in is for  
13 the company to know that the value of its business is at stake, and the risk to the value of  
14 the business is very great if it should commit the infringement and be found out. Its value  
15 destruction that motivates businessmen - correct?

16 A Yes.

17 Q Again, here I think we will be in agreement, the line of authority – I think this is common  
18 ground, but just so we can be clear about this – effectively Mr. Cheshire was responsible for  
19 the South East region of the C&P business of Hays, is that correct?

20 A Correct.

21 Q And he reported to Mr. Smith?

22 A Correct.

23 Q Mr. Smith was indeed a director of the company, is that correct?

24 A Of the specialist block, yes.

25 Q And Mr. Smith, at least at the time, then reported to Mr. Waxman?

26 A Correct.

27 Q So in fact Mr. Cheshire was, as it were, reporting directly to a director and that director, Mr.  
28 Smith, in turn to the managing director of the company?

29 A Robert Smith was a director of a subsidiary of the company, not of the listed company.

30 Q But you have described in your witness statement that this was a relatively flat structure?

31 A Correct.

32 Q And indeed, so much so that Mr. Waxman, as you understand it, used to attend the – and I  
33 use this word simply to refer to the board of the C&P division, let us not argue for the  
34 moment what that means – the C&P board was one that Mr. Waxman used to come to?

1 A As he did to all others, yes .

2 Q Yes.

3 A That was his style to manage, which was to attend these meetings, which occurred

4 throughout the country in each of the specialisms.

5 Q So we can take it then that Mr. Cheshire, who was on that Board which effectively governed

6 the C&P division was putting forward his ideas, together with other members of the board,

7 and interacting with the managing director, Mr. Waxman, on that basis, is that correct?

8 A Normally the attendance of Mr. Waxman was to hear the financial results which would be

9 presented by the finance director. He generally did not stay on for the operational issues, he

10 delegated those to Ron Smith.

11 Q Yes, so Mr. Smith, you certainly accept is senior management?

12 A Correct.

13 Q You would also accept, I assume, that this board of the C&P division were concerning

14 themselves with the strategic questions necessary for that division to go forward. Is that also

15 correct?

16 A They would be concerning themselves with the operational issues of optimising and

17 delivery of the annual budget, their prime concern would be that the strategic issues would

18 generally be dealt with at the head office.

19 Q I suppose it depends what you would mean by “strategic issues. But, for example, it is that

20 board that would consider questions as to national accounts?

21 A Correct.

22 Q And who would be dealt with ----

23 A Sorry, that may or may not be the case. If the national account stretched across other

24 specialisms it would not be considered by that board if it was considered by the Executive

25 Committee, i.e. at a higher level, which Mr. Smith was a member.

26 Q Yes, but there were some aspects of the national accounts that were considered by that

27 board?

28 A Yes, they were specific to the C&P, some elements of that could be considered, yes.

29 Q And so, for example, questions as to who you might want to deal with, and not deal with,

30 would have been matters located in the board of the C&P business, correct?

31 A If such matters were raised to that board it would consider them, yes.

32 Q There is a Decision which has been rendered in this matter by the OFT, could that be

33 placed before you? It is CB1. Do you have it?

34 A Yes.



1 Q If you would turn to p.123 of the Decision? You will see there is a discussion there about  
2 what were the exclusions that were taking place pursuant to the cartel behaviour that was  
3 the subject matter of the Decision. If you look at 4.86 you will see that in the second  
4 sentence it begins,

5 "In a letter dated 31<sup>st</sup> January, 2005, Hays informed Taylor Woodrow that it refused  
6 to supply labour candidates to Taylor Woodrow through Parc in the north-west  
7 region".

8 If you look at the footnote you will see that that was a letter from Duncan Collins of Hays to  
9 Mr. Warrington of Taylor Woodrow. I can place that letter before you if you would like,  
10 but do you accept that such a letter was sent?

11 A I have no knowledge of it.

12 Q You have no knowledge of it.

13 A But I accept the point. I have no knowledge of it at all.

14 Q We do have a witness statement in these proceedings from Mr. Collins who explains that at  
15 the time - in 2005 - he was reporting to Mr. Cheshire. Is that consistent with what you  
16 know?

17 A I don't know Mr. Collins. But it could be. He had a couple of regional directors underneath  
18 him. He may be one of them.

19 Q Mr. Collins says (witness statement bundle, CB3, tab 3, para. 9) that in the period up until  
20 June 2005 he reported to Mr. Cheshire. "During this period I was meant to have regular  
21 meetings." He says that in point of fact he did not have as many meetings as he would have  
22 perhaps wanted because Mr. Cheshire did not seem to be as interested as he would have  
23 liked. However, it certainly appears from Mr. Collins' statement that he was reporting  
24 directly to Mr. Cheshire.

25 A That's perfectly possible, yes.

26 Q What we have here is a situation, if one locates what is occurring in January 2005, where  
27 Mr. Cheshire has been involved in various collusive agreements in respect of cutting out  
28 Taylor Woodrow, and certainly not dealing with Parc in these matters, and then the letter is  
29 written by Mr. Collins. Does that come as a surprise to you?

30 A Yes.

31 Q What investigation, in point of fact, has Hays done as to who knew about this cartel  
32 behaviour?

33 A We went through the entire organisation, including C&P to establish if there were any cartel  
34 activities. You will recall that we were also asked by the OFT to look into the IT

1 recruitment business at the same time. We probably data-mined every e-mail that was on  
2 our servers through this process.

3 Q You see, what this letter would indicate is that the execution of the cartel strategy, at least as  
4 to this aspect of it, was done by Mr. Collins.

5 MR. BREALEY: I hesitate to interrupt here, but there is a witness statement from Mr. Collins.  
6 The OFT have not challenged the statement of Mr. Collins. They are not cross-examining  
7 him. What is happening here is that Mr. Lawson is being asked questions which should  
8 properly be put to Mr. Collins.

9 MR. UNTERHALTER: With respect, that challenge is not properly made. Mr. Collins' evidence  
10 is accepted that he reported to Mr. Cheshire. We are exploring the relationships between  
11 what Mr. Cheshire was doing and how his policy was executed.

12 THE CHAIRMAN: Mr. Collins does not deny that he wrote the letter, does he, in his statement?

13 MR. BREALEY: Not as far as I am aware, no. He does not deny that he wrote the letter. Really  
14 the questions should be put to him as to what he meant or what conversations he had, or  
15 whatever -- whether he knew about the cartel. It is not for Mr. Lawson to give evidence on  
16 behalf of Mr. Collins.

17 THE CHAIRMAN: As I understand it, all that Mr. Lawson is being asked is about the  
18 investigations that Hays conducted when this matter came to light. That seems to me a  
19 proper line of questioning. Mr. Lawson obviously cannot give evidence of what Mr.  
20 Collins thought.

21 A I do not actually know Mr. Collins, sir.

22 Q I understood that from your earlier answer, yes.

23 MR. UNTERHALTER: Just to put the point again to you, Mr. Lawson, the fact is that that letter  
24 is an execution of a Decision taken at the cartel meeting which was no longer to deal with  
25 Parc and to indicate that to Taylor Woodrow. It is Mr. Collins who writes the letter.

26 A Yes - and Mr. Collins is a subordinate of Mr. Cheshire.

27 Q Yes - and therefore it would certainly seem that what has happened here is that at least one  
28 other employee appears to have been implicated at least in the execution of this cartel. Did  
29 you know that?

30 A No.

31 Q No. Nothing was ever brought to your attention about that?

32 A No.

33 Q I want you, if you would, to turn to the Decision and look at p.298, para. 5.315. This was a  
34 submission that was made by Hays where it was said, "Hays submitted that Mr. Cheshire

1 had no individual authority to make any Decisions that affected the Construction and  
2 Property division's business on a national level. Hays submitted that, 'At most, Mr.  
3 Cheshire could be described as a mid-level divisional manager with responsibilities in a  
4 small part of the Hays Specialist Recruitment business'". That theme is borne out at 5.318  
5 where it is said:

6 "In terms of the extent of his authority, Mr. Cheshire stated that he had the  
7 authority to make Decisions about matters that related to individual offices, but  
8 matters affecting C&P on a nationwide basis were determined by the C&P board  
9 upon which he sat).

10 **Mr. Cheshire stated that collectively, he, Mr. Smith and Tim Cook,**  
11 **determined C&P's sales strategy including the preparation of annual**  
12 **strategic plans, targeting of clients, which neutral vendors to deal with and**  
13 **national sales incentives".**

14 **Do you see that?**

15 **A Yes.**

16 **Q Is that in fact correct?**

17 **A Yes. It is correct. I mean, we could debate whether annual strategic plans and**  
18 **annual budgets are the same thing, but in essence that would be my understanding.**

19 **Q Yes. In respect of matters concerning national accounts of which Taylor Woodrow**  
20 **would be one example -- Is that correct?**

21 **A In essence that would be my understanding.**

22 **Q Yes. So, in respect of matters concerning national accounts of which Taylor Woodrow**  
23 **would be one example; is that correct?**

24 **A I would think so, yes.**

25 **Q And Vinci another?**

26 **A Yes. I think so.**

27 **Q Yes. -- as to whether to deal with a neutral vendor such as Parc, those are matters that fell**  
28 **within the authority of the C&P board.**

29 **A If they were advised of that matter, yes.**

30 **Q Yes. Here is the interesting question for you, Mr. Lawson: If Mr. Cheshire says - and you**  
31 **seem to accept that those were matters that could only be decided at the board level, and**  
32 **that is in fact confirmed by what Mr. Smith has to say on these matters, if authority was**  
33 **being followed, what appears to be the case is that these were matters raised with the board**  
34 **because that is the area in the company where the authority is located for these matters.**

35 **A I have seen no evidence, and I am not aware of any evidence, that said that the issues that**  
36 **Mr. Cheshire was discussing at the CRF were ever brought to the C&P board.**

37 **Q But, Mr. Lawson, what inquiries have been made to properly determine that issue?**

1 A As said, we have looked at every email that we could mine, recover. We have asked our  
2 team. We have asked Robert Smith, etc. That is it. It appears to be, on all the evidence that  
3 we have before us, Mr. Cheshire operating on a solus basis.

4 Q But that is not what Mr. Cheshire says. Mr. Cheshire, in respect of whom there is no  
5 witness statement before the Tribunal -- What Mr. Cheshire says is, "These were matters I  
6 took to the board". So, either Mr. Cheshire is lying or the board was approving these  
7 policies.

8 A I have seen no evidence that-- none whatsoever -- that the issues of the CRF went to the  
9 board.

10 Q But you do not know, you are just saying so?

11 A I can only answer questions on the material that I know.

12 THE CHAIRMAN: Mr. Unterhalter, I do not think the OFT has made any finding that the board  
13 approved these matters. It hasn't made that finding.

14 MR. UNTERHALTER: This line of questioning goes to something slightly different. I will not  
15 pursue it longer than necessary, but what I want to put to you, effectively, Mr. Lawson, is  
16 this: what this tends to indicate is that the *locus* for these kinds of Decisions is at board  
17 level. It would seem, certainly if Mr. Cheshire's account of things is followed, that that is  
18 where he received his authority. Is that a matter of concern to you?

19 A No, it is not a matter of concern that Mr. Cheshire would receive his authority from the  
20 board. Mr. Cheshire, who in my opinion was operating outside the remit that was he given,  
21 did not discuss the issues that he was discussing at the CRF with his colleagues and  
22 operated on a *solus* basis.

23 Q I am asking you what basis you have for making that claim?

24 A The basis I have for it is that I have seen no evidence of the CRF and its implications ever  
25 being discussed at the board of the C&P, or anywhere else for that matter.

26 Q That you have done simply by looking at emails?

27 A Emails and minutes, yes.

28 Q I think you will agree, Mr. Lawson, that Decisions of this kind concerning whether to deal  
29 with intermediaries such as Parc are matters of some importance. Would you agree with  
30 that?

31 A Yes.

32 Q They have a direct bearing on how you will maintain a commercial relationship with major  
33 clients in the C&P business?

34 A Correct, yes.

1 Q And if Mr. Cheshire is correct, and you seem at least to this extent to agree, that these are  
2 matters located at the board level of C&P, then Mr. Cheshire was at least involved – let us  
3 put aside the question of whether he brought any of his cartel behaviour to the notice of the  
4 board – just generally speaking, then Mr. Cheshire was directly involved in rather important  
5 Decisions going to important clients and the strategies to be pursued in dealing with those  
6 clients – correct?

7 A Mr. Cheshire would operate his dealings with the major clients within the parameters set by  
8 Robert Smith and Denis Waxman. He had no flexibility beyond that. He was a sales  
9 manager and his job was to sell the company’s activities to our clients.

10 Q What I am putting to you, Mr. Lawson, is that at this board level, this is not Mr. Smith  
11 instructing Mr. Cheshire, that is a board that is constituted, as Mr. Cheshire has stated at  
12 5.319 of the OFT Decision, where matters were debated concerning, amongst other things,  
13 sales strategies and strategic plans concerning national accounts and issues concerning the  
14 C&P business.

15 A Yes.

16 Q Do you agree?

17 A Yes, and Mr. Smith would set the parameters for those.

18 Q I think the point I am putting to you is that you do not need a board if it is just a matter of  
19 instruction. You constitute a board, no matter what appellation one gives it, for the purpose  
20 of taking Decisions among the members of that board, otherwise why have a board?

21 A I don’t think it was a board, and it isn’t a board. It was an effective means of ensuring that  
22 there was the same communication to all members of the activity. So you have the two  
23 people there, the South-East chap and the northern provinces fellow, and they both received  
24 the same instructions at the same time.

25 Q That is not what your witness statement says. You do not say that the board was constituted  
26 as a convenient means of conveying instructions?

27 A No, but I do describe the parameters under which that board operated.

28 Q Those parameters, I want to put to you relative to what Mr. Cheshire has to say on the  
29 subject, are rather constrained, and deliberately so, because Mr. Cheshire, who presumably  
30 participated on that board, has an account where he indicates, as I have pointed out to you,  
31 the kinds of matters that were debated there?

32 A Those issues would be – yes, they would be discussed, but the Decisions would be made by  
33 Mr. Smith.

1 Q I am putting to you and I should not have thought that you would want to be disputatious on  
2 this point, is Mr. Cheshire is of sufficient seniority within the organisation that he is  
3 participating in debates to influence the outcome of strategically important matters  
4 concerning the C&P business. That is what I am putting to you.

5 Q My answer is that he would input with regard to the sales activities in the South-East of  
6 England. That was his role, to run those offices in the South-East of England.

7 Q Mr. Lawson, I understand what his role was when he left the board, but what I am putting to  
8 you is that when he was at a board meeting and they were discussing matters at the board  
9 meeting, he was free to, and did, engage in the discussion to influence and achieve  
10 outcomes concerning the strategic questions relevant to the C&P business. It seems  
11 obvious.

12 A No, he would be inputting with regard to the activities of the South-East of England.

13 Q Mr. Lawson, are you seriously suggesting that all that this board did was receive sales  
14 reports from persons such as Mr. Cheshire and that these runners then received their  
15 instructions from Mr. Smith, and that is what the board was. Have you seen the minutes?

16 A Yes.

17 Q And?

18 A That's a reasonable analysis. There would be comment as to variations as to operations  
19 within the parameters set; but in essence it was about sales activities in that division.

20 Q Then you and Mr. Cheshire clearly do not agree on the subject.

21 A I think there are a number of areas where Mr. Cheshire and I do not agree.

22 Q Yes, indeed. I want to put it to you that you do not constitute a board – in other words, a  
23 permanent standing body of this kind – simply for the purposes of exchanging information  
24 and receiving instructions. That Mr. Smith could do by picking up the phone or receiving a  
25 report?

26 A That is the normal way that multi-division sales operations are run. That is a perfectly  
27 standard way of doing it, and it is what I've seen in other companies as well.

28 Q How often did this board meet?

29 A I think about every month. We had 13 periods a year.

30 Q So they got together monthly just for this exchange of information?

31 A Absolutely, and they would then look at the overall performance of the business, etc.

32 Q And nobody mentioned the possibility of, "This strategy or that strategy might be working  
33 well, we perhaps want to" ----

1 A You would share practice. Of course that happens. That's a perfectly standard thing that  
2 goes on at these things.

3 Q Of course, and consequently Mr. Cheshire is on a standing body where these matters are  
4 discussed, presumably for the purpose of reaching well informed Decisions for the company  
5 and particularly this division?

6 A Certainly unified Decisions, yes.

7 Q That is what I am putting to you, that Mr. Cheshire is of sufficient seniority in the  
8 organisation to be at least participating in those discussions, potentially influencing them,  
9 even if he could not finally take any Decisions in respect of them?

10 A Yes, that's accepted.

11 Q Would you also then confirm that the size of the C&P division – this cannot be a  
12 confidential matter because it is in your accounts – was sizeable? In other words, of the  
13 divisions that were represented in the company this was a sizeable division. In fact, I think  
14 it was the second largest – is that correct?

15 A Yes, in the UK.

16 Q In respect of the UK business, yes. In 2009 what was its approximate turnover?

17 A In 2009, £47 million, I think.

18 Q Just roughly?

19 A I think £47 million, but you're asking me from memory.

20 Q I have got the 2008 figure. Perhaps you would like to look – there is a non-core bundle ----

21 A I thought you asked me for 2009.

22 Q I did ask you for 2009. I can show you a figure for 2008 which you will find in the non-  
23 core bundle 4, the exhibits to the experts' report, vol.1, look at p.230, do you have it?

24 A Yes.

25 Q You will see in respect of the UK and Ireland there is a breakdown by way of net fees of the  
26 various divisions, and you have "Accountancy & Finance first, and then you have  
27 construction.?"

28 A Yes.

29 Q And it is £118 million?

30 A Yes.

31 Q And that is a pretty consistent position as number two by order of net fees, would that be  
32 about right?

33 A Yes, absolutely right.

1 Q So it accounts for something less than a quarter of the net fees of the UK and Ireland  
2 business?

3 A Correct.

4 Q I want to put to you, we do not have the figures in the accounts, but the South East business  
5 was at least 50 per cent of that and probably a considerable amount more, would that be  
6 correct?

7 A I don't know.

8 Q You do not know, but you know enough about the business I would have thought to know it  
9 the rough proportion?

10 A Yes, it would be significant, yes.

11 Q It would be more than the norm?

12 A No, I don't know that is true, I don't know.

13 Q You just do not know?

14 A No, it would be significant.

15 Q It would be significant?

16 A Yes.

17 Q Probably at least 50 per cent.?

18 A I don't know. It would be between 40 and 60 I would imagine, but I don't know.

19 Q 40 and 60 per cent, I understand, all right. That means that Mr. Cheshire is in charge of a  
20 very considerable amount of net fee business, let alone the turnover for which he would  
21 have been responsible?

22 A Yes.

23 Q And if we compare it just by relative orders of magnitude, to a company like Eden Brown,  
24 for example, in 2007 – and these are again on the published figures – its fees were of the  
25 order of just a shade under £16 million in total?

26 A Yes.

27 Q So you are talking about a man, Mr. Cheshire, who is responsible for a very significant  
28 amount of business with key clients that are of great value to your company, would you  
29 accept that?

30 A Yes. He helped operate a significant amount of turnover and, of course, being the size we  
31 were, we had a very well developed methodology for managing such things.

32 Q Therefore, in respect of the South East division he is responsible for the profit and loss of a  
33 very vital part of your C&P business?



1 A He is responsible for the sales and operates the manning levels within certain parameters,  
2 and the fee levels were defined.

3 Q But if he does not do his job properly, given the responsibility that he has then, your figures  
4 could be significantly compromised in a key part of your business?

5 A Yes, as they would be for any other sales manager.

6 Q Yes, and it is really for that reason that the OFT has said that it is not a question of how  
7 many other people in this very large organisation were above him or at his level – I think  
8 the number is said to be about 70, is that more or less right?

9 A Yes, and still today I think, roughly between 70 and 80 at his level.

10 Q But that is across your worldwide operations. In the UK and Ireland we have seen there is a  
11 very compressed reporting structure. He is (or at least, was then) the third tier down. You  
12 have the managing director, Mr. Waxman, you have Mr. Smith, and then you have Mr.  
13 Cheshire?

14 A But that was the manner in which the then CEO, Denis Waxman, chose to manage it, and it  
15 was a style that had been there for 30-plus years and had now run its course.

16 Q Run its course or not, that is how it was structured, and that meant because of the few  
17 tierings that there were that Mr. Cheshire was in the UK and Ireland business very high up  
18 the chain?

19 A No, because the power was concentrated among the level above Mr. Cheshire, and always  
20 has been in that business at that time.

21 Q You see the other thing about his seniority, Mr. Lawson, is this, that whether he mentioned  
22 these matters to the board or not, the fact is that he was able to effect the cartel behaviour  
23 across key parts of the C&P business, that is what he was able to do as a matter of his  
24 practical authority, irrespective of his legal authority?

25 A There is no evidence that he achieved that. He operated under cover. He probably gave  
26 undertakings to competitors that he could not deliver and, as we have seen throughout the  
27 CRF just ceased to exist even before the dawn raid occurred.

28 Q You are suggesting that he just gave undertakings but in fact I have just pointed out to you a  
29 letter that was written which flowed directly from agreements that had been struck in the  
30 CRF?

31 A But that letter was never enacted as far as I am aware. He wrote the letter ----

32 Q No, no, no, are you suggesting that there was in fact a supply that was taking place? The  
33 only exclusion in respect of Taylor Woodrow was in respect of one category of workers

1 which were technical workers, everyone else you would not deal with Parc. Were you  
2 revising the admissions that you made?

3 A But then the evidence I have seen, the revenue with Parc continued through this process, the  
4 revenues that Parc enjoyed with the company.

5 Q How did it do so? Through what mechanism?

6 A I have no idea.

7 Q Well perhaps you should, because the way it occurred was to take Parc out of the picture  
8 and, at least in respect of Vinci enter into an arrangement which disintermediated Parc, that  
9 is how it was done, and seemingly Mr. Cheshire was doing all of these things?

10 A But the actual company revenue with Parc was constant through this period, or reasonably  
11 constant.

12 Q I do not need to take you through the many parts of the Decision, but Mr. Cheshire, I think  
13 you will accept, is deeply involved in the CRF - correct?

14 A Correct, yes.

15 Q And the admission that has been made by your company was to say that there was, through  
16 the target fee initiative, and the collective boycott, a situation that arose where in fact the  
17 ability to negotiate with the confidence that your competitors in CRF were going to adhere  
18 to similar rates, was a factor that had a consequence for your commercial negotiations with  
19 parties such as Vinci, that is the admission that you have made?

20 A Agreed.

21 Q So what I am putting to you is that Mr. Cheshire was so positioned in your company that he  
22 was able to strike a deal within CRF and then ensure that you were given a wholly undue  
23 advantage in your negotiations with a customer?

24 A But he could not deliver it, he did not deliver that.

25 Q What do you mean? What do you mean he did not deliver it?

26 A He did not deliver the agreements that he endeavoured to enter into in the CRF.

27 Q I am afraid that that is simply not correct. There was a clear indication to Taylor Woodrow  
28 that they would not be dealt with, save in respect of technical workers. Are you suggesting  
29 that they were dealt with beyond that?

30 A Yes.

31 Q What is your evidence for it?

32 A Revenues with Taylor Woodrow.

33 MR. BREALEY: I really do want to interrupt the cross-examination infuriating though it is, but if  
34 the issue is going to be put as to the effect of this concerted practice, then I think Mr.

1 Lawson has to be shown the passages in the Decision where it is proved that there was an  
2 effect, and then Mr. Lawson can give evidence on that. But what Mr. Unterhalter cannot do  
3 is just willy-nilly say: "These were the effects, please give us your opinion on them". He  
4 just cannot continue to do that. He has to show the witness passages in the Decision where  
5 the effect is clearly shown.

6 THE CHAIRMAN: I think, Mr. Unterhalter, you can either do it by reference to the Decision or  
7 presumably to obtain leniency Hays made admissions.

8 MR. UNTERHALTER: They did indeed.

9 THE CHAIRMAN: You can do it by reference to the admissions that Hays made, but I think it is  
10 right that you should not just put it to Mr. Lawson in the abstract.

11 MR. UNTERHALTER: Oh indeed. (To the witness): If you would have regard to 4.98 of the  
12 Decision.?

13 A Which bundle is that in.

14 THE CHAIRMAN: That is in bundle 1 which I think you have.

15 A Yes.

16 MR. UNTERHALTER: If you look in the Decision at 4.98 you will see that it says,

17 "With the exception of AWA and of Hays with respect to 'Technical' staff, each  
18 of the parties subsequently acted on this agreement by collectively refusing to  
19 supply candidates via Parc to Taylor Woodrow until at least January 2006".

20 That comes, if you turn back to p.122 - and this is where we found that letter - you will see  
21 that Mr. Cheshire, if you look at p.120 of the minutes of the CRF, at 4.75,

22 "Simon Cheshire confirmed that if the Labour Hire business was put through Parc  
23 as well Hays would exit the agreement on both the Labour and Technical  
24 business".

25 Now, the only business that was not exited was the technical business. Do you see that?

26 A Yes.

27 Q There is a very full admission which follows from an account that Eden Brown gives. That  
28 is then confirmed as an admission that is given by Hays. If you would look at p.168, para.  
29 4.230,

30 "For example, CDI AndersElite told the OFT that: 'because each CRF member  
31 then knew the rates at which Vinci were prepared to deal for this type of  
32 arrangement. In consequence ---"

33 It then sets out a number of consequences.

1 “It enabled each CRF member to know that in tendering at that rate they would  
2 not be missing out on a commercial opportunity to deal at a higher rate.  
3 It meant that the CRF members knew that if they wished to be added to the PSL,  
4 they need not offer a rate lower than that apparently achieved by Hill McGlynn in  
5 its negotiations.

6 It meant that [sic] knew that it would be commercially worthwhile making the  
7 effort to deal direct with Vinci.

8 It potentially affected Vinci/Parc negotiating power.

9 4.231 During the course of its investigation the OFT asked certain of the parties  
10 to comment on this statement from CDI AndersElite, and Hays responded as  
11 follows:

12 ‘Hays accepts that the information described in the OFT’s letter dated 1 June,  
13 2007 could have encouraged a CRF member not to accept an offer at a lower rate  
14 and/or hold out for a higher rate.

15 Hays therefore broadly agrees with the analysis provided by CDI AndersElite”’.

16 What I want to put to you, Mr. Lawson, is that Mr. Cheshire was in a position not only to  
17 strike these agreements but to have these effects by way of improving the bargaining  
18 position of Hays vis-à-vis key clients, such as Vinci and Taylor Woodrow. You have  
19 admitted it.

20 A Yes. But, clearly he could within the south-east and co-operating on a service basis.

21 THE CHAIRMAN: Can I just ask about that? You refer to the south-east. You have national  
22 accounts. I think you mentioned that earlier.

23 A Yes, we do, yes.

24 Q Would they be some of the most important?

25 A National accounts would be some of the highest revenue accounts of the company, yes.

26 Q Taylor Woodrow ----

27 A Taylor Woodrow would probably be one of them, yes.

28 Q You said you do not know Mr. Collins personally. But, your company has put in a witness  
29 statement, as you saw, from Mr. Collins. You have that in the same bundle where your  
30 witness statement is Mr. Lawson, at Tab 3. Mr. Collins was appointed, he says in para. 2, at  
31 the bottom of the page, National Accounts Director. In paras. 6 and 7 - and it was said to be  
32 confidential; I do not know if it still is - he talks about his role in looking after all of the  
33 C&P business national account. You see that?

34 A Yes.

1 Q That was the job he was given.. Then he says in para. 9 that in the period up until June he  
2 reported to Mr. Cheshire. He was meant to have regular meetings to discuss national  
3 accounts. They should have been generally monthly, but not absolutely every month, and  
4 so on. Is it not right that Mr. Cheshire was therefore responsible for national accounts?  
5 A (After a pause): That would appear so, yes.  
6 Q You said earlier with regard to this quasi-board that he would input re. sales activities in  
7 south-east England when he was regional director. But, he was also the member of the  
8 board with responsibility for national accounts, was he not?  
9 A Clearly according to this, yes.  
10 Q On that, when you say in your statement at Tab 2, p.44, para. 57, where you talk about Mr.  
11 Cheshire's role, you say at (f) that he had no responsibilities beyond the south-east of  
12 England. But, in fact, he did, did he not, because he also had responsibility for national  
13 accounts?  
14 A On the basis of that, yes.  
15 Q Thank you.  
16 MR. UNTERHALTER: Thank you. It was, of course, because he was so positioned that he was  
17 in a position to participate in CRF and have an influence over what was occurring in respect  
18 of national accounts.  
19 A That must be clearly true, yes.  
20 Q There is a note that I have of an interview that was held by the OFT with Mr. Robert Smith.  
21 It is not on the record. But, I would ask for an opportunity to put this matter to the witness.  
22 It is a very short recording of the minutes of that interview.  
23 THE CHAIRMAN: Mr. Lawson will not have seen that then.  
24 MR. UNTERHALTER: No, he will not.  
25 THE CHAIRMAN: Has that been disclosed?  
26 MR. UNTERHALTER: No, it has not. Indeed, we only came upon it this morning, it is a  
27 Freshfields minute which has been reproduced. They clearly have it. It is just that we only  
28 came upon it this morning.  
29 THE CHAIRMAN: How did you come across it?  
30 MR. UNTERHALTER: It was produced by Freshfields in the leniency process. When I say 'we  
31 came upon it' it was as a result of inquiries that we made to ----  
32 THE CHAIRMAN: It was a note that was put to you by Hays in the course of the leniency  
33 process.  
34 MR. UNTERHALTER: Indeed. It is that note that we would want to put to Mr. Lawson.

1 THE CHAIRMAN: (After a pause): It is difficult to anyone to comment on it without knowing  
2 what it says. If you would give a copy to Mr. Brealey ----

3 MR. UNTERHALTER: I will give a copy to my learned friend and he can look at it. (Same  
4 handed)

5 MR. BREALEY: I do not know if the Tribunal has been handed this at all?

6 THE CHAIRMAN: No, we have not. We would like to know what you say about it first.

7 MR. BREALEY: All I know is that it starts at p.12 and the first thing I would like to do is to see  
8 whether they have just taken something -- I have not even read it yet. I would like to see  
9 whether they have taken it out of context. I am told that there is a lot more to it than this.  
10 There are a lot more interviews. We just do not know the purpose for which this is being  
11 brought to the witness.

12 THE CHAIRMAN: Mr. Unterhalter, if you are going to do this in cross-examination, first of all it  
13 is highly desirable that you inform counsel for the party that is calling the witness  
14 beforehand so that they can look through the document. Obviously, apart from anything  
15 else, they can re-examine on it. We do not normally, as it were, take people by surprise in  
16 this way. They can also make reasoned submissions if they say it is not fair in it being put  
17 in.

18 MR. UNTERHALTER: We do not mean to do any unfairness to my learned friend. However, if  
19 he wishes to resist the questions being asked ----

20 THE CHAIRMAN: At the moment nobody knows what the question is.

21 MR. UNTERHALTER: Perhaps I could just indicate. It is a very short point. We do not need to  
22 unduly delay over it. It is simply that portion of an interview with Mr. Smith which goes to  
23 questions put concerning what was known to him concerning the contracts with Vinci and  
24 Parc, and Taylor Woodrow. It goes to his state of knowledge around the matters that I have  
25 already raised with Mr. Lawson.

26 THE CHAIRMAN: Although the Decision is based on Mr. Cheshire - not on Mr. Smith.

27 MR. UNTERHALTER: No Indeed. Indeed. The issue though is that this was simply circulated  
28 as part of what was going on, located within that board that we have had some ----

29 THE CHAIRMAN: I do not think that is the basis, is it, of the Decision?

30 MR. UNTERHALTER: We accept entirely that it is about Mr. Cheshire's competence as a senior  
31 manager. The only question is: Within what year, as it were, did he exercise those  
32 functions? All of this simply goes to what were the things that were discussed at the board  
33 level. Nothing more, nothing less.

1 THE CHAIRMAN: You have made your finding in the paragraph you referred to as to what was  
2 discussed.

3 MR. UNTERHALTER: We do not need to take it any further. We are happy to leave it on that  
4 basis. We have no further questions.

5 MR. BREALEY: I have no further questions.

6 THE CHAIRMAN: Mr. Lawson, in your witness statement you describe - and, indeed, you were  
7 asked about - the new compliance programme that Hays has introduced - a very  
8 comprehensive compliance programme. You describe it in your statement. The individual  
9 who, as it were, particularly let down Hays and the events which have led to the Decision of  
10 you being here as Mr. Cheshire. In your statement can you turn, please, to tab 2, the  
11 stamped numbering it is p.33 of the bundle, it is p.5 within your statement. At para.16  
12 onwards you describe in detail the new compliance programme and the various aspects of it.  
13 Do you see that?

14 A Yes.

15 Q The first step, as you explain, in para.16 is that the legal director or general counsel, Alison  
16 Yapp, is personally making presentations, and you say at p.34 at the top of the next page  
17 that altogether at least, and then there is a figure, and again I do not know if that is  
18 confidential, it is marked confidential, attended these tailored presentations. That was one  
19 level of the compliance programme. Then you explain other ones. There is email, there is  
20 on-line training, and so on. Would Mr. Cheshire, or someone in his position, as it were, be  
21 one of the people who would have the personal presentation, the tailored presentation, from  
22 Alison Yapp?

23 A Yes.

24 Q Thank you very much.

25 A And in addition, he would do the on-line.

26 Q And in addition the on-line.

27 MR. DAVEY: Mr. Lawson, in para.60 of your statement you say that at the time of the  
28 infringement there were a number of individuals at Mr. Cheshire's level of seniority - is  
29 that in the UK or is that worldwide?

30 A Global - worldwide, sorry. Senior managers, there would be 15 globally. I think there was  
31 a point that came up in the presentations to you. At Mr. Cheshire's level globally there  
32 would be circa 70.

33 THE CHAIRMAN: Any questions arising out of those?

1 MR. BREALEY: Just arising out of one question that you asked, Sir. Mr. Lawson, you were  
2 taken to para.16, p.33, and whether Mr. Cheshire would have been essentially a key  
3 manager. Why would he have been a key manager?  
4 A He was a key manager because he had control of a number of offices, and that would  
5 constitute being a key manager.  
6 Q Would being a key manager necessarily mean that he was a senior manager?  
7 A No, it does not. He was not known to me. The difference in my mind between a senior  
8 manager and a key manager is that a senior manager has profit responsibility, a key  
9 manager may have other responsibilities. All the senior managers had profit responsibility.  
10 Cheshire did not have profit responsibility.  
11 MR. BREALEY: Thank you.  
12 THE CHAIRMAN: Thank you very much, Mr. Lawson. You are released as a witness which  
13 means you can go.  
14 A Thank you very much indeed.  
15 (The witness withdrew)  
16 MR. BREALEY: The next witness is Mr. Paul Venables.  
17 Mr. PAUL VENABLES, Sworn  
18 Examined by Mr. BREALEY  
19 Q Mr. Venables, could you locate bundle CB3, the witness statement bundle, and go first to  
20 tab 1. Do you see there a statement that says it is your first statement?  
21 A Yes.  
22 Q Do you have any corrections to this statement?  
23 A Yes, I do, I am afraid. If you go to para.28 I am afraid there are some slight numerical  
24 errors in here. At 28(a), the 335 per cent should be 333 per cent. Later on in that where we  
25 talk about the pre-leniency, that should be 122 per cent.  
26 THE CHAIRMAN: These are now not confidential?  
27 A No. They are published data anyway.  
28 Q I did wonder.  
29 A The next number, instead of 94 per cent it should be 93 per cent.  
30 MR. BREALEY: If you go to p.24 of the bundle, is that your signature?  
31 A Yes.  
32 Q If you then go to tab 5 and do the same thing, there is your second witness statement, can  
33 you identify the signature at p.89?  
34 A Yes, that's mine.



1 Q Can you confirm to the Tribunal that the facts and matters in both of these statements are  
2 true to the best of your knowledge and belief?

3 A They are.

4 MR. BREALEY: If you stay there Mr. Unterhalter will have some questions for you.  
5  
6

7 Cross-examined by Mr. UNTERHALTER

8 Q Mr. Venables, would you go to NCB4, which is the non-core bundle 4. It is the exhibits to  
9 the expert report, volume 1. In that bundle you will find your accounts, and I want to you  
10 look in the first place at p.178.

11 A Yes.

12 Q Can we get a few things clear that I am sure will be common ground. There are accounting  
13 policies that are determined by Hays and you are one of the key people involved in making  
14 those policies?

15 A Yes, I'm the Group Finance Director. Clearly I've got people under me, but I determine the  
16 principles and make sure that our policies are in line with that.

17 Q Those matters are put no doubt to the board for their approval?

18 A Yes.

19 Q And they are no doubt then also put past your external auditors who will also approve them  
20 – is that correct?

21 A They don't approve them. Our auditors clearly audit the financial statements and make sure  
22 they're consistent with the policies.

23 Q Yes, but if there was any deviation from proper accounting norms they would inform you of  
24 that – would that be correct?

25 A Yes.

26 Q So they ensure consistent, as it were, treatment with applicable accounting norms – would  
27 that be correct?

28 A Yes.

29 Q So we have a definition then on turnover in your accounts, which you will see at p.178, and  
30 it is in the second column under the heading "Turnover", and that is the definition that  
31 stands for turnover in the treatment of this matter by Hays – is that correct?

32 A Yes.

33 Q Could we just go through that definition step by step. It says:

1                   “Turnover is measured at the fair value of the consideration received or receivable  
2                   ...”  
3           That presumably is received or receivable by Hays – correct?  
4   A    Yes.  
5   Q           “... and represents amounts receivable for goods and services provided ...”  
6           Is that correct?  
7   A    Yes.  
8   Q           “... in the normal course of business, net of discounts VAT and other sales-related  
9           taxes.”  
10          So if you are wanting to determine turnover for the purposes of your company, one begins  
11          by asking, “What are the goods and services provided?” Is that correct?  
12   A    You look at the accounting standards which help define what should go into turnover, and  
13          then you interpret those.  
14   Q    You have looked at those accounting standards, some of which are detailed in the first  
15          column on p.178 and you have derived this definition – is that correct?  
16   A    We have, yes, each of the five paragraphs there.  
17   Q    Yes, absolutely. The principal definition is to be found in the first paragraph, and it begins  
18          by looking at the notion of what consideration is receivable for the goods and services  
19          provided by Hays – is that correct?  
20   A    And in this context we have to look at two accounting standards that give great detail on  
21          what we should include.  
22   Q    We will come to that. What you then go on to explain, if we look further on, we see that in  
23          the next paragraph there is:  
24                  “Turnover arising from the placement of permanent candidates is recognised at the  
25                  time the candidate commences full-time employment.”  
26          That is your position as far as permanent candidates are concerned. Then:  
27                  “Provision is made for the expected cost of meeting obligations where employees  
28                  do not work for the specified contractual period.”  
29          Then you move over to temporary placements?  
30   A    Yes.  
31   Q           “Turnover arising from temporary placements is recognised over the period that  
32           temporary staff are provided.”  
33   A    Yes.

1 Q So would you accept that in the very consideration of these two categories, which is  
2 turnover arising from permanent candidates and turnover arising from temporary  
3 candidates, there is a different temporal dimension?  
4 A There's a different time period because the nature of the service is slightly different.  
5 Q If we look at the definitions what we see in respect of the placement of permanent  
6 candidates is that there is a point of time at which it arises which is when the candidate  
7 commences full-time employment?  
8 A Yes.  
9 Q That is because, in effect, you find the candidate. You present the candidate to the  
10 employer – in this case the construction company?  
11 A Yes.  
12 Q And if the construction company wishes to it can enter into a contract of service with that  
13 individual?  
14 A Yes.  
15 Q And it is at that point of time that your commission is earned?  
16 A Yes.  
17 Q And that represents turnover for the purposes of turnover for permanent employes?  
18 A Yes.  
19 Q The placement of permanent employees – correct?  
20 A Yes, correct.  
21 Q If we look at the situation with temporary placements, there there is a different situation  
22 because, as your own definition indicates, there is a period of time over which those  
23 services are provided?  
24 A Yes.  
25 Q What happens, as I understand it, and you will correct me if I am wrong, is that you are  
26 responsible for accumulating the time sheets?  
27 A Yes.  
28 Q There is an hourly rate that has been determined, and amounts become payable over the  
29 period as you submit invoices in respect of the time sheets that you have accumulated -  
30 correct?  
31 A Yes.  
32 Q So as this service is provided by Hays so you can tender your invoices?  
33 A No, our service is provided at the start of the process in both cases. It is the temp who  
34 clearly receiving – the temp will work over a period of time, and because of employment

1 legislation, which I am sure we will come on to, we receive amounts for their pay as well as  
2 the commission that we make.

3 Q At the moment I just want you to focus on what you are saying to the world in your  
4 accounts, and what you are saying is that you provide a service, is recognised over the  
5 period that the temporary staff are provided – are provided by whom?

6 A The temporary staff are providing their labour/service direct to our client.

7 Q I want to put to you, Mr. Venables, that it is perfectly clear on any reading of this that  
8 temporary staff are provided by Hays, that is your contractual obligation by the company?

9 A No.

10 Q Are you suggesting that your contracts do not provide that Hays will provide the services of  
11 temporary staff to the construction company?

12 A Our service is that we will find the appropriate person for our client, and then the temp  
13 starts work at our client.

14 Q Yes, Mr. Venables, your contracts stipulate that Hays will provide these services to the  
15 construction company, am I correct?

16 A It sets out the services that we are asked to provide, yes.

17 Q So you will find the workers, and then it is your obligation to provide them to the  
18 construction company?

19 A And the construction company says they want to use them and, yes, as you know we have to  
20 go under a contract for service, and we provide them to the client, yes.

21 Q That is the critical point, you provide them, i.e. Hays provides them under the contracts?

22 A They are not our workers, but yes, we facilitate them starting to work for our clients.

23 Q Let us be clear, you are, that is Hays is under the obligation to provide. It is the  
24 construction company that looks to Hays to provide those workers?

25 A To find the people on their behalf, yes.

26 Q And to provide them?

27 A I am not sure of the definition of “provide”. Our job is to find the appropriate people and  
28 then transfer them to our client.

29 Q But you do so because it is your obligation to provide, and the construction company looks  
30 to you to provide them. Are you happy with that?

31 A We have a service we provide, which is our recruitment services, and then there is a  
32 separate labour service which the temp provides, yes.

33 Q But, Mr. Venables, let us not fence around this issue.

34 A I am not trying to fence.

1 Q The fact of the matter is that the worker does not enter into a contract with the construction  
2 company, Hays does?

3 A Correct. We have a contract with our clients, and then when the client wants us to find  
4 them a temp and they are happy with that temp we have a contract with the temp, we  
5 provide the temp to them.

6 Q Yes, you provide the temp to them, exactly. Then you put up an invoice and that is charged  
7 on the invoice that you put to the construction company?

8 A We have an invoice, yes, which clearly involves two elements I am sure comes in.

9 Q Yes, just to be clear, the invoice actually refers to an hourly rate, and that is made up of two  
10 components, one is your commission fee, and the other is the cost to you of providing the  
11 worker?

12 A And sometimes both can be clearly broken out, and sometimes it is just one item.

13 Q In fact, quite a good deal of the documentary evidence we have seen suggests that there is  
14 simply a single rate that is reflected on the invoice?

15 A Yes.

16 Q If we carry on reading – I am still on p.178 -  
17 “Turnover arising from temporary placement is recognised over the period that  
18 temporary staff are provided. Where the Group is acting as a principal, turnover  
19 represents the amounts billed for the services of the temporary staff . . .”

20 A Yes.

21 Q So in other words, including the salary costs of that staff, that salary cost is obviously the  
22 cost to you?

23 A No, it is the cost to our client. There are two elements to this, there are two distinct parts.  
24 There is the commission that we receive for the service we are having, and there is the  
25 salary costs that are passed through and go through to our ----

26 Q We will deal with your pass through allegation, let us just deal with what the language is  
27 saying in your report. You are referring to the fact that where the group is acting as a  
28 principal, which is in the standard case where you are entering into a contract with the  
29 construction company, correct?

30 A Yes.

31 Q You were acting as a principal, you determined that to be the case?

32 A In the two accounting standards it is quite clear what are the principles that determine  
33 whether it is principal or agency, and we follow those, yes.

34 Q In the standard case for most purposes you are acting as a principle?

1 A Not in all cases.

2 Q Not in all, but let us just deal with the generality ----

3 A The majority, yes.

4 Q In the majority of cases ----

5 A Under the accounting standards we are acting as the principal, yes.

6 Q That means that you are undertaking the obligation to provide the service, and you are

7 earning a consideration ----

8 A We are providing a recruitment service, yes. We do not provide a labour service.

9 Q I do not want to go back, we have covered that ground. Let us just deal with this, you are

10 acting as a principal, and then it says: "The amounts billed for the service of the temporary

11 staff"?

12 A Yes.

13 Q That is the services you are providing because this is acting as a principal?

14 A It is acting as a principal, yes.

15 Q In acting as a principal you are providing the service, that is why you are a principal?

16 A There is no real difference whether we are a principal or agent in the service we are

17 providing.

18 Q I am just reading the language. You are speaking about the fact that you are acting as a

19 principal, turnover represents the amounts billed for the services. If you are acting as a

20 principal the services you are rendering ----?

21 A You have to be rendering the staff.

22 Q You have to be rendering the service, otherwise you are not a principal?

23 A It goes on to the services of the temporary staff.

24 Q What you are doing is you are rendering the service of supplying the temporary staff?

25 A Yes.

26 Q Yes. And in respect of that you then say that it includes the salary costs, and I am putting to

27 you that can only mean the salary costs to Hays of those staff because you are acting as

28 principal?

29 A Again, the accounting standards are very clear what is principal or agent, we follow that. If

30 we are principal we have to include the remuneration of the temporary staff in our turnover,

31 yes.

32 Q But I am raising a slightly different point. We have established you are acting as a

33 principal?

34 A Yes.

1 Q You are supplying the service as a principal?

2 A We are providing a recruitment service, yes.

3 Q I think we have had that discussion, which is that you are providing the temporary workers  
4 as a principal to the construction company, correct?

5 A Yes.

6 Q And those constitute costs to you in providing that service, and that is precisely what you  
7 are saying at the foot of p.178?

8 A The cost is only incurred clearly where the construction company is using the temp, yes.

9 Q That may be. It may be that it is only when the construction company asks you to provide  
10 the worker that you incur the cost, but it is your cost, that is Hays' cost. Is that correct?

11 A Again, under the accounting standards we have to take the principal fee which includes the  
12 cost of temporary labour, yes.

13 Q Yes. So you reflect that then as a cost to Hays in respect of the provision of the temporary  
14 workers?

15 A Under the accounting standards we have to, yes.

16 Q Yes, all right. You have indicated that under the accounting standards you have to make a  
17 determination as to whether or not you are acting as a principal?

18 A Yes.

19 Q And there are a variety of factors that you can look to for that purpose, what were the  
20 factors that persuaded you that you were acting as a principal?

21 A The main one is, if we stand back we are in 28 countries, we have more than 30,000 clients,  
22 and we need to ensure that our accounting policies were consistently applied; we have to  
23 have consistent accounts. So we followed FRS 5 and IAS 18 which are the relevant  
24 accounting standards. They list certain factors for principal or agency. Specifically under  
25 FRS 5 it says that unless you have disclosed to the relevant parties you are an agent you are  
26 a principal. So our policy, again to ensure consistency across, is unless we have had a  
27 specific arrangement with our clients, where we have been operating a payroll agency on  
28 their behalf, and that has been disclosed to them, and we disclose it to the temp, then we  
29 account on a principal basis, yes.

30 Q So you are saying it is the fact that you have not disclosed to your client the construction  
31 company, that you are acting as an agent that leads you to the presumption that you must be  
32 acting as principal?

1 A Well actually, we go a little bit further than that, we have 30,000 customers and unless we  
2 have a specific agency agreement we assume that we are principal, and that is effective in  
3 the stated policy you are asked to follow under FRS 5.

4 Q But there are a number of other factors, it is not a uni-factor consideration, is it?

5 A There are about five or six factors depending on which standard you are looking at.

6 Q Including risk?

7 A Yes.

8 Q And was that surely not one of the things that you considered?

9 A It is one of the factors, but as we were going through, I am sure the other parts were  
10 accounting policy, we looked at “had we disclosed” – we had an agency arrangement. You  
11 are right, there is then “Do we have a credit risk”. There is then: “Are we responsible for  
12 providing the service?” We do not provide the labour service, we provide the consulting  
13 service, so that would not have been a factor, so there is a number of factors we take into  
14 account, but the consistent one that drove our policy is have we explicitly disclosed an  
15 agency arrangement, “Yes” or “No”? That is a rebuttable presumption under FRS 5.

16 Q You say that that was the factor, but you I assume would take all of the factors into  
17 consideration and come to a conclusion, that would be the way you would go about it?

18 A No, if you have 30,000 – if you only had one business with one client, then clearly you can  
19 look at the merits on that one client. If you have 30,000 customers, we are in 28 countries, I  
20 do not want every single country trying to exercise their judgment as to what they think the  
21 standards mean. To make sure that we have consistency, and also if you recollect it is only  
22 in these accounts we clearly show turnover, outside of these accounts turnover is not a  
23 relevant matrix in our industry, there is no focus on it by shareholders, no focus on it by  
24 analysts. In my four years here I have never been asked a question about turnover, so our  
25 policies in great detail focus on our net fees, we have to have accounting policy for  
26 turnover, we set it out here, and the rebuttable presumption in FRS 5 was unless you have  
27 said you are an agent you are a principal, and that is been the driver. But you are right, we  
28 look at all of the principles, but that is the one we look at more than the other factors.

29 Q As I understand it, you do not use FRS is that correct?

30 A There is FRS 5 and then there is IAS the International Accounting Standard.

31 Q I thought that was the one that you used?

32 A In the International Accounting Standard it does not have a point which says; “Have you  
33 disclosed whether or not you are agency?” But actually at the time the Accounting  
34 Standards Board issued a press release which said that the principles in FRS 5 are the same



1 as IAS 18 and they were not expecting any firms to change their accounting just because of  
2 what came out in IAS 18.

3 Q In other words, you accept IAS 18 does not refer to this disclosed agency agreement?

4 A But FRS 5 does. The UK Accounting Standards Board issued a press release when IAS 18  
5 came out, which clearly set out, it is pretty clear and stark, it is a short press release, I am  
6 sure you have it there, it sets out that they were not expecting any changes, and specifically  
7 the two are consistent.

8 Q But, in point of fact had you ----

9 A Sorry, and by the way that has been consistent across all of these years and our auditors,  
10 Deloitte, one of the big firm of accountants who have audited are happy with the treatment  
11 that we have taken.

12 Q So you in effect apply IAS 18, even though it does not make reference to the disclosed  
13 agency point, correct?

14 A Yes.

15 Q And you do so simply for historical legacy reasons?

16 A No, the Accounting Standards Board announcement came out after IAS 18, so it gave  
17 guidance at that time. It was not some guidance that came out two or three years previous,  
18 it came out at that time, and it said that FRS 5 is consistent with IAS 18. In other further  
19 parts to it they were not expecting companies to change their accounting standards, sorry,  
20 their accounting treatment, just on the fact that IAS 18 had been issued.

21 Q So what we can then accept is that throughout the years you have adopted the position that  
22 you are acting as a principal here?

23 A Yes, we have adopted it consistently unless we disclose that we are an agent, yes.

24 Q Not only do you do so, but indeed it is very much the position with most of your peers and  
25 competitors in the industry as far as we can see.

26 A Yes.

27 Q So, it appears to be an industry norm.

28 A Clearly, as I'm sure will come, there have been some exceptions which have kind of come  
29 out of this process, but, yes, it's an industry norm.

30 Q Yes. As a result of this case and the consideration that Mr. Hall has given to this matter  
31 nothing has changed, notwithstanding, as I understand it, the fact that you think that Mr.  
32 Hall is persuasive in his opinions as to the fact that you could be considered an agent. In  
33 point of fact you have not changed your accounting policy. Correct?

1 A No. We have not. And we don't need to. I mean, our accounting policy is -- Everything  
2 we disclose in our accounting policy. It's not just one line under an individual note. As I'm  
3 sure you're aware, the true and fair view is on all thirty-three pages. So we're clear, on the  
4 face of our -- In fact, my first year as Group Finance Director of Hays was 2006. So, we  
5 had to implement IFRS. In fact, it's the only time in my four years, other than this case,  
6 that I've ever thought about turnover. As you'll see on p.175, which is just previous, in  
7 addition to disclosing turnover we specifically disclose net fees on the face of the income  
8 statement. That's an additional information we're allowed to disclose under GAP. Also, in  
9 the note that you went to ----

10 THE CHAIRMAN: Allowed to disclose under ----?

11 A Under generally accepted accounting principles we're allowed to give additional disclosures  
12 if it helps the reader. So, we disclose net fees on the face, as well as turnover. We also, as  
13 I am sure we will come on to, then disclose in the next two paragraphs in there, where Hays  
14 acts as principal in arrangements, invoicing on behalf of other recruitment agencies --  
15 turnover represented -- invoice collection on behalf of the other recruitment agencies,  
16 including arrangements where no commission is directly receivable from the group. So, we  
17 want to make sure that the readers of our financial statements understand that there are  
18 items included in turnover for which very, very clear -- It is not only that we get no value  
19 out of the work of the temporary worker - we actually get no value ourselves for our  
20 services. One final point: We also, in note 6 to the accounts, which is another thing I added  
21 at the time -- At p.182, at the bottom of p.6, I specifically included a reconciliation between  
22 turnover and net fees because, as a new finance director coming into Hays in 2006,  
23 collectively now you've got all of the items you need to know. You've got turnover. You  
24 can see included in there is the remuneration of temporary workers. You get to net fees with  
25 the commissions that we earn on the services we provide. Included in the turnover note we  
26 have got all those constituent parts to it, including where we act as agent, which the service  
27 will be exactly the same, but where we act as agent we only include the net fee in turnover  
28 and net fees, and we don't include the remuneration of temporary workers. So, collectively,  
29 all of that together means that in my mind, as a finance director, and I'm tasked with this,  
30 you know, "Is this kind of true and fair? Have we given adequate disclosure?" That gives  
31 adequate disclosure to all the issues in the round. So, the reader of the financial statements  
32 can clearly see that 75 percent of what goes into turnover is the remuneration of the  
33 temporary worker.

1 Q But let us just get back to the question, if you do not mind, Mr. Venables. I was putting to  
2 you that you have made a determination; that you act as a principal; that you have done so  
3 consistently and you mean not at all to change that treatment for the future; is that correct?

4 A Yeah. I mean, I think you asked me originally about Mr. Hall's statement. There are some  
5 clear merits in some of the points that he has raised. I am happy, as Group Finance Director  
6 at Hays, with my accounting policy. It may well be that I give some additional disclosure  
7 to enhance this, but I haven't felt any need to change it because I am happy with the policy  
8 we have.

9 Q Yes. So there is going to be no re-statement of your accounts.

10 A No.

11 Q Yes. Indeed, if you were to move over to an agency definition you would have to re-state  
12 your accounts because these are very material sums that are involved. Correct?

13 A Yes. Yes. So, if, for example, all of our activities that have been under Stage 5 -- There's  
14 no difference. There's no substantive difference where we're acting as an agent -- acting as  
15 a principal in this matter, which I'm sure will come up in services. From a substantive  
16 service standpoint of what we're doing, if everything was under the agent, then actually our  
17 net fees would be the same as turnover. It's just that we have certain arrangements where  
18 we specifically break out the payrolling service directly under a separate legal agreement.

19 Q Mr. Venables, I wonder if you could just try and answer the question - because otherwise  
20 we are going to be here a very long time. The question I just put to you was: You are not  
21 planning to re-state your account ----

22 A No, we don't need to.

23 Q These are material amounts. Correct?

24 A As a whole, this shows a true and fair view and I am happy with our policy. If we only, for  
25 example, had turnover on the face of the P&L and none of this explanation, then I wouldn't  
26 be because it wouldn't show a true and fair view. We're having turnover on the face of the  
27 income statement. We're having net fees. We are clearly demonstrating in Note 6 to our  
28 accounts the remuneration of temporary workers. Yes, I am happy that that meets the  
29 accounting standards.

30 Q Yes. You are happy therefore to maintain the fact that you are acting as principal. Correct?

31 A Unless we have specifically disclosed to all parties that we are acting as agency, yes.

32 Q Yes. That is because this Decision is ultimately your Decision and those on the board with  
33 whom you consult before making accounting policies. Correct?

1 A We have to read the accounting standards. We have to look at our business. We have to  
2 form appropriate policies with a need to make sure that there is adequate disclosure, which  
3 we have done here. Clearly, as you have said earlier, our auditors will review our accounts  
4 and determine whether they are happy with it, yes.

5 Q In other words, it is not Mr. Hall's judgment on this matter that counts. It is your judgment  
6 and those with whom you consult within the company for the purposes of making this  
7 determination.

8 A And my judgment is that we have covered all of those items. We are back to, if I was only  
9 showing one line as turnover, that in my view would be misleading and I would not have  
10 signed the accounts. Because we show all of this as a package of disclosure, it meets the  
11 true and fair view.

12 Q What was my question, Mr. Venables?

13 A Am I happy with the -- I apologise.

14 Q My question to you was: It is your Decision - not Mr. Hall's - as to whether you act as  
15 principal or not.

16 A Yes.

17 Q The answer is?

18 A That unless we've disclosed as an agent, we act as principal, yes.

19 Q And it is your Decision to make.

20 A The board's Decision, yes.

21 Q Yes. Very good. Now, can we go to p.137 of this volume? Here you speak about a  
22 financial review. Do you see that?

23 A Yes.

24 Q You speak in the first paragraph about the performance of the group. Do you see that?

25 A Yes.

26 Q It says,  
27 "The performance of the group has been impacted by deteriorating conditions in  
28 all our markets, particularly in the second half of the year. Group turnover  
29 decreased by 4 percent, net fees by 15 per cent".

30 A Yes.

31 Q I think you would accept that any reasonable reader of that statement would infer that you  
32 consider turnover to be something relevant to the performance, or lack of it, of the group.

33 A Yeah. I think you've got to take all of these -- the whole of this annual report -- I'm going  
34 to say, and I know it's in my witness statement, so I apologise -- I mention turnover about

1 three times in all of this in our annual report, and I mention net fees -- I can't remember  
2 whether it was ninety or sixty times - 'cos there's two separate disclosures. I think it was  
3 ninety times. This is in fact the -- I may well be corrected. I am sure you will. We're  
4 starting off here, and in line 3 in that part I mention turnover. I don't think I mention it in  
5 any other part of this 'cos it then goes on to net fees. As I'm sure you know, earlier on in  
6 this statement where we've got an operating review on every single one of our businesses --  
7 As an example, pp.130 and 131, here, under the UK and Ireland, if you look on the right-  
8 hand side, you can clearly see that we're talking about the operational performance of our  
9 UK and Ireland business. I don't think turnover is mentioned anywhere on this page. It  
10 starts with net fees in the individual parts of the UK business and then shows operating  
11 profit. So, you're right. On that one page I mention it. I don't think I mention it anywhere  
12 else.

13 Q Mr. Venables, I am just putting a very simple point to you - that is, that when the reader is  
14 asked to consider the performance of the group at the passage in the financial report you  
15 mention turnover as one indication of performance. That is correct, is it not?

16 A They've already read twenty-nine pages until then and turnover's not mentioned once.

17 Q Right. Well, let us read on, shall we ----

18 THE CHAIRMAN: Can I just ask: Why do you mention it there?

19 A Well, because we have to show somewhere -- If we talk about the face of the account, we  
20 show turnover. We show in the summary income statement there -- In fact, this is again the  
21 only time we show turnover. So, we mention it once because some readers are interested in  
22 it. The bulk of our readers of financial statements - certainly all of the analysts and  
23 shareholders focus ----

24 Q Sorry, Mr. Venables. I am not looking at the summary on the bottom half of the page. I am  
25 looking at your personal review and your comment on the performance of the group. Why  
26 do you mention turnover as relevant?

27 A It would be strange in a financial statement to the annual report, in a total of ninety-nine  
28 pages, to not mention it at all. I think that's the only time I actually mention it. It may not  
29 be under my name, but I also write all of the operational review on behalf of my board  
30 colleagues as well, like I talked to you earlier on. There we are discussing ----

31 Q I am only asking about this. I am not asking about the other bit.

32 A I think it's probably for completeness, Sir.

33 MR. UNTERHALTER: Yes. It gives a complete sense of the performance of the group.

1 A If it was an important matrix of our performance of our group it would have been mentioned  
2 earlier on. It would've been mentioned earlier on. It would've been mentioned in other  
3 parts of this statement. This is, you know, almost a hundred page document, and it's  
4 mentioned once.

5 Q Mr. Venables, these are your words. They are not ours.

6 A They are.

7 Q That is what you have said. Any reader reading this would understand what you are saying  
8 - that is, that turnover is one matter of relevance to performance.

9 A I think somewhere in here we talk about the key performance indicators of our business, and  
10 turnover is not mentioned at all.

11 Q Yes. Would you accept that every single year there is reference, as far as we can see, to  
12 turnover as an indicator of performance?

13 A Every single year turnover is mentioned once in our annual report. Net fees is mentioned  
14 between sixty to ninety times. Again, it's in my witness statement how many times.

15 Q Mr. Venables, the point I am putting to you is not about how many times - but that it is an  
16 indicator of performance, in your own words, year after year.

17 A But if I mention net fees ninety-nine times and I mention turnover once in something I've  
18 written and taken my time to write in trying to explain our performance, then I think what it  
19 does give an indication to is that net fees is ninety-nine times more important than gross  
20 turnover.

21 THE CHAIRMAN: I think, Mr. Unterhalter, you can move on.

22 MR. UNTERHALTER: Yes, Sir. (To the witness): On that same page, at p.137, let us read on.  
23 The last paragraph says,  
24 "The temporary placement business representing 56 per cent of Group net fees,  
25 was more resilient with net fees decreasing by 7 per cent. This represented a  
26 volume decrease of 6 per cent and a 10 basis points decrease in the underlying  
27 temporary margin to 16.8 per cent. The temporary placement business achieved  
28 growth in the first half of the year, but volumes fell in the second half as demand  
29 weakened".

30 How do you determine a margin?

31 A A margin is net fees divided by turnover.

32 Q Yes. Therefore, turnover here, when you are concerned with margins, is a relevant metric.  
33 Correct?

34 A Yes.

1 Q Yes. When you refer to volume, that is, in effect, the value of the services that you are  
2 providing. Again, it is relevant for the purposes of working out your margins.

3 A Volume will be the number of temps.

4 Q Yes. The number of temps. So, the number of temps multiplied by the rate will give you  
5 your turnover.

6 A Yes, and the number of temps multiplied by a margin will give us our net fees.

7 Q Yes. So, the point that I am putting to you here is that, again, volume and turnover are  
8 relevant for the purposes of margin determination.

9 A Volume is important for margin determination because clearly margin is our net fees, and  
10 clearly the more temps that we have out at our clients, the more fees that we will earn. I'm  
11 not sure that the turnover has a greater relevance than that.

12 Q Well, the point is - and I do not think we need to debate further on this - that volume is a  
13 component of turnover and turnover is relevant to margin. What you are marking out here is  
14 that it is a volume decline that is putting pressure on your margins.

15 A No. I'm actually breaking up the two separate points. I'm breaking it at: (1) what has  
16 actually happened to the amount of temps; and (2) what is the margin we achieve? Clearly,  
17 in a recession, as we've just been through, we come under pressure from our clients and our  
18 margins. They are two separate points.

19 Q Yes. But your volumes are also falling.

20 A Yes.

21 Q That is one of the things that is also putting pressure on your margins.

22 A Not necessarily. But, clearly, if margins have gone down -- if volume has gone down, then  
23 it's possible, yes.

24 Q Exactly. Now, whilst we are on the subject of margins, would you look at p.321? You do  
25 here examine the margins of the temporary business. It seems that the margins on  
26 permanent and temporary workers do differ because there is commentary in the reports on  
27 these matters. Is that correct?

28 A Yes.

29 Q If we look at p.321 in the first column, you will see that it says in the first paragraph:  
30 "While our temporary business margin was broadly stable in the second half of the  
31 year, there are two legislative changes in the United Kingdom that may put modest  
32 pressure on the temporary margin business."  
33 Then you explain the legislation. It says:

1 “Firstly, legislation was introduced in April 2007 impacting the tax status of  
2 temporary workers. This particularly affects the Construction & Property and  
3 Information Technology sectors. Secondly, legislation has been introduced  
4 requiring that temporary workers are paid additional holiday entitlements.”

5 Do see that?

6 A Yes.

7 Q That legislative change requires that Hays provides a holiday entitlement as part of what it  
8 makes available to the temporary worker – correct?

9 A Yes.

10 Q And that entitlement has increased?

11 A Yes, so that our clients will pay for that holiday entitlement, yes.

12 Q The point is that you have not recouped it from your clients because it is putting pressure on  
13 your margins?

14 A As it turned out, we recouped 99 per cent of it, but you are right, there was legislation which  
15 came out in two stages which increased the amount of holidays that temps get, originally  
16 from 24 to 26 days, and then from 26 to 28. This is some time ago, so I apologise. Clearly  
17 at that time, we would have been getting ready to go through discussions with our clients.  
18 Clearly the cost of temps was potentially increasing because they were going to get more  
19 paid holidays. We would have flagged that there was some potential risk to our margin.

20 Q In other words, what this demonstrates, I want to put it to you, Mr. Venables, is that a  
21 legislative change can increase your liabilities to the temporary workers, and you may not  
22 recoup because you are risk in respect of these matters, and you may not recoup it from the  
23 client under your contract, and that is exactly why the margin is under pressure?

24 A I think you’re working the wrong way round. Our problem is that the costs that our clients  
25 are going to pay has now been increased. The question is, will the clients be happy to pay  
26 all of that or will they be happy to pay the vast majority of it. In this case we were able to  
27 recover about 99 per cent of that cost.

28 Q Let us look at the warning that you are sending out here. You may have actually managed  
29 to recoup the great majority but the warning you are sending to the world in your statement  
30 is that you may not recoup, and that is because Hays has to pay the temporary worker in  
31 accordance with the requirements irrespective of what it receives from the construction  
32 company?

33 A Yes, that’s a completely separate point, isn’t it? That’s the credit risk standpoint, which I’m  
34 sure we’ll come on to. This issue is the cost of the temp for our clients was increasing, and



1 would we be able to recover it? As it turned out we recovered 99 per cent of it, but you're  
2 right, when I wrote this, and I apologise, it's got to be July/August – this is the 2007 annual  
3 report, is it?

4 THE CHAIRMAN: I think that is right, yes.

5 A I apologise, Sir, we are going back some time. There will have been a change in legislation.  
6 As you can see, in fact, it is October 2007 and April 2007, so I was writing this in August  
7 2007, and I will be flagging that there could be some risk. As it is, 99 per cent of it was  
8 offlaid, yes.

9 MR. UNTERHALTER: Mr. Venables, there are two sides to this. One is that the risk that the  
10 construction companies, the clients, may not pay all of this increased holiday allowance, but  
11 the second is that Hays is obliged to pay it. It is a cost to you, this holiday allowance?

12 A No, we would have agreed – again, we will have agreed with our client what is the – a  
13 temporary worker as a rate, we have a margin, often that is very explicit. The risk,  
14 therefore, was the cost of a temporary worker to our client was increasing and therefore the  
15 question was, would we able to recover all of it or could a small part of that lead to a  
16 reduction in our temporary margin, which is why I disclosed it here. As I've just covered,  
17 we were able to recover 99 per cent of it.

18 Q Mr. Venables, I do not want to go round in circles, but the fact is that in respect of this  
19 holiday allowance that is an amount that you have to provide to the temporary worker that  
20 you are contracting with – correct?

21 A No, this is an amount that a temporary worker – a temporary worker will receive it because  
22 there will be certain days where the client is paying for them and they will be on holiday,  
23 yes.

24 THE CHAIRMAN: When you said, Mr. Venables, that, in fact, as things turned out you  
25 recouped 99 per cent of it, when you wrote this, and you think it was about August, did you  
26 know you would recoup that?

27 A Of course not.

28 Q If you had not recouped 99 per cent you would still have had to pay that entitlement to the --  
29 --

30 A We'd have had less margin, yes, and the real question with (a) is that the difficulty is when  
31 you've got a large number of clients is clearly you've got to have a lot of discussion with  
32 each of those clients, and when I was writing these financial statements – I apologised  
33 earlier, I wasn't sure if it was 2007 or 2008 – you can clearly see that there were two uplifts,

1 as it was, because it was a statutory increase. Our clients understood that and the rates were  
2 amended accordingly.

3 Q Let me give you one other reference to the way in which you style your accounts that may  
4 be relevant. Could you look at p.238 in this volume ----

5 THE CHAIRMAN: And this is which year?

6 MR. UNTERHALTER: This is 2008.

7 THE CHAIRMAN: So the accounts start at 211, yes, and you are taking Mr. Venables within  
8 these accounts to p.238?

9 MR. UNTERHALTER: Yes. We see that under the heading “An excellent financial result” we  
10 see group turnover increased by 20 per cent, the same kind of statement that we saw in 2009  
11 – do you accept that? This is a feature of how you style your accounts?

12 A It’s a standard table in the accounts. This the only section in the whole of our annual report  
13 that we mention turnover. We show turnover in the table above. I cover it right at the start,  
14 as I have here, then in all of the other parts of the directors’ report and the business review  
15 we talk about net fees, because net fees is what is reviewed by our shareholders and by all  
16 analysts in this industry.

17 Q That is one metric of performance, net fees, but it is not the only one.

18 A But it is the one that all of our shareholders focus on, and that was clearly set out in the  
19 expert witness report of John Woolland, who is an analyst, one of the key analysts in our  
20 sector. He said that he, as an analyst – in fact, I complain that in my four years at Hays I  
21 will have done more than 1,000 meetings with our shareholders. Their focus is on how we  
22 are growing our net fees, how we are growing operating profit, and what’s happening to our  
23 head count.

24 Q All that I am putting to you is that, although that may be the way in which one performance  
25 metric is assessed by persons from various perspectives, another can be turnover?

26 A Turnover is a statutory item that we have to disclose in here. In all other aspects of this  
27 annual report, in all parts of the business review, in all of the meetings we have had with our  
28 shareholders, turnover is never mentioned because it’s irrelevant. It’s an irrelevant item in  
29 our industry. That’s why, when we started this discussion, I said that in the notes to the  
30 accounts I clearly set out that 75 per cent of turnover is the remuneration of temporary  
31 workers.

32 Q Could we have a look at some of your contracts. Would you look at bundle, NCB4, volume  
33 2. Just to orientate you, these are your standard terms of business, and it commences at  
34 1731, but the actual terms appear from 1733.

1 A Which page am I going to?

2 Q I would ask you to turn in the first place to 1735. I want to take you to various parts of this  
3 agreement, but you do confirm that this is the standard basis upon which you contract with  
4 your clients – is that right?

5 A I’m just trying to figure out whether this is a standard contract or whether it is a specific  
6 customer contract.

7 THE CHAIRMAN: I think it is introduced on p.1731, Mr. Venables, by your expert, Mr. Hall, as  
8 standard terms of business. If you go back to p.1731 it is says, “Standard Terms of  
9 Business – current”, and then over the page it is permanent staff, and that is 1733 and 1734.  
10 Then one gets to 1735, I think running through to 1737, and that seems to be temporary  
11 staff.

12 MR. UNTERHALTER: If I could take you to the second paragraph on 1735 it says:  
13 “The parties hereby agree to the introduction and supply by the Employment  
14 Business ...”

15 May we pause there for a moment. “Employment Business” is something of a term of art  
16 because it has legislative consequences – correct?

17 A I’m not a lawyer, I’m not an expert in this area, but, yes, I’m sure it is a form of art.

18 Q In broad terms you know that if you are acting as an employment business rather than an  
19 employment agency under the relevant legislation, you cannot act as an agent and you are  
20 obliged to pay the temporary worker whether you are paid or not? Was that a matter about  
21 which you are aware?

22 A No, you’re right. What we do is exactly the same under all of these terms, but clearly where  
23 we’re providing temps there is specific employment legislation, and you’re right, that then  
24 leads to a legal form.

25 Q Yes, but “Employment Business” has a specific meaning, and I think you understand that it  
26 means, in effect, that you cannot act as an agent? Do you not know that?

27 A I don’t know that. I can explain my understanding. The main point of difference is that  
28 under the employment legislation, clearly in the event of a temp we are responsible for the  
29 payment of the temp. So substantively what is the difference between the two? We have a  
30 liability to pay the temp.

31 Q Perhaps we need not be delayed and I will come back to it, there is also a provision that you  
32 may not act as an agent in those circumstances?

33 A I’m Group Finance Director, not a lawyer.

1 Q But it is the case that you need to be acting as an Employment Business within the scheme  
2 of the legislation as so understood. It is a reference to the employment legislation?

3 A I'm afraid that's not ----

4 Q Again, you do not know, very well. Let us carry on:  
5 "... supply by the Employment Business to the Client of the temporary worker  
6 named in the Engagement Letter ..."

7 Can there be anything more clear than that what you are contracting for here is that Hays, as  
8 the Employment Business, is going to supply to the client the temporary workers? It is an  
9 obligation you are undertaking?

10 A If our client decides to take a temporary worker, then part, as you know, of our recruitment  
11 service is that we clearly try to secure that on behalf of our client.

12 Q It may well be that your client has particular needs and you will try and meet those needs,  
13 but let us just look at what you are undertaking to the client. Your own contracts refer to  
14 the fact that what you are doing is, you are supplying, not the worker is supplying, you are  
15 supplying the service?

16 A We are finding – we are finding the temporary worker. The temporary worker is  
17 performing the labour service and we are doing a recruitment service to find them.

18 Q This is your own contract, Mr. Venables?

19 A No, this is the recruitment industry.

20 Q No, no, Mr. Venables, you would accept, would you not, that one of the ways in which you  
21 determine how to treat these matters for the purposes of turnover is to look at the contracts –  
22 correct? It is part of what you have to do as an accountant?

23 A Yes, and when I said earlier on, in determining how we do our accounting, if we have an  
24 agency arrangement we treat it one way, if we don't we treat it another way.

25 Q And one of the reasons why you treat these relationships as principal relationships is  
26 because contractually that is what you are providing?

27 A Contractually, we have to pay the temp.

28 Q Put aside the payment of the temp, just look at the ----

29 A There is no substantive ----

30 Q Let me finish my question and I promise I will give you all the time you need to answer.  
31 The contract that you and your company have concluded in its standard terms makes it plain  
32 that Hays is providing the service.

33 THE CHAIRMAN: Mr. Unterhalter, (i) if it is a submission on the contract I am not sure it is  
34 necessarily helpful to do it by way of cross-examination of a witness, that is a submission

1 you can make to the Tribunal. (ii) what this clause actually says, I think, is “supply of the  
2 worker to provide the services.” So on one reading it is the worker that provides the  
3 services, but you can make submissions on the contrary to us.

4 MR. UNTERHALTER: We will do so. The only reason I am raising this with Mr. Venables is  
5 one of the considerations that is relevant to making principal determinations is: what do  
6 your contracts actually provide, that is the purpose, it is not whether he has an exhaustive  
7 view as to its ----

8 THE CHAIRMAN: I think Mr. Venables agreed that as a general statement earlier, but one of the  
9 relevant matters is what the contracts provide without going through the actual clauses in  
10 the contract.

11 MR. UNTERHALTER: Well I do not, again, want to duly extend this consideration, but I do  
12 want to draw your attention, Mr. Venables, to some provisions in this agreement which his  
13 that in clause 3 on p.1735, which is that it is the employment businesses responsible for the  
14 payment of the temporary workers, you accept that?

15 A Yes.

16 Q And there is a consequence which flows from that by way of the risks that are attached  
17 because ----

18 A There is a credit risk.

19 Q Yes, and you accept that?

20 A Yes, and as we discussed earlier, that is one of the things that we have to look at, it states in  
21 the Accounting Standards, yes.

22 Q And then it says under 5, if you turn the page:

23 “The Client agrees to provide the Employment Business sufficient information to  
24 enable the Employment Business to confirm the suitability of the Temporary  
25 Worker . . .”

26 So they must provide the information as far as that?

27 A Clearly the most important thing is what is the service the client wants the temp to do so  
28 that we can try to make sure we find the right person with the right skills, yes.

29 Q Then we see on questions of replacement under 7(b):

30 “The Employment Business shall have the right to replace a Temporary Worker  
31 with another individual to provide the Services. Any replacement Temporary  
32 Worker supplied pursuant to this clause shall be deemed to be supplied under the  
33 same terms as governed the original Temporary Worker under this agreement.”

34 Do you see that?

1 A I do.

2 Q Now, what I want to put to you about that provision is that this is entirely consistent with  
3 the way in which you have indicated temporary workers are supplied in your financial  
4 accounts, which is that you are providing workers, and you can take one out and put one  
5 back over the period of the contract; you are, as it were, providing a work force under  
6 specifications to the client. That is why ----

7 A We don't ----

8 Q If I may just complete the question: That is why, unlike in the situation with permanent  
9 workers you can take out a worker and simply replace that worker over the lifetime of the  
10 contract?

11 A That never happens. So we are clear, 95 per cent of what we do, whether it is permanent or  
12 temporary recruitment, is exactly the same. The client gives the requirement, we find the  
13 appropriate worker, we try to match the skills, we get the client's agreement and then we  
14 place them there. The only difference between permanent and temporary is in the case of  
15 permanent the client has made the Decision they want to employ, so they will contract  
16 direct with them. In the case of a temp absolutely the client does not want to employ, does  
17 not want an employment risk, and under the legislation as you covered earlier, we have a  
18 requirement to ensure that the temp worker is paid.

19 So we do not have a body of workers, we do not manage a body of workers, we do not have  
20 temps, so I am not sure where this is going because there is no substantive difference  
21 between what we do in permanent recruitment to what we do in temporary recruitment.

22 Q You say it makes no difference, but why do you provide in an agreement that you can in  
23 fact take workers out and simply replace them if, in fact, it is exactly the same service as  
24 you would provide in respect of permanent workers? I want to put to you that you can only  
25 provide for that in an agreement because in effect you are supplying a complement of  
26 workers over the period agreed with the construction company, and if you find other work  
27 for that person that you will be better remunerated you can substitute, and you do?

28 A In my four years in the company that has never happened. There is not a party substitution.  
29 Clearly at some point the temporary worker might go sick, and may not have performed a  
30 particularly good job there, so we may be asked to replace, but this is not a group of people  
31 that we have. Temporary workers tend to register with lots of agencies, because what they  
32 want to do is secure employment so they can pay their own bills, etc. What we do is when  
33 we have the requirement from our client we find the right person and we send them through  
34 to the client. The client then manages all aspects of what the worker does for them. The

1 worker has some skills and the client manages it under their supervision and direction and  
2 control.

3 THE CHAIRMAN: You say this has never happened in your four years, you are the Group  
4 Finance Director, would you know ----

5 A Yes, I would because ----

6 Q Just a moment. If on one contract in Hartlepool for temporary workers the regional  
7 manager were to replace one with another, would he come to you as Group Finance  
8 Director?

9 A No, I would not know that, but I am one of two executive directors at Hays and we are  
10 involved in all aspects of the business, we run the company. My understanding is that that  
11 does not happen. Equally, before I joined Hays I worked for a company that had more than  
12 150,000 employees. I personally recruited more than 500 people and have had more than a  
13 couple of thousand temps, I was the managing director in that business as well. That just  
14 does not happen, that is not the role of recruitment companies.

15 Q For some reason it has been thought right and necessary to have that clause in your standard  
16 terms. Do you know why?

17 A I can make an educated guess if I may. Again, if somebody has been off sick for a period of  
18 time, clearly we do not get paid, when a worker is off sick the worker does not get paid and  
19 we do not get paid, it is a contract for service, they only get paid when they work. Clearly if  
20 somebody has gone off sick for a period of time, generally the client will call us and say:  
21 "Joe Bloggs has gone off sick, can you find somebody else?" I guess all this to us is:  
22 "Please come to us first and ask us to replace them".

23 MR. UNTERHALTER: I am putting to you that the reason you have this in your standard clause,  
24 whether it is for reasons of sickness, or whether for other reasons, you have that ability, you  
25 have that right?

26 A No, we do not have that ability. Our temps are working for our client on their premises,  
27 they are part of our teams of our clients when they call up something. It is just not credible  
28 to suggest that we could call up a client at any point and say: "We'd like to have that temp  
29 out and we'll find you another one", that just does not happen.

30 Q Well it is odd because, and I will find the provision in one of your other agreements, but  
31 there is one of your agreements where in fact you undertake not to take a worker away for  
32 other employment, I will find that in a moment. Are you aware of that?

33 A I have read the contracts, there will be some clauses, and it may well be that that has been  
34 driven off by a customer seeing this, but I have been involved in the recruitment industry

1 for 20 years, and that is just not something that happens. So we need to look at the  
2 substance of the business. I realise that there is a clause in here which may be interpreted. I  
3 have not had a chance to look at all of the other clauses in this part as we have been going  
4 through, but that is not something that happens in recruitment. We are not providing an  
5 employment service, we are not an IT service company, we are not Balfour Beatty. If  
6 Balfour Beatty, who are a construction company, were doing a project as a subcontractor  
7 clearly they have taken responsibility for something that they have said a building will be  
8 built. We do not do that, our business is you, the client, determine what you want to do and  
9 we will find you the people that can help you do it.

10 Q Well we will come to that provision, I will find it and you will see that obviously your  
11 clients believe that you have this ability and so sometimes specifically provide that you  
12 should not be able to do so?

13 A Again, there may be individual clauses which are here for form or whatever, I am not the  
14 company lawyer, but in my knowledge, having been involved in recruitment for more than  
15 20 years, I have never heard that has happened.

16 Q All right, let us look at the charges which you will see under clause 2.1:

17 "The client agrees to pay the hourly charge plus VAT in respect of each hour  
18 worked . . ."

19 Do you see that?

20 A Yes.

21 Q ". . . each hour worked by the temporary worker." You have already accepted that often  
22 that is simply an all in hourly fee?

23 A Sometimes it is. There is also a large number of contracts where there is a specific margin  
24 that we are receiving and in fact, as I am sure you are aware, unfortunately most of the  
25 contracts that fell part of the CRF were stated fixed margin contracts.

26 Q Well let us read on in 2.1, if you look at the last sentence:

27 "For the avoidance of doubt the Employment Business reserves the right to  
28 increase the hourly charge subject to statutory requirements."

29 So it is yet a further indication I want to put to you, Mr. Venables, that what is happening is  
30 that you are providing these workers over a period of the agreement and you are reserving  
31 the right to increase the hourly charge over the period of the contract?

32 A That is just not credible, that does not happen.

33 Q Well that is what it says, I hope it is credible, it is what it says.



1 A It might do, and where that is very useful, and I give you an example of that is when I was  
2 asked about the holiday pay some 10 or 15 minutes ago, a legislative change came out, it  
3 led to a temporary worker having four additional holiday days, which clearly increases the  
4 amount of holiday work. We would have agreed a rate for that temporary worker. Clearly  
5 now there are going to be some hours where that temporary worker does not work but they  
6 are going to get paid, so the hourly rate for when they are working needed to be increased,  
7 and you are right in those circumstances this is a very good clause to go to the clients and  
8 say: "There has now been a legislative change", or it might have been a tax change or  
9 whatever it is, "the rate will increase" it is just not credible to suggest we could call up a  
10 client – let us take [Confidential], or any of the ones in here, [Confidential] – and say "We  
11 have just decided, we have got out of bed this morning and we have decided we want to  
12 increase our hourly rate." We have been doing recruitment for more than 40 years.  
13 We have long standing customer relationships and you do not build an ongoing customer  
14 relationship if you are at any point in time just increasing your prices. Clearly, a clause like  
15 this is very useful because there could be two things happening. We might well have  
16 something which says: "The going rate for a lawyer when we sign a contract is £x per hour"  
17 and overtime that going rate will change, and all this enables us to do is to say "The rate has  
18 changed." But, quite frankly, when the client calls us up with a job they will say: "I want a  
19 construction worker to perform X job," the company in case in this part well knew what the  
20 going rate was for a architect, for example, they will tell us what they were prepared to pay,  
21 but sometimes clearly if you had a much smaller company they wouldn't know and we'd be  
22 able to pass on to them "This is the rate". So there may be a clause in here but that is not  
23 the substance of any recruitment business I know.

24 Q Well you keep referring to "the substance" but the fact is that you are placed in a position  
25 where these kinds of clauses are written into your agreements ----

26 A Into our standard terms.

27 Q And they are the kinds of rights that are wholly consistent with the fact that you are  
28 providing the service over a period of time, and you are adjusting the rates by right over the  
29 period that you supply these workers ----

30 A No, and again, what happens here is a client will call up and they will say that they want a  
31 temp for six weeks. They might seek our advice, what is the appropriate rate for an  
32 architect, or they may well know, and that will be the rate that is fixed for that period of  
33 time. Clearly, we might have another assignment further down when again we will state the  
34 rate, so this is not how recruitment – it is just not credible to suggest that recruitment

1 companies go and say “You know what, we’d like to increase our rates this morning”, that  
2 doesn’t happen.

3 Q I just read your contracts, Mr. Venables. Let us look at clause 6.1 under “Liability”:

4 “The Employment Business undertakes to make all reasonable efforts to ensure  
5 reasonable standards of skill and experience from the Temporary Worker.”

6 Then there are some exclusions for liability in respect of what the worker will do. It says:

7 “. . .but no liability is accepted by the Employment Business for any claim arising  
8 from failure to provide a Temporary Worker for all or part of an Assignment.”

9 Again, what it is saying is: “You will provide a worker, and you will take steps to ensure  
10 there are reasonable standards”?

11 A We are a recruitment business and our job is when the client says this is the skill I want you  
12 to find for me, clearly we will try to find somebody who has appropriate skills. What this  
13 says is “ We will make all reasonable efforts”. If you said you want an architect, you want  
14 that architect to work on this type of project? We’d like them to have relevant skills”, then  
15 clearly as part of our recruitment services we will interview that person, we will ask them  
16 those questions. “Have you got skills working in X, Y, and Z in a fairly top level generic  
17 way?” and then we will hand the temp across to our client. But, you then need to go to  
18 Clause 9.2 which says that the client “agrees to be responsible for all acts, errors and  
19 omissions of the temporary worker, whether wilful negligence or otherwise”. So, it is pretty  
20 clear, you know. Our job is to use appropriate skill to find somebody with the right skills to  
21 be able to do the job the client wants, but when they go to the client’s premises they are  
22 under the supervision, direction and control of our client. It is the client that manages the  
23 whole of the project. We do not visit any of our locations. So, we do not visit the client and  
24 find out, you know, ‘Has the temp appropriately done a certain building?’ because we don’t  
25 have skills to do that.

26 Q All that I am pointing out to you is that from a variety of perspectives all of this contract  
27 points to the fact that it is Hays that is undertaking these obligations in respect of the  
28 workforce that it is delivering to the client. These are all just indications of the same theme.

29 A I disagree. I don’t think that’s accurate at all. 9.2 clearly sets out - and if I had a bit more  
30 time there’s probably another one in here - that, you know, we’re not responsible for the  
31 acts of the temps. When the temp goes to our client, they work for our client. They work  
32 under the direction of our client and the supervision. It’s the client’s responsibility to  
33 ensure that the work is to a certain standard. We do not give any warranty on the level of  
34 work that takes place. Our job as a recruitment company -- That is why we’re called a

1 recruitment company and not - I don't know - a construction company or an IT service  
2 company. Our job is to make sure that we use appropriate skills. Clearly part of that is to  
3 make sure that the person does have a qualification. Depending on our agreement with our  
4 client, if they have said that they have worked on certain projects, that they actually have  
5 worked on those projects.

6 Q Just so that we can try and avoid unnecessary differences, we are not suggesting that you  
7 are required to supervise these workers once they are with the client. We are making the  
8 point that from these agreements it seems plain that you have got to provide these workers  
9 and that they have got to be at the requisite level of skill for the purposes of the client.  
10 That is what I will suggest.

11 A No. That's not true. In the construction space we're not a construction company. We  
12 don't have intimate knowledge about what typical skills are needed to do a certain project.  
13 We will ask the client what they want. They will tell us, "We want you to find us an  
14 architect. We want them to work for X period of time. We would like that they have these  
15 sorts of skills and relevant experience". Our job is to try to make sure from their resume,  
16 from having a discussion with our client, and with the candidate, that it looks like they've  
17 got those skills. We won't know whether they have those skills. We won't know whether  
18 they're particularly good or not. We can see what work they've done in the past. It's when  
19 they start at our clients and they're under the supervision and control of our client -- Our  
20 client is the only person that will know, "Have they got the right skills?" All we've got due  
21 care to do is just to -- What we can't do is just throw somebody to our client. You know?  
22 This is all about, you know, "You're a recruitment company. Exercise your judgment in  
23 trying to make sure you've found somebody that's got the skills to do the job". Nothing  
24 more than that.

25 Q The point is that if, having supplied them, they are not to the requisite standard, it is your  
26 obligation to ensure that they are. That is what you have to do, and you have to do it over  
27 the period of supply.

28 A No, it's not.

29 THE CHAIRMAN: I think we have exhausted this topic. We see what Clause 8 says. I think  
30 perhaps one can move on.

31 A Yes.

32 MR. UNTERHALTER: I have mentioned that there was an agreement where you do make some  
33 interesting provisions as to what can and cannot be done. It is in the exhibits to the witness

1 statements, which is NCB3, Volume 1, Tab 3 of the [Confidential] Agreement. It  
2 commences at p.339. Look, please, at p.342. We see under ‘The Services’ at 3.1,  
3 “The Supplier in its own right and make best endeavours to ensure that the  
4 Temporary Worker where applicable warrants and represent to the Buyer that: ----  
5 “

6 MR. BREALEY: Sir, I understand this is confidential. It is live.

7 THE CHAIRMAN: I thought that the standard clauses are not confidential.

8 MR. BREALEY: Apparently this is not a standard contract.

9 MR. UNTERHALTER: Perhaps I could make this very simple. (To the witness): Would you just  
10 have regard to 3.10? I have indicated that there was an agreement which had certain  
11 features of a specific sort. You need to answer in response to 3.10 ----

12 THE CHAIRMAN: Can we just read 3.10? It needs a bit of concentration to read this very small  
13 print. (Pause whilst read):

14 MR. BREALEY: I am informed, Sir, that we can waive confidentiality over this clause. It can be  
15 read out.

16 MR. UNTERHALTER: Have you had an opportunity to look at it?

17 A It’s a non-poaching clause, is it not?

18 Q It says, “-- this Agreement will not solicit or entice away or endeavour to entice away from  
19 the Buyer any employee of the Buyer or any temporary worker currently assigned under the  
20 assignment with the Buyer without, in any such case, the prior written approval”.

21 So, there is no enticement provision. You are required to make that worker available and  
22 they cannot be enticed away.

23 A The way I read that one -- I apologise. I have only just had chance to look at this. The way  
24 I read that is that clearly as part of a recruitment process we will have had a discussion with  
25 our client. Let’s say we’ve met a senior person at the client. What we’re not able to do is to  
26 try to poach, first of all, somebody who works for our client.

27 THE CHAIRMAN: I think that is exactly right.

28 MR. UNTERHALTER: In other words, you have provided the workers to the client and you  
29 cannot, as it were, withdraw them because you would like perhaps to put them on another  
30 assignment for a higher fee.

31 A Again, that’s never happened. So, in my four years as Group Finance Director and my  
32 twenty years in recruitment, that just doesn’t happen in this industry. You’re not going to  
33 deal with a client such as [Confidential] -- You’re not gonna make a Decision one day,

1 “You know what? We’re gonna take all of your temps away from you”, or something like  
2 that. That doesn’t happen. This is one clause in this agreement.

3 Q Yet another indication as to what we say is the case, which is that you provide the  
4 workforce.

5 A I mean, clearly, when you end up -- I mean, when we’ve got on to these contracts, these are  
6 not standard contracts. Clearly in our discussions with our clients sometime we insert  
7 clauses in here that our client wants. If some of these clauses are completely irrelevant to  
8 Hays, then, quite frankly, we’re not interested in them. You know, the standard recruitment  
9 process is for 99 per cent of all the workers you put, they attend the assignment, they  
10 complete the work, everybody gets paid, there are no issues. So, if there are any issues it is  
11 on the one in one hundred where anything happens. So, you know, there’s a lot of clauses  
12 in here that -- nearly all of them -- I mean, the beauty about recruitment in my time as  
13 Group Finance Director is that there’s no litigation in the area; there’s no customer claims  
14 in the area; we’ve never had to go against insurance. All of those sorts of things. But,  
15 clearly, our clients will have a lot of clauses in her which might give them protection in a  
16 theoretical event.

17 Q Again, I am not certain whether confidentiality is being claimed over this contract, or not. I  
18 just want, in broad terms, to refer you to Clause 3.2 of this agreement where, again, one sees  
19 that there are provisions about how the services will be provided. It is entirely consistent  
20 with what we have seen in your standard clause agreements.

21 A If I have got this right, this says that -- I apologise. In my own witness statements, there  
22 was an appendix I put to it which -- For example, this is probably one of the clauses that  
23 was raised by the OFT at the time where I also covered the other key clauses. Rather than  
24 me trying to read through each clause in here and say -- I’m not sure where it is in my  
25 bundle. This is one of the contracts, I think, that was raised, was it not? It was one of the  
26 ones that were given. You raised, or your expert witness raised, one clause. We then raised  
27 a number of ones back.

28 Q It is one of them. All that I am pointing out to you about these agreements is that ----

29 A Am I able to go ----

30 THE CHAIRMAN: We are slightly wondering whether we need to spend more time on this?

31 MR. UNTERHALTER: No. I have regard to time. I do not need to spend ----

32 THE CHAIRMAN: We do want Mr. Venables’ evidence to complete today.

33 A Am I able to make one final point?

34 THE CHAIRMAN: Yes.

1 A If I can just make one point because I think it gets to the heart of it? Our clients asks us to  
2 do a recruitment service. Let's say it's an architect and they're on £50,000. Let's say our  
3 commission for the purpose of this is 15 per cent. At the end of that route, 95 per cent of  
4 what we do is exactly the same in a recruitment process. The last 5 per cent is the bit that is  
5 different. We spent all of our time on the last 5 per cent. But, in that case, Sir, if they're  
6 permanent, you know, they're going to get a salary of £50,000 and we're going to get a  
7 commission of £7,500. £7,500 is what goes into our turnover £7,500 is what goes into net  
8 fees. If we have to go through - because of employment regulations, if the client's decided  
9 to go down the temp route, and let's say for the purpose of this it's a one-year contract, so  
10 it's a comparable period -- In that case, the temporary worker will be paid and we will  
11 receive £57,500. The temporary worker will be paid £50,000. Our accounts will show  
12 turnover of £57,500. In Note 6 - remuneration of temporary workers - £50,000 and net fees  
13 of £7,500. So, if turnover is to be the determinant part, you can have the same worker  
14 because often it can be the same person who might go down a permanent route and might  
15 go down a temporary route. Now, it is not credible to suggest that Hays, or any other  
16 recruitment agency, is providing seven times the service under a temp contract where  
17 suddenly that turnover will be £57,500.

18 THE CHAIRMAN: I do not think that question has been put to you.

19 A Well, it's the substance though underpinning all of these different points.

20 Q Mr. Venables, you are not here to make a speech or submission. You have got extremely  
21 able counsel - quite a number of them - who will be making submissions in due course. If  
22 you would just answer the questions.

23 A I apologise.

24 MR. UNTERHALTER: Let me try, if I may, to speed up this process somewhat because perhaps  
25 we can reach some measure of agreement as to what the arrangements are. You would, I  
26 think, accept - and I hope I do not have to take you to the agreement - that you enter into a  
27 separate agreement with the temporary worker. Correct?

28 A Yes, sir, as you said earlier on, under the employment legislation. If the client determines  
29 not to take the temp direct into them - because sometimes that happens - then clearly what  
30 the legislation is trying to ensure is that the temp gets paid. So, as part of that, when the  
31 client has said, "Yes, I want that temp" we will have a contract for service with the temp.

32 Q Yes. The point there - and it is just the language of the clause - is that the temporary work  
33 on acceptance of any assignment will supply his or her services to the employment

1 business. In other words, what is clear from your contractual arrangements is that the  
2 temporary worker supplies services to Hays.

3 A No, that's just not credible in this industry. They don't provide their labour service to us.  
4 They provide it to our client. It just happens to be because of employment law that these  
5 items go through our books.

6 Q Contractually they contract with you.

7 A They have a contract for services with us, yes.

8 Q They do not have a contract with your client.

9 A No.

10 Q I think all that is being said is that therefore, because perhaps of legislative reasons, that is  
11 the structure. It is in the contract with you that the temporary recruit agrees to provide  
12 services.

13 A To our client, yes. That is the legal form.

14 Q It is a contractual obligation that the temporary recruit undertakes to you - because he is in a  
15 contract with you.

16 A If they want it, yes. Clearly, assuming the temp wants the work, then of course ----

17 Q That is how it is structured. Let me then move on to another subject, since that seems clear  
18 enough from your contract. That concerns the issue of risk. You have indicated, in your  
19 witness statement at any rate, that whilst you take it that credit risk is one of the features of  
20 the agreement that you did pay attention to, you say that the materialisation of this risk is  
21 very low?

22 A The net risk is very low, yes.

23 Q The net risk is very low. I want to put it to you, and it seems that Deloitte, your auditors  
24 agree, that the indicator of whether you have a principal relationship or not is not whether  
25 the risk materialises, but whether there is risk exposure that exists – the existence of the risk  
26 under the accounting standard, not whether you can mitigate that risk in one form or  
27 another?

28 A That's not what drives our accounting.

29 Q Is it not the case that the standard under which judges risk for the purposes of making a  
30 principal or agency determination is not whether the risk materialises, but whether the risk  
31 exists?

32 A That's one of the factors. There's one part of our turnover note that you didn't take me to,  
33 the last paragraph, which clearly shows that where we have a disclosed agency  
34 arrangement, we do not include the remuneration of temporary workers in our turnover. We

1 still have in those circumstances the same credit risk. Just because our policy has been to  
2 follow – if we have a disclosed agency, that’s how we treat it. That’s been determining  
3 factor. So the gross credit risk is there throughout, but that’s not what drives how we do our  
4 accounting now.

5 Q As I understand it, that is a factor that you take into account for the purposes of making this  
6 determination on the principal agency point – am I right?

7 A It is, but as I’ve just described, where we’ve got two transactions which could be with the  
8 same client, if one was going through a disclosed agency arrangement we did not include  
9 the remuneration of temporary workers in turnover; in the other one, if there wasn’t  
10 disclosed agency we did, we would have had the same credit risk in both with different  
11 accounting for each one, which was our policy and which was signed up by our auditors,  
12 yes.

13 Q All right. Is it also the case that the way in which you deal with this question in your annual  
14 report, and again perhaps I can try and cut through this as best I can, is that what you  
15 indicate is that this risk is spread widely because you do not have only one big customer?

16 A Yes.

17 Q Is that correct?

18 A Yes.

19 Q So it spread over a large number of customers, and consequently you identify the risk and  
20 then say, “But we are not overly exposed to one big customer and therefore we are able to  
21 spread the risk properly” – do you accept that?

22 A And that clearly talks to the gross risk that we have in each of those transactions. As I said  
23 earlier, we’ve got 30,000 customers, so it’s clearly diversified.

24 Q Can we go to the actual way in which you go about procuring these temporary workers, and  
25 to that end could I ask you to look at NCB3, volume 1. Can you tell the Tribunal, you have  
26 a ----

27 A Where are we?

28 Q I am sorry, it is NCB 3, volume 1, I want to refer you to a large number of entries of this  
29 kind, but perhaps could you look at p.293.

30 THE CHAIRMAN: What is this document?

31 MR. UNTERHALTER: Perhaps I can just indicate, and my learned friend can tell me if this is  
32 problematic from any point of view.

33 THE CHAIRMAN: It is marked “Confidential”, what actually is it?



1 MR. UNTERHALTER: As far as we understand, it is something called a [accounting system]  
2 Information Capture System, but perhaps Mr. Venables would identify it for us?  
3 A I'm the Group Finance Director, so I'm afraid that it may well be that I haven't ----  
4 Q Are you unable to identify this for us? It was provided by Freshfields pursuant to certain  
5 enquiries that were made?  
6 A Again, I'm not the UK finance director, or even the finance director of this business, it  
7 looks like it's a list of individuals, but I can't – and I can hardly read it either.  
8 Q Perhaps this is not confidential, which is that you have a database ---- Let me ask you, do  
9 you have a database of temporary workers?  
10 A Clearly, yes, we have a record of all of the transactions that happened in the past. We'll  
11 clearly also receive CVs of people who have registered with us, yes.  
12 Q In fact, you capture – certainly, if this is an example of it ----  
13 A This isn't our database, I don't think.  
14 Q Whether it is the entire database or not, I am simply concerned with ----  
15 A It's not our database. [accounting system] is not our database. [accounting system] is our  
16 accounting system.  
17 Q All I am asking you to identify for us, Mr. Venables, is that you have a database in which  
18 you keep details of temporary workers in their thousands, and next to them there is an  
19 identification of their competence and the appropriate rate at which you will hire them out?  
20 A No, that's not ----  
21 Q I would be surprised if a company of your size did not have such a database, but perhaps  
22 you would tell us otherwise?  
23 A This looks like – I haven't seen ---- I apologise, if I've seen this document before, it's years  
24 ago. This looks like just an extract of actual transactions. It's not a list of what rates people  
25 would work for. It looks like it's a historical list of actual temps, but again, without having  
26 a chance to look at it in more detail ----  
27 Q Let me ask you in more general terms, you are seeking to source temporary workers?  
28 A Yes.  
29 Q You clearly have people on file in your database. As to who you have, their competences  
30 and the rates at which they work?  
31 A No, not the rates. The rates will be determined at that point. We may have some historical  
32 – that's our business – we may have some historical record, and I think this is actual  
33 transactions, where it will say what their rate was. What we won't know until we have a  
34 conversation with a temp – we've had a conversation with a client, the client will tell us

1 what they're prepared to pay – what we won't know until we've had a conversation with the  
2 temp is about what the temp wants.

3 THE CHAIRMAN: I think, Mr. Unterhalter, this is – you will have had more time to look at it  
4 than I, but it explains on p.278, this being part of the [accounting system] ----

5 A The [accounting system] is our UK, or was our UK accounting system.

6 Q Financial information for candidate placements.

7 A Shall I read the page, Sir.

8 Q It is said to be confidential, but on that basis it appears to be a historic record used for  
9 generating invoices?

10 A Yes, [accounting system] is our accounting system. Clearly to be able to raise an invoice to  
11 our clients, we will need to know what is the temp being paid and what is our margin.

12 MR. UNTERHALTER: All right, so you have, you say, historical information but ----

13 A Sorry, this is historical. This is ----

14 Q Let me ask you the question, it is not difficult. You are in the business of supplying  
15 temporary workers?

16 A Yes.

17 Q Sometimes these are on large projects which are going to run over a number of months –  
18 correct?

19 A Yes.

20 Q A construction company approaches you and says, “I want a variety of competences to  
21 service a particular project” – correct?

22 A Yes.

23 Q You will go into your database and you will seek to source the relevant workers that the  
24 construction company wants – yes?

25 A Yes, correct.

26 Q You will then make a proposal based on the work complement that this construction  
27 company wants and the rates at which you will supply those workers. That is what you do?

28 A Again, two elements. First of all, certainly, as you can imagine, in a recession, as is the case  
29 at the moment, our client will tell us what they are prepared to pay. It's clearly a buyers'  
30 market at the moment.

31 Q It was not always.

32 A I was going to come to that actually. Clearly, at other points where labour is short then the  
33 temp will come in and they'll say, “I got £25 per hour on my last assignment, I want £30  
34 now”. That is part of a discussion. Our client will say, “These are the services we want to

1 get”, we’ll then say, “In the market at the moment this is what you’ll have to pay for that”.  
2 The client clearly then takes a view, do they want to pay that or do they not want to pay it?  
3 That’s recruitment.

4 Q Yes, but what I am putting to you is, irrespective of whether you have to adjust your rates  
5 one way or the other, let us look at the circumstances that were applicable at the time that  
6 the infringement took place, at times of labour where there was a shortage of skills –  
7 correct?

8 A Yes.

9 Q Particularly in the construction sector, perhaps in others – correct?

10 A Yes.

11 Q A client has got a big project and it wants competent people to be supplied on a temporary  
12 basis?

13 A Yes.

14 Q You will put up a proposal based upon all the competences that are required across a range  
15 of disciplines and you will put in a rate which will cover that supply of workers?

16 A First of all, it doesn’t happen like that. A client is not going to come to us and say, “We’ve  
17 got a construction project, can you get everybody for us”. Most construction companies  
18 have their own internal recruitment businesses, they actually do more than 50 per cent –  
19 someone like Balfour Beatty do 80 per cent of their own recruitment. What they’ll say is,  
20 “We need two architects”, or, “We need someone with this skill”, and then, you’re right, we  
21 will clearly find out from that temp what is the rate they want. We’ll then let our client  
22 know. The construction market is a good example. In the construction market our clients  
23 very well know what the going rate is in the market. As you’ll know, in a lot of these  
24 agreements, our margin was very express, what we were able to charge on top. The client  
25 will say, “Okay, so the temp is going to get this per hour, your margin is Y, this is the total  
26 cost if we decide to use it”.

27 Q In point of fact, one of the reasons that Parc was controversial, certainly to Mr. Cheshire,  
28 was precisely because it seems that construction companies had difficulties in assessing  
29 whether they were getting value for money at all?

30 A Clearly construction companies, like every other company, want to get great service at the  
31 lowest possible price, yes.

32 Q Yes, but the more general point that I want to make to you is that you are making an  
33 offering, and very often it is an offering simply in respect of rates, in respect of the positions  
34 that need to be filled by temporary workers with a client, and it is an all-in rate?

1 A No, most of these agreements that wasn't the case. Most of these agreements, there was a  
2 stated margin that we would get on top of the rate. So they would say, "The going rate for  
3 an architect is £45 an hour, can you get me somebody with the right skill at that". That for  
4 us is either a yes or no, can we get? We'll attempt to do the job for that job. In a lot of  
5 these agreements we had a fixed margin, which might have been 13 per cent, 15 per cent, or  
6 in the case of where Parc were trying to get to, 10 per cent. What we're not doing is saying  
7 to – we will clearly advise our temps about what the going rate is and what they should  
8 expect to get. What we can't do is tell a temp, "This is the rate", what we can say is, "This  
9 is the most that the company is prepared to pay, the construction company is prepared to  
10 pay, do you want this assignment or not?" That's normal.

11 Q Which contracts do you particularly have in mind? Which ones?

12 A We could take – if you go to any of the ones in there, there's two, [Confidential] – I've got a  
13 summary of the main contracts in my ----

14 Q Why do we not go to the contracts you have been relying upon. Perhaps I could refer you to  
15 expert reports, core bundle 4, and Mr. Hall's report, p.43.

16 A Sorry, where am I going to?

17 Q Core bundle 4, pp.42 and 43, but confidentiality has been sought in respect of these  
18 contracts. (After a pause) It simply identifies particular contracts?

19 A Yes.

20 THE CHAIRMAN: Mr. Unterhalter, how much, given the time, have you got?

21 MR. UNTERHALTER: I need to deal with this subject and then there are just a few other  
22 matters, but I might ask just to review overnight.

23 THE CHAIRMAN: Well how much longer?

24 MR. UNTERHALTER: Probably about 15, 20 minutes, I would have thought.

25 (The Tribunal conferred)

26 THE CHAIRMAN: Mr. Unterhalter, there is also of course re-examination, so that does look like  
27 30 minutes at least, possibly 40 at the outside I would hope, but more like 30. In that case I  
28 think it sensible to stop now, Mr. Venables has been in the witness box for a while. We are  
29 starting at 10 tomorrow. If you can liaise with Mr. Brealey and sort out exactly what is  
30 confidential, it may be that the names of the clients are confidential but the clause you want  
31 to refer to is not, I do not know, but that is one possibility, but you can sort that out rather  
32 than slowing things down if we go on now, and we are just not going to finish. I would  
33 suggest that is the route we take. Mr. Brealey?

1 MR. BREALEY: At the moment I do not have any re-examination, it is just the names of the  
2 clients which are confidential, so I do not know whether you want to continue and get it out  
3 of the way.

4 THE CHAIRMAN: At the moment you do not have any re-examination, but you do not know  
5 what is coming in the next 20 minutes. Unless there are great problems for Mr. Venables  
6 tomorrow morning I think we will break now and we are starting at 10 really to factor in  
7 this situation.

8 LORD PANNICK: Can I mention a very minor matter, which is with the consent of the Tribunal,  
9 I need to be elsewhere tomorrow afternoon, I hope that is acceptable.

10 THE CHAIRMAN: Yes, I do not think you are dealing with that part of it ----

11 LORD PANNICK: I can deal with the Terrorist Asset Freezing Bill, that is what I shall be  
12 dealing with tomorrow afternoon. I am very grateful.

13 THE CHAIRMAN: 10 o'clock tomorrow.

14 (Adjourned until 10.00 a.m on Tuesday, 27<sup>th</sup> July 2010)

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