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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 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

– and –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– and –

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED
(2) CDI CORP.

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

HEARING
DAY THREE

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. and Ms Maya Lester and 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: Good morning.

2 MR. UNTERHALTER: Sir, if I may, first to indicate in respect of the two notes that you asked
3 us to prepare, they are well in hand. We hope to be able to produce both of them by the end
4 of today. That should be possible.

5 THE CHAIRMAN: Yes. I think it is desirable that they are at least circulated to the parties by
6 the end of the day and that we have it for tomorrow morning.

7 MR. UNTERHALTER: There may be an issue about some confidential information as to some
8 aspects of the fines that have been imposed in certain cases, but we will perhaps speak
9 amongst ourselves as to how to regulate that matter.

10 Mr. TIMOTHY ALLEN, Sworn

11 Examined by Mr. UNTERHALTER

12 Q Mr. Allen, can you locate Bundle CB4? Under Tabs 3 and 4 of that bundle there is your
13 first report and supplemental report. Could I refer you to pp.262 and 315? Would you just
14 tell the Tribunal whether those are your signatures?

15 A Yes, they are.

16 Q There has also been a joint statement signed by yourself and Mr. Hall. On p.10 of that joint
17 statement could you identify your signature there?

18 A Yes, that's my signature.

19 Q Are the contents of these reports as well as the joint statement true and correct to the best of
20 your knowledge and belief?

21 A Yes, they are.

22 THE CHAIRMAN: Can I just say, exactly as with Mr. Hall, parts of Mr. Allen's reports stray
23 into matters that really are assessment of the evidence for the Tribunal and not really
24 accountancy expertise. You need not therefore cross-examine on those.

25 MR. BREALEY: I bear that in mind, sir.

26 THE CHAIRMAN: It is exactly the same point that I made yesterday. The key point really, as
27 we see it, for the accountancy experts is whether Hays and the other appellants either could
28 have, or should have, in accordance with GAAP accounted for turnover using net fees
29 instead of the way they did.

30 Cross-examined by Mr. BREALEY

31 Q With that in mind, Mr. Allen, good morning.

32 A Good morning.

33 Q Probably one of the easiest questions then is: Why, on a general level, do companies
34 prepare annual reports and accounts?

1 A To provide information to shareholders and other users of the accounts.

2 Q What sort of information is that?

3 A They prepare accounts that include a financial review, income statement, balance sheet, and
4 accompanying notes.

5 Q You say annual reports. What are the annual reports? What is the purpose of an annual
6 report?

7 A To provide the financial position of the company at the year end at which they're reporting
8 and to provide a review of the financial information for the year then ending.

9 Q The financial statements - what purpose do they serve?

10 A To support the information that forms part of that annual review.

11 Q In these annual reports and financial statements you generally find turnover. Is that
12 correct?

13 A Yes.

14 Q Out of interest, why is it called turnover?

15 A Because it's the turnover of goods or services for the entity.

16 Q So, the amount of services or goods you are turning over.

17 A Yes.

18 Q You say in your first report at para. 3.1.1 - you do not have to turn it up - that turnover is
19 sometimes called 'revenue'; it is sometimes called 'sales' or 'income'. Why is that? Why
20 are those interchangeable?

21 A Because it can be called, and represented in various different forms in various different
22 entities.

23 Q Basically, as I take your opinion, the financial metric - whether you call it sales, turnover,
24 income - indicates the extent to which a company is providing a particular service.

25 A It indicates the extent to which the company is providing a particular service. It can do, yes.

26 Q It is a transaction-based metric.

27 A Yes.

28 Q With that in mind, could you go to NCB4, Volume 1, p.109? This is essentially the 2009
29 annual reports and accounts for Hays.

30 A Yes.

31 Q At p.111 you see the contents of the annual report in the financial statements. I think we
32 can agree that, broadly, they are similar contents to that which you would find in most
33 companies' accounts.

1 A Yes, the framework for what is included in a company's accounts is set by, firstly, the
2 Companies Act and then the accounting framework within which they operate - whether
3 that be International Accounting Standards, UK GAAP, or otherwise.

4 Q So, you would get the financial operational highlights, you have a chairman's statement ----
5 A Yes.

6 Q If we go on to p.113, this is the financial and operational highlights which I think you have
7 just said you would see in most annual reports and accounts.

8 A Yes.

9 Q In most financial operational highlights, I think you would agree that you would see the
10 turnover figure, or a revenue figure?

11 A It would depend upon the industry in which the business operates and how the business
12 carries out its operations and in certain companies, for example, a bank you wouldn't see a
13 turnover number because it would report net interest income. In businesses where you
14 would have a mix of services, for example, a bank and an insurance company, then it may
15 have splits between those in the notes, so it would really depend on the relevance of that
16 turnover figure as a metric as to whether it was included in the operational highlights as a
17 figure on its own.

18 If you are looking at faithful presentation of the accounts under the international accounting
19 standards framework under which these financial statements are prepared, then the
20 overriding requirement is to produce a set of financial statements that includes all of those
21 disclosures at some point that would inform a user of the accounts, so it may not necessarily
22 be in the financial highlights but if it is relevant it would be somewhere in the financial
23 statements.

24 Q Broadly you would, as I understand your evidence you have given to the Tribunal you
25 would expect the turnover figure in the financial operational highlights but, depending on
26 the industry you might find another figure?

27 A Yes, you might, or you might find a split in the notes to the financial statements or
28 elsewhere.

29 Q Why is it, in your opinion, we see net fees there and not turnover?

30 A Because in this particular industry there is a mix of services that is provided and the first
31 point at which these financial statements hit solid rock in terms of comparability of the
32 services is at the net fees level.

1 Q It is slightly more than comparability, is it not? What is the purpose of presenting the net
2 fees figure on this page which is the highlights page? What is the purpose of presenting the
3 net fees figure?

4 A It is to give the user of the financial statements the information that they require to track the
5 performance of the business in summary.

6 Q Precisely. It gives the true indication of the performance of the business?

7 A Yes, it gives the relevant statistics that in summary the company believes should be drawn
8 out in the operational highlights.

9 Q Why should operating profit be just below net fees? What is that indicating to the reader?

10 A That that's the next relevant indicator that they believe should be drawn out in the summary.

11 Q Do you accept on this page that "net fees" is being used to judge the performance of Hays
12 as a business?

13 A Yes, for good reason, because where you have a mix of business, as I say the first line
14 where you can actually judge the performance of the overall business is net fees.

15 Q Why in your opinion do they not put turnover here?

16 A Because they believe that turnover is relevant to part of their business and not all of it.
17 Therefore, in terms of segmental reporting, which is carried out elsewhere in the financial
18 statements they believe it's relevant in terms of determining how that net fees figure is
19 arrived at and it is disclosed separately in the financial statements as such. So the turnover
20 number is in the financial statements, and in the financial review.

21 Q We will come on to that, obviously we have seen the word "turnover" mentioned, and my
22 question to you is why, in the highlights, is a company such as Hays presenting net fees
23 rather than turnover?

24 A Because turnover is for a segment of its business, not for the business overall.

25 Q Only for a segment?

26 A Yes.

27 Q What I would suggest to you here is that essentially Hays is substituting ----?

28 A Sorry, could I correct what I just said?

29 Q Certainly, yes.

30 A The turnover is not just a segment of the business, because it includes both the permanent
31 and the temporary staff but the mix in turnover is confused because you have commission
32 based permanent employee business in it and temporary business, so it's a combination of
33 for the permanent business the turnover is equivalent to the net fees, and for the temp ----

34 Q Could you say that again?

1 A The turnover is equivalent to the net fees essentially.

2 Q For the business?

3 A For the permanent side of the business, but in the temporary side of the business the
4 turnover is not equivalent to net fees, so the first point at which the permanent side of the
5 business, and the temporary side of the business equate in terms of financial performance is
6 when you come to the net fees line, and that is why I would imagine the net fees line is
7 pulled out in terms of the financial summary.

8 Q Here we are looking at the whole of Hays' business?

9 A Yes.

10 Q And there is one figure "net fees"?

11 A Yes, well there are several figures including net fees. Net fees is the starting point for the
12 financial summary.

13 Q If you had turnover there and not net fees, what you have just said to the Tribunal is that it
14 would provide a confusing picture?

15 A Well it would not necessarily give you the first point at which the business demonstrates a
16 real trend in its profitability because within the turnover for the temporary business, as I
17 say, you have costs associated with that before you come to net fees, and the company's
18 determination is that that information, to give a fair representation, is disclosed not on here,
19 but in the financial statements.

20 Q And it would not give a real indication of the growth of the business, if we just had a
21 turnover figure and not net fees?

22 A Yes, it could do.

23 Q "It could do"?

24 A Yes.

25 Q How?

26 A Because if you looked at – it's confused because you have a combination of essentially
27 gross profit plus turnover, if you reported a turnover line, but it would still give some
28 indication of the performance of the business. If you talk about turnover growth or decline,
29 that would represent the sum of commissions on permanent worker placements and the
30 gross value of the sales on temporary worker placements, so it would give some indication
31 of the trend in the business.

32 Q But you would accept that net fees gives a better indication?

1 A Yes, because the two are consistent, the two lines of business become consistent at that
2 point. The gross profit essentially of the business is consistent across all services lines. It is
3 inconsistent for temporary and for permanent workers.

4 Q Why, in your opinion, if you look at the “net fees” column do these accounts show a growth
5 - well it is actually a decline – in net fees? What is that telling the reader of these
6 accounts?

7 A That the gross profit has declined.

8 Q Then the operating profit has declined?

9 A Yes.

10 Q So the performance of the business has declined?

11 A Yes.

12 Q So that is the financial highlights of this page. If you look at the operational highlights we
13 see: “temporary placement, net fees down 7 per cent”?

14 A Yes.

15 Q And we see permanent placement fees down 29 per cent. Can you tell the Tribunal why the
16 scale of permanent placements are being judged by net fees?

17 A So they can be compared with the decline in permanent placements at the same point. The
18 two figures, the percentages are consistent in terms of where the businesses are being
19 compared. So if temporary placement net fees are down 7 per cent, and permanent
20 placement fees are down 29 per cent, then that tells you what the trend is in the gross profits
21 of each of those businesses.

22 Q Does that not indicate to you that the activity of Hays is declining?

23 A Potentially, yes.

24 Q And that the activity declining is placements?

25 A The “net fees” is down 7 per cent, that could be as a result of the two metrics that create that
26 number working in different directions or in the same direction.

27 Q If you look at “Temporary Placement, net fees down 7 per cent”, is that not indicating to
28 you that net fees are being earned from placements.

29 A Sorry? Net fees are being earned from temporary placements?

30 Q The placement is the activity. Net fees are being earned from the placements.

31 A It’s the gross profit from the temporary business.

32 Q Can you go on to p.117? Is this normal to have this in a set of accounts - a business
33 overview?

34 A Yes.

1 Q What is this suggesting to the reader?

2 A It's giving some statistics that it believes are of use to the users of the accounts in forming a
3 view on the financial performance.

4 A Again, I ask the same question: why, in your opinion, is there a reference to net fees here
5 and not turnover?

6 A Because, as I said before, net fees is the first comparable across the business as to where
7 you have a consistent metric to measure different segments of the business.

8 Q Isn't net fees being used interchangeably with turnover in this industry?

9 A For permanent placements and for agency business, yes.

10 Q And for temporary?

11 A For temporary, no.

12 Q Where on this page do you see any other measure than net fees to judge temporary
13 placements?

14 A You don't.

15 Q You do not.

16 A And I wouldn't necessarily expect to see it because that is a segment of the business which
17 has its own metrics. It has turnover, cost of sales, and net fees which are disclosed
18 separately to give a faithful presentation of the accounts elsewhere. This is pulling out
19 certain highlights from the financial performance at a summary level to give, on a page, the
20 profile of the group. So, there are very few statistics here. The statistics that the company
21 considers are relevant are the split between the various divisions, and those areas at which
22 you can compare performance. So, net fees -- It doesn't surprise me that net fees is the
23 statistic they pull out because it's a good comparator between the different parts of the
24 business.

25 Q Normally on this page you would see turnover.

26 A Yes, and if Hays was only engaged in the provision of temporary placements and those
27 were accounted for on a principal basis, then I would expect to see turnover on this page.

28 Q But, Hays has a mix.

29 A Yes, which is why it's not here.

30 Q What do you understand by 'net fees by specialism'?

31 A It depends on the sector in which the business is operated, I would imagine. I don't prepare
32 the accounts. As a user, I would imagine that that depends on where the permanent or
33 temporary placements are recorded within the different segments in the business.

1 THE CHAIRMAN: Is it not explained in the little table that accountancy and finance is one
2 specialism?

3 A Yes. That's why I say it's the different sectors.

4 MR. BREALEY: Would you accept that what this page is telling the reader is that the degree to
5 which net fees are earned by the specialist departments within Hays.

6 A Yes.

7 Q Then net fees by division -- This is telling the reader the net fees earned by the various
8 worldwide divisions ---

9 A Geographically, yes - which is a requirement. You need to give performance by sector and
10 by geographic region.

11 Q Again, 'net fees' is being used here as an indication of the amount of money being earned
12 by the specialist department and the geographic departments.

13 A Yes.

14 Q If one goes on to p.120, again we have the chief executive's strategic review. Again, I think
15 you would agree with me that this is standard in accountancy. You usually have a chief
16 executive's statement.

17 A Yes.

18 Q What is the purpose of the chief executive's strategic review?

19 A To give a review of the business - in overview.

20 Q Again, I would suggest to you the same point: that normally in a chief executives strategic
21 review you would have reference to turnover or revenue.

22 A Yes, if it was representative across the entire business, yes.

23 Q Because we only have net fees here I think you would accept that having a turnover figure
24 would not be representative of Hays' overall business.

25 A Correct - because of the mix.

26 Q Can we go on to p.130? This is an operating review. Would you explain to the Tribunal
27 what this is doing? What is an operating review?

28 A Again, giving financial highlights from the operation. So, the chief executive is giving the
29 strategic view which is key considerations with regard to strategy. This is looking back at
30 the operating profits, etc. of the business over the year.

31 Q What are the operations, in your view, that are being referred to?

32 A The operations of the company.

33 Q Which are?

34 A Which are the various sectors set out here.

1 Q No. The sectors are not operations. What are the actual activities -- the operations being
2 carried out by these sectors?

3 A Well, they're divided between specialisms - permanent, public sector, regions, private
4 sector market, public sector market, etc. - within this operational review So, they consider
5 those to be the operations.

6 Q I suggest to you that the operations here are placements.

7 A Okay.

8 Q Yes? I take 'Okay' on the record to be a 'Yes'?

9 A It doesn't say that here, but ----

10 Q If you look up p.131,
11 "In the United Kingdom and Ireland, net fees declined by 27 per cent ...with
12 operating profit down ... Permanent placement net fees decreased ... temporary
13 placement net fees decreased ---"
14 The net fees are related to placements. That is correct, is it not?

15 A That seems to be the case, in terms of the operational review, yes.

16 Q So, when we are looking at the operations of Hays in its operating review, we are looking at
17 placements.

18 A That's who they decide to review it, yes.

19 Q That is how they decide to review it.

20 A Yes, that's how they decide to present their operations.

21 Q So, when we are looking at the net fees in the various divisions and specialisms, we are
22 looking at the fees earned on the placements.

23 A Yes.

24 Q Again, I suggest to you that here, in this operating review, across the mix of Hays' business,
25 Hays is representing net fees as turnover.

26 A No.

27 Q I thought we started off with your evidence that turnover was a metric which measured the
28 activity of a company.

29 A Yes, but net fees are not turnover. Net fees are only turnover for what you would call the
30 permanent placement business. That's the only point where net fees are equivalent to
31 turnover.

32 Q I will ask you the question again. We established at the beginning that turnover - you can
33 call it revenue; you can call it sales; you can call it income - represents the scale of activity
34 of a company.

1 A Yes.

2 Q Here we are looking at the scale of activity of Hays in his operating review.

3 A Yes.

4 Q The figure which is being put forward to judge that scale of activity is net fees.

5 A Yes, which is equivalent to gross profit.

6 Q In light of the agreement with both of those statements net fees is being put forward by
7 Hays on these two pages as equivalent to turnover.

8 A No, it cannot be. Under accounting definition it cannot be equivalent to turnover.

9 Q Under a realistic market definition?

10 A It's gross profit because it's the ----

11 Q You accept that under a realistic market definition net fees is indicating the scale of the
12 activity of the company.

13 A Yes, because that's the first line at which you can draw a comparison with regard to the
14 performance of the business - because of the mix.

15 Q If we go over the page to p.132, we see the same operating review for Asia Pacific.

16 A Yes.

17 Q If we go on to p.134 we have the operating review for continental Europe and the rest of the
18 world.

19 A Yes.

20 Q I think you accept - because it is there on the page - that Hays does not present a turnover
21 figure to measure the scale of its activity across the mix of its business.

22 A Correct.

23 Q We then get to the financial review, which I am sure you have read several times, at p.137.
24 That is the very first time we see the reference to turnover.

25 A Yes.

26 Q Just looking at this page on p.137, I would suggest to you that on any fair reading of this
27 that net fees is being greater prominence than turnover to measure the performance of Hays'
28 business.

29 A Yes, and for the reasons I gave previously that's what I would expect.

30 Q You fairly accept that. If we go to p.142 this is Key Performance Indicators. What would a
31 key performance indicator mean in a set of accounts?

32 A Exactly what it says - a measure of key performance or an indicator of key performance.

33 Q Of the scale of its business? How it is performing?

34 A A measure of key performance - not necessarily the scale, but of the key performance.

1 Q We see there the first net fees growth.
2 “The year-on-year growth in our net fees provides a measure of the business
3 development and growth in each period.”
4 Do you agree with that?
5 A Yes, because it does. Net fees for consultant.
6 “The average net fees generated per sales consultant represents how productive
7 fee earners are in the business.”
8 Do you agree with that?
9 A Yes.
10 Q What do you think these fee earners are doing?
11 A They are generating revenue and profit for the business.
12 Q By what sort of activity?
13 A By creating opportunities for temporary or permanent placements.
14 Q How do you measure, in the sense of a financial metric, what those fee earners are doing?
15 You are doing it by net fees per consultant?
16 A Yes.
17 Q You are not doing it by turnover per consultant?
18 A No, because if a consultant was selling both permanent and temporary business that would
19 give you a skewed comparator.
20 Q Precisely. Let me go to p.182, please. We have almost finished on the accounts. I am
21 looking at Note 6. This is operating profit from continuing operations.
22 “The following costs are deducted from turnover to determine net fees from
23 continuing operations.”
24 Are you able to give an opinion on what the ‘continuing operations’ are?
25 A ‘Continuing operations’ are the operations of the business - what it is engaged in.
26 Q You see turnover figure and then remuneration of temporary workers. Just over £1.7 billion
27 is being deducted.
28 A Yes.
29 Q Why would the accounts draw the readers’ attention to this amount of money being
30 deducted - this £1.7 billion?
31 A To give a fair presentation of the results, but also to disclose the turnover, cost of sales, and
32 gross profit of the business in standard format. The labels attached to it in this note are
33 turnover, remuneration of temporary workers and net fees, but that’s essentially what the
34 note is doing.

1 Q Under that do you see,
2 "Prior to 1st April, 2009, turnover and remuneration of the workers excluded
3 transactions relating to contracts performed under the staff hire concession".
4 A Yes.
5 Q Can you remind the Tribunal what the staff hire concession was?
6 A That is the concession that was taken advantage of with regard to VAT exempt clients
7 where Hays accounted for those relationships on an agency basis prior to the removal of the
8 staff hire concession in 2009 when they switched to account for those on a principal basis.
9 Q In the various evidence - and I think you have discussed this with Mr. Hall - are you aware
10 that the effect of that concession meant that approximately £200/250 million was put in the
11 turnover figure?
12 A Yes. That figure was a figure that was quoted in Mr. Hall's expert report.
13 Q So, as a result of the withdrawal of this concession on 1st April, 2009 the turnover figure
14 increased, in broad terms, by 10 percent.
15 A Yes.
16 Q £2.5 billion -- £250 million. 10 per cent.
17 A Yes.
18 Q Clearly, Hays has not increased its scale of activity by 10 per cent, has it?
19 A It is responding to a change that it believes it has taken in the substance of those
20 arrangements. To change from accounting on an agency basis to a principal basis Hays
21 must have made the determination that the substance of those arrangements has changed
22 from an agency basis to a principal basis.
23 Q I will ask the question again. Clearly Hays has not increased the scale of its activity by 10
24 per cent, has it?
25 A The substance of those arrangements has changed. So they are therefore recording the
26 activity under IAS18 now, from April 2009 onwards, as a gross inflow of economic benefit.
27 Q Has it increased the scale of its activity? It is a simple question. Has it increased the scale
28 of its activity?
29 A The nature of those arrangements, I would imagine, has not changed. The substance, it
30 appears, must have changed because they have moved from one form of accounting to
31 another. So, something must have changed with relation to the arrangements carried out in
32 relation to those particular activities. In substance accounts have to be prepared on the basis
33 of substance over form. So, the substance of those arrangements must have changed from

1 March to April 2009, or over the period that the VAT hire concession was removed -- the
2 VAT mitigation concession was removed.

3 Q The turnover figure has just, overnight, gone up by 10 per cent. I suggest to you that
4 normally when turnover goes up by 10 per cent - certainly on a £2.5 billion company - the
5 scale of an activity has changed, has it not?

6 A Yes, it would normally have changed - or there has been some change in the underlying
7 accounting that has caused that change. In this instance the company is clearly disclosing
8 that there has been a change in the underlying accounting that has caused that change. They
9 don't actually give the magnitude of that change in this note, even though it is 10 per cent of
10 the revenue. But, they are advising the user of the accounts that there has been a change in
11 turnover because of the removal of the staff hire concession. They are saying they were not
12 in there before, and now they are. So, in terms of the faithful presentation for the user of the
13 accounts, they have the information. They don't actually have the number, but they have
14 the information to determine that the turnover number has changed because of a change in
15 accounting rather than a change in the performance of the business.

16 THE CHAIRMAN: So, they are indicating, explaining that this change is not due to a change in
17 the performance of the business, but a change in the underlying accounting.

18 A Yes, and the substance of the arrangements that give rise to the accounting.

19 MR. BREALEY: The substance of the arrangements, I suggest to you, have not changed because
20 net fees have not changed.

21 A The substance of the arrangements in terms of recognising revenue have changed. The
22 business has made a determination under IAS18 that there is a gross inflow of economic
23 benefit from these transactions. That is the driver of the recognition of revenue.

24 Q Would it give any indication of an increase in placements, the fact that turnover ----

25 A No, no.

26 Q So the operational activity, we are none the wiser because turnover has gone up by 10 per
27 cent?

28 A Yes, due to a change in the substance of these arrangements.

29 Q The fact that £250 million goes in to the overall turnover of the company and the fact that
30 net fees does not change, what does that suggest to you?

31 A That the change in the substance of the arrangements has not altered the gross profit, and
32 you wouldn't expect it to.

33 Q Would that suggest to you that the remuneration, the temporary workers' remuneration
34 being paid to Hays by its client is being passed straight through to the worker?

1 A The no change in the net fees? Sorry.

2 Q Yes?

3 A The fact that net fees doesn't change, does that indicate ----

4 Q Turnover has gone up £250 million?

5 A Yes.

6 Q Net fees has not changed. Would that not suggest to you that temporary workers'

7 remuneration essentially get passed on to the temporary worker through Hays?

8 A No, because to recognise those arrangements is revenue, you must record that you are

9 recording the gross inflow of economic benefit, the business is recording a gross inflow of

10 economic benefit in relation to the sale and the separate transaction that it is able to record

11 as a result of that, the cost of sale is the payment to the temporary worker.

12 Q In substance is their remuneration not being passed on?

13 A No, the way that Hays is accounting for these transactions is as two separate transactions.

14 In order to record the revenue it is collecting hourly rates times hours on to an invoice, and

15 that invoice is having VAT applied to it, and those figures are being collected in Hays'

16 accounts as revenue and that number appears in the turnover figure quoted in the operating

17 profit note here. The payable side of the business is taking the cost of the temporary

18 workers recording that and putting that into remuneration of temporary workers equivalent

19 to the cost of those sales. Hays cannot record the revenue unless it has gross inflow of

20 economic benefit from the sales' side of the transaction so it's treating the transaction as

21 two separate transactions and not a pass-through. If it was a pass-through it would record it

22 as an agency relationship. If it was just collecting on behalf of but had not gross inflow of

23 economic benefit from it would not record it as revenue, and could not.

24 Q If I say to you the following: Although the revenues relating to temporary workers' wages,

25 costs are passed through to the temporary worker, they are nevertheless revenues recorded

26 by the recruitment agencies. I will say it again for you, although the revenues relating to

27 temporary workers wage costs are passed through to the temporary worker, they are

28 nevertheless revenues recorded by the recruitment agencies. Do you disagree with that

29 statement?

30 A I disagree with the "pass through" part of it. In terms of the cost of sales of any business, if

31 a business acquires something and then sells it on to somebody else, that is always a pass

32 through, so if it buys cars and sells them to consumers then the car passes through that

33 business. The separate transactions are the sale of the car and the purchase of the car. In

1 this instance it's the sale of the temporary worker service and the cost being the payments to
2 them.

3 Q Can you just take out bundle CB1, which is the Decision, and turn to p.251 and para.5.125.
4 What I just quoted to you was the OFT's own case, which is that:

5 " . . . although the revenues relating to temporary workers' wage costs are passed
6 through to the temporary worker they are nevertheless revenues recorded by the
7 Recruitment Agencies."

8 A. Yes.

9 Q Are you saying that the OFT is wrong?

10 A I wouldn't - I mean I wasn't involved in drafting this Decision but I wouldn't have called it
11 a "pass-through" because in accounting terms it's two separate transactions.

12 Q From a market reality point of view is it a pass-through?

13 A No.

14 Q Is it a pass through in any shape or form?

15 A No, it's a revenue and a cost of sales.

16 THE CHAIRMAN: Does it not rather depend how you use the term? You could say when a
17 main contractor bills the employer, and the main contractors use sub-contractors, so the bill
18 to the main employer includes the costs of the sub-contractor, they might even be shown
19 "Sub-contractor X – electrical works", "Sub-contractor Y", and he gets the money and then
20 he has to pay it on, one could call that the "pass-through" ----

21 A Yes.

22 Q In a general sense it is a pass-through.

23 A. Yes.

24 Q I think you are saying in accounting terms ----

25 A. Correct.

26 Q -- you would not describe that as a "pass-through", although people might say it really is a
27 pass-through because you are not keeping the money, you are just going to pay it on?

28 A Yes, in the way that if the consumer buys the car you will be paying for your profit margin
29 on the car plus the cost of the car, so the cost of the car is a pass-through in the same sense.

30 MR. BREALEY: Could you go to your first report and to p.213 and para.2.2.8, and if you could at
31 the same time also take out the witness statement bundle CB3 and have tab 7 open. You
32 say at 2.2.8:

1 “In my view it makes sense to focus on Net Fees as the comparator between
2 entities within this industry sector because the entities within the sector appear to
3 have a variable mix of business as regards temporary and permanent workers.”

4 Essentially you have confirmed that in your cross-examination?

5 A Yes.

6 Q What actually is being compared? You talk about “comparator”, but what actually is being
7 compared?

8 A Between entities?

9 Q Yes, you talk about it makes sense to focus on net fees, this is in the context of looking at
10 the performance of Hays internally and externally. I am asking you what actually is being
11 compared – you say it makes sense to have net fees as a comparator ----

12 A Yes.

13 Q -- what actually is being compared?

14 A The performance of the entities in the industry.

15 Q You would accept that the market considers net fees as the true measure to judge the
16 performance of the recruitment business?

17 THE CHAIRMAN: Mr. Brealey, I thought this is one of the points that is now agreed, if one
18 looks at the agreed statement 5.1.1, that has been confirmed now, I do not think ----

19 MR. BREALEY: That is, but I am trying to work out what – if we have a look at Mr. Shepperd’s
20 statement at para. 7?

21 A Yes.

22 Q I understand it Mr. Allen is agreeing that you can use net fees as a comparator and if one
23 looks at para. 8 of Mr. Shepperd’s statement on Mr. Allen, we see after the quotation:

24 “In fact, I would go further to say that the only way in which recruitment agencies
25 can be compared is by reference to Net Fees ...”

26 A Yes.

27 Q “ This is the reason that all recruitment industry analysts focus on Net Fees
28 generated by Hays and other recruitment agencies.”

29 Then the next sentence:

30 “That is, Net Fees is the figure that allows analysts to assess the actual economic
31 performance and activity of the business carried out by recruitment agencies.”

32 What I was going to ask you is where Mr. Shepperd says: “That is, Net Fees is the figure
33 that allows analysts to assess the actual economic performance and activity of the business
34 carried out by recruitment agencies”, whether you agree with that statement?

1 THE CHAIRMAN: I thought that is agreed in 5.1.1 of the agreed statement?

2 A It is agreed, I don't disagree with anything Mr. Shepperd says, it makes sense – as I've said
3 before – that the analyst community focuses on net fees. If a business in the sector had 10
4 per cent of temporary and 90 per cent of permanent it would be wrong to compare it with
5 the business that had the opposite, 10 per cent of 90 per cent, because the two would not be
6 comparable at the turnover levels, so analysts focus on net fees in my view quite logically.

7 MR. BREALEY: It is essentially para. 9, Sir, that I was going to ask about. Mr. Shepperd goes
8 on:

9 “Mr. Allen, however, goes on to say in the same paragraph that: ‘*turnover (being*
10 *the combination of the value of services provided both as proposed and agreed) is*
11 *the true measure of the scale and magnitude of a business.*’ ”

12 He disagrees with you on that. Mr. Shepperd's evidence is unchallenged and, as I
13 understand it, you have just agreed with everything that Mr. Allen says, sorry Mr. Shepperd.
14 (Laughter)

15 A I agree with everything Mr. Allen says.

16 Q Except in this paragraph. Do you agree with Mr. Shepperd at para. 9?

17 A Yes, I do in terms of the recruitment industry. My statement in my expert report was that
18 turnover was, I think he quotes it here, is a metric for a business in general, and if we were
19 in a world where recruitment agencies only provided temporary workers, and everybody
20 accounted for it on a principal basis turnover would be a relevant metric, and analysts
21 would, I imagine, focus on turnover. The fact that we're not in that perfect world where
22 they can perform that comparison means that they focus on net fees across the industry.

23 Q In the light of that, just to be clear, if you look at the last sentence of para. 10:

24 “Due to the characteristics of the recruitment industry, the market considers the
25 Net Fees figure to be the equivalent of the turnover figure form most other
26 industries.”

27 You would agree with that as well?

28 A Yes, on the basis that, for example, if you were comparing department stores and their sales
29 turnover would be relevant in the recruitment industry because of the mix turnover is not,
30 and therefore net fees is the figure that they use as the first point where they can perform a
31 valid comparison across the different entities.

32 Q In your joint report (tab 5), para. 2.2.3 you say that you do not believe, and you also say that
33 Mr. Hall can't either, that you do not believe that you are able to form a view on the nature
34 of Hays' transactions?

1 A Yes, and this is an important point from an accounting perspective.

2 Q Why is it important?

3 A Because the framework for international accounting standards requires that the accounting
4 for transactions is carried out on the basis that the substance of the transactions is the
5 overriding requirement and not their legal form.

6 Q Why is it that you feel unable then to come to a concluded view?

7 A Because I believe that the view on the substance of the transactions could only properly be
8 arrived at by management; management is in the position to determine how the transactions
9 operate in practice, and they are, as Mr. Venables testified, working with the contracts on a
10 day to day basis, and determining what the substance of those contracts is for the purposes
11 of accounting, and they are making the determination based on the substance of those
12 transactions and that in respect of temporary workers they are largely to be accounted for as
13 a principal, and that is driven by the substance. I as an expert coming in to look at this
14 independently can only form a very limited, if any, view on the substance of the transactions
15 because I don't have that day to day operational ability that others that run the business do
16 have, and I don't believe that Mr. Hall does either.

17 Q That is why, as I understand it, in the joint report at para. 4.1.1(b) at p.9, your opinion is that
18 Hays could, under certain circumstances account for net fees and turnover?

19 A If Hays reached a determination that the substance of its transactions was such that they
20 were operating as an agent then it would account for them as an agent, as would any other
21 recruitment business.

22 MR. BREALEY: I have no further questions but I am afraid Mr. Harris and Miss Kreisberger
23 will.

24 THE CHAIRMAN: Yes, Mr. Harris.

25 Cross-examined by Mr. HARRIS

26 Q Good morning, Mr. Allen, I am afraid Mr. Brealey is right, it is a little bit of a tag team
27 performance this morning and going into this afternoon. I would like to address you with
28 some questions on a different topic, if I may, the topic of principal and agency in your
29 report. I think you would agree with me, would you not, that there are six principal factors
30 identified in the accountancy literature that bear upon the issue of whether or not there is a
31 principal or an agency relationship?

32 A If you are drawing the six from the list in Mr. Hall's report where he lists other factors, then
33 I think you are missing one of the ones from FRS 5.

1 Q Well let us take them from your report instead, shall we? If you would look at your first
2 report, which is in the expert bundle CB4, tab 3 at p.242. Do you see at the top of that page
3 you have identified the six principal factors as (a), (b), (c), (d), (e) and (f)?

4 A Yes, with sub-divisions within (a). So there are in fact six principal factors. These are
5 principal relationship, yes, whether they include ----

6 THE CHAIRMAN: You are summarising what Mr. Hall has set out in his figure 4.1 ----

7 A Yes.

8 Q -- derived from UK and US standards?

9 A Yes. In terms of determining, there are two sides to the coin. There is determining whether
10 it is a principal or determining whether it is an agent, and I set out in the joint statement the
11 factors from FRS in relation to the other side of the coin which is how you determine, this is
12 at p.2 of the joint statement, under "UK GAAP Agency Arrangements" etc. and they are
13 not necessarily there, so these are one side of the coin, so these are the principal, the factors
14 in relation to determining whether it was a principal, and then the other side of the coin is
15 you look at the obverse and say "are they therefore an agent?" So the factors set out in the
16 joint statement in that paragraph on pp.2 and 3 would also be relevant.

17 Q Yes, but I think we are agreed, Mr. Allen - though we may not agree at later points, that in
18 relation to ----

19 A In relation to principal specifically, yes.

20 Q Right. You would agree with me, would you not, that these factors in your report and in
21 Mr. Hall's report (a), (b), (c), (d), (e), and (f) bear relevantly upon the question of whether
22 or not there is a principal or agency relationship in any particular circumstance.

23 A In combination with the factors in relation to agency as set out. That is particularly why I
24 put those agency factors in the joint statement - to make sure there was a balance between
25 both sides of the determination, and that one just doesn't look at the principal side, but one
26 also looks at the agency side. I think this became more relevant in the light of Mr.
27 Venables' evidence in that he was saying that essentially what Hays have followed was UK
28 GAAP in terms of the determination of the disclosed agent requirement where you disclose
29 that you are an agent and then you account for it as an agent. There is a rebuttable
30 presumption that you don't account for it as an agent where you haven't disclosed that
31 you're an agent. That was what he said was the policy that Hays was following. Therefore,
32 the factors in relation to the agent follow on from that determination. So, it appeared that
33 that was more what he was applying in terms of how to apply Hays' judgment.

1 Q I follow that. But, effectively, all that comes out of pp.2 and 3 of the joint statement is that
2 there is another factor - namely, the seller has disclosed the fact that it is acting as an agent.

3 A No ----

4 Q If you look at (b), (c), and (d) they are all already included within the (a), (b), (c), (d), (e),
5 and (f) on your para. 5.3.4.

6 THE CHAIRMAN: Well, disclosure of the agent is (f).

7 MR. HARRIS: In fact, they are all included, yes. I am grateful.

8 A For example, (b) on p.3:
9 “-- once the seller has confirmed its customer’s order with a third party, the seller
10 will normally have no further involvement in the performance of the ultimate
11 supplier’s contractual obligations.”

12 Yes, I guess that’s involved in the determination of service specification.

13 Q Yes. Precisely. That is effectively encompassed within (a), is it not?

14 A Yes. Yes.

15 Q You do accept then that these six factors, whether expressed in the form (a) to (f) in your
16 first report or in (a) to (d) in the joint report, are relevant factors to be considered for the
17 purposes of determining principal or agency.

18 A Yes, and I think the way they are set out in the joint report I would defer to because the
19 expert reports are characterising them generally rather than looking at the actual wording of
20 the indicators. I think the actual wording of the indicators is relevant to the determination
21 rather than just following either mine or Martin Hall’s characterisation of them.

22 Q I take that point. But, you would also agree with me that all of the factors have to be taken
23 into consideration before reaching a view on principal or agency, do they not?

24 A Well, in terms of accounting judgment the judgment is made based on the framework that
25 applies to International Accounting Standards or UK GAAP. So your overriding
26 requirement no. 1 is substance over form. How you apply your accounting policy is then set
27 by the indicators. So, there is an umbrella within which an accountant is operating in
28 making their determination. These indicators fall within the specifics in relation to
29 particular transactions within that umbrella.

30 Q But within the umbrella you should consider all other factors, should you not?

31 A There’s no requirement to consider all of the factors. They are indicators.

32 Q You say there’s no requirement to consider all of the factors, but I’m reading from CB4, tab
33 3, p.242, para. 5.3.5 of your first report, five lines down. I thought it was your evidence to

1 the Tribunal - and I quote - that “the relevant strength of each of the indicators should be
2 considered”.

3 A Relevant strength. The accounting Guidance - and this is Guidance in IAS18 and in the
4 Application Note - is that you should consider these indicators.

5 Q Yes. All of them.

6 A So, you have got a list of indicators. You can determine that, for example, inventory risk is
7 not applicable or that others are. So, if one does not apply to your business you would not
8 really consider it.

9 Q We will look at them individually in a moment, but I think you just said - and correct me if I
10 am wrong - that within the accountancy standard framework you should consider these
11 factors.

12 A Indicators.

13 Q These indicators.

14 A Yes, these are indicators.

15 Q There are six of them, are there not?

16 A Yes. They are not mandatory requirements. They are indicators.

17 Q But in your analysis you have not considered all of the indicators, have you?

18 A Yes.

19 Q Well let us just have a look at that. Your Indicator (a), taking it from your p.242, Tab 3, is
20 primary responsibility for providing goods or services.

21 A Yes.

22 Q If you turn over in your first report, to the next page, p.244, do you see that you analyse
23 that?

24 A Yes.

25 Q So, one could put a little (a) next to that heading, just above 5.3.8.

26 A Yes. I mean, I’m not analysing the indicators here. I’m commenting on Mr. Hall’s
27 assessment of the indicators. So, I haven’t commented on all of the indicators in my report.
28 Mr. Hall pointed that out in his response to my expert report. So, I don’t comment on what
29 he’s saying about particular indicators because I didn’t have a comment to make, because I
30 didn’t have enough information to make a comment.

31 Q Mr. Allen, your expert evidence in 5.3.5 is that “the relative strength of each of the
32 indicators should be considered”. I just want to see to identify with you the fact that in your
33 report you have not covered three of the indicators, the relative strength of which you say
34 should be considered.

1 A Yes. I haven't commented on them.

2 Q Right. Well, let us just identify which ones you have not commented on in giving your
3 expert opinion. Perhaps we can take this rather more quickly in light of what you have just
4 said. You accept with me that you have covered in your report factor (a).

5 A Yes.

6 Q Then, on p.246, sub-paragraph (f) discloses that it is acting as an agent.

7 A Yes.

8 Q Then on the next page, p.247 of the bundle, 'Exposure to the Customer's Credit Risk' - that
9 is sub-paragraph (d), is it not?

10 A Yes.

11 Q So, that means that you have not opined in your expert report upon the relative strength, or
12 indeed any evidence on indicators -- Let me get this right: your (b), (c), and (e) - 'exposure
13 to inventory risk', 'discretion in establishing prices', and 'amount earned is pre-
14 determined'.

15 A Yes. I haven't commented on them.

16 Q The truth is that each of those other three indicators, or factors, all support Mr. Hall's thesis,
17 do they not, that it would be reasonable for a professional accountant to come to the view
18 that the appellant could account for temporary wages on an agency basis rather than a
19 principal basis. That is right, is it not?

20 A In relation to inventory risk, I believe inventory risk in the accounting standards is really in
21 relation to goods since it talks about despatch, shipping, return, etc. In terms of 'discretion
22 in establishing selling price and the amount earned is pre-determined' I gave no comment
23 on that in my expert report under the general caveat that I was not able to make judgment in
24 relation to certain elements because the information before me did not allow me to
25 comment. So, I didn't believe I had enough information in relation to particularly the
26 contracts or the substance of the contracts in order to comment on 'discretion in establishing
27 selling price' or 'amount earned is pre-determined'. So, I gave no comment on it. I had
28 nothing to say.

29 Q Right. Well, I will be completely fair to you, Mr. Allen. I am going to take you to each of
30 these factors which you have omitted to mention in your expert report, but if your evidence
31 in response to my questions is, "I simply cannot say. I do not know", fair enough.

32 A Yes.

33 Q Let us have a look at each of them briefly, shall we? I am going to take one of the factors
34 you have omitted - your factor (c) - discretion in establishing the prices. My proposition to

1 you, Mr. Allen, is that this factor points towards a principal because if it is present it shows
2 an undertaking acting in its own capacity in taking important Decisions in its own names
3 and on its own account. Discretion in establishing prices. That is right, is it not?

4 A Sorry? Where are you quoting from?

5 Q No. I am putting a proposition to you - that the reason that discretion -- If an undertaking
6 has discretion in establishing prices, that points towards it being a principal, does it not?

7 A It's one of the indicators in the accounting literature.

8 Q Yes. So, if it is present it points towards there being a principal relationship; is that right?

9 A Let me just look at the actual wording from the Standards. (After a pause): The wording
10 under IAS18 - and I am reading from p.2 of the joint statement at (c),
11 "The entity has latitude in establishing prices, either directly or indirectly. For
12 example, by providing additional goods or services".

13 Now, I would take that to mean that the latitude in establishing selling prices comes from
14 the ability to, for example, add an extra service at no charge or at a reduced charge, or
15 where you have a bundle of services you have latitude in establishing selling price because
16 you have a group of factors that you can provide to an entity. Therefore you have latitude
17 in determining what margin you are going to earn from the price that you are charging.

18 Q The selling price of a temporary worker is his wage, is it not?

19 A The selling price of the service in relation to temporary workers is whatever Hays is
20 charging for in relation to its service under its contract with its client.

21 Q Let us try the question again. The selling price for a temporary worker is the wage of the
22 temporary worker, is it not?

23 A The selling price ----

24 Q Yes. The temporary worker sells his services in return for the wages that he receives, does
25 he not.

26 A If the temporary worker is engaged by the ultimate client, then, yes, directly.

27 Q Right. It is fair to say, is it not, that the appellants do not have any discretion in establishing
28 the wages of the temporary worker, do they?

29 A But we are talking about something else there. We are talking about the temporary worker
30 being engaged directly by the client. I am talking about the service -- the cost of the service
31 -- what Hays is billing for in totality. It is billing for the service of providing a group of
32 temporary workers under a contract.

1 Q You would accept from me, would you not, that it is Hays' client which determines the
2 wage levels which it is willing to pay for the labour service - not Hays which determines
3 those wage levels, is it?

4 A I don't know.

5 Q Perhaps I could take you to the witness statement bundle, CB3, Tab 1, page 15, para. 44.
6 This is Mr. Venables' first witness statement. Do you see in that statement, about eight
7 lines down, the very words I just put to you which you said you do not know? They are in
8 fact the very words of Mr. Venables which were not challenged by your counsel. I will read
9 them to you again:

10 "It is Hays' client which determines the wage levels it is willing to pay for the
11 labour services."

12 Do you see those?

13 A Yes, but my point is that that is only part of a package of services. When I, as an
14 accountant, am looking at the indicator under IAS 18 I am looking at the price for the
15 service, and the price for the service does not just include the wages of the temporary
16 worker. Under the indicator here, (c) - does the entity have latitude in establishing the
17 overall price? - yes, it does, because it is able to provide a service for free, or at a reduced
18 rate on top of the service it is providing in relation to the temporary worker. So, it does
19 have, in the overall price, which would be the hourly rate for the service -- Because Hays is
20 being remunerated based on hours times rate, that rate would include the bundle of services
21 that Hays is providing. It would have latitude in setting that rate.

22 Q One of the other factors that you omit to mention in your report is the pre-determined
23 amount. I will come on to that in a minute, Mr. Allen. You will have an opportunity to
24 comment on that as well. But, just sticking with this point, I think I heard you right to say a
25 moment ago that it is critical in your expert accountancy opinion to have regard to the
26 Decisions about the substance of the operations of the business that are made by the
27 management of the business. Was that right?

28 A Yes.

29 Q Here is Mr. Venables saying that it is Hays' client which determines the wage levels it is
30 willing to pay for the labour services. So, that is his evidence and his view of the substance
31 of this business.

32 A Yes. I am sorry. Mr. Venables, in his evidence, which I sat through on Monday and
33 Tuesday, said that. There were comments like: "It's currently a buyer's market". So the
34 buyer sets the rate, presumably meaning the hourly rate. But, it was not previously. So,

1 | there is obviously an economic dynamic in terms of the rate that is being agreed with the
2 | client. The supply/demand consideration is what he appeared to be explaining in his
3 | testimony.

4 | Q Perhaps I will put this in another way and then we will move on. You are not in a position,
5 | are you, Mr. Allen, to gainsay this evidence that Hays' client, which determines the wage
6 | levels it is willing to pay for the labour.

7 | A No, I am not.

8 | Q So, as regards this first factor that you have not referred to, insofar as it amounts to
9 | discretion in establishing the temporary worker's wages, that is not a discretion that lies in
10 | the hands of Hays, is it?

11 | A Mr. Venables, in his evidence, says not.

12 | Q Right. In that sense, this factor points towards agency, does it not?

13 | A No, because you are looking at the service as a whole. You may not have discretion in
14 | relation to a particular part of what you're selling, but in relation to setting a price for the
15 | service as a whole, you clearly have discretion.

16 | Q Let us move on to that one then. The second of the three factors that you do not refer to in
17 | your report is your factor (e) - the amount earned is pre-determined. I put it to you that if
18 | an entity earns a pre-determined amount or a fixed percentage per transaction, then that
19 | indicates that it is acting as an agent. You would agree with that, would you not?

20 | A It's an indicator, but it's not definitive.

21 | Q I entirely accept that. It's a fair point. It is one of six. They all have to be considered. It is
22 | an indicator.

23 | A Yes.

24 | Q Right. But, you would accept it is an indicator in the manner that I have just myself
25 | indicated.

26 | A Yes, and it could be an indicator of an agency relationship, yes That's what it says. I agree.
27 | I agree.

28 | Q I am very pleased to hear it. So, basically, the people to act for commission - they are
29 | agents, are they not?

30 | A Yes.

31 | Q That commission is what should be counted in their case as revenue, is it not - not the gross
32 | amount.

33 | A Yes. If the determination under IAS18 is that there is no gross inflow of economic benefit,
34 | then you record only the commission.

1 Q The appellants - whether that be Eden Brown or Hays or, for that matter AndersElite, they
2 do generate a pre-determined amount, do they not? A percentage of the value of the
3 transaction? That is what they earn, is it not?

4 A I was presented with seven contracts in the expert evidence of Mr. Hall and one contract in
5 relation to another entity from the submissions that Hays had put in in response to the OFT.
6 So, I had eight contracts. There are others. There's the AndersElite standard contract.
7 There are other contracts that have appeared in evidence. My opinion from looking at those
8 contracts was that I was not able to establish from the sample presented to me whether or
9 not that factor represented either agency or principal, or indicated either (1) because I didn't
10 believe the sample was representative - and I pointed that out in my first report; and (2)
11 because it wasn't clear to me from the interpretation of the ones that I could review that that
12 was the case.

13 Q I follow that.

14 A That is really an evidential point.

15 Q Yes. You have just said that you were reviewing evidence, the contracts.

16 A Yes, but I didn't believe them to be representative.

17 Q But you just agreed with me ----

18 A You would need to look at the substance of the negotiations in practice as to how that
19 selling price is determined or pre-determined.

20 Q Just a minute ago you agreed with me, without me needing to take you to the IAS18 that
21 agents earn commission and the commission is what should be accounted for as their
22 revenue figure - not the gross amount.

23 A If they satisfy the requirement and the overriding requirement of substance over form.

24 Q Right. Perhaps we can have a look at a contract for Eden Brown and then one for Hays on
25 this point. If you could take up, please, NCB2, tab 7, this is Eden Brown's terms and
26 conditions of business.

27 A Yes.

28 Q On the first page it covers permanent staff. Do you see that at the top of the right-hand
29 column - Section 1?

30 A Yes.

31 Q Then, the next page is the one I am interested in since we are debating temporary staff.
32 Section 2 - "temporary staff". If you could just read to yourself Clause 2.3, please? (Pause
33 whilst read): That is Eden Brown describing itself, is it not, as "charging a commission for
34 our service".

1 A
2 "The hourly charge consists of the hourly rate paid to the temp, including amounts
3 in respect of PAYE and employer's and employee's national insurance
4 contributions and the commission we charge for our service."
5 Yes.
6 Q Yes. So, in line with what we just agreed a moment ago that would be indicative of acting
7 as an agent, would it not, earning a commission?
8 A Yes.
9 Q One would expect to see that commission figure as the one reported for turnover under
10 IAS18. Right?
11 A Yes - unless Eden Brown, in its own determination, looking at this contract overall, had
12 determined that this represented a principal relationship, either as a result of the other
13 indicators or as a result of substance over form.
14 Q I accept that again. We are not looking at this factor in isolation.
15 A Not an indicator in isolation.
16 Q Yes. I am not looking at this in isolation. But, when one does just look at this, as we go
17 through the factors one by one, that would be indicative, would it not, of an agency
18 relationship?
19 A Yes.
20 Q Right. Can I also take you to a Hays contract on a very similar point? NCB4, Volume 2.
21 Tab 3 Page 1735. This is a document which we, in the courtroom, have looked at many
22 times. It is the terms of business for the introduction and supply of temporary workers by
23 Hays. Do you see Clause 2.1, half-way down the left-hand column?
24 A Yes.
25 Q If you could just read that to yourself? There is no need to read it out. (Pause whilst read):
26 Do you see that in the middle of that they also describe themselves in a very similar way on
27 this point to Eden Brown as "charging a commission calculated as percentage of the
28 temporary worker's hourly rate and employer's NIC". Do you see that?
29 A Yes.
30 Q So, again, just focusing on this factor for a moment - one of the ones you have not
31 mentioned in your report - this would be indicative of an agency relationship, would it not?
32 A Yes, it could be.
33 Q Just to wrap up on this point with two references to the evidence -- You can put down NCB
34 2 and 4, and if you could locate the witness statement bundle again, CB3. Look at Mr.

1 Venables' evidence in his first statement at Tab 1, and in particular, page 24, para. 71, the
2 very final paragraph. (After a pause): Do you see that Mr. Venables also there refers to the
3 amounts being pre-determined for the duration of any contractual arrangement?

4 A Yes. In this paragraph he is referring particularly to construction clients that use an
5 intermediary, such as Parc, where they have open book arrangements, which I assume is
6 giving the end user the breakdown between the cost and the margin that they're earning, and
7 accordingly the amounts derived from Hays in relation to those particular types of service
8 will be pre-determined for the duration of any contract.

9 Q Right. To be fair to Mr. Venables, if one looks at para. 70, what he says is that large clients
10 often enter into open book type arrangements.

11 A Yes.

12 Q At para. 71 he gives an example of a large client using an intermediary.

13 A Yes.

14 Q So, in his evidence here he is talking about all his large clients, is he not?

15 A With open book arrangements, yes.

16 Q Yes. What he is saying is that there is a pre-determined margin for all of those clients.

17 A Yes.

18 Q Right. You would accept from me that that also points, when we are just focusing on that
19 within the mix of these factors, towards ----

20 A It could do.

21 Q Does it not

22 A It could do.

23 Q So, that is two of the three that you do not analyse in your report. I said that I would go to
24 all three of them. That is only being fair to you. You mentioned inventory earlier. That is
25 the other one that you do not cover. But, just taking this as a broad proposition first, I
26 would be right to say, would I not, that running an inventory points to a principal
27 relationship because it means that there is a risk being held by that undertaking - a risk
28 connected with whether or not the inventory can actually be sold at some point.

29 A Yes.

30 Q It is right, is it not, that the appellants do not have any such risk because they do not run any
31 inventory of temporary workers, do they?

32 A My reading of IAS18 is that this relates principally to goods. It talks about shipping or
33 return -- shipping or on return. That is set out in the joint statement at p.2(b) If you look at
34 the way that IFRS and others have discussed this, then they are really, it appears, talking

1 about goods rather than services. That's how inventory is typically referred to in
2 accountancy terms.

3 Q I take that. There was, of course, Mr. Hall's evidence yesterday which was that this one is
4 not, even in his view, as of central relevance as the other factors, but nevertheless he said
5 that it was not completely or utterly irrelevant. Do you accept what Mr. Hall said about that
6 - it has some relevance, but not as central as ----

7 THE CHAIRMAN: I think he said 'limited relevance'. That was his expression.

8 MR. HARRIS: Yes. Precisely. Yes, I accept that.

9 A I think in relation to the fact that it refers to goods, it has no relevance.

10 Q There is the point of principle, is there not, Mr. Allen, which is why it has some limited
11 relevance? The principle is that if you have an inventory you take on a commercial risk that
12 you might not be able to dispose of the inventory. But, by analogy, there is no such risk in
13 the case of Hays or Eden Brown as regards temporary workers; is there?

14 A Well, it has no inventory, no goods.

15 Q But by analogy it does not have a bench of temporary workers whom it is paying before it
16 can assign them to its clients, does it?

17 A No, it doesn't have that.

18 Q So, insofar as there is any relevance to this factor, it could only point towards being agency,
19 could it not.

20 A If one made a determination that there was no inventory risk, then it would point towards
21 agency, yes.

22 Q Right. So I put it to you, Mr. Allen, that it is not a very auspicious start for you, is it, on this
23 topic of principal and agency because of the six factors in your expert report which you say
24 the relative strength of each of which should be considered, in fact you have not considered
25 three of them. That does not inspire one with the notion that you have conducted a
26 systematic or thorough review of this topic, does it?

27 A I have no problem with the opinion that I have given as a result of my review. My review
28 was based on the evidence that I had before me and I made no comment on those particular
29 indicators because I didn't believe that I had the representative material in front of me to
30 make a comment.

31 Q Perhaps one would be forgiven for thinking, Mr. Allen, that you have agreed with me that
32 when focusing on two of those omitted three factors, and, to the extent that it is relevant, the
33 third, they all point towards agency. Your omission of reference to them is perhaps not the
34 most independent or impartial way of proceeding, is it?

1 A My report was in response to Mr. Hall's report and I made comment in relation to those
2 factors where I believed I could make comment.

3 Q Certainly where you do comment, Mr. Allen is on another of the factors, credit risk. In fact,
4 of the three factors that you do analyse on this topic in your report, you place significant
5 weight on credit risk, do you not?

6 A Yes. In analysing how Hays and the other appellants reached their judgment that the
7 substance of the relationships is such that they should be accounted for as principal, credit
8 risk is mentioned as one of the recurrent factors in both the witness statements and in the
9 evidence.

10 Q But for you it is a peculiarly important factor, is it not? Let me just show you what you say
11 about this in your first report at CB 4, tab 3, page 248, para.5.3.21. If you would like to see
12 the sub-heading on the previous page "Exposure to the Customer's Credit Risk", and you
13 say here that the legal requirement has significant implications impacting upon the
14 substance of the transaction?

15 A Yes.

16 Q But just taking this in stages, the credit risk is just one of six factors, is it not?

17 A Yes. The reason that I refer to credit risk here so significantly is because based on my
18 reading of Hays' own submission and the evidence of Mr. Venables, it appeared to form a
19 key factor or determinative factor as I described it. Actually, I didn't say it was a
20 "determinative factor" I said it was one of the factors that they were considering; Mr.
21 Venables was certainly considering it as something that he believed was highly relevant to
22 the determination of principal or agent, and that was my interpretation of his first witness
23 statement and Hays' submission on the point, the fact that there was a requirement to pay
24 these temporary workers thereby imputing a credit risk, was a significant factor.

25 Q Yes, I follow that.

26 A And I was looking at the judgment made by management because in my view the judgment
27 made by management is what is being questioned here.

28 Q I follow that.

29 A That is what Mr. Venables had told me in his witness statement.

30 Q Thank you, Mr. Allen. Sir, may I just take one moment? (After a pause) Mr. Allen, it is
31 right is it not that if credit risk were so important and determinative then there would be two
32 consequences at least, would there not? The first would be that where there is credit risk,
33 and on the approach that it is very significant or determinative, that would mean such
34 undertakings that do have credit risk should account for income on a principal basis?

1 THE CHAIRMAN: Can I just clarify, are you saying it is determinative, or it is of significance?
2 A I am saying it was obviously a significant factor. My understanding of the evidence of Mr.
3 Venables is that it was a significant factor in the determination of the principal/agency
4 relationship. There was some dispute as to whether or not it was the determinative factor,
5 and that was dealt with in my expert report backwards and forwards between myself and
6 Mr. Hall.
7 Q Yes, but that is whether for Hays it was the determinative factor?
8 A Yes.
9 Q But for you, when you look at it, is it the determinative factor?
10 A No, but it is a very significant factor, but not determinative.
11 MR. HARRIS: But just focusing on credit risk for the moment, as an indicator if there is credit
12 risk that points towards accounting for income on a principal basis, does it not?
13 A Yes.
14 Q And if there is no credit risk then on this approach it would point to accounting for that
15 income on an agency basis?
16 A It depends.
17 Q It depends on what?
18 A If you look at Application Note G to FRS5 and it is quoted in the joint statement at p.3,
19 looking at the obverse in terms of an agency relationship, so (d) towards the top of p.3 of
20 the joint statement: "*The seller bears no stock or credit risk ...*" so this is an indication that
21 it is an agent, so there is no stock or credit risk:
22 *"... other than in circumstances where it receives additional consideration from*
23 *the ultimate supplier in return for its assumption of this risk."*
24 So there is a caveat to that.
25 Q Yes, I take that point, Mr. Allen, but I am just focusing for a moment on exposure to
26 customer's credit risk, which is what you are commenting on in your first report at the
27 passages I have just identified?
28 A Yes.
29 Q So insofar as we focus on credit risk, and the two consequences that I have just set out in
30 relation to this factor would follow?
31 A Yes.
32 Q Where there is credit risk it points towards principal, where there is not credit risk it points
33 towards agency ----?
34 A That's correct.

1 Q -- as an indicator?

2 A Oh yes, as an indicator.

3 Q But that is correct, is it not?

4 A Yes.

5 Q But in the real world it doesn't work like that, does it, Mr. Allen? Let us take a few
6 examples, looking at the joint report that you were just referring to a moment ago, on p.8 of
7 10, this is the dispute between you and Mr. Hall regarding 'del credere' timber agents, you
8 recall that dispute?

9 A Yes.

10 Q And the fact is that those agents do accept credit risk, do they not, and yet they do not
11 account for the monies as an agent?

12 A Yes, they would fall squarely within the passage that I just referred to in terms of that they,
13 back on p.3 of the joint statement at (d), receive consideration from the ultimate supplier in
14 return for the assumption of the risk. 'del credere' agents are essentially credit insurance
15 brokers, so they are receiving a fee for taking on the credit risk.

16 Q I follow that, Mr. Allen, there is no dispute between us on that but what I am focusing on is
17 the credit risk, and this is an example of an undertaking who does accept credit risk and yet
18 does not account for the turnover as a principal, instead it accounts as an agent, does it not?

19 A Yes, in compliance with UK GAAP.

20 Q So that points in a particular direction, and then there is the HPPS example, that is the staff
21 hire concession, the VAT exemption. When HPPS was being used as a payroll agency by
22 Hays it had credit risk, did it not, in the sense that it had to pay the temp irrespective of
23 whether or not it got paid, do you accept that?

24 A Yes, a structure was arranged involving two subsidiaries of Hays, which accounted for the
25 margin and the cost separately.

26 Q But it did accept the credit risk, did it not?

27 A Yes, it did.

28 Q And yet it did not account for it as a principal?

29 A Correct, and that would be the result of a determination that the substance of those
30 arrangements was of an agency nature and there has been some debate in my expert report
31 between myself and Mr. Hall and with Deloitte as the auditors as to how that determination
32 was arrived at.

1 Q Yes, but the fact remains that in both of the examples I have just give you the timber agents
2 and the HPPS there is an acceptance of the credit risk, and yet not accounting for it as a
3 principal.

4 THE CHAIRMAN: Well on the first example, Mr. Harris, Mr. Allen made clear that the
5 summary in his report at 5.3.4 is just a summary of what is in the accounting principles,
6 and the accounting principle on credit risk has that caveat, and he explained that ‘del
7 credere’ agents are firmly within the caveat. So I do not think that point particularly
8 applies. You can ask about the second point but I think Mr. Allen has responded to the first
9 point saying: “Actually when you look at the actual standard for which that is just a
10 shorthand summary, it firmly fits within the way credit risk has a qualification.

11 MR. HARRIS: Well, Sir, perhaps I can put a similar point a different way. I take that point, and I
12 take plainly what the caveat is in one expression of the credit risk indicators. Let us look at
13 the flip side of the same coin, there are situations, are there not, where there is no credit risk
14 and yet Hays and Eden Brown and the other appellants do account for the income as a
15 principal, for example ----

16 A Yes, and I think – sorry, continue.

17 Q I was just going to say, it may not assist you because I think you are on the point, but for
18 example, when Hays and Eden Brown source their temporary workers through other
19 recruitment agencies, they do account for those wages as principal even though they do not
20 have any credit risk?

21 A Yes, and this is another point that has been the source of some debate between myself and
22 Mr. Hall, and Deloitte as the auditors, and the most recent response from Deloitte in their
23 letter of 4th June I think it was, was that ----

24 THE CHAIRMAN: Just pause a moment. Mr. Brealey, is what is said in that letter still
25 confidential? It is so marked and I am not sure whether, unwittingly, Mr. Allen might be
26 straying into dealing with that letter.

27 MR. HARRIS: The mere existence of the letter ----

28 THE CHAIRMAN: Mr. Harris, if you ask the question carefully?

29 MR. HARRIS: I am grateful to the Tribunal. The mere existence of the letter does not pose a
30 problem, and I do not propose to ask any detailed questions about that leg of the debate.

31 A I can give the general point that is made by the letter ----

32 THE CHAIRMAN: I am not sure.

33 MR. HARRIS: Just in terms of the principle, but I am not sure you need to, Mr. Allen.

34 THE CHAIRMAN: I think, just pause, Mr. Allen, because there seem to be sensitivities here.

1 A Yes.

2 THE CHAIRMAN: I do not know how far you want to explore this.

3 MR. HARRIS: We do not need to look at the content of that letter or anything because Mr. Allen,
4 you accepted the basic point that where Hays and Eden Brown source their temporary
5 workers through other recruitment agencies there is no credit risk and yet they account for
6 them as principal?

7 A I think the point there was that even though credit risk was there, the credit risk had been
8 mitigated by the back to back arrangements that were entered into, and therefore in terms of
9 an indicator, and I think this was touched on yesterday with Mr. Hall, the existence of risk is
10 the indicator, the mitigation of it does not exclude the fact that it is included in the
11 indicators. So credit risk is an indicator, if it is mitigated it is still an indicator.

12 Q At one point in your second report, Mr. Allen – expert bundle (CB4), tab 4, p.304 at para.
13 3.3.16, one of the examples that I just put to you, that is in the middle – subparagraph (b) of
14 the preceding paragraph, the HPPS example?

15 A Yes.

16 Q As I read your 3.3.16 amongst the points you make are that actually although they may
17 appear “. . . to be at odds with relevant accounting practice, I also noted that any potential
18 errors would not have been material.”

19 A Yes.

20 Q Do correct me if I am wrong but as I read it the suggestion that you give there is: “Okay,
21 there are these differences on certain aspects”?

22 A Yes.

23 Q “I am not quite sure how they fit in in some respects with accountancy guidelines, but in
24 any event they are not really that big or important”?

25 A My assessment was that they were not necessarily material to the accounts because they are
26 not disclosed. When the HPPS arrangement was removed the figure, as we saw in the
27 operating profit note previously was not disclosed as a separate figure, therefore if it was it
28 would be material.

29 Q Well come on, Mr. Allen, that is a rather odd way of going about it, is it not? On any
30 stretch of the imagination the figure that we have been talking about in respect of HPPS, the
31 change to the turnover overnight, for Hays, when the staff hire concession is removed, is
32 £250 million or 10 per cent of the gross turnover figure. On any stretch of the imagination
33 that is material, is it not?

34 A Well Hays did not appear to think it was.

1 Q I see, but what about you, Mr. Allen, you would take the view that that is material 10 per
2 cent, would you not?

3 A 10 per cent is borderline materiality for accounting terms, yes, 10 per cent is a benchmark.

4 Q But £250 million is borderline material in your view, is that right?

5 A Yes, it is on turnover, yes.

6 Q Oh, I see. Then we have established, and we are in agreement that one exercises one's
7 professional accountancy judgment by reference to these factors that we have been
8 discussing, but would it not be fair to say that there are other factors of some relevance as
9 well, for example, the issue of control, who has control over the goods or services in
10 question?

11 A Yes, the accounting judgment is made in the round.

12 Q So the issue of control over the goods or services would be made in the round by references
13 to other commonsense considerations such as who has control over the goods and services?

14 A Potentially, yes.

15 Q But that is another factor that would point towards these appellant companies being agents,
16 would it not ? I will happily turn up the provisions of the contract, if you like, but they
17 clearly say, do they not, that the control and the direction of the temporary worker is to be
18 exercised by the end client rather than the recruitment agency, do they not?

19 A In accounting terms I was presented with the contracts and my review and read of the
20 contracts, and I used the phrase I think in my first and second expert report, and in the joint
21 statement, "managing a body of workers" came from phrases within contracts where it
22 appeared that there was a contract for a group of workers and therefore there is a service to
23 provide a group of workers to a client and that is the contract that Hays and the other
24 appellants are entering into.

25 Q But you would accept, would you not, that Hays or Eden Brown, or any of the appellants
26 do not exercise the control over the worker when performing the worker's job, do they?

27 A No, and I made this point clear because I think there was some misunderstanding from my
28 comment in my first report about managing the body of workers that it did not extend to
29 supervision of the workers.

30 Q Yes, but insofar as that bears, as you I think expressed it a minute ago, "in the round" on
31 this question of principal and agency?

32 A Yes.

33 Q It does not point towards Hays or Eden Brown being a principal, does it, because they do
34 not have direction and control over the provision of those services, do they?

1 A They have control over the provision of the service as a whole being the supply of the group
2 of workers.

3 Q Well I understand your point. Now, just asking you a little bit about the nature of the
4 exercise of the judgment as regards these various factors as a professional accountant. I
5 think you would accept from me that the judgment is essentially subjective, is it not, in the
6 sense that each accountant could come to a different view subjectively on the same set of
7 facts, that is right, it not?

8 A Yes, what typically tends to happen in the world of accounting, is that standards are
9 developed over time, and they become generally more prescriptive over time, as the
10 standards become generally more prescriptive the accounting profession considers them and
11 accounts and financial information develop in concurrence with the development of those
12 standards and what you see in relation to the question of principal/agency relationship is the
13 development of the accounting Guidance over time from FRS 3 and its application in
14 November 2003 through to IAS 18 and the new example added in the appendix at no.21 in
15 November 2009. So as that Guidance develops accountants as a group look at how they
16 exercise their judgment in that framework, and the general framework develops as well,
17 because accountants tend to apply judgment in consultation with their peers and with others
18 that operate in the industry, so they do not operate on their own, they are guided by the
19 standards, the framework, their auditors, other accountants, etc. so judgment develops over
20 time. What tends to happen in the accounting profession, we are not sheep but we tend to
21 follow a view, and therefore judgment is applied in that context, the context is that one sits
22 and looks at all the factors, and generally look at how things are done in general. So
23 accountants would sit, apply judgment based in that general context.

24 Q I follow that, Mr. Allen, I am just slightly conscious of the ticking of time because, as I
25 said, there is a tag team, and Miss Kreisberger has some questions for you and I have some
26 more. My question was quite specific, it was that inherently the judgment is of a subjective
27 nature, is it not?

28 A Yes, in that context.

29 Q In that context you would agree?

30 A Yes, it was important for me to set the context.

31 Q Right, I take that point, thank you. In reality that is what is going on between you here and
32 Mr. Hall, is it not? You have reached, as professional expert accountants, different
33 subjective views as to the judgment that should be exercised in regard to a particular set of
34 facts, that would be fair, would it not?

1 A Yes, but I think there is quite a significant difference between the opinion that I have
2 arrived at and the opinion that Mr. Hall has arrived at because I have tried to look at
3 applying judgment in the context that I just described, and I do not believe that Mr. Hall
4 has.

5 Q I see. But it is also fair for me to say that given you have agreed that this is subjective
6 professional accountancy judgment it would be legitimately possible to come to a different
7 view of the correct accountancy treatment. To pick up on Mr. Sterling's phrase of
8 yesterday, it is a "finely balanced" judgment, is it not, in certain circumstances?

9 A Yes, and I would look at that. I was interested in Mr. Sterling's evidence yesterday for a
10 couple of reasons, (i) he talked about the finely balanced judgment; and (ii) he talked about
11 potentially looking at changing his accounting treatment, or his judgment in relation to these
12 particular contracts, and he referred in his evidence I think to the framework, that I referred
13 to as the preamble, when applying judgment in that he looked at consistency with his peers
14 is what I believe he was referring to ----

15 Q Correct, he did.

16 A -- in accordance with the accounting standards framework. In preparing my report I also
17 looked at how the other industry players account for temporary workers in their accounts,
18 and I reviewed, what I got was 20 accounts – it was not a sample that was in any way
19 biased, it was the accounts that I could get in the time to review and the result of that review
20 was that in all cases – I think in two of them there was some small agency business – but in
21 all case those entities accounted for these transactions on a principal basis. In terms of the
22 framework and applying the judgment that would be a significant guide to how one would
23 interpret the accounting pronouncements in this area, you would look at how others had
24 interpreted them and you would come to a view in that context.

25 Q But still on this issue of judgment it is right that those very sets of accounts to which you
26 have just referred they illustrate, do they not, that there can be a differing professional
27 accountancy judgment on this very question of whether to report gross or net at the
28 turnover level on the same fact set, do they not? Do you want me to give you an example of
29 that?

30 A Yes.

31 Q If you could turn to Mr. Hall's second report, it is the example of Robert Walters at p.147,
32 tab 2 of CB4. Do you have that?

33 A Yes.

34 Q Do you see the Robert Walters' example?

1 A Yes.

2 Q You are familiar with the example, are you not?

3 A Yes.

4 Q What Mr. Hall has done is he indented citation within para. 3.4.9, he is citing there from the
5 Robert Walters' 2003 Financial Statements, is he not?

6 A Yes.

7 Q And what that reveals is that they, Robert Walters, had reviewed the Guidance, identified
8 certain transactions, only involved them in an intermediary role, and they go on to say that
9 they now only recognise the net income from those transactions, do they not?

10 A Yes, and this is exactly what I was referring to in my preamble, is that when this accounting
11 Guidance came out in 2003, and this is the 2003 Financial Statements of Robert Walters, so
12 FRS 5 Application Note G is issued, and is relevant to those financial statements, that as the
13 new more prescriptive Guidance appeared, and that Guidance was called "Accounting for
14 the Substance of Transactions" that Robert Walters obviously formed the view that the
15 substance of these particular transactions was not that of principal but was that of agent.

16 Q Yes, precisely, they formed that view by reviewing certain transactions and now coming to
17 the view that they should be accounting for differently, have they not? There is no
18 suggestion, is there, that the underlying factual nature of their operations has changed one
19 jot, is there?

20 A No, but the accounting framework has changed quite considerably.

21 Q So what they have done is change their accountancy presentation notwithstanding that the
22 underlying factual nature of their activities has not changed at all, that is right, is it not?

23 A Well I don't know what they have done, but all I can say in accounting terms is that they
24 have responded to the issue of Application Note G to FRS 5 in 2003 and they have looked
25 at it appears, because they say that they have reviewed the Guidance, they have reviewed
26 that new Guidance, and the new Guidance, which is considerably more prescriptive than
27 anything that was around before, has set out the indicators that we have been referring to.
28 They have looked at the indicators and the indicators have told Robert Walters that actually
29 transactions that they were accounting for as a principal should in fact be accounted for as
30 an agent.

31 Q But you have no basis whatsoever for saying, have you, that the underlying nature of their
32 factual activities has changed at all?

33 A They determine that the substance of those transactions in accounting terms determined how
34 the revenue should be recovered.

1 Q I follow that, Mr. Allen, but the question is: you have no basis for saying that the facts of
2 what they do have changed?

3 A No, I have not, no.

4 Q And let us just have a look at the box, if I may, in paragraph 3.4.11, this is Mr. Hall
5 extracting the impact of the change in Robert Walters' change in accounting treatment. You
6 follow the figure, do you not?

7 A Yes.

8 Q The gross profit line figures, when one compares them, are identical, are they not,
9 notwithstanding the restatement?

10 A Yes.

11 Q And one can very clearly work out what the difference is in the headline turnover figure
12 because it is those restatement figures on the right hand side?

13 A Yes.

14 Q So one can see the same numbers ----

15 A Yes.

16 Q -- on the page, they have just been reconfigured, or reformulated in terms of their
17 presentation, have they not?

18 A Yes, because Robert Walters have re-assessed the substance of those transactions, and I
19 totally disagree with what Mr. Hall says at 3.4.13 that that is a result of subjective
20 professional judgment, it is not.

21 Q But there is no suggestion here, is there, that Robert Walters has taken the view that this is
22 an error in their accounts, is it? They describe it as a restatement, and they set out the
23 numbers?

24 A Yes, because that is clearly allowed under FRS 3.

25 Q So this is not an error, notwithstanding that the change in their turnover line is 78, and I am
26 assuming that these are millions?

27 A Yes.

28 Q So £78,540,000 change in the turnover figure, but not an error?

29 A Yes, because under accounting literature under FRS 3, an error is not defined as something
30 in response to a change in the accounting framework, that would be grossly unfair to say
31 that accounts would include errors if you changed the landscape that they are prepared in.
32 So the landscape that Robert Walters prepared its accounts in changed, they responded to
33 that change, it is never going to be an error.

1 Q There may be a bit of confusion here between us, Mr. Allen, because in your second report,
2 tab 4 of the expert bundle (CB4), at page 306, para 4.1.3(b) you say in parenthesis at the
3 end:

4 “(which, on the basis of the value of the amounts involved, would appear to
5 constitute a material error)”.

6 Here you are talking about potential changes in the format or presentation of the appellants,
7 namely Hays, Eden Brown and Anders?

8 A Yes.

9 Q So what you say here is: “it is on the value of the amounts involved” that it goes towards
10 material error?

11 A There are two factors. If you are comparing this with the Robert Walters’ treatment, the
12 Robert Walters’ treatment was in response to a change in the accounting framework, which
13 is clearly not an error, it is a change as a result of changes in accounting standards. The
14 position here is that if Hays were to change its basis for forming a judgment under these
15 particular contracts to go from principal to agent, it would have to recognise that it had
16 erred in its previous judgment. I believe Mr. Hall agreed with that statement in his evidence
17 yesterday.

18 Q This is maybe where the confusion lies. What you say in 4.3.1(b) is that on the basis of the
19 value of the amounts involved that leads one to conclude that it is a material error. But, that
20 is not right, is it?

21 A Well, it will be most of the turnover.

22 Q Let me just see if I can establish that proposition with you. Take up NCB4, Volume 2,
23 p.1773, para. 5(c). This is IAS8. You will recognise this, will you not, Mr. Allen? You
24 referred to it yourself.

25 A Yes.

26 Q Changes in accounting estimates and errors. The IAS standard. Paragraph 5(c) at p.1773.
27 Do you see the definition there of ‘material omissions’?

28 A Yes.

29 Q So, whether or not something is a material omission or error depends not just upon the size
30 of it, but the nature of it. That has to be judged in the surrounding circumstances.

31 A Yes.

32 Q You were here yesterday, were you not, when Mr. Sterling gave his evidence. I will
33 happily take you to the transcript, if you like. His evidence was that one could re-state --
34 He was talking about the Eden Brown accounts. It would not be material; it would just be a

1 change of terminology, and all the numbers would remain the same, would they not? He
2 was talking about changing the turnover figure to become gross transaction value, and
3 changing the net fees figure and labelling it turnover, but all the numbers staying the same.

4 A Yes.

5 Q That would not be a material error, would it?

6 A It would because the turnover number would have changed. I would disagree with Mr.
7 Sterling on that point.

8 Q I see. But, how is that a material error when one has regard to para. 6 of this IAS8 which
9 talks about

10 “--assessing whether an omission or mis-statement could influence economic
11 Decisions of users, and so be material, requires consideration of the characteristics
12 of those users ... [those] users are assumed to have a reasonable knowledge of the
13 business and accounting and a willingness to study the information with
14 reasonable diligence”.

15 Surely, Mr. Allen, it must be right, must it not, with a reasonably diligent user of the
16 account who knows about the business and he sees the exact same numbers are in the
17 accounts - they are just re-stated and they have got different labels -- Surely, Mr. Allen, that
18 is not going to be a user who is being materially misled, is it?

19 A Here, we're in International Accounting Standards which is the set of standards that Hays
20 prepares its accounts to. If Hays were to move to an agency basis for reporting, as it did
21 with the HPPS arrangement, and as we saw, caused a reduction of £200/£250 million in
22 turnover, then if Hays were to do the same in respect of these particular transactions then
23 one would imagine that it would do the same in respect of recording them, i.e. they would
24 disappear from the turnover. It is not even a requirement. The Guidance under UK GAAP
25 says that you can report the gross throughput value. We looked at this yesterday with
26 regard to department stores and concessions. They are not sales of the business. They are
27 billings on which you are purely earning a commission. So, they are very different in
28 nature. That is what Mr. Sterling was referring to yesterday - that he was going to move his
29 turnover into what would potentially be an optional disclosure. Now, under International
30 Accounting Standards - which is what we're looking at here and which is the framework
31 that Hays operates under - they do not have that option. Now, they could disclose that if
32 they wanted to, if they felt that that gave a fairer presentation. But, in relation to the change
33 that they made in relation to HPPS, they simply removed those amounts from their turnover

1 - as did Robert Walters, as we just saw. So, effecting the impact of this error would remove
2 a significant chunk of turnover.

3 Q Thank you, Mr. Allen. I have just one more topic left with you, briefly. You mentioned a
4 moment ago that you had analysed twenty sets of recruitment agency accounts.

5 A Yes.

6 Q One of them was not the set of accounts for Comensura, was it?

7 A No.

8 Q Can you just turn to Mr. Hall's report - the second report? That is in the expert bundle
9 (CB4), Tab 2, page 158, para. 3.5.14. Mr. Hall first starts his references to Comensura.
10 You are obviously familiar with that passage, are you not? Just before I ask you any
11 detailed questions, you are familiar with this passage of his report, are you not?

12 A Yes.

13 Q Where he talks about Comensura and Matrix as being recruitment process outsourcing
14 companies. Yes?

15 A Yes.

16 Q You know what they are, do you not?

17 A I mean, I had a look at the accounts of Comensura as attached to Mr. Hall's report. I don't
18 know where I would find that in the bundles, but it was one of the exhibits. The principal
19 activity of the company was described as something like ----

20 THE CHAIRMAN: Would you like to see it?

21 A Yes. It might help. But, it was something like the management of contingent labour
22 services for neutral vendors, and something else. It was an odd description.

23 MR. HARRIS: I will happily take you to it, Mr. Allen, in the time we have left. NCB4. This is
24 the one that is referred to as Mr. Hall's Exhibit 16. It is NCB4, Volume 2, Tab 3, p.1589.

25 THE CHAIRMAN: I think that is the vendor agreement. You want the annual report.

26 A Yes.

27 THE CHAIRMAN: Page 1483.

28 A If we turn to p.1486 - this is the passage I was trying to recall.

29 "The principal activity of the company is the management of contingent labour
30 spend for both private and public sector clients on both a vendor independent and
31 a vendor neutral basis."

32 Now, I actually don't know what that means. I was trying to determine what the activity of
33 the company actually was. I did go as far as looking at the parent company, which I think
34 was called Impellam, to see how Comensura was dealt with in its parent company. It was

1 squarely not placed within the provision of temporary workers in their financial statements.

2 I obviously followed this point through from Mr. Hall's report.

3 MR. HARRIS: As I have no doubt you should have done. Maybe I could short-circuit this in a
4 different way. Take the witness statement bundle (CB3) and turn to Tab 5. That is the
5 second witness statement of Mr. Venables. Turn to page 84, para. 36. Mr. Venables is a
6 man who, in evidence orally, described himself as having twenty years' experience in the
7 recruitment business and having been financial director of Hays, one of the biggest
8 operators since 2006. Do you see how, half-way down, he refers to the very paragraphs of
9 Mr. Hall's report to which I have just taken you. He said that,

10 "-- where Mr. Hall considers the accounting treatment of Matrix, Alexander Mann
11 and Comensura. Hays supplies temporary workers to each of these recruitment
12 process outsourcing companies (RPOs). Although the services is offered by each
13 of the RPOs is essentially the same, as Mr. Hall demonstrates, if Matrix and
14 Alexander Mann account on a principal basis, while Comensura accounts on an
15 agency basis".

16 My first question to you is: You have no reason to dispute Mr. Venables when he describes
17 the services offered by the three RPOs as being essentially the same, have you?

18 A Yes, but I don't know what an RPO is actually doing or what the substance of its
19 arrangements are.

20 Q I accept that. But, as regards the essentiality of the sameness, to use rather odd English, that
21 you cannot dispute, can you? (Laughter)

22 A I am not really sure how to answer that.

23 THE CHAIRMAN: Rephrase the question.

24 MR. HARRIS: I will rephrase the question. I am coming to the end, Mr. Allen. Bear with me.

25 Mr. Venables describes the activities of these three companies as essentially the same. You
26 have no basis to dispute that evidence from him, have you?

27 A No, but he does not actually say what they are doing.

28 Q Right. But, the important point is that they are essentially the same, and yet they have
29 accounted for their recruitment process outsourcing - whatever exactly that may mean - on a
30 different basis, have they not, when it comes to agency and principal and hence the
31 presentation in the turnover figure of either gross turnover or net fees.

32 A Yes. My point in relation to the industry was in relation to the twenty sets of accounts that I
33 was able to look at, but I was looking at the services in relation to temporary workers, and
34 for that service line the accounting was uniform across the industry.

1 Q I am grateful, Mr. Allen. Thank you for bearing with me, particularly at the end there. I
2 have no further questions, Sir.

3 Cross-examined by Miss KREISBERGER

4 Q Mr. Allen, you will be pleased to hear I only have a very few questions for you this
5 morning. They are on behalf of CDI. Mr. Allen, can I ask you to take your first report and
6 turn up p.223 (CB4, Tab 3) Can I ask you to have a look at para. 3.4.8 which is at the
7 bottom of that page? Sub-paragraph (a): you summarise AndersElite's argument there. It
8 is an argument relating to the case law. I do not think I need to read it out. Then, if we go
9 over the page, to para. 3.4.9 you say,

10 "On the basis of the above arguments, the appellants contend that net fees or gross
11 profit (in the case of Eden Brown and AndersElite) constitutes applicable turnover
12 under the 2000 order definition".

13 A Yes.

14 Q Mr. Allen, is that statement, as it relates to CDI, based on our Notice of Appeal?

15 A Yes.

16 Q Could you just point me to the part of the Notice of Appeal on which that is based? There is
17 no source on that paragraph cited.

18 A Let me just read the paragraph before giving that.

19 Q The Notice of Appeal is in CB2.

20 A Sorry. I was just reading my report as to what I've said. (Pause whilst read): Sorry. Could
21 you take me to the ----

22 Q It is CB2, Tab 7. Mr. Allen, if you are unable to find it, perhaps in the interests of saving
23 time, will you take it from me that that is not stated in our Notice of Appeal?

24 A Okay.

25 Q In fact, if I take you to Footnote 20 on p.243, at the bottom of the page there -- You can just
26 read that to yourself, Mr. Allen. But, we note there that in defining relevant turnover, which
27 is what this ground is directed at, the OFT is not bound by the terms of the 2000 order. So,
28 that actually contradicts what you say at 3.4.9 of the report.

29 A Okay. I mean, obviously, I haven't read the whole thing, but I'll take your representation.

30 Q So, we can just accept that 3.4.9 is wrong as it applies to CDI.

31 A Yes, if that's what the Decision says.

32 Q Thank you, Mr. Allen. Mr. Allen, if I could ask you to take up an authorities bundle 1, Tab
33 19.

34 A I do not have that.

1 Q There is another way round this. We can take it in the core bundle.

2 THE CHAIRMAN: One can be passed over. (Same handed) A Commission Notice.

3 MISS KREISBERGER: Mr. Allen, could I ask you to turn to p.35 of that tab? You will see there

4 is the heading there, 'Turnover' - the concept of turnover.

5 A Yes.

6 Q This is the Commission Notice - the jurisdictional notice in the merger context. It is

7 something which you address in your report. If we just turn to para. 158, there the Notice

8 starts out by saying - and I am paraphrasing here - that turnover essentially equates to the

9 total amount of sales for providers of services. We get that from the last sentence there.

10 "The turnover of the undertaking concerned consists of the total amount of sales

11 for the provision of services in the last financial year."

12 A Yes.

13 Q You agree with that, Mr. Allen?

14 A It is so, yes.

15 Q It is just the language. So, if we then go to the next paragraph - and, again, this is purely on

16 the wording of the Notice - it says that that principal may have to be adapted in certain

17 circumstances, even if the intermediary invoices the entire amount to the final customer

18 because turnover in that case equates to commission -- You see that is at the second

19 sentence of 159. So, the principal may have to be adapted to the specific conditions, and

20 even if the intermediary invoices the entire amount, the turnover of the intermediary

21 consists solely of the amount of its commission.

22 A Yes, if the intermediary invoices the entire amount the turnover consists solely of the

23 commission, yes, and they may have to adapt in those circumstances.

24 Q Yes. So, we are agreed. So, what the Commission is saying there is that if you are dealing

25 with an intermediary you look at its turnover as it appears in the accounts and you isolate

26 that element of it which represents commission, however that may appear.

27 A Yes. I mean, I am looking at this as an accountant - not as a lawyer.

28 Q Absolutely. I would not ask you to stray outside of that territory. Mr. Allen, you agree with

29 that. That is what the Commission there is saying. It is quite plain.

30 A It is difficult for me to take a piece of legislation in isolation and look at definitions of

31 turnover.

32 Q Mr. Allen, this is something you address quite specifically in your report.

33 A Yes. I deal with the point in relation to the example here, where it gives examples such as

34 media or travel agencies as an intermediary. I talk about ----

1 Q We will turn to your report in a moment. But, you give an interpretation of this paragraph.
2 So, I am not asking you to do anything that is not covered in your report, just to be clear. I
3 am not asking a very specific question as to the definition of turnover. All I have put to you
4 - and I just want to be clear that you agree with me - is that if you are dealing with an
5 intermediary - and this is what the Commission says - you look at its turnover as it appears
6 in the accounts and you say, "That part of the turnover which equates to commission is what
7 we treat as turnover. Even it invoices the entire amount to the final customer, the turnover
8 of the undertaking acting as an intermediary consists solely of the amount of its
9 commission".

10 A No, I don't think it is saying that.

11 Q I have just read this sentence out to you.

12 A I think it's saying that even if the service is sold through intermediaries, they might bill the
13 whole amount, but the commission is only the bit -- that's only the part they're recording.

14 THE CHAIRMAN: Miss Kreisberger, I know that Mr. Allen does address this in his report. But,
15 what the Commission is saying -- or what it means when they are dealing with turnover for
16 the purpose of merger regulation is obviously not in an accounting sense, and really it is
17 then a question for us, and, I think, not for Mr. Allen, whether he has expressed an opinion
18 on it, or not.

19 MISS KREISBERGER: Except, Sir, that he does give a very specific accounting interpretation of
20 these paragraphs. I can take you to his report ----

21 THE CHAIRMAN: I think it might be better if, having reminded Mr. Allen of what the Notice
22 says, you ask him with regard to what he says in his report.

23 MISS KREISBERGER: Sir, I am grateful. If we then turn to the report at p.235, para. 4.4.13, this
24 is where you draw your conclusion, Mr. Allen, and I admit to being somewhat baffled by
25 this. I should just clarify. You say 'the regulation may be directed at clarifying the value of
26 turnover'. You mean the Notice that we have just been looking at?

27 A Yes.

28 Q Yes. So, that is an error. So,
29 "-- the [Notice] may be directed at clarifying the value of turnover in instances
30 where an entity is acting as an agent or intermediary ... and presents in its financial
31 statements the gross value of sales throughput ---"

32 A Yes. I mean, all I'm saying here - and I'm saying 'may be', quite carefully - is that the
33 regulation refers to the media companies and package holidays and advertising -- certain
34 sectors whether agents or intermediaries, and under UK GAAP, having looked at certain

1 companies that report as intermediaries, they disclose their gross turnover, their throughput

2 ----

3 Q Just to be clear there, Mr. Allen, when you say 'certain intermediaries', of the examples
4 given by the Commission you referred to one of each - you give two examples. You give
5 the example of one travel agent and one media agency.

6 A Yes. I have been looking at examples of those types of companies, yes, as to how they
7 would disclose under UK GAAP.

8 Q One example of each type of company.

9 A Yes.

10 Q So on the basis of those specific examples you deduce that the Commission is looking at
11 something really very specific indeed. Yet, just coming back to the Notice, Mr. Allen, it
12 does not mention the concept of gross value of sales throughout at all, does it?

13 A No, but it is talking about the invoicing of the full value where it is not recognising the
14 value of the sale - it's recognising commission.

15 Q It does not, does it? It says that where you are dealing with an intermediary turnover equals
16 commission. That is actually all the Notice says, is it not.

17 A If the intermediary invoices the entire amount to the final customer, the turnover of the
18 undertaking acting as an intermediary consists solely of the amount of its commission. All I
19 am doing is looking at where they do invoice the full amount and how they record that in
20 their financial statements in these two examples.

21 Q You look at two examples of how they do that. On the basis of those two examples you
22 give a very specific interpretation of this and you say that on the basis of the fact that these
23 two undertakings happen to account in this particular way - and it is voluntary disclosure ---

24 A Correct.

25 Q You say that on the basis of those two examples the Commission must be talking about
26 companies which report turnover on a net basis and make an additional voluntary disclosure
27 of gross value of sales throughout. Would you agree with me, Mr. Allen, that that is a very
28 specific interpretation?

29 A As I say, it appears to me that 'may be' is what I say.

30 Q May be. So you accept that there is an alternative interpretation.

31 A Maybe, yes. I would not want to interpret the legal ramifications of whatever that definition
32 is saying. From an accountant's perspective I am just saying that this may be what it is
33 directed at, but I couldn't give a definitive opinion on it, and I would not.

34 Q You would not on the basis of two examples.

1 A No. Maybe.

2 Q So, you accept the alternative explanation, where we began.

3 A Yes. That's exactly why I put 'may be'.

4 Q So, given that you accept that you would also then accept, Mr. Allen, the last sentence of

5 your para. 4.4.13. You say that AndersElite's claim that it is an analogous position to travel

6 agents and media agencies 'does not appear to me to be supported' -- Well, you have told us

7 that you only offer this as one of various interpretations ---

8 A That is on the basis of the examples.

9 Q Of those two examples. I think we are agreed on that. You would agree with me, therefore,

10 that that last sentence does not stand if your suggested interpretation, in your words, may be

11 ---

12 A Correct.

13 Q -- also does not stand.

14 A Yes. As I say, that does not appear to be supported.

15 Q So, it is a suggestion which you accept ---

16 A It is deliberately tentative.

17 Q You accept that may be wrong.

18 A Yes. From an accounting perspective it's deliberately tentative. I agree.

19 Q Thank you, Mr. Allen. I have no further questions.

20 Re-examined by Mr. UNTERHALTER

21 Q May I ask you, Mr. Allen, to look at CB3, the witness statement bundle? Under Tab 7 --

22 You were taken to Mr. Shepperd's statement, and particularly p.105, para. 8. The sentence

23 in the middle of that paragraph where it is said.

24 "Net fees is the figure that allows analysts to assess the actual economic

25 performance and activity of the business carried out by recruitment agencies".

26 What is the perspective of analysts for the purposes of making that statement?

27 A Analysts are being engaged to review performance and inform the market as to investment

28 Decisions in particular listed companies.

29 Q If I could then ask you to turn to NCB4, Volume 1, p.137 where we read Mr. Venables

30 saying,

31 "The performance of the Group has been impacted by deteriorating conditions. In

32 all our markets, particularly in the second half of the year, Group turnover

33 decreased by 4 per cent and net fees decreased by 15 per cent".

1 As an accountant reading that passage, what does it tell you about the activity of the
2 business?

3 A That at the sales level it has shrunk and at the gross profit level it has shrunk more
4 considerably - presumably because, as I said before, there was some interplay between the
5 two metrics.

6 Q Yes. Then, secondly, if I could take you to the expert bundle, CB4, and your first report
7 under Tab 3, turn to p.242, para. 5.3.5 where you say,

8 "Consideration of these indicators and the determination of whether an entity is
9 acting as a principal or as an agent are made by management ----"

10 Now, where we read in respect of temporary workers a turnover figure, has management
11 made a determination and what determination have they made?

12 A That the nature and substance of the relationships is that of a principal.

13 Q Now, it was said of you on a number of occasions that you had omitted to deal with three of
14 the factors that appear in the immediately preceding paragraph. Would you just tell us
15 where it was that you did feel that you could comment on the factors, where it was that you
16 felt you could not and why?

17 A I commented on the factors where I believed I had adequate information to make a
18 comment, and where I felt the information was either inadequate or unrepresentative to
19 make a comment, I did not make a comment.

20 Q Lastly, it was suggested to you that these questions of judgment are ones of a subjective
21 nature and you spoke about the relevant context. You began to speak about your
22 differences with Mr. Hall in relation to the relevance of that context?

23 A Yes.

24 Q But I think in my learned friend's enthusiasm to proceed with haste he perhaps did not quite
25 let you explain what your difference with Mr. Hall was on that score. Could you briefly tell
26 us what that is?

27 A In relation to the difference of approach, if I had been in Mr. Hall's position then the first
28 thing I would have done I would have talked to Hays about how and why they had formed
29 the judgment they had over the years, that they had been accounting for these transactions
30 through the framework set by the accounting pronouncements and the changes in it. I
31 would then, having regard to that, have looked at how the industry reports and I did that in
32 my own report in respect of the 20 companies that I had identified in the time, to see
33 whether Hays was consistent with the industry and Mr. Hall's report essentially is based on
34 a management determination that there is fine judgment – I am not sure they are the

1 particular words, but they are certainly what Mr. Sterling said. If you sought variation
2 across the industry as you do, Mr. Hall gave the example in his report of property
3 companies and how there is a variation in accounting across that industry. That suggests
4 that some people are coming to different Decisions for certain reasons. In the recruitment
5 industry it appeared that there was homogenous accounting across the industry. So one
6 would imagine that with similar contracts in place, and there is no reason to believe that
7 they would be massively different, that you would account in the same way for the same
8 substance of transactions so that would set your framework. As an expert I would then be
9 interested in how Hays could account differently, and Hays could account differently if the
10 substance of its relationships was in some way very different to the rest of the industry
11 because the industry seems to have set a standard. As I said in my evidence, what happens
12 in these situations with regard to the development of the accounting for particular
13 transactions is that it goes through an evolution and that judgment goes through an
14 evolution and it arrives at an equilibrium, and the equilibrium in the recruitment industry is
15 to account for these relationships based on their substance which is that of principal.

16 MR. UNTERHALTER: Thank you. I have no further questions.

17 THE CHAIRMAN: We have no questions, thank you very much, Mr. Allen, you are released.
18 Five past two we shall return.

19 (The witness withdrew)

20 (Adjourned for a short time)

21 THE CHAIRMAN: Just before you begin, Lord Pannick, could I ask Miss Kreisberger, have you
22 and those assisting you been able to locate the document that you referred to yesterday, the
23 SS2?

24 MISS KREISBERGER: Yes, I understood it had been added to the bundle.

25 THE CHAIRMAN: It has been supplied, has it?

26 MISS KREISBERGER: Yes, it has, it has been added.

27 THE CHAIRMAN: Yes, Lord Pannick.

28 LORD PANNICK: Can I take the Tribunal away from indicators of an agency relationship, Mr.
29 Harris's concern this morning and back to indicators of a lack of principle and
30 disproportionality in relation to the MDT?
31 May, I begin, Sir, Members of the Tribunal, with a general point. My friend, Mr.
32 Unterhalter, in his opening submission on Monday, said that the OFT enjoys a margin of
33 appreciation in the assessment of the relevant penalty and he said that it is incumbent on us
34 to identify what he described as a "benchmark"; a benchmark by reference to which we can

1 identify error. He said it is insufficient for us to rely on what he called “an intuitive
2 judgment”, I am referring to the transcript of Monday’s proceedings, p.26.

3 Our submission is that the approach of the OFT is outside the scope of any legitimate
4 discretion and it involves errors of principle. The benchmark, of course, is proportionality.
5 An assessment of proportionality is necessarily dependent on the facts of the individual
6 case, and however wide the scope of the discretion and the powers of the OFT, they are
7 circumscribed, at least to this extent, that the OFT cannot absolve themselves from
8 compliance with the fundamental principle of proportionality under UK and EU law. So
9 my friend’s reliance on discretion can provide no answer if, and to the extent, that we can
10 show a lack of proportionality and errors of principle. We do not put these points forward
11 on the basis that Mr. Allen answered some of Miss Kriesberger’s questions at the end of the
12 morning session, that is “maybe”. We put these matters forward on the basis that we can
13 establish clear errors of principle, and a manifest disproportionality, not that we need to go
14 that far.

15 These errors of principle, as we will describe them, are of considerable significance in the
16 case of my client, Hays, because as the Tribunal has seen prior to Step 3, the penalty was
17 £15.169 million. Step 3 increased the penalty to £41.3 million, and at the very least this
18 must establish a need to assess with particular care the way in which Step 3 is applied in this
19 case.

20 Sir, as I indicated in opening we have three points and under the second and third points
21 there are three factors that we want to emphasise. The first point is, and let there be no
22 doubt about it, we recognise that a penalty in this context may include an element for
23 deterrence, that is specific deterrence and general deterrence. But, and it is the important
24 “but”, we say that the penalty must be linked, and properly linked, to culpability, and not as
25 we say, and I will develop this point, as in the MDT as it has been applied, dissociated from
26 culpability, and purely instrumental, that is based on what the OFT considered necessary to
27 secure deterrence.

28 The starting point is that the OFT accepts that Steps 1 and 2 assess culpability by reference
29 to the seriousness of the wrongdoing. Step 1 is measuring the scale of culpable conduct,
30 and Step 2 is assessing its duration. We see this in the OFT defence, core bundle 2.

31 THE CHAIRMAN: Scale and seriousness?

32 LORD PANNICK: Yes, scale and seriousness, both of them are relevant.

33 THE CHAIRMAN: The two elements in ----

1 LORD PANNICK: Precisely so. If we go to the OFT's defence at core bundle 2, tab 2, we see
2 how the OFT describe the matter at para. 124, they say: "The twin objectives of the
3 imposition of financial penalties are set out [above]" – I will come back to that in a moment.
4 Then they say this: "The Step 1 assessment (and matters considered at Steps 2 ..." that is
5 duration and then the mitigating and aggravating factors at Step 4, "... involves
6 consideration of the seriousness of the infringement, i.e. the first policy objective."
7 That, Sir, Members of the Tribunal, is a reference to the Guidance – I will just give you the
8 reference, it is vol.1 authorities, tab 15, para.1.4. There are twin objectives, as you know,
9 the question of culpability and the question of deterrence.
10 Step 3 serves a distinct purpose. It is concerned to ensure that the penalty has a sufficient
11 deterrent effect, and we see this at para. 125 of the defence, if the Tribunal has kept that
12 open (CB2, tab 2) para. 125: "The other objective is deterrence." Then there is some detail
13 which the Tribunal will already have read, and in the penultimate sentence of 125:

14 "For this reason, the OFT may adjust the penalty upwards at Step 3 to achieve the
15 objective of deterrence."

16 The purpose and effect of Step 3 is, as the Decision states, simply to ensure that the penalty
17 reaches a level sufficient to achieve deterrence. We see this in the Decision, which is CB1,
18 p.314, this is in the assessment of the penalty for Hays. It is para.5.412, the detail is set out
19 and it says at the end: "... so as to ensure that it reaches a level sufficient to achieve
20 deterrence." So the OFT, under Step 3, are doing no more and no less than looking for a
21 penalty that will have the desired deterrent effect .

22 THE CHAIRMAN: Pausing there, thus far do I understand rightly, you do not quarrel with the
23 principle.

24 LORD PANNICK: We do not quarrel with the principle that it is permissible to look at
25 deterrence as well as culpability. Our point is that it is impermissible to adopt a penalty
26 purely on the basis that it achieves a deterrent effect that is dissociated from any
27 consideration, any linkage with culpability.

28 THE CHAIRMAN: What I do not quite follow, and it is no doubt my failing, leave aside MDT,
29 and the MDT methodology which you attack root and branch, once you have gone through
30 Steps 1 and 2 to deal with culpability if you make any further adjustment – any further
31 adjustment – almost by definition the adjustment is dissociated from culpability because
32 you are making adjustment purely for deterrence, so that is why I am slightly lost at the
33 moment.

1 LORD PANNICK: Any addition for deterrence will involve a penalty more serious than the
2 penalty would have been were it confined to questions of culpability.

3 THE CHAIRMAN: Yes.

4 LORD PANNICK: That I respectfully agree with. Our complaint is that what the MDT involves
5 is to arrive at a result which is purely instrumental. In other words, you say: “How much
6 penalty do I need in order to deter?” and that result may be vastly different from the penalty
7 that would have been appropriate purely by reference to culpability, and there is no attempt
8 – this is our complaint – no attempt to check the result that is arrived at by reference to
9 deterrence so as to ensure that it bears some reasonable relationship to what would have
10 been the figure under culpability. To give a very simple example ---

11 THE CHAIRMAN: That I understand.

12 LORD PANNICK: Let me give a very simple example. Suppose that you wished to deter people
13 from driving their vehicles too fast. The object is deterrence. You may decide that in order
14 to achieve that objective you need to impose a very, very severe sanction because it is very
15 easy to drive more than 70 miles per hour on the motorway, it is very dangerous to do so, so
16 you will impose a very serious sentence. If you are only looking at culpability you would
17 arrive at a much lower sentence. My point is it cannot be right in principle simply to ask
18 yourself what sentence, what penalty do I need in order to achieve deterrence? Of course I
19 accept that any regard to deterrence will lead to a penalty more severe than pure culpability,
20 my objection on behalf of Hays is to an approach that looks only at deterrence, and seeks to
21 arrive at a result that is necessary to achieve deterrence, dissociated from any link or check
22 with the confinement of culpability, and that is our complaint. Our complaint is that Step 3
23 does not proceed by reference at all to the figure arrived at under Steps 1 and 2, it is entirely
24 dissociated from it. It is not a question of saying Step 1 and 2 arrives at a defined figure and
25 in order to allow for the important consideration of deterrence we must add, say, 50 per
26 cent, or perhaps in an exceptional case 100 per cent. There is no link between the Step 1
27 and 2 figure, and the Step 3 figure which simply replaces it, and replaces it by reference to
28 total worldwide turnover, which is not said by the OFT, nor could they, to have any link
29 with the concept of culpability.

30 There are two possible answers to this point i.e. there is no link between Step 3 and
31 culpability. The first possible answer was that given by my friend in his opening statement.
32 In his opening statement (transcript, pp. 32-33 day one) Mr. Unterhalter said that the MDT
33 is rooted in culpability because, he said, in many cases the Step 1 and 2 figure suffices to
34 secure deterrence.

1 With great respect that will not do. It does not establish a link between the Step 3 figure
2 and culpability to say that there are some or many cases where Step 3 is not applied at all.
3 We are concerned with a case where Step 3 is applied, and where there is no link between
4 the Step 3 result and culpability.

5 The other possible answer, which my friend did not give in his opening statement, but let
6 me deal with it in case he wants to address it in his submissions. It is true, and I accept, that
7 the Step 3 figure uses the same 9 per cent starting point as was used in Step 1, i.e. the
8 seriousness figure. But of course the figure to which the 9 per cent is applied at Step 3 is 15
9 per cent of the total worldwide turnover. So it does not create a satisfactory link with
10 culpability to use the same 9 per cent figure at Step 3 because the total figure to which 9 per
11 cent is being applied has no connection with culpability, it is simply not a figure that has
12 any relevance to culpability.

13 THE CHAIRMAN: Is not the real point, if I may, because of course Step 2 is also applied to
14 worldwide turnover, that the Step 1 in assessing culpability, says that relevant turnover is
15 what should be used at Step 1?

16 LORD PANNICK: Absolutely.

17 THE CHAIRMAN: And MDT throws relevant turnover out of the window and puts in MDT. It
18 does not ignore Step 2, it does not ignore part of Step 1, what it does it ignores relevant
19 turnover.

20 LORD PANNICK: Well I respectfully agree. It may come to the same thing. I respectfully
21 adopt that. Relevant turnover is of course used at Step 1 by the OFT because it is their
22 assessment in assessing culpability that it is relevant turnover and nothing else that matters.

23 THE CHAIRMAN: That is why it is relevant.

24 LORD PANNICK: Exactly. And the bizarre element of Step 3 is that having carefully assessed
25 Step 1 and Step 2 which, as I have shown the Tribunal, is what the OFT regard as material
26 to culpability, that figure is then put aside, it is not the basis, the foundation of an uplift
27 which may, and this was my earlier answer, Sir, to you, may be appropriate on the facts of a
28 particular case. It may be appropriate in many sentencing contexts to say: "This is what
29 your offence deserves, purely by reference to culpability, but I am not going to stop there.
30 I, as the sentencing judge, or the person imposing the penalty, whether it is a disciplinary
31 context, or any other context, I have to have regard to the need for deterrence, there is a lot
32 of this going on", or "It is very important to deter people. So I am not going to stop at the
33 penalty that would otherwise be appropriate, I am going to raise it to a degree", but that is

1 not what happens here, and that is our fundamental first objection to the application of the
2 MDT.

3 What is happening here is that Step 3 is simply displacing the assessment of culpability, an
4 assessment by reference to relevant turnover, and it is doing so despite the OFT's own
5 Guidance that there are twin objectives. Can I just take the Tribunal to this, this is
6 authorities bundle 1, and it is tab 15, para. 1.4: "Policy Objectives", and what the OFT tell
7 us, it is very simple statement:

8 "The twin objectives of the OFT's policy on financial penalties are:

9 * to impose penalties on infringing undertakings which reflect the seriousness of
10 the infringement"

11 - that is Steps 1 and 2 –

12 * to ensure that the threat of penalties will deter undertakings from engaging in
13 anti-competitive practices."

14 Our complaint is that where the MDT is applied, there are not twin objectives. What we
15 have is deterrence being the overwhelming paramount factor, unaffected by the culpability
16 factor. Step 3 simply replaces the figure which has been arrived at under Step 1 and Step 2.
17 It does not build on it, use it as a foundation stone.

18 THE CHAIRMAN: I understand that, but I do not think it is quite right to say it is unaffected by
19 seriousness, because the 9 per cent is applied to it, and if it was less serious 5 per cent.

20 LORD PANNICK: I accept that, but the crucial element in the assessment of the deterrence
21 figure in Step 3 is the total worldwide turnover figure times 15 per cent, times the
22 seriousness figure. What is crucial is the worldwide turnover figure in assessing the figure
23 that one arrives at in relation to deterrence. That is the crucial, central element of the
24 deterrence figure. So, we are not, contrary to suggestions that my friend has made at
25 various points in the skeleton arguments, seeking to challenge the Guidance on MDT. We
26 are relying on the Guidance at para. 1.4. I will show the Tribunal in a moment that we are
27 relying on other paragraphs of the Guidance.

28 Our submission is, yes, deterrence is a relevant objective, but the OFT must comply with
29 proportionality, and proportionality is breached unless the OFT start from the Step 1 and
30 Step 2 figure and build upon it, and do not, as they do in our case, displace the Step 1 and
31 Step 2 figure, and conduct a different exercise which is instrumental, designed to arrive at a
32 result which secures sufficient deterrence as they see it. The result, as we have seen in our
33 case, is to lead to a Step 3 figure that is almost three times greater than the amount that the

1 OFT itself considered was justified in order to punish the seriousness of our conduct. That
2 is our first point.

3 Our second objection is that the OFT must give individualised consideration to the
4 circumstances of Hays, and any other company that they are considering imposing a penalty
5 on. Our second objection is that what the OFT did not do in our case was ask themselves
6 whether the figure produced by Step 1 and Step 2 is in fact, in the circumstances of our
7 case, sufficient to secure deterrence. Instead, what the OFT did was to proceed on an
8 assumption that only a proportion - 15 per cent - of worldwide turnover multiplied by the 9
9 per cent -- only a proportion of worldwide turnover can suffice for the purposes of
10 deterrence.

11 Now, individualised assessment is required by the Guidance. Can I ask the Tribunal please
12 to look again at the Guidance (authorities bundle 1, Tab 15) at para. 2.12 on p.10. This is
13 under Step 3. There the Tribunal will see on p.10 at the top, “Step 3 - Adjustment for other
14 factors”. At para. 2.12,

15 “The assessment of the need to adjust the penalty will be made on a case by case
16 basis for each individual infringing undertaking. This step may result in an
17 increase or a reduction of the financial penalty calculated at the earlier step”.

18 We say that is absolutely right. It must be right in principle. If one looks then at para. 2.11,
19 that explains that there may be a need for deterrence. In the second half of para. 2.11 - and,
20 of course, the Tribunal will want to read all of this - we are helpfully told by the OFT,

21 “Considerations at this stage [Stage 3] may include, for example, the OFT’s
22 objective estimate of any economic or financial benefit made or likely to be made
23 by the infringing undertaking from the infringement and [and this is what I
24 emphasise] the special characteristics, including the size and financial position of
25 the undertaking in question”.

26 So, we are told that it is necessary at Step 3 to have an individual assessment of this
27 company ----

28 THE CHAIRMAN: That would include worldwide turnover.

29 LORD PANNICK: It may well do.

30 THE CHAIRMAN: Depending on the size and financial position.

31 LORD PANNICK: Absolutely. I do not dispute that worldwide turnover at least may be - and in
32 many cases will be - a relevant consideration. Sir, you have my point. My point is that it is
33 not the only consideration. My objection is to the use of a formula which makes worldwide
34 turnover the exclusive consideration at Step 3. So, Step 3, we are told by the OFT, must be

1 done on an individualised basis. Again, I am not challenging the Guidance. I am relying
2 upon it. Individual consideration is essential as the OFT there state at paras. 2.11 and 2.12,
3 even when one is considering general deterrence. It is obviously in relation to specific
4 deterrence that you look at the individual circumstances of this company, but paras. 2.11
5 and 2.12 are not only confined to specific deterrence. They are recognising general
6 deterrence as well. That, again, is right in principle. If I, as the person imposing the penalty,
7 want to deter other companies, they need to know that any wrongdoing by them will also be
8 punished by a sanction which is appropriate in their individual circumstances - that is, their
9 financial position.

10 So, the recurrent theme, if I may so describe it, in the OFT's skeleton argument, "What
11 about general deterrence?", is no answer to this point. One always, of course, deters, and
12 deters properly by imposing a penalty that is appropriate in the individual circumstances of
13 the individual offender.

14 Now, our complaint in the Hays' case - and I am sure that this is a general complaint that is
15 true of others as well - is that the OFT have not asked themselves whether in the
16 circumstances of Hays the sum arrived at after Steps 1 and 2 is sufficient for the purposes of
17 deterrence of a company in our financial position. Instead, what they have assumed is that
18 only a proportion of total worldwide turnover will suffice for the purposes of deterrence.
19 May I take the Tribunal - to make this good - to the Decision in CB1. If the Tribunal please
20 would go in the Decision at p.283, we can see the OFT's analysis at 5.246 where they tell
21 us,

22 "The OFT is of the view that the penalties for Randstad [and Hays] at the end of
23 Step 2 represent a low proportion of each party's total turnover".

24 That is worldwide turnover. There is then a table that establishes that. At para. 5.247 we
25 see their conclusion. This is what they say,

26 "The OFT therefore increases the penalty of Randstad and Hays at Step 3 to arrive
27 at a sum that represents, for each party, a sufficient deterrent, having regard to the
28 seriousness of the infringement and that party's total turnover".

29 That is their approach. It is a very simple approach. But, in my submission, it is plainly
30 wrong as a matter of principle. It ignores the impact in the circumstances of this company
31 of the £15 million figure that the OFT have already arrived at at Steps 1 and 2 - that is,
32 whether a penalty of that size would in fact deter a company in the circumstances of Hays.
33 It is of vital importance, if the OFT are contemplating as they are, increasing a penalty

1 which is already at the level of £15 million to ask themselves the question whether a sum of
2 that size is adequate in the individual circumstances of this company to deter.

3 THE CHAIRMAN: You say it ignores it. Are they not saying, “We look at the figure which is
4 the confidential figure --“ apparently, though I am not quite sure why if it is total turnover
5 from the accounts and if the £15 million is not confidential I cannot see how the
6 percentage ----

7 LORD PANNICK: I am told from behind that that percentage is confidential, but the sentence --
8 The amount of turnover is not known -- The relevant apparently is not known.

9 THE CHAIRMAN: I see. In any event, they have looked at the percentage and said, “Well, this
10 is rather small. Therefore a company is not going to take a great deal of notice of something
11 where that is so small a proportion”. They look at it individually, for Hays, as to what the
12 actual proportion is ----

13 LORD PANNICK: That is all they look at.

14 THE CHAIRMAN: That is all they look at, but they are looking at it individually. You can say
15 they should look at other factors ----

16 LORD PANNICK: Certainly, I accept ----

17 THE CHAIRMAN: But an individualised examination.

18 LORD PANNICK: I entirely accept there is an individualised assessment of the proportion of
19 total turnover which is turnover in the relevant market. My point - and it is a point I have
20 made already - is that that, although a relevant factor in relation to deterrence, is not an
21 exclusive factor. There are other relevant factors. I am going to come to them in a moment.
22 The OFT are proceeding on an assumption that the turnover figures identify, in the
23 circumstances of the individual company, what sum is required for deterrence. I say that
24 that plainly will not suffice. If you are asking yourself the question, “How much do I need
25 to fine Hays in order to make them take notice?”, turnover, although relevant, is not the
26 only factor that is material. If one needs judicial authority to this effect -- I say the
27 proposition is self-evident, but if one needs judicial authority we have one authority in
28 Luxembourg and one authority in the Court of Appeal. The authority in Luxembourg is the
29 *Musique Diffusion Francaise* case (authorities bundle, Volume 4, Tab 57) where the
30 European Court of Justice pronounced on relevant principles at Law Report p.1908. At
31 para. 120,

32 “In assessing the gravity of an infringement regard must be had to a large number
33 of factors, the nature and importance of which vary according to the type of
34 infringement in question and the particular circumstances of the case. The factors

1 may, depending on the circumstances, include the volume and value of the goods
2 in respect of which the infringement was committed and the size and economic
3 power of the undertaking and, consequently the influence which the undertaking
4 is able to exert on the market.

5 121. It follows that, on the one hand, it is permissible, for the purpose of fixing
6 the fine, to have regard both to the total turnover of the undertaking, which gives
7 an indication, albeit approximate and imperfect, of the size of undertaking and of
8 its economic power, and to the proportion of that turnover accounted for by the
9 goods in respect of which the infringement was committed, which gives an
10 indication of the scale of the infringement. On the other hand, it follows that it is
11 important not to confer on one or the other of those figures an importance
12 disproportionate in relation to the other factors and, consequently, that the fixing
13 of an appropriate fine cannot be the result of a simple calculation based on the
14 total turnover. That is particularly the case where the goods concerned account for
15 only a small part of that figure. It is appropriate for the court to bear in mind those
16 considerations in its assessment, by virtue of its powers of unlimited jurisdiction,
17 of the gravity of the infringements in question”.

18 Precisely so. That is our point. It is a point that has been infringed, breached by the OFT in
19 this case. They have treated total turnover as a feature of overriding importance which must
20 be the factor which informs the figure to be imposed by way of a fine.

21 The Court of Appeal judgment is less specific. It is also in Volume 4 at Tab 53. It may be
22 of assistance. It is the *Lindsay* case. I hope the Tribunal’s copies of *Lindsay* now contain
23 the Weekly Law Reports version. We originally had the transcript.

24 THE CHAIRMAN: Yes. This is the enthusiast tobacco tourist.

25 LORD PANNICK: It is. Mr. Lindsay goes to Calais. He is coming back.

26 THE CHAIRMAN: He is goes again and again.

27 LORD PANNICK: Yes, but he likes Calais apparently.

28 THE CHAIRMAN: His family like cigarettes.

29 LORD PANNICK: That is his problem. His family apparently are heavy smokers. He comes
30 back with a large quantity of tobacco. The authorities take the view that because he has not
31 paid duty, not merely should the tobacco be confiscated, but his car should be as well. That
32 is what he is objecting to. I cite the case simply for the proposition which can be found in
33 the judgment of the Master of the Rolls, Lord Philips, at p.1784, para. 52, under the heading
34 ‘Human Rights’, at the end,

1 “I would accept Mr. Baker’s submission that one must consider the individual
2 case to ensure that the penalty imposed is fair. However strong the public interest,
3 it cannot justify subjecting an individual to an interference with his fundamental
4 rights that is unconscionable”.

5 So, you have got to look at the individual circumstances which is what the European Court
6 of Justice has said.

7 THE CHAIRMAN: In that case, am I right, if he had been a commercial smuggler - which, for
8 reasons the Court of Appeal found a little puzzling, he was not alleged to be - they would
9 have accepted a policy of confiscating the car in all cases.

10 LORD PANNICK: Sir, you are correct. You are correct.

11 THE CHAIRMAN: But, because he was not, they said it is disproportionate.

12 LORD PANNICK: Sir, you are correct. But what they did not have to consider, of course, was
13 the case of someone who was a commercial operator, who might have been able to advance
14 factors that were material to the individual circumstances of his case. Suppose there were
15 someone who had brought across a small number of packets of tobacco for commercial
16 purposes to sell in the local pub, but he could show that his car was necessary because he
17 had an elderly disabled mother and he needed to take her each week to the Friendship Club
18 for her lunch -- One can imagine hard cases where individual consideration would have
19 been necessary.

20 THE CHAIRMAN: But save for such exceptional cases, the Court of Appeal said that a policy
21 that said that all commercial smugglers -- I think it is particularly clear in the judgment of
22 the present Lord Chief Justice ----

23 LORD PANNICK: Yes, indeed.

24 THE CHAIRMAN: -- would be acceptable. As long as you kept a sort of reservation for the
25 wholly exceptional case, a policy that said ‘confiscation of the car, whatever it is, in all
26 cases would be all right’.

27 LORD PANNICK: Yes - no doubt because, given the nature of the offending conduct -
28 smuggling for commercial purposes - taking away the car that had been used for that
29 purpose was entirely proportionate, not necessarily by reference to deterrence, but it is
30 entirely proportionate on a culpability basis. It is a very serious offence if done for
31 commercial purposes. However, the passage that I showed the Tribunal does accept that an
32 individualised consideration is required. I would say an individualised consideration of
33 some sort would be required even in the commercial basis. Suppose the Customs were to
34 say, “This is what you’ve done. We’re simply not interested. We are not going to read your

1 representations as to the individual circumstances of your case”. Plainly, in my submission,
2 that would be unlawful.

3 THE CHAIRMAN: But you are not suggesting the OFT did that.

4 LORD PANNICK: No. No. No. My submission here is that this is much more a *Musique*
5 *Diffusion* type of case where we are concerned with an objective of deterrence within the
6 specific context of reliance on total worldwide turnover. While recognising that this is a
7 material factor, certainly, it cannot be used as a determinative factor with no other factors
8 being looked at.

9 What the OFT do say in answer to this point is that, “The limited assessment of
10 individualised consideration at Step 3 does not matter because you, Hays, can raise any
11 case-specific factors you like at Step 4, when mitigation can occur”. Sir, in my
12 submission, that will not do. In the case of Hays the application of the MDT at Step 3 was
13 a highly significant aspect of the penalty, as I have said, almost trebling the relevant sum.
14 The limited adjustments made at Step 4 are of a very different order of magnitude. They
15 address a very different issue. They are not concerned with assessing the level of
16 deterrence. They are concerned at Level 4 with mitigating or aggravating factors relevant to
17 culpability. Therefore, the existence of Step 4 is no answer.

18 That is our second complaint - an assumption that if we look on an individual basis at total
19 turnover for this company - and we take a proportion of that - that is necessary -- It is not
20 good enough just to -- We are not going to look at and ask, on the individual circumstances
21 of this company, whether the Step 1 and Step 2 figure suffices for deterrence.

22 There is a linked point, Point 3, which is this: that having conducted the Step 3 analysis and
23 arrived at a result by reference to total worldwide turnover, the OFT do not then step back
24 and ask themselves, “Is this a proportionate result in the light of all the circumstances of this
25 company?” The impact on the company - because, of course, we are looking, after all, at
26 deterrence - needs then to be assessed. The question must be asked, “Do we really need to
27 impose a fine of £41 million in order to deter this company? Should we not, as para 2.11 of
28 the Guidance suggests, look at the financial position of the undertaking in question?” That
29 is, of course, not confined to turnover issues.

30 In relation to both of these complaints - our second complaint and our third complaint - that
31 is, the second complaint that you do not ask after Step 2, “Is £15 million actually enough for
32 deterrence in the circumstances of this company?” and our third complaint that you do not
33 ask after Step 3, “Is £41 million really necessary in the circumstances of this company for
34 deterrence?” - we say there are three particular factors that the OFT have failed to look at.

1 The first of them is the profit figure. Again, I emphasise, I am not submitting to the
2 Tribunal that profit is determinative. I am not submitting - I have said so already - that
3 turnover is irrelevant. Our point is that profit is treated by the OFT as irrelevant and
4 turnover is treated as the only relevant economic indicator for the purpose of assessing what
5 is needed for deterrence. The profit figures are set out in our grounds of appeal. They were
6 mentioned by my friend, Mr. Brealey, on Monday. They are in the Grounds of Appeal at
7 CB2, Tab 1, p.10, para. 1.16. They are very stark figures. The fine of £41.3 million - the
8 Step 3 figure ----

9 THE CHAIRMAN: Some of these are marked in my copy as confidential.

10 LORD PANNICK: Yes. I think they are not. I am grateful to you, Sir, for raising the matter, but
11 I have been told that what you find in para. 1.16 (i), (ii) and (iii), and (iv) and (v) as well are
12 no longer confidential. The fine of £41.3 million (the Step 3 figure) represents 335 per cent
13 of the annual profits of the construction and property business for the 2008/2009 financial
14 year.

15 THE CHAIRMAN: Shall we just read these quickly to ourselves? (Pause whilst read): Thank
16 you.

17 LORD PANNICK: These figures come from Mr. Venables' evidence which I do not invite the
18 Tribunal to turn up. Can I give you the reference? CB3, Tab 1, para. 28. That is where it
19 comes from. The OFT say, "Well, profit may go up. It may go down". That, of course, is
20 true. But, so may turnover. The OFT point out that there are various ways in which you
21 can assess profit. You can look at gross profit, net profit, pre-tax, post-tax. Our point is a
22 starker one, our complaint is not that the OFT have chosen to look at the wrong measure of
23 profit, our complaint is that despite purporting to assess what penalty is needed to secure a
24 deterrent effect, the OFT have decided to avoid any consideration of the impact of the
25 penalty on profit despite its obvious relevance, to put it at its lowest, to whether the penalty
26 has a deterrent effect.

27 In the real world, and deterrence is after all concerned with the real world, profit figures are
28 an important indicator of the actual effects of the penalty. In the real world, a big reduction
29 in profits will inevitably have a real deterrent effect on a commercial undertaking such as
30 Hays. It hurts a company to take away a slice of its profits, the bigger the slice the bigger
31 the pain and the greater the deterrent effect. If, as is the case, the OFT are under the MDT
32 seeking to arrive at a result that has a deterrent effect it is simply perverse to ignore any
33 consideration of impact on profits and focus exclusively on worldwide turnover. It makes

1 no sense whatsoever. That is the first matter that the OFT are simply not looking at and not
2 prepared to look at.

3 The second factor which we say the OFT's approach wrongly ignores is this. Steps 1 and 2
4 are already the result of figures produced by reference to gross turnover. As the Tribunal
5 well knows, one of our complaints on this appeal, Mr. Brealey is going to deal with this
6 tomorrow morning, is that the turnover figures at Steps 1 and 2 should not be based on
7 gross turnover, they should be based on net fees, and that submission will either find favour
8 or it will not. But, in our case, when the OFT came to assess the need for deterrence at Step
9 3, what they have failed to recognise is that the £15 million that they have arrived at, at Step
10 2 is already a figure which includes a very significant proportion attributable to the wages
11 of the temporary staff. My point is that on any view the Step 2 figure, even if it is right, and
12 of course we say it is wrong, but if it is right to use gross figures in Steps 1 and 2 the OFT is
13 already greatly exaggerating in the real world the economic position of Hays.

14 If you are going to ask: is it really necessary, in order to deter a company in the financial
15 position of Hays in the real world, is it really necessary to add an even higher penalty at
16 Step 3, it is absolutely vital to look at the economic reality of this company in this industry,
17 and look at its actual margins rather than theoretical margins, that is the point. That is the
18 second factor of individualised consideration which has simply not occurred here by the
19 OFT.

20 THE CHAIRMAN: As I think you recognised in opening, if Hays succeeds on challenging the
21 turnover and arguing that net fees should have been used in Step 1, then of course this point
22 would go.

23 LORD PANNICK: It does go save to this extent, if my friend, Mr. Brealey, can persuade the
24 Tribunal that it should be net turnover that is the basis of Steps 1 and 2, then I would add to
25 that it could not then be appropriate to use gross worldwide turnover at Step 3.

26 THE CHAIRMAN: Oh no, you would have to use net.

27 LORD PANNICK: You would have to use net, and there is a big difference, because the figures
28 show that the gross turnover figure which the OFT used was £2.447 billion.

29 THE CHAIRMAN: Mr. Unterhalter, is that accepted that if the net fees is the right figure in Step
30 1, then assuming, take MDT for this purpose is accepted as methodology, but then in
31 looking at worldwide turnover similarly it should be net fees?

32 MR. UNTERHALTER: I will take an instruction, but as I understand the position there is a
33 consistent treatment of turnover at every step in the Guidance, and so the determination as
34 to what turnover means for the purposes of Steps 1 and 2 in respect of these appellants

1 would then become applicable for the purposes of MDT, and it would be consistently
2 applied at every step, that is logical.

3 THE CHAIRMAN: It seems logical to us, I have to say.

4 MR. UNTERHALTER: Unless my clients indicate otherwise.

5 THE CHAIRMAN: I do not think Lord Pannick need pursue that.

6 MISS KREISBERGER: If it assists at para. 34 of the OFT's skeleton in CDI's case that point is
7 accepted in terms.

8 THE CHAIRMAN: Thank you very much.

9 LORD PANNICK: I am very grateful both to Mr. Unterhalter and to Miss Kreisberger and,
10 indeed, to the Tribunal for clarifying that point and we see the obvious force of the
11 consistency point. Can I just give the Tribunal the figures, because the figure upon which
12 the OFT worked at Step 3 was a gross worldwide turnover figure of £2.447 billion, and the
13 net figure for gross worldwide turnover is a fraction of that, it is £670.8 million net turnover
14 figure. I do not ask the Tribunal to turn it up, but it is in NCB2, tab.1, p.4. that is where that
15 figure comes from.

16 So our second factor that I say the OFT should have looked at on an individualised
17 assessment but did not, is the reality of the position if they are right that gross figures must
18 be used at Step 1 and Step 2.

19 The third factor relevant to deterrence, which they have simply not looked at, which they
20 say is not relevant, is this: they have failed to have regard at Step 3 to the content of the
21 compliance measures for the future introduced by the company in response to the OFT
22 investigations.

23 Our point is this, if and to the extent that a company has reacted positively since the defect
24 was identified, since the wrongdoing was identified, and it has adopted mechanisms to
25 prevent further unlawful acts, a lesser sanction is going to be required for deterrence of that
26 company. Again, the same must be true of general deterrence, if other companies adopt
27 proper protective measures they too do not require so severe a penalty for deterrence of
28 future wrongdoing.

29 The facts here are not in dispute. The fact accepted by the OFT is the fact that in this case
30 (Hays' case) our most senior management immediately implemented a very robust
31 compliance policy as soon as the infringement was drawn to their attention.

32 THE CHAIRMAN: I do not understand your submission that this is relevant to general
33 deterrence, if another company sees that because Hays, having committed a serious
34 infringement, then gets it reduced because afterwards it introduces a compliance

1 programme, that is not going to deter another company from breaching. It will tell the
2 other company “We can breach because as long as afterwards we introduce compliance.” I
3 can see specific deterrence, yes, but general deterrence ----

4 LORD PANNICK: General deterrence is this, it will encourage other companies to introduce
5 proper compliance measures, because in the industry and the world at large people will
6 know that if they have proper compliance measures that will be of considerable value.

7 THE CHAIRMAN: It will not be of value because you may prevent an infringement and
8 therefore a large fine, and that is why you introduce it, but that is deterrence...

9 LORD PANNICK: I understand, Sir, the point that you are making, it is certainly relevant to
10 specific deterrence.

11 THE CHAIRMAN: It is relevant to specific deterrence, yes. I think there the point is that this is
12 addressed in the Guidance of course, as you know, and that is a point that is very expressly
13 brought in at Step 4.

14 LORD PANNICK: The difficulty with that is that Step 4 results in a very limited mitigating
15 factor. We can see how it is brought in at Step 4, at CB1 in the Decision, p.302, and
16 para.5.337, the starting point is 5.336, where a number of companies, including Hays make
17 submissions regarding the existence of a compliance policy. 5.337:

18 “Following an assessment of these submissions the OFT considers that each of
19 these parties have (sic) adequately demonstrated that they have taken
20 appropriately active measures to introduce compliance measures that are
21 appropriate ...”

22 It is a bit clumsy but the Tribunal has the point, “... that are appropriate for the size of the
23 company or company group in question.”

24 At the very least that must be highly material to whether you need to impose a higher fine in
25 order to deter Hays from wrongdoing in the future. My point is that it is not good enough to
26 give us a 5 per cent reduction, which is what they give us.

27 THE CHAIRMAN: The confidentiality again has been waived on that, has it?

28 LORD PANNICK: The figure? The 5 per cent reduction? If it was confidential it is no longer. It
29 is difficult to see how that could be a commercially sensitive matter. I will no doubt be
30 rapped over the knuckles after the Tribunal adjourns today. But to give a 5 per cent
31 reduction is welcome, it is not enough, but it is better than nothing, but what that ignores is
32 that at Step 3 the OFT have found that it is essential to fine us more than £15 million, and
33 almost to treble the fine because of a need to deter, specifically and generally, and I say it is
34 highly relevant at the very least to specific deterrence, that we are not a company, on the

1 findings of the OFT itself, that needs specifically to be deterred. The detail of the
2 compliance measures that we have taken, and I hope the Tribunal will think that they are
3 entirely ----

4 THE CHAIRMAN: Yes, we have seen that. My point was that although you say you are not
5 challenging the Guidance, you are saying of course as a separate point that the 5 per cent is
6 not enough, it should be more, that is a separate argument. The Guidance clearly treats
7 compliance for the future as something that comes in at Step 4 ----

8 LORD PANNICK: As a mitigating factor.

9 THE CHAIRMAN: Yes, and not in calculating deterrence or not.

10 LORD PANNICK: But it is a different exercise. Compliance features are very relevant as a
11 mitigating factor, is it appropriate to reduce the fine that should otherwise be imposed on
12 this company. My complaint is that what is happening here at Step 3 when the OFT are
13 considering whether to raise the fine and whether to do so for the purposes of deterrence,
14 they are obliged by their own Guidance to take account of the circumstances of each
15 individual infringing undertaking, that is what the Guidance says at 2.12, and I say it is
16 highly relevant as to whether you need to increase a penalty at Step 3 for specific
17 deterrence, that this is a company, by reference to the steps that it has taken, that does not
18 need to be deterred in this respect, certainly not to the extent that the OFT considered. The
19 detail, and I am not going to take the Tribunal to it, is set out by Mr. Lawson in his witness
20 statement (CB3, tab 2, paras. 11 to 36) and the cross-examination of Mr. Lawson on
21 Monday did not challenge ----

22 THE CHAIRMAN: Well this will come back in ground 6, which one of your colleagues will be
23 addressing.

24 LORD PANNICK: Indeed. So those are the three matters, and the Tribunal may be persuaded by
25 some of these factors I have drawn attention to and may be unpersuaded by others, but the
26 substance remains what we have here is an OFT which is concerned to assess deterrence,
27 what it is not doing, contrary to its own Guidance, is assessing the circumstances of the
28 individual company. What it is doing is to assume that a proportion of the total worldwide
29 turnover of this company is necessary as the penalty in order to secure deterrence.
30 The effect of the OFT's formulaic approach - and it is a formulaic approach can be seen in
31 the Decision, not just in our case but even more starkly in the Hill McGlynn case and if we
32 go back to CB 1, and the Tribunal will look, please, at p.317. The Tribunal will see the
33 section that addresses the penalty for "" Beresford Blake Thomas Ltd/Hill McGlynn etc,
34 and at 5.437 ----

1 THE CHAIRMAN: We have noted that.

2 LORD PANNICK: The figure, I will not read it out, at 5.439 it is a very large multiple of the
3 Step 2 figure, as the Tribunal well knows, they benefited at 5.448 from a 100 per cent
4 reduction, so that is why they are not here, but you have the point.

5 One other point on this area, I am very reluctant to take the Tribunal to any of the
6 transcripts of the other hearings that have been heard, the construction cases, but it may just
7 be of assistance to look at one page from the Ballast Nedam case which I have here. (Same
8 handed) This is another case in which my friend, Mr. Unterhalter, had a starring role, and
9 this was heard before the President, Professor Bain and Mr. Clayton ,and I am inviting the
10 Tribunal's attention, please to transcript p.32 where Professor Bain asks a question of my
11 friend:

12 "Mr. Unterhalter, does there not have to be some limit to the extent to which you
13 take account of UK turnover? I see what you are doing. I ask myself the
14 question: 'What would have happened if Shell or BP ...'"

15 The Tribunal may think BP have enough problems! (Laughter)

16 "... happened to have had a UK subsidiary in 2004 with £100 million turnover in
17 this industry?' The answer is that using your principle you would have come up
18 with a fine of over £1 billion. That just seems to me to go beyond the level of
19 plausibility. You cannot conceivably fine a company £1 billion for the kind of
20 infringements that there are here, whatever the reasons. It just does not seem
21 right. So, do you not have to modify your principle in some way, again to take
22 account of the particular circumstances?"

23 etc. And then my friend responds, can I pick it up at line 19:

24 "... one is asking in deterrence whether the scale of penalty will suffice because
25 otherwise if one uses what would then be, in our submission, a contrary, but
26 equally rigid notion, which is to say, 'Well, there is some principle that says UK
27 turnover is all that matters', then you could have a circumstance in which a
28 conglomerate which is very sizeable and very economically powerful just happens
29 to have a small UK turnover and then escapes with a very modest penalty wholly
30 disproportionate to its size and influence . . .

31 THE PRESIDENT: Is that not a good reason for adjusting the penalty upwards? I
32 do not see that that is a problem. It is just that that is what you have to do, is it
33 not? You have to take a view on what you need in a particular case. That is the
34 merit of looking at each individual case as well as having a structure. The

1 argument against you is that you have a perfectly rational structure, but you have
2 not actually gone and looked at each individual case as well.”

3 Precisely so. That is our case.

4 THE CHAIRMAN: Professor Bain’s example is not entirely hypothetical.

5 LORD PANNICK: No.

6 THE CHAIRMAN: Because Shell has a subsidiary in tobacco.

7 LORD PANNICK: Indeed so, and my friend has to deal with this. If he is going to say that the
8 MDT proceeds by reference to a proportion of total worldwide turnover one is going to
9 arrive at manifestly disproportionate results unless there is a further mechanism to assess by
10 reference to the circumstances of the individual case what is proportionate, and that has not
11 been done in the circumstances of our case.

12 Finally on this matter I should mention the *Makers’* case, because the OFT in their written
13 submissions rely heavily on the *Makers’* case, which I am not going to take time on and I
14 will give you the reference when it can be found.

15 THE CHAIRMAN: It is vol.4, tab 54.

16 LORD PANNICK: Thank you very much. Individualised consideration is required. The *Makers’*
17 case involved very striking facts, construction firm with an annual turnover of £69 million.
18 Its turnover in the relevant market was £130,000 and the fine after Step 2 was a mere
19 £6,500. No doubt a proportionate result was arrived at in that case, but it cannot be
20 determinative of this case.

21 Finally, may I address what would be a proportionate result, and Freshfields, my
22 instructing solicitors, produced a document which we hope may be of assistance to the
23 Tribunal, and I would be very grateful if I could hand that up (Same handed) and copies
24 have been provided to my friends. We produced a document entitled: ‘Penalty scenarios’
25 for Hays, and what this contains on p.2, are three tables – tables 1, 2, and 3, which are based
26 on mixed fees, that of course being our submission.

27 Tables 4, 5, and 6 are based on gross turnover, which of course is the OFT’s starting point.
28 If, Sir, Members of the Tribunal, you go to p.2, you will see at table 1, which uses, as I say,
29 net fees, and you see the figure there, the Tribunal can see down the left hand side, that we
30 have given results for a seriousness level of 7 per cent, 8 per cent, and 9 per cent, 9 per cent
31 being of course the figure that the OFT adopted in our case. We have given the figures, and
32 there are 12 boxes in table 1, depending on whether you increase at Step 3 by 0 per cent, 50
33 per cent, 75 per cent or 100 per cent. None of these figures are confidential.

1 If we take the least onerous approach, which is NF1, the top left hand box: “Net Fees 1”, the
2 Tribunal sees that if you start with a 7 per cent figure and you have no uplift at Step 3, you
3 arrive at a figure of £2.9 million. If you take the 9 per cent seriousness level, which is my
4 friend’s approach, and you uplift that by 100 per cent, you double it for deterrence, you
5 arrive and it is in the final box, “NF12” (Net Fees 12) you arrive at a figure of £7.49
6 million.

7 Table 2 then proceeds by reference to those figures, and there are three variables, this is
8 Step 4, mitigation and aggravation. Either you reduce by 10 per cent, which is our
9 submission, or you stand still at Step 4, or you increase by 5 per cent which was the
10 approach adopted by the OFT. Looking, for example, at NF1, which was the 7 per cent
11 figure with no uplift, you see the results, they vary from £2.6 million up to £3.05 million. If
12 you adopt the more onerous approach of NF12, which was the 9 per cent seriousness figure,
13 and the 100 per cent uplift, you arrive at a Step 4 figure of £6.7 million up to £7.8 million.
14 Table 3 then reduces all of this for the leniency reduction of 30 per cent. So you arrive at a
15 final figure, assuming you start with net fees, at NF1, which is the least onerous, you arrive
16 at a penalty of £1.8 million up to £2.1 million, or if you are going to be harsher on Hays,
17 and you are going to adopt a 9 per cent seriousness figure, and a 100 per cent uplift at Step
18 3, the figures vary from £4 to £5 million.

19 On p.3 we do the same exercise using gross turnover, and again you can ----

20 THE CHAIRMAN: I think we can follow the table.

21 LORD PANNICK: I am grateful. The point I want to make is even if – even if – you stick with
22 gross turnover, which was the approach taken by the OFT, and even if you maintain the 9
23 per cent seriousness level, both of which are in dispute, Mr. Brealey is going to deal with
24 those, you arrive under table 4, GT9 at a figure of £15.1 million with no uplift for Step 3,
25 which we say must be right, given that you are already using gross figures, and if you are
26 using GT9, we see that the figure in table 6, that you arrive at as a concluding point, is £9.5
27 million up to £11.1 million, and that is even if, as I say, you are wholly unpersuaded – and
28 we hope you will not be unpersuaded – of Mr. Brealey’s submissions that 9 per cent is too
29 much, and net fees should be used.

30 THE CHAIRMAN: Assuming some uplift is considered to be appropriate, whether one is
31 looking at Step 2 or Step 3, how does one relate whether it should be 15 per cent, or 75 per
32 cent or 100 per cent to the three factors that you said should be taken into account?

1 LORD PANNICK: The three factors, I submit, all lead inexorably to the conclusion that no uplift
2 is appropriate in this case at Step 3, particularly if you, the Tribunal reject my friend's
3 submissions in relation to gross and net turnover.

4 THE CHAIRMAN: Well that is a pessimistic answer from the point of view of Hays.

5 LORD PANNICK: Yes. Very pessimistic.

6 THE CHAIRMAN: Do you say "No, we are likely to succeed, Mr. Brealey will succeed", and
7 following that he is going to succeed saying it should be 8 per cent or 7 per cent. One ends
8 up with the figure of £3.2 million, or £2.9 million. Suppose the Tribunal takes the view,
9 well that really is not sufficient deterrence, so one then has to look at plus 50 per cent, plus
10 75 percent, plus 100 percent, you have given us three factors.

11 LORD PANNICK: Yes.

12 THE CHAIRMAN: How does one relate those factors to arrive at the right percentage?

13 LORD PANNICK: One is looking at p.2 on the assumption that I was being wholly pessimistic.

14 Let us be more realistic and optimistic and hope that we persuade the Tribunal to use net
15 fees, and we persuade the Tribunal that a 7 per cent figure rather than a 9 per cent figure is
16 appropriate. We are then in the level of NF2 or 3 or 4. NF2, 3, or 4 - the difference
17 between them, if we go to Table 3, the minimum penalty figure for NF2, which is a 50
18 percent uplift, would be a £2.7 million fine, and the maximum figure for 7 per cent would
19 be NF4, which would be £.2 million. If we are in that area then I will be kicked from
20 behind if I am making concessions that I should not make, but I would not at that level
21 suggest to the Tribunal that no uplift for deterrence would be appropriate because we are
22 dealing with net figures as the starting point. We are dealing with a level of fine that can be
23 more easily related to the profit figures that I showed the Tribunal. But, I do submit that a
24 figure in the region of £4 million, which is where we would arrive at on these figures, is the
25 right sort of figure for a penalty in all the circumstances of our case. It is a matter for the
26 judgment of the Tribunal as to whether the factors that I have drawn attention to justify a 50
27 per cent uplift on a net fees (p.2) or a 75 percent deterrence uplift, or even a 100 percent.

28 THE CHAIRMAN: It is a very subjective judgment.

29 LORD PANNICK: Inevitably so. Inevitably so. In any sentencing exercise, as you, Sir, will
30 know, in any sentencing exercise in court, there is an element of subjectivity. The points I
31 have been making hitherto, however, are, I say, points of real principle - points of manifest
32 disproportionality.

33 THE CHAIRMAN: I understand that.

1 LORD PANNICK: Doing the best I can, my submission, since that is what you asked me to
2 provide to the Tribunal, is that the appropriate tables are Tables 1, 2, and 3 on p.2 (the net
3 figures), the appropriate level of seriousness for the reasons that Mr. Brealey will develop,
4 is the 7 per cent figure. I would accept on behalf of Hays that if we are working on net fees,
5 and if we are working on a 7 per cent figure for seriousness, a deterrence uplift of 50 to 75
6 per cent the Tribunal may think is appropriate. That would arrive at a conclusion, if it is
7 NF2, of between £2.7 and £3.2 million fine. If it is NF3, the figure would be between £3.2
8 and £3.7 million. I would also submit that the appropriate figure is the -10 per cent figure
9 for the reasons that Mr. Brealey is going to develop.

10 THE CHAIRMAN (No microphone): [inaudible].

11 LORD PANNICK: Yes, it is the point relating to: Was it a senior member of the management?

12 Should we have had a greater reduction? Mr. Brealey will help the Tribunal with that.

13 That is my submission as to the level of penalty. It is between £3 and £4 million -- between
14 £2 and £3 and £4 million depending on the judgment, Sir, that you and the members of the
15 Tribunal make. It is certainly not anything like the level of penalty that was imposed in the
16 circumstances of this case.

17 Sir, unless I can seek to assist further.

18 MR. DAVEY: You can indeed. You are suggesting as a methodology that one should look for
19 the Step 1/Step 2 result and then apply a percentage uplift. In looking at what percentage
20 that would be how you would take into account the factors mentioned in the Guidance - the
21 economic or financial benefit made or likely to be made by the infringing undertaking, etc.,
22 etc. I will not go through them all. Are you suggesting, by putting the table forward with
23 the figures that you have that a 100 per cent uplift would be on the outside? I am thinking
24 particularly of the *Makers* case which you just happen to have mentioned. Let us forget
25 about the methodologies, the Tribunal's view in that case, as I recall, was that the final
26 figure was appropriate. The final figure was, if I recall, significantly more than 100 per
27 cent up on the original figure. Now, are you saying that those sort of results are no longer
28 possible because the logic would be -- I was not on that particular Tribunal. You would, in
29 effect, be saying that the Tribunal accepted a wholly disproportionate figure.

30 LORD PANNICK: My submission is that the approach and the result must depend upon the
31 circumstances of the individual case. I am certainly not submitting that there can be no
32 case in which a deterrence uplift of more than 100 per cent could be appropriate. That is
33 not my submission. My submission is that for all the reasons I have sought to identify, in
34 the circumstances of this case we say it is very difficult to see any justification for a

1 deterrence uplift of more than 100 per cent. If the Tribunal thinks there is a justification,
2 then, if it finds this table helpful, it will double the results. The mathematics would not be
3 difficult. The particular problem of *Makers* was that the fine that was the result of Steps 1
4 and 2 was so small - £6,500 - that it was totally meaningless. Totally meaningless in the
5 real world. The thrust of the submissions that I have presented to the Tribunal for your
6 assessment is that on any view in the economic circumstances of this company the figure
7 arrived at after Steps 1 and 2 on the basis of gross fees - £15 million plus - is a very, very
8 substantial sum of money in the economic circumstances of this company. But, I would
9 equally say that even if you use net fees as the basis of assessment, the figure that you arrive
10 at after Step 1 is still a very substantial sum of money - it is millions of pounds - much,
11 much larger than a company would be fined if it were responsible for some breach of health
12 and safety or corporate manslaughter, or something of that sort. It is a very substantial sum
13 of money. Although I can accept that it may be appropriate in your judgment nevertheless
14 on a net fees basis to have an uplift for deterrence, this is not a *Makers* case where you need
15 to have so substantial an uplift in order to arrive at more than a derisory penalty which
16 would have been the result in *Makers*. So, I emphasise that. I am grateful for the question. I
17 should have made it clear. I am not suggesting, by this table, that there cannot be cases
18 where more than 100 per cent uplift is appropriate.

19 THE CHAIRMAN: Or, indeed, that you are going to approach the uplift by a percentage. It
20 would be several thousand percent in *Makers*. But, you approach it on a different basis.

21 LORD PANNICK: As long as your starting point is: this is what culpability would lead us to.
22 We need to ask the question: What is it appropriate to add to that, having regard to the
23 culpability figure? So, we hope those tables are helpful. They are simply meant to be
24 illustrative of the various options that the Tribunal has and the results that would be arrived
25 at, and to give a flavour of why we say that the result in our case is disproportionate and
26 would simply not be arrived at on, we say, any sensible basis using either net fees or gross
27 turnover, particularly using net fees for the reasons that Mr. Brealey is going to develop.
28 Unless there are points that those behind me want me to add, those are the submissions I
29 wanted to make on behalf of Hays.

30 THE CHAIRMAN: Lord Pannick, in your skeleton argument, which is at Tab 3 of CB2, at p.148
31 in the bundle, p.47 in the skeleton, there is a further ground of challenge to MDT that is
32 mounted, if you will recall, which is in terms that what is alleged is an unlawful alteration to
33 the penalty Guidance. You have not addressed on that at all. Is that challenge maintained?
34 Did you want to say something about that?

1 LORD PANNICK: Our position is this: we do not abandon that point, but we candidly recognise
2 that it is not as strong a point as the points that I have sought to develop. I am therefore not
3 going to take time with the Tribunal developing the point. However, can it be please be
4 treated as not abandoned? I hope that is sufficient to answer the Chairman's question.

5 THE CHAIRMAN: Give me just one moment? (After a pause): Thank you, Lord Pannick. We
6 have no more questions.

7 LORD PANNICK: Thank you, sir.

8 MR. HARRIS: Sir, with the Tribunal's permission I will address this issue from the perspective
9 of Eden Brown. As I said in opening, Eden Brown puts its case on this topic of the level of
10 deterrence at Step 3 on two bases: the first is that the figure for deterrence that has been
11 applied to Eden Brown is too high and is disproportionate and excessive particularly by
12 reference to the treatment of other parties to the CRF. That is a submission that is made
13 wholly irrespective of whether the Hays challenge to MDT that Lord Pannick has just so
14 eloquently advocated is successful. The second way is that I respectfully and gratefully
15 adopt the challenge that Hays makes to the MDT. We say that if that challenge is
16 successful it would follow, as Lord Pannick has just said, that the size of the figures for
17 Hays and correspondingly for other parties at the Step 3 level would be reduced - very
18 significantly reduced on proportionality grounds for the reasons that he has given. If it is
19 right that for proportionality reasons the deterrence factor applied to the other parties is very
20 significantly reduced - the figures are significantly reduced - then it would follow that Eden
21 Brown's treatment is even more unfair and disproportionate.

22 THE CHAIRMAN: The point being made, I think, was that Steps 1 and 2 which deal with
23 culpability -- They deal with culpability, and one then looks at that, saying, "Well, is that
24 sufficient for deterrence? Do you need to increase it?" Now, depending on what happens
25 on net fees - if net fees and seriousness come down - Hays realistically accepts that there
26 might need to be some increase. If they do not, then Hays submits no increase. You stop
27 there. But, I did not understand the submission to be that if Hays loses on the net fees
28 issue, while it says that there is no uplift of Step 3, it was not the burden of Lord Pannick's
29 submissions that then there has to be a downward adjustment at Step 3.

30 MR. HARRIS: No, but the OFT's problem on this front -- Perhaps I can take you to the Decision
31 at CB1, page 286, para. 5.254 to illustrate this point? The OFT do not say that there cannot
32 be a downward adjustment at Step 3 if one has arrived at a figure for seriousness after Steps
33 1 and 2 that is referable to culpability. They do not say that. Quite the opposite. The OFT
34 expressly acknowledges at para. 5.254 that notwithstanding the figure that has been arrived

1 at after Step 1 and Step 2, nevertheless (and here I quote from the middle of that paragraph)
2 “that would result in an excessive penalty as the penalties would be greater than necessary
3 in order to achieve deterrence”.

4 THE CHAIRMAN: And you benefited from that.

5 MR. HARRIS: Yes. I will go on to develop this in a minute. We say we have not benefited
6 sufficiently or proportionately, particularly by reference to others, but what the OFT cannot
7 say is that having arrived at a Step 1 and Step 2 figure referable to culpability, as we have
8 heard a moment ago, that it cannot then be reduced at Step 3.

9 THE CHAIRMAN: Oh, no. It clearly can be reduced, and the Guidelines recognise that, I think.

10 MR. HARRIS: Perhaps this will become clear if I develop my first point and the comparison
11 between the position in which Eden Brown finds itself and the position of other parties to
12 the Decision. I will expand, if I may, briefly, on the first way I put this.
13 Effectively, our appeal on this first point is that the reduction that was applied to Eden
14 Brown at this stage was insufficient, and is insufficient because what remains at the end of
15 that reduction is disproportionate and discriminatory. That is the key point. But, it is also
16 arbitrary. I will develop that briefly. There are a number of ways of looking at the
17 disproportionality and discriminatory nature of what we have been left with after Step 3.
18 The first one can be ascertained by reference to the Decision at CB1, page 291, para. 5.283.
19 The figure for us ends up, after Step 3, as falling within the range there specified. When
20 one has a look at Footnote 894 [and some of these figures doubtless do remain confidential]
21 the figure for Eden Brown is not confidential at 10.9 per cent. One can see, just by casting
22 one’s eye across the other figures, that Eden Brown’s figure is the highest compared to
23 every other participant in this cartel.

24 THE CHAIRMAN: It is the same as one other.

25 MR. HARRIS: Sir, it is not, because if one reads the box which I believe remains confidential,
26 one can see the reason that it is not. Something else happens to that percentage. For reasons
27 best known to the OFT, they have included the percentage which makes it look like it is the
28 same as my client’s percentage, but having omitted a very material ---

29 THE CHAIRMAN: That is at Step 5, yes.

30 MR. HARRIS: Yes. So, on that measure, notwithstanding the downward adjustment which is
31 said to be on proportionality grounds, or by reference to Eden Brown’s circumstances,
32 nevertheless we have remained at the highest percentage -- our fine remains highest as a
33 percentage expressed of net fees.

1 If I could assist the Tribunal by handing in a document that performs this same exercise in
2 respect of the fines that were handed out in the French Competition Commission's Decision
3 that we looked at briefly in my opening. (Same handed) In the left of the table are the four
4 parties fined in that Decision. In the column headings one can see the relevant metric. In
5 parentheses beneath, in the relevant boxes, are the paragraph references to the Decision. So,
6 we need not turn it up now. However, one can see that expressed as a percentage of sales
7 turnover, the figure for Manpower is 0.90 ----

8 THE CHAIRMAN: Just to be clear, this is sales turnover in France, is it? It is not worldwide?

9 MR. HARRIS: I can check. (After a pause): They are certainly consolidated turnover figures. I
10 will check that point for you, Sir. Those percentage sales turnover figures I will come back
11 to because it is my next comparator. But, the final column is the one we are looking at at
12 the moment. The fine for those five companies, when expressed as a proportion of its gross
13 margin, which is the equivalent of net fees, are the figures in the final column, the very
14 highest of which is 7.5. The others are significantly lower. All of those are obviously very
15 much lower than the 10.9 per cent that applies to Eden Brown. So, it is just another
16 illustration of the same point, though of course I accept there are differences in the manner
17 in which the fining process happens under the French Competition Commission's rules and
18 regulations. I thought it might assist just for illustrative purposes.

19 The next way that I express this point is by reference to Eden Brown's penalty as a
20 proportion of total worldwide turnover. So, after what has happened to Eden Brown at Step
21 3, the penalty for Step 3, expressed as a proportion of its total worldwide turnover, is to be
22 found in the Decision at CB1, page 312, 5.392.

23 THE CHAIRMAN: Just to be clear because some of the confidentiality claims have been falling
24 away -- The percentage reduction that you were given at Step 3, which you took us to, is
25 that still confidential?

26 MR. HARRIS: Not in my case.

27 THE CHAIRMAN: No, at 5.259. Not the 10.9 per cent, but ----

28 MR. HARRIS: No. As regards my client, no. There are other reduction figures for other parties
29 who are not today represented.

30 THE CHAIRMAN: No. We are not concerned with that. 40 per cent is not confidential.

31 MR. HARRIS: The 40 per cent is not confidential.

32 THE CHAIRMAN: That is very helpful.

33 MR. HARRIS: So, I make a similar point to the one I have just made about the proportion of net
34 fees by reference to worldwide turnover. I will take this more briefly because it is

1 effectively just a different mathematical expression of the same point. At 5.392 the final
2 outcome is 2.3 per cent of Eden Brown's total turnover. Again, that is not confidential.
3 But, when one compares that with every other party it is higher. Perhaps I will hand in on a
4 separate sheet tomorrow morning the paragraph references - because there are seven or
5 eight of them - but I have gone through the exercise of comparing that percentage of total
6 worldwide turnover with every other party, and we are higher than everybody else. That is,
7 of course, what one expects if one is higher as a proportion of net fees. Then, last but not
8 least, the figure can be discerned in a different way, which is that in the case of, for
9 example, Hays, and the other parties to whom the MDT has been applied, then the notional
10 relevant turnover figure for them is 15 per cent of worldwide turnover. But, of course, in
11 Eden Brown's case it has ended up being 19.2 per cent. So, again, mathematically ----
12 Sir, the point that I make is really rather a simple point: that on any one of these measures
13 what has ended up happening to Eden Brown, notwithstanding the adjustment at Step 3, is
14 that it has ended up with a figure that is said to be for deterrent purposes, which on every
15 mathematical approach is higher than everybody else, and not just by a miniscule amount.
16 That is the nub of my first complaint. We say that we have ended up receiving the highest
17 of all of these measures, notwithstanding that Eden Brown participated in the same CRF
18 infringement in virtually the same way, for virtually the same period of time and it has been
19 assessed by the OFT at Step 1 as having the exact same level of seriousness.

20 THE CHAIRMAN: If Lord Pannick's submission is right - that it should be an individualised
21 consideration on a case by case basis - of course you might well end up with a different
22 percentage of these different metrics for the different appellants.

23 MR. HARRIS: I accept that. I accept that. But, we have the exact same complaint - and I will
24 not duplicate orally what Lord Pannick has already said - which is that there has been a
25 failure to take account, which is obliged under the law of proportionality, of the specific
26 circumstances of our case. I will elucidate upon them briefly because Lord Pannick has
27 covered them largely, and I just have some minor additional points to make. The
28 fundamental background against which this assessment must occur is that it is the OFT's
29 own case that we participated in the same infringement in more or less the same way for
30 more or less the same time and we have been assessed by them as having the same level of
31 seriousness. Yet, we have ended up on all of those metrics as being treated more harshly
32 than any of them. Although I take the Tribunal's point that there must be an individualised
33 assessment, that also has not happened in our case because what the OFT does in our case is
34 that they say, "By reference to your percentage of relevant turnover as a proportion of your

1 worldwide turnover we must reduce your fine on that score [the 40 per cent]”. But, what
2 they have not done is to take account of any of the other individual factors that bear upon
3 my client’s circumstances.

4 Those factors, bar one, are the same factors that Lord Pannick identified. Hence, I will keep
5 this part of my submissions very short. I will take them in no particular order. The first
6 was compliance. We adopt his submissions. That should have been taken into account in
7 our case, but was not. I mention only two points. The first is that on the OFT’s own case
8 deterrence is intended to be a forward-looking measure - both forward-looking specifically
9 and forward-looking generally. Self-evidently, compliance is also forward-looking. The
10 Tribunal itself took the point, “Well, it comes after the event. It is designed to prevent
11 future infringements”. I gratefully adopt that. It is. My point is that therefore they are both
12 directed, that is to say deterrence on the one hand and compliance on the other, at the same
13 issue of principle, namely, what is going to happen in the future. What we say, and here we
14 adopt Lord Pannick’s submissions, is that the OFT has failed to give sufficient, or indeed
15 any recognition at this Step 3 stage, to compliance. Notwithstanding that they are directed
16 towards the same principle, and that is why we also adopt Lord Pannick’s submission that
17 although it is fair to take into account compliance as a mitigating factor later on, it would
18 not be fair to disregard it at Step 3, because it is directed in such large measure to the same
19 issue of principle, and yet the OFT has not done that, and that is our complaint. I would
20 simply add by way of postscript that we do see it as being most specifically relevant to
21 specific deterrence – to repeat my “specifics”. It does have some marginal relevance to
22 general deterrence as well in that other companies will see that their peers have a
23 compliance policy, I accept that they might see that it was imposed after the event, but that
24 possibly attribute to some other market participants with a greater degree of knowledge of
25 what is really going on. But the fact that their peer group, including, for example, large
26 companies like Hays may have a compliance policy, also has a deterrent effect for the
27 others generally in the sense that it educates them, puts in place a series of imperatives and
28 principles for their company that by definition of their existence in that company are likely
29 to deter these others – generally that is – from committing future infringements. So it has
30 greater relevance to specific deterrence, but it is not wholly irrelevant in my respectful
31 submission to general deterrence.

32 My second point is the same as Lord Pannick’s so I will keep this very brief, it is the fine as
33 a percentage of our profit, and although I do not need to turn this up you will recall that Mr.
34 Sterling, in his evidence-in-chief augmented or updated, if you like, the profit figures, that

1 was in this confidential letter. I am very carefully and tenderly going to deal with this
2 subject because this is one of the few things that does remain deeply, deeply confidential.

3 THE CHAIRMAN: Should we be looking at this as the OFT, you say, should have looked at it
4 when they took the Decision, which was in September 09?

5 MR. HARRIS: No, Sir, I do not say that. I say that your jurisdiction is at large to come up with
6 the most appropriate and proportionate penalty on the facts and information that are before
7 you today.

8 THE CHAIRMAN: So if an infringing undertaking was subjected to a penalty quite properly on
9 the level of profit that was then shown and various financial performance indicators, and the
10 OFT did its job as you and Lord Pannick say they should do, looking at all of those relevant
11 factors, and they came up with a penalty that was unimpeachable, but in the subsequent year
12 the company has an unfortunate and significant downturn in its financial performance, you
13 say one could appeal that penalty and the Tribunal should vary it by redoing the calculation
14 on the new figures as at the date of the appeal, even though there is nothing wrong, the OFT
15 could not be criticised for what they did?

16 MR. HARRIS: Yes, Sir, I do say that. This is an issue on which we cross swords with the OFT
17 and I will happily take you, if I need to, to the precise references first thing in the morning,
18 but it is at our Notice of Appeal, which is tab 4 of CB2, page 168, para 4.5, footnote 21.
19 We cite two cases in support of that proposition, the very one that you have just put to me,
20 that:

21 “...the level of the fine as determined by the Tribunal should take account of the
22 situation prevailing at the time of the Tribunal’s judgment.”

23 That possibly may mean at the time of argument before the Tribunal, unless they are
24 expecting an addendum or postscript. The OFT has taken issue with that but not in the
25 direct sense. I will have to check the precise manner in which they put it when they deal
26 with that paragraph in our Defence. I am very grateful to those instructing me, this can be
27 seen in the OFT’s defence to Eden Brown, at tab 5 of CB2 at page 188, para. 22 and this is
28 the passage from *Argos* that we cited.

29 THE CHAIRMAN: Page 188.

30 MR. HARRIS: That is correct, and the particular sentence is over the page at 189. This is the
31 Court of Appeal citing *Napp*, which is the other case that we referred to and the relevant
32 sentence:

33 “... this Tribunal is bound to base itself on its own assessment of the infringement
34 in the light of the facts and matters before the Tribunal ...”

1 In fact it does say “at the stage of its judgment”, so it is conceivable I could go out of
2 business between now and when you hand down judgment and then I could submit an
3 addendum saying that is even more relevant – let us hope that does not happen.
4 What it flows from is quite important because indeed it links into one of the other points
5 that I wish to make, namely, that flows from the corporate human rights that my client is
6 entitled to rely upon. It is the full and independent judicial scrutiny by an impartial and
7 independent Tribunal. You have to come to the right determination of penalty in your
8 judgment based on the materials that are before you. The materials that are before you in
9 this regard as concerns Eden Brown, are the updated ones that Mr. Sterling testified to in
10 evidence-in-chief, and the point here is really rather straightforward again, which is already
11 on the materials that were set out in forecast terms, in Mr. Sterling’s second witness
12 statement, CB3 tab 9. Already the impact on the applicant’s then forecast current year
13 profits was extremely significant. That figure is no longer confidential because it has
14 obviously been superseded. It was already 63 per cent, and we know the figures for Hays
15 ,and for what little this is worth that figure is already higher than the impact upon Hays
16 measured by reference to the relevant factor of profit, but of course in light of what is in the
17 confidential letter the implications are absolutely obvious, I do not need to spell them out.
18 That is that issue.

19 Very briefly we adopt what Lord Pannick says also about the relevance and the individual
20 consideration of our case about using gross turnover to find the percentage at Step 3. I need
21 say no more about that.

22 The fourth factor, which we have made in our notice of appeal, if you wish to turn that up it
23 is obviously in the pleadings bundle, and ours is at CB2, tab 4. and in particular at page 177,
24 para.8.20(b), is that there has been a general economic downturn in the recruitment
25 consulting industry. I do not over emphasise this point I just say it is a relevant factor; that
26 is what Mr. Sterling refers to when he sets out the declining net fees figures in his second
27 witness statement. We say that for the same reason that you can take account, indeed the
28 Court of Appeal directs you, respectfully, to take account of updated profit figures, or
29 updated materials before you as of the day that I am presenting the case, then you should
30 also take account of the fact that this industry is suffering a downturn in relevant net fees,
31 and those are set out in para. 8.20(b) in the table and repeated in Mr. Sterling’s second
32 witness statement.

33 **THE CHAIRMAN:** The figures for the recruitment consulting industry, your footnote 42, look at
34 2008/9 compared to 2007/08.

1 MR. HARRIS: Yes, I would suggest that the more relevant ones are the ones at the bottom of the
2 table, showing a significant downturn between 08/09 and the forecast 2010 figures. I have
3 just noticed I do not believe we have updated the forecast figures, but I can have that dealt
4 with. The point is generically the point that Lord Pannick raised, which is that these are
5 individual factors that bear upon the circumstances – you have the point.

6 That then takes me on to the third complaint that I have about the way in which the OFT
7 approached this question of deterrence due to Eden Brown, namely, arbitrariness. You
8 heard me say in opening that the principal way that I put this point is that the 19.2 per cent
9 figure, and this of course echoes somewhat Lord Pannick's submissions as well, could on
10 the OFT's approach have been any other number, in the same way that the 15 per cent that
11 the OFT has decided in the exercise of its margin of appreciation could have been 10, or 20,
12 or, frankly, anything, the 19.2 per cent has been arrived at in exactly the same way, namely
13 on a completely arbitrary basis.

14 THE CHAIRMAN: I have to say I cannot follow that point because the 15 per cent is, so far as I
15 have seen, not actually reasoned as to why it is 15, not 20, or 12, or whatever, but the 19.2
16 per cent like the figure that was arrived at for Hays before the MDT was substituted, was,
17 and this is the way Lord Pannick put his submissions. That was the figure arrived at on an
18 individualised basis, by applying Steps 1 and 2.

19 MR. HARRIS: No, Sir, it was not. The figure 19.2 per cent is the figure that is arrived after the
20 deduction for my client, the figure prior to that is the one in the confidential table at (CB1)
21 table 5.3 on p.284 of the Decision.

22 Since the 19.2 per cent is not confidential I cannot believe for a minute that the figure that it
23 came down from was confidential, that was 32 per cent.

24 THE CHAIRMAN: Well if the 40 per cent is not confidential, the 32 cannot be, can it?

25 MR. HARRIS: Exactly, so none of this is confidential. The point that you just put to me, Sir,
26 was that 19.2 is arrived at as an individual consideration after Steps 1 and 2, but that is not
27 right. The figure that was arrived after Steps 1 and 2 was a different figure, and then it is
28 adjusted down by 40 per cent, and instead of the 32 one gets 19.2. Plainly, I do not
29 complain that it comes down, on the contrary, but what I am saying is the fact that one has
30 gone down to 19.2 is arbitrary.

31 THE CHAIRMAN: What you are saying really is the 40 per cent is arbitrary?

32 MR. HARRIS: Yes, well and that is an exact ----

33 THE CHAIRMAN: That is the point you are making?

1 MR. HARRIS: Exactly, one cannot discern from this Decision how my circumstances should
2 result in a final level of 19.2 or a reduction of 40 and in exactly the same way one cannot
3 discern from this Decision how or why those figures that apply to Henry Recruitment, that
4 are confidential in CB1, page 286, para. 5.257, are the figures that they are, nor the figures
5 for Fusion People at para. 5.258, they are simply plucked out of the air by the OFT. What
6 they do not do at any stage, and this is a core complaint that I have, they do not say, by
7 reference to the individual circumstances of Eden Brown, particularly the four that I have
8 highlighted, and the evidence that bears upon them, our judgment is that this figure of 19.2
9 is needed on the circumstances of your case in order to deter you. Quite the opposite, let me
10 show you what they do say. It is at the Decision at CB1, page, 287, para. 5.260. The sum
11 total of their reasoning for this 19.2 per cent is that the OFT considers that these downward
12 adjustments are appropriate in terms of each party.

13 Sir, with respect, we say that is simply not good enough, that is an arbitrary figure. It is not
14 rounded in the circumstances of my case, it does not bear any reference to the evidence that
15 pertains to my client. It could have been without changing a single word in this Decision
16 20.2 per cent, or 18.2, or 25.2, that, Sir, is the very essence in my submission of
17 arbitrariness, and that is precisely the thing that the court in Strasbourg struck down in the
18 case of *Carbonara* which is at Authorities Bundle Volume 3, tab 33, the one I mentioned in
19 opening – I do not propose to turn it up unless invited to do so, partly because I have an eye
20 on the clock.

21 In order to comply with the requirement under Article 1 Protocol 1 of conditions provided
22 by law, you are not permitted to have arbitrary and unforeseeable deprivations of property
23 which, in this case is the fine.

24 This, Sir, is the very essence of arbitrariness. The OFT on the day that they wrote this
25 Decision considered that that downward adjustment was appropriate. If they wrote the
26 Decision today they might decide some other downward adjustment was appropriate, and I
27 have no way of knowing today, next week or last week, why it is that that was considered
28 by them to be appropriate, and I put this one final way before moving on and it is, again, a
29 point I made in opening. I am entitled to full and effective, independent and impartial
30 judicial scrutiny of the OFT's figures by this Tribunal and I pose the question again
31 rhetorically: how does this Tribunal effectively determine that the OFT's 19.2 per cent
32 figure, or its 40 per cent reduction, which ever you want to call it, is the appropriate one. I
33 respectfully submit that you cannot do so because you have not been provided with the

1 materials to do so by the OFT and that is because they have deliberately refrained from
2 analysing them in the first place. That is the point I make about arbitrariness.

3 I will just conclude, if I may, with one brief comment on *Lindsay*, and subject to any
4 questions from the Tribunal. We adopt what Lord Pannick submitted regarding the Court of
5 Appeal case of *Lindsay* and in particular the need to focus upon individual circumstances,
6 but you, Mr. Chairman, asked Lord Pannick about the point that the Master of the Rolls, as
7 he then was, made – I think you had in mind para. 63 – I am in vol. 4 of the authorities
8 bundle, tab 53 at page 21, para. 63. The point that you put to Mr. Pannick was that it
9 seemed to be being said that if there were in fact commercial smuggling ventures then it
10 would be acceptable to take forfeiture of the car irrespective of the value of the car. I
11 agreed, for what it is worth, with what Lord Pannick said about it seems peculiarly
12 appropriate where you are dealing with commercial smuggling to take away the very
13 figurative and literal vehicle for conduct of the smuggling.

14 We say what is going on here is the reason that that policy was struck down as unlawful was
15 precisely because it failed to take into account this very important consideration which was
16 whether or not it was a commercial smuggling venture, or a personal smuggling venture,
17 and that was the reason for rejecting the policy and holding it to be unlawful. That is how
18 we pray in aid the case of *Lindsay*. We say in that case the relevant consideration, probably
19 the most relevant consideration – who knows – is commercial smuggling versus personal
20 smuggling. The policy was unable to take account of a relevant consideration and was
21 therefore struck down as unlawful. What we are saying is that the policy approach that the
22 OFT has taken to deterrence, for the reasons adumbrated by Lord Pannick, is unable to take
23 into account considerations other than the percentage of worldwide turnover. It does not
24 take into account all these other factors, and that ought, we say inexorably, to lead to the
25 same conclusion as the Court of Appeal reached in *Lindsay*, which was by being unable to
26 take into account these relevant considerations it is an unlawful policy.

27 Sir, those are the submissions I make on Step 3 on behalf of Eden Brown, unless I can be of
28 further assistance.

29 THE CHAIRMAN: (After a pause) No, we have no questions.

30 MR. HARRIS: I am grateful.

31 THE CHAIRMAN: Miss Kreisberger, we indicated that we would like to give you half an hour
32 and we adhere to that, and we will therefore sit later so that we hear your 30 minutes, if that
33 is what you are offering us, as it were.

1 MISS KREISBERGER: If it assists, we were insisting on our minimum 30 minutes for the
2 temporary wages' ground, if you remember, and on MDT I think I can be 10, so it may be
3 that I can just be heard.

4 THE CHAIRMAN: So much the better, otherwise we would have risen for five minutes, but if
5 you are going to be about 10 minutes I think we will just carry on. Yes, thank you.

6 MISS KREISBERGER: The Tribunal will appreciate from our opening statement that Ground 2,
7 our MDT ground, only arises in relation to CDI if (i) we succeed on Ground 1 in relation to
8 temporary wages; and (ii) the challenge of Hays to the MDT sales because if no MDT
9 applies to Hays, CDI cannot be said to benefit from what the OFT referred to as a
10 "windfall" in their skeleton.

11 So, unlike Lord Pannick, I am going to take an optimistic stance from the outset and say
12 that we, of course, consider (i) our success on Ground 1 to be highly likely; and we also
13 consider (ii) to be almost inconceivable in the light of Lord Pannick's submissions to day,
14 but we nonetheless cover this ground for completeness. (Laughter)

15 The argument made against us is that if other parties such as Hays have been subject to a
16 specific MDT calculation that we have heard a lot about today, the very same calculation
17 based on 15 per cent of worldwide turnover should be applied to CDI. If relevant turnover
18 is calculated on a basis which means that it comes to less than CDI's worldwide turnover. I
19 say to the Tribunal that we do not accept this for three key reasons. First, it is trite law that
20 the principle of equal treatment is breached where parties in a different position are treated
21 in the same way. This is the problem with MDT which we have heard much about today – I
22 do not intend to repeat the submissions of Lord Pannick, I of course adopt them. But the
23 problem with MDT is that it adopts a uniform approach divorced from individual
24 circumstances, as Lord Pannick referred to it, the need for individual consideration.

25 The point I would like to make is that CDI is not in the same position as Hays, and that is
26 because CDI is a foreign undertaking, based in the US, and only 18 per cent of CDI's
27 worldwide turnover (less than a fifth) is generated in the UK, and it is probably just helpful
28 to turn this up to have a look at the figures and that is in NCB 2, tab 17 at p.388. This is
29 CDI's Form 10K for 2008. At p.388, on the right hand column on that page one sees the
30 second table, "Revenue", and it is split out there in dollars, for the US, the UK and there is
31 worldwide turnover there at the bottom. So only \$206 of \$1,118, putting that into thousands
32 is UK turnover, so as I said, that is 18 per cent ----

33 THE CHAIRMAN: Is this gross turnover or net fees?

1 MISS KREISBERGER: This is gross turnover. So having just done the sums on the basis of that
2 column there for 2008, one gets 18 per cent for UK turnover, and over 80 per cent is
3 therefore wholly unconnected with this jurisdiction, and in fact 70 per cent, that is the 773
4 figure you see there, 70 per cent is derived in the US. So it is heavily based on turnover
5 arising in the States.

6 THE CHAIRMAN: North America.

7 MISS KREISBERGER: Yes, 70 per cent is the US, yes. So 80 per cent, as I said, is wholly
8 unconnected to this jurisdiction. One can contrast that with the figures for Hays. We know
9 what the worldwide turnover figure is, that is at 5.418 of the Decision – I do not think we
10 need to turn it up, and I am sure those sitting behind me and to my left will jump up if I get
11 this wrong. On our calculations, and just for your note, we take this from the Hays' Annual
12 Report 2009, which is at NCB2, p.72, and we base this on UK and Irish turnover, so it is not
13 just UK. On our calculation that is 57 per cent of Hays' overall worldwide turnover, so it is
14 almost 60 per cent, well over half, compared to our 18 per cent, less than a fifth. Sir, you
15 have the point – very different proportions – we are dealing with a foreign undertaking here.
16 We say it would be both discriminatory and lead to a disproportionate result for CDI to treat
17 it in the same way as Hays for these purposes. These are obvious differences and need to be
18 taken into account.

19 I make two further points on this. The first is to develop that point - the difference. As we
20 have already said, penalty assessment is always ultimately a question of fairness on the
21 facts. That is why there is a need for consideration of individual circumstances. So, Sir,
22 you put to Lord Pannick that the OFT might say here, "Well, here, in this case, in Hays'
23 case, there has been individual assessment of relevant turnover because they give the
24 percentage in the Decision". Hays, of course, dispute that. I do not interfere with that. But,
25 all I would say is that here, of course, there has been no individual consideration of the
26 particular factors relating to CDI in relation to the MDT - in particular, this factor that I am
27 now putting before you, that it is a foreign undertaking with a very different mix of
28 turnover. That is not in that table. It has not been up for consideration in the Decision
29 because the MDT was not applied to CDI. So, we say, again, it would be discriminatory to
30 treat it in the same way as Hayes where you have no individual consideration of this issue in
31 the Decision.

32 The second point I would like to make is that there is no authority for the application of this
33 specific MDT tool - the 15 per cent tool - the worldwide turnover of a foreign undertaking,
34 where the infringement was committed by the UK subsidiary. Now, I would like to refer

1 here to *Makers* which Lord Pannick has already taken you to. I do not propose to take you
2 to the judgment itself, but I would like to make a slightly different point on *Makers*. I make
3 that because the OFT rely on *Makers* in response to us. They say, “The Tribunal has
4 sanctioned this”, effectively.

5 THE CHAIRMAN: Yes. Lord Pannick did not actually take us to the Decision.

6 MISS KREISBERGER: Sorry. He did not take you to the case - he referred to it. Like Lord
7 Pannick, I am not going to take you to it. I am going to make this one specific point on
8 *Makers*. It is a point which is covered at para. 50 of our skeleton. The Decision in *Makers*
9 was addressed to the UK subsidiary. *Makers*, in fact, was then - and I assume still is - part
10 of a group, a US group, called the Keller Group. Now, the application of the MDT to
11 *Makers*' turnover, the UK subsidiary's turnover, led to a penalty of £522,585. Now, having
12 done a little research of this, I have had a look at Keller Group's accounts. I was not going
13 to hand those up. I can if the Tribunal is interested, tomorrow morning. They are on-line. I
14 see that in 2005 Keller Group had a worldwide turnover of £685.2 million. So, that is not
15 far off CDI's worldwide turnover.

16 THE CHAIRMAN: Is that pounds or dollars?

17 MISS KREISBERGER: That is pounds. So, that is greater than CDI's, though not by a huge
18 amount. So, had the OFT addressed its Decision in *Makers* to the Keller Group, the MDT
19 penalty would have been ten times greater. So, it is with a degree of under-statement that
20 the OFT acknowledges in its skeleton in CDI's case at para. 38 that the facts of *Makers* are
21 not identical to those in CDI's case. Quite. I simply make the point that *Makers* is not
22 authority for what is in fact a very different approach which the OFT is here advocating. It
23 is not an approach they applied to us in the Decision. I just note that since Lord Pannick
24 handed up a couple of pages of the transcript in the *Ballast Nedam* appeal, I do not propose
25 to hand this up. I would simply mention, if it is of assistance, that the two pages before the
26 pages handed up - pp.30 to 31 of that transcript - deal with precisely this point. The
27 President of the Tribunal there makes this comment ----

28 THE CHAIRMAN: This point' being the *Makers* point?

29 MISS KREISBERGER: The *Makers* point, he makes exactly this comment - that the *Makers*
30 approach is a different approach. It is not authority for an MDT applied to the foreign
31 parent of a UK subsidiary. It is on exactly that point. I am very happy to hand that up if it
32 is helpful, but I simply refer to those pages since Lord Pannick brought it in.
33 Just to sum up, we say that the MDT should not be applied to CDI's fine, even if the
34 conditions for this ground are, in the event, triggered, because, first, CDI is not in an

1 identical position to Hays due to the proportion of foreign turnover (it has its foreign
2 group); second, there is no consideration in the Decision of whether the circumstances here
3 would justify the application of the 15 per cent MDT to CDI; and third, the OFT is not
4 assisted in this by the approach taken in *Makers*.

5 I would like to just make one final point. It is yet another table for the Tribunal on where
6 we say the penalty could go. (Same handed) These figures are confidential. So, it is just
7 for disclosure within the confidentiality ring. This table relates to the point which we
8 discussed earlier, which the Tribunal has well in mind - that if the parties are successful on
9 Ground 1, then the MDT must be calculated with temporary wages stripped out of the
10 overall MDT figure - the worldwide figure. So, that is simply what we have done here. So,
11 this only arises if the Tribunal is against us on the three points I have just made, and against
12 Hays' appeal on the MDT.

13 I should just observe that we do not play with any other variables in this table. This is based
14 on 9 per cent as a starting amount on seriousness. That is not because we accept 9 per cent -
15 we do not. We challenge that figure. The first column is simply stripping out temporary
16 wages. That is already in the documents before the Tribunal. But, we have just set it out
17 there just as a useful comparator. But, the column we are looking at is the column on the
18 right. I am not going to say the figures out loud because they are confidential, but the figure
19 at the top - the CDI worldwide turnover excluding temporary wages -- You can see how
20 that figure has been calculated in the box. The first figure you see in that box to the right -
21 that is the sum of temporary wage costs for the CDI group. Now, that figure cannot be got
22 from CDI's accounts. It is not apparent on the face of the accounts. We do have a witness
23 statement from the Chief Legal Officer at CDI, just verifying these figures which I can hand
24 up to the Tribunal, if that is of assistance. (Same handed) He simply confirms that these
25 are the right figures. This is, again, confidential. So, that is how we have come to the figure
26 there at the top of the column. We then simply work through the calculation which the OFT
27 performed - the MDT calculation - but on the new basis of worldwide turnover, stripping
28 out temporary wages. You see at the bottom of that column the figure after Step 5. Then
29 we apply the leniency discount to that. So the very last figure is where one would get to on
30 an overall penalty. This is our last resort position.

31 THE CHAIRMAN: Yes. I see. That is very clear.

32 MISS KREISBERGER: Sir, unless I can be of any further assistance, that completes my
33 submissions on the MDT.

1 THE CHAIRMAN: Do you accept, Miss Kreisberger, and adopt Lord Pannick's submissions
2 with regard to the way Step 3 should operate - that is to say, that there can be an uplift for
3 deterrence - clearly that is what Step 3 says - and that therefore if one were to end up with
4 one or other of these figures at the bottom of your second column then it would certainly be
5 possible for the Tribunal then to consider on an individualised basis whether that is
6 sufficient or whether, having regard to the sort of factors that he mentioned there should be
7 an increase for deterrence.

8 MISS KREISBERGER: Of course, on the third column deterrence is factored in. So, on the
9 second column we of course accept that the Tribunal can look at this in the round. The
10 Tribunal is ultimately concerned with the final amount of the penalty, taking account of
11 seriousness and deterrence. So, of course, deterrence must be factored in. We say that the
12 penalty that one looks at taking out temporary wages is a sufficient level. But, of course, it
13 is within the Tribunal's discretion to determine whether a further uplift is necessary at Step
14 3.

15 THE CHAIRMAN: For that purpose we can look at worldwide turnover, albeit, you say, not
16 through an MDT. But, it is one factor one would look at.

17 MISS KREISBERGER: Yes, and we rely on para. 121 of the *Musique Diffusion* case.

18 THE CHAIRMAN: The *Pioneer* case, yes.

19 MISS KREISBERGER: It is in our skeleton. They must both be taken into account - never one to
20 the exclusion of the other -- worldwide turnover to the exclusive of the affected turnover.

21 THE CHAIRMAN: Thank you very much.

22 Mr. Unterhalter, can I raise with you, because this will otherwise be gone into tomorrow,
23 Ground 4 of the CDI AndersElite appeal which is the calculation of relevant turnover which
24 is all about the certain categories being excluded? As I understand it, it is now common
25 ground that those categories were in when if the OFT had had the figures they would have
26 been excluded.

27 MR. UNTERHALTER: Sir, it is not contended that the figures are not correct.

28 THE CHAIRMAN: So, the argument seems to be to us, "Well, CDI AndersElite says the OFT
29 should have asked us." The OFT says, "AndersElite should have told us without being
30 asked. The onus is on them". It does seem to us, I have to say, without having heard you on
31 it, that now that this fine is subject to appeal, if it is common ground that there was an error-
32 and assume in your favour that it is not something for which the OFT should be criticised,
33 but let us just for the purpose of this discussion accept that - but now that it is acknowledged
34 by everyone that if those figures had been presented in a different way, the fine would have

1 been different, it is not very attractive, it seems to us, for the OFT to say, “Well, too bad.
2 The Tribunal must stick to where it was”.

3 MR. UNTERHALTER: Could I indicate that that very issue has been a matter of some
4 discussion. I am seeking an instruction. We did meet at lunchtime on that very point, and I
5 will indicate to my learned friend what our position is before the commencement of
6 proceedings tomorrow.

7 THE CHAIRMAN: I think that would be helpful, and I think I have indicated the Tribunal’s
8 initial reaction to that point, given that you are not representing a commercial party, you are
9 representing a public authority.

10 MR. UNTERHALTER: Oh indeed, we do take that.

11 THE CHAIRMAN: Miss Kreisberger?

12 MISS KREISBERGER: Sir, could I just take the opportunity, given that is the case, the table we
13 handed up, we have another version that I was going to hand up tomorrow but I think ----

14 THE CHAIRMAN: Well let us wait and see where we get to.

15 MISS KREISBERGER: It takes account of the Ground 4 point.

16 THE CHAIRMAN: Well, depending where we are we may be substituting another table.

17 MISS KREISBERGER: Thank you, Sir.

18 THE CHAIRMAN: But Mr. Unterhalter will inform you of the position.

19 MR. HARRIS: Sir, with your permission may I detain the Tribunal for just one moment longer. I
20 would like, with the permission of the Tribunal, to hand in another authority which, were
21 the Tribunal to find a moment overnight, could potentially speed matters along tomorrow.
22 This is a Court of Appeal case (*Muscat v Cable & Wireless* [2006] All ER (D) 127 (Mar))
23 concerning the question of whether or not, notwithstanding the tripartite contractual
24 relationship between a temporary recruitment agency and the client, there can nevertheless
25 be an employment relationship direct between the temp and the end user client. The Court
26 of Appeal concludes that, as a matter of law, that is possible, it depends upon the facts and
27 circumstances of each case. In particular, for the Tribunal’s references, the principal
28 paragraphs for that legal proposition are 34 and 35, and 41. Were the Tribunal to find the
29 time to cast its eye over in particular those three paragraphs it may be that issue can be
30 taken very, very briefly tomorrow. But in light of some of the questioning from the
31 Tribunal at an earlier stage in the proceedings I thought that that might be a helpful
32 authority to have available.

33 THE CHAIRMAN: Thank you very much, we shall endeavour to look at that, and we shall
34 resume – yes, Mr. Brealey?

1 MR. BREALEY: Case management, we have tomorrow, I think you indicated, say, about midday
2 to start for the OFT, they wanted three hours. I wonder whether we could start at 10
3 o'clock, we have quite a lot to get through in an hour and a half tomorrow? If not, we will
4 do our best to get through in an hour and a half but an earlier start would give the appellants
5 two hours.

6 MR. UNTERHALTER: May I just indicate on that point, we too need a certain amount of time to
7 digest what has transpired in the course of today and so on, and perhaps you would also
8 bear that in mind in determining the starting point for tomorrow's proceedings.

9 THE CHAIRMAN: We will start at 10.30 and we will sit until 5 o'clock if necessary so that you
10 can have two and a half hours, and the OFT can have its three hours.

11 MR. BREALEY: Thank you very much indeed. One last matter, we were promised two notes.

12 THE CHAIRMAN: I think the understanding was that you will get them this evening, and we
13 will get them tomorrow morning, so if you speak to Mr. Unterhalter.

14 MR. UNTERHALTER: They are ready.

15 MR. BREALEY: Thank you.

16 THE CHAIRMAN: 10.30.

17 (Adjourned until 10.30 a.m. on Thursday, 29th July 2010)

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