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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

29 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 FOUR

## 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: Can I just record we have had the two notes from the Office of Fair Trading  
2 for which we are very grateful, thank you. Yes, Mr. Brealey?

3 MR. BREALEY: Thank you, Sir. Subject to your direction, we have agreed between the  
4 appellants, I am going to speak for 45 minutes on all the grounds of appeal in Hays' case,  
5 and then Mr. Harris.

6 THE CHAIRMAN: Yes.

7 MR. BREALEY: What we have done, to try and speed things up, hopefully it is the last thing we  
8 are going to hand up to you – essentially what we tried to do, I handed up at the beginning  
9 of the case the points of emphasis which set out our grounds, and what we have tried to do  
10 here is incorporate the relevant evidence-in-chief and in cross-examination as it applies to  
11 the various grounds of appeal. So in this bundle we have handed up you will see tab 1 –  
12 notice of appeal, net fees, etc., seriousness, compliance, and senior management. I hope it  
13 is all there, it is just hot off the press.

14 Could I start off with net fees, that is tab 1? Just to give the structure of this document,  
15 essentially the first seven pages follow broadly the submissions I made in opening. Then at  
16 annex A and B (annex A starts at p.8) we set out the evidence that we say applies to the type  
17 of services that we are providing, and then annex B (p.16) is the relevant financial metric.  
18 If in the next 15 minutes I go through this document, as I am sure you are aware now, Sir,  
19 and Members of the Tribunal, we set out our case at p.2, the object of identifying relevant  
20 turnover. Then we have tried to set out what are the relevant activities – what actually is the  
21 service that is being provided. I summarise it at para. 6, but the argument that appears to be  
22 advanced by the OFT now, but one cannot really see it from the Decision, is that Hays  
23 provides the temporary workers' services to the client. In other words, there appear to be  
24 two bilateral relationships, and not what we call a triangular relationship. We will come on  
25 to the *Muscat* case that Mr. Harris handed up yesterday. There the Court of Appeal  
26 describes the service we are providing as a triangular relationship.

27 The thrust of the cross-examination of Mr. Venables and Mr. Herron was that the worker is  
28 providing a legal service to Hays and Hays is providing that service to the client. We say  
29 that is a fundamental misunderstanding. We do not see it in the decision but that was the  
30 thrust of the case put by the OFT before the Tribunal. We say that when one looks at all the  
31 evidence, including the contracts, it is simply a fundamental misunderstanding to say that  
32 we (Hays) are providing the services to the clients. Hays is a recruitment agency, it is  
33 placing workers. It is not, as I said in opening, liable for any negligence on the part of a  
34 temporary worker insofar as providing legal service or engineering services goes.

1 So Annex A to this note – I am obviously not going to read it out, but hopefully the  
2 Tribunal will find it helpful – at p. 8, we show the relevant evidence relating to the service  
3 provided. First, we have set out the evidence of the factual witnesses because it is material  
4 to see how the witnesses see themselves providing the services. It is relevant because  
5 according to Mr. Venables it would almost be unworkable if Hays were providing legal and  
6 engineering services, they do not have the infrastructure. That is the thrust of the evidence  
7 of Mr. Venables.

8 We then set out the evidence in Venables 2. We then set out the cross-examination of Mr.  
9 Venables, and he still maintains that he is placing a worker, and that worker is providing a  
10 service to the client.

11 At p.11 we set out the evidence of Mr. Shepperd and the Tribunal will note that this  
12 evidence is unchallenged. Then we set out also the evidence of Mr. Herron at Eden Brown  
13 and the cross-examination because he gave, as did Mr. Venables, a frank summary of how  
14 he perceived Eden Brown were providing services. So I do not obviously propose to go  
15 through that, that is for the Tribunal's note, but the thrust of that factual evidence is that the  
16 worker is providing the service to the client. The worker is providing the service to the  
17 client, and Hays is providing the worker. That is the factual evidence. Let us have a brief  
18 look at the standard terms and conditions to see whether the contracts fit in with the factual  
19 evidence. The Hays' standard terms with the client – some issue was made as to whether  
20 they were standard terms or whatever – the standard terms are at NCB 4, vol.2 and if we can  
21 go to that to look at the relevant clauses. This is all in the context that Hays is not  
22 providing the legal service to the client, or the engineering service to the client. Although on  
23 the note I have emphasised particular clauses it is worth just having a look at the "Terms of  
24 Business for the Introduction and Supply of Temporary Workers."

25 "The parties hereby agree to the introduction and supply by the Employment  
26 Business to the Client of the temporary worker . . ."

27 The word "supply", when we look at the decision the OFT uses the word "supply" in the  
28 context of permanent workers and temporary workers, there is no difference, it is a supplier.  
29 Clause 1.2 is quite clear and, Sir, you referred to this during the cross-examination. Clause  
30 1.2:

31 "Subject to clause 4.6 below, the Assignment shall commence at the start of the  
32 first day on which the Temporary Worker, provides the Services to the Client".

33 That is not Hays, we submit, providing legal services to the client. Then we have  
34 "Charges", and I emphasise the word "commission".

1 Then we also emphasise clauses 9.1 and 9.2 over the page:

2 “The Temporary Worker has been engaged by the Employment Business under a  
3 contract for services. The Temporary Worker is deemed to be under the  
4 supervision, direction and control of the Client ...”

5 That is important, so not under the supervision, direction and control of Hays, and then:

6 “The Client agrees to be responsible for all acts, errors and omissions of the  
7 Temporary Worker as though the Temporary Worker is an employee of the  
8 Client.”

9 This is an indication of what we would call a triangular relationship. This is not simply two  
10 bilaterals, this is a triangular relationship, to use the words of the Court of Appeal in a case  
11 we will come on to in a moment.

12 When one looks at the terms of contract between Hays and the worker, 1107 of the same  
13 bundle. What I need to do is hand up the temporary assignment confirmation letter which  
14 goes with this, which I gave to Mr. Unterhalter at the start of the week. It has never been  
15 referred, but maybe that can be slotted behind exhibit 16.

16 THE CHAIRMAN: Shall we make that 1110A. (Same handed)

17 MR. BREALEY: Here it refers to “Assignment”:

18 “*Assignment* means the assignment of the Temporary Worker ...”

19 THE CHAIRMAN: Where are you now? You are in the document?

20 MR. BREALEY: No, I am on the terms, I am on the contract, I will come on to the new  
21 document in a minute.

22 “*Assignment* means the assignment of the Temporary Worker by the Employment  
23 Business to a Client ...”

24 So the temporary worker is essentially being assigned to a client –

25 “... in the relevant Assignment Confirmation Letter ...”

26 THE CHAIRMAN: Is that what you have given us?

27 MR. BREALEY: That is what I have given you, and just while we are on it, you will see the third  
28 paragraph of that letter. I would imagine that the identities of the parties are confidential,  
29 but it does not really matter. You see what Hays is saying to the temporary worker in the  
30 third paragraph:

31 “You must submit your time sheets and the client for whom you are working will  
32 authorise the time worked ...”

33 One looks at the contract, and look at provision of services. Mr. Unterhalter and the OFT  
34 may, although they did not in the decision, rely on 2.2 and 2.3 where:

1 “The Temporary Worker is under no obligation to accept any Assignment which  
2 may from time to time be offered to him or her by the Employment Business ...  
3 but on acceptance of any Assignment he/she will supply his/her service to the  
4 Employment Business in order to enable it to supply services to the Client.”

5 We say that, on a proper interpretation of that clause, all that is doing is saying that the  
6 temporary worker is making him or herself available – “available” – to Hays, so that Hays  
7 can make the temporary worker available to the client.

8 THE CHAIRMAN: What are the “services” that the temporary worker is supplying to Hays?

9 MR. BREALEY: “Services”, I interpret this, will be, say, the legal services, so the worker is  
10 saying, “I will make my legal services available” ----

11 THE CHAIRMAN: Legal services?

12 MR. BREALEY: Or engineering services, or whatever services the temporary worker is a  
13 specialist in, and “I will make my services available so that you, Hays, can make them  
14 available” ----

15 THE CHAIRMAN: You say it is “will supply”, so, “I will supply my engineering services to  
16 Hays”?

17 MR. BREALEY: Yes.

18 THE CHAIRMAN: So that Hays can supply them to the client – that is what it says, is it not?

19 MR. BREALEY: That is what it says, yes.

20 THE CHAIRMAN: So it is supplying the services to Hays, and Hays is then supplying those  
21 services to the client? That is what it says, is it not?

22 MR. BREALEY: Yes, and we say that is not how it should be read.

23 THE CHAIRMAN: How do you read it?

24 MR. BREALEY: Making the services available.

25 THE CHAIRMAN: That is not what it says. It is pretty plain English, is it not. As *Muscat*  
26 makes clear, you start by looking at the wording of the contract.

27 MR. BREALEY: Yes, and we say that when one looks at the contract as a whole, the three  
28 documents that I have given, which is the temporary assignment confirmation, these terms  
29 of assignment ----

30 THE CHAIRMAN: The temporary assignment confirmation is time sheets.

31 MR. BREALEY: On a proper interpretation of these three documents, is it the case that the  
32 temporary worker is providing plumbing services, legal services, engineering services to  
33 Hays, so that Hays can provide those very services to the client. We say that on a proper  
34 interpretation that is not the case. What is happening is that the temporary worker is

1 making his or her services available. It is a contract for services, entering into a contract for  
2 services and Hays is, in turn, making the temporary worker available to provide those  
3 services to the client.

4 THE CHAIRMAN: The second part is certainly correct – that is what Hays is doing to the client,  
5 they are making the services of that engineer or whatever available to the client. As  
6 between the engineer and Hays, if this means what it says the engineer is self-employed  
7 working under a contract for services, not a contract of employment, with Hays, so that  
8 Hays can then offer him out to their clients.

9 MR. BREALEY: Offer him out so that the worker ----

10 THE CHAIRMAN: The client gets the benefit.

11 MR. BREALEY: So the worker can provide the services to the client.

12 THE CHAIRMAN: That is what achieved. There is no doubt about that, that is common ground.  
13 Clearly the actual engineering work is being done for the client, it is not being done for  
14 Hays. I am not sure how that really helps us.

15 MR. BREALEY: It is not how the contract works. The contract does not work in the way  
16 suggested by the OFT in this case, though I do repeat that it does not make this case in its  
17 decision. The contract simply does not work as if Hays is responsible for providing the  
18 multitude of services that we saw in those 17 specialisms right at the beginning in my  
19 opening – accountancy, construction, legal. It is simply not passing those services on, it is  
20 making available the temporary worker so the temporary worker can provide those services  
21 to the client, as we see from the temporary assignment confirmation letter, that is why I  
22 handed this up because this also puts the terms of assignment into context. “You must  
23 submit your time sheet and the client for whom you are working”.

24 THE CHAIRMAN: That seems to be entirely neutral. You can have a window cleaning  
25 company that sends out contract window client, and it says: “When we send you out to  
26 clean the windows at Freshfields we like Freshfields to sign your time sheet because we  
27 would like to make sure you have actually been there doing the work.”

28 MR. BREALEY: It also says that you are working for Freshfields.

29 THE CHAIRMAN: Yes.

30 MR. BREALEY: So there is Hays telling the temporary worker that the window cleaner who has  
31 been sent off to Fleet Street is working for Freshfields, to clean Freshfields’ windows.

32 THE CHAIRMAN: Well, if you interpret that meaning contractually.

1 MR. BREALEY: We know that there is no formal contract between the temporary worker and  
2 Freshfields in that case. But that is why that lacuna posed a problem for the Court of Appeal  
3 in the *Muscat* case.

4 THE CHAIRMAN: We can look at that in due course.

5 MR. BREALEY: That is the high water mark of the OFT's case advanced to the Tribunal that it  
6 is pinned, the whole case seems to be pinned on clause 2.2. If that is the way it works, that  
7 Hays is providing the services to the client it is contrary to all the factual evidence, that is  
8 not how it works. How it works is that Hays, as a recruitment agency, places a worker and  
9 that worker provides a labour service to the client. That is not how Hays understands it, that  
10 is not how the market understands it; that is not how Mr. Shepperd understands it, and Hays  
11 interprets clause 2.2 as making available the services to Hays so Hays can make the services  
12 available.

13 We interpret that clause as one of the services ----

14 THE CHAIRMAN: I think we have the point.

15 MR. BREALEY: It is making themselves available to provide a service, a contract for service.

16 We have seen the factual evidence, we have seen the contracts.

17 Previous decisions: Mr. Harris handed up the *Muscat* case, and I take the point, Sir, that  
18 each case must be read on its own facts, but here we did have Cable & Wireless as the  
19 client, we have the company Abraxas as the agency and we have Mr. Muscat, through  
20 Abraxas as the worker. What I would emphasise here is that the set up seems to be fairly  
21 similar to the set up in the present case, Hays, Eden Brown, CDI, which is that the worker  
22 enters into a contract for services with the agency, so there is a very similar contract.

23 THE CHAIRMAN: The issue in that case, because it is an employment case, is whether there is a  
24 contract of employment between the worker and, in that case, Mr. Muscat, and, as it turned  
25 out after the takeover, Cable & Wireless. We are not concerned with whether the engineer  
26 who was introduced is an employee of Taylor and Woodrow, and I do not think you are  
27 even asking us to go that far, are you.

28 MR. BREALEY: There is absolutely no reason why this Tribunal should be determining the  
29 contractual relationship between a worker and any unidentified client. What I would ask  
30 the Tribunal to take from this case is that the entering into of a contract for services with the  
31 agency does not mean that the agency is providing the services to the client. So in Hays'  
32 case there is a contract for service, we have seen it, the fact that there is a contract for  
33 service, and a similar assignment, Abraxos, the agency, assigns the worker to the client.  
34 The entering into the contract for service with the recruitment agency does not mean t hat



1 the agency is providing the services and that is why there was then a problem because the  
2 Court of Appeal perceived that the worker was providing the labour service and that caused  
3 the problem because, as the court recognised, the worker is providing the labour service, but  
4 on the face of it has no protection.

5 THE CHAIRMAN: Well he was not an employee, that was the issue. Did he have employment  
6 rights? He was under a contract for services with the agency.

7 MR. BREALEY: And was providing the services to Cable & Wireless, as in this case there is no  
8 formal contract between the worker and the client. One sees at para. 25 in the *Dacas* case,  
9 the court was then concerned that the worker, in that case Mrs. Dacas, had been found to be  
10 employed by no one.

11 THE CHAIRMAN: Yes, so had no employment rights.

12 MR. BREALEY: Yes.

13 THE CHAIRMAN: That is a quite different question. It could well be that the engineer here is  
14 employed by no one, is self-employed, which is the issue there, it does not help us on the  
15 point you are addressing.

16 MR. BREALEY: Well it does, with respect, because she had no employment rights, but was still  
17 providing a labour service to the client. So the vice was the worker was providing a labour  
18 service to the client, as a fact, was providing the service to the client but appeared to have  
19 no contractual rights.

20 THE CHAIRMAN: The vice was that Mrs. Dacas was employed, it was said, by no one, it would  
21 not have been a vice if she had been employed by the agency. I think it was argued she was  
22 employed by the agency, I think they were asked to appear in the Court of Appeal.

23 MR. BREALEY: And they are not employed by the agency they are a contract service.

24 THE CHAIRMAN: Because of the contract ----

25 MR. BREALEY: Service, yes.

26 THE CHAIRMAN: And therefore to see could you imply that in those circumstances she might  
27 be employed by the client – in fact she was not, was she?

28 MR. DAVEY: No, she was not.

29 THE CHAIRMAN: In the end.

30 MR. BREALEY: But a contract for service with an agency in this case did not mean that the  
31 agency was providing the service to the client, and that is the point that I would like to  
32 emphasise.

33 The point is made that it is a specific case, but this is the sort of triangular relationship that  
34 does happen in the recruitment industry. The temporary worker enters into a contract for

1 services with the agency, that does not mean that the agency is providing the very service to  
2 the client, and we can see that from the temporary assignment confirmation letter. Whereas  
3 one does not see actually what service this person is supposed to be providing, that will be  
4 determined by the client. All that the temporary assignment confirmation letter is doing is it  
5 is saying: “You are working for the client ...”

6 THE CHAIRMAN: As a project accountant in that case, that is what it says.

7 MR. BREALEY: Absolutely.

8 THE CHAIRMAN: So that is the service you are providing.

9 MR. BREALEY: Yes, the worker is providing that service, but not Hays.

10 THE CHAIRMAN: All I am saying is that temporary assignment confirmation does specify the  
11 service.

12 MR. BREALEY: Yes, but the service that is provided by the worker, not Hays.

13 THE CHAIRMAN: But your question is “to whom?”

14 MR. BREALEY: When it says “accountancy” it is a job title.

15 THE CHAIRMAN: But it is also a service, is it not?

16 MR. BREALEY: I remind the Tribunal of the standard agreement between Hays and the client,  
17 which specifically talks about the worker providing the service to the client. That is the  
18 contract between Hays and the client.

19 THE CHAIRMAN: It specifies, the new document you have given us, various things that the  
20 worker must and must not do in the course of carrying out his work. The last page, the  
21 various bullet points, the penultimate – “Do not operate tools, plant, equipment unless  
22 authorised and trained to do so.” That is the kind of thing you say to your staff, you would  
23 never say that when you introduce a permanent employee to someone else, because it is  
24 nothing to do with you, you have done the introduction, that is the penultimate bullet. I see  
25 just under half way down: “If you are involved in an accident ensure Hays are made aware”.  
26 You would not be doing that if the agency has no interest in your carrying out the work.

27 MR. BREALEY: Can I come back to the “Terms of Business for the Introduction and Supply of  
28 Temporary Workers.” The OFT can only succeed in its case that Hays is providing a  
29 service to the client if it can prove that by reference to the contractual relationship between  
30 Hays and the client. So this is an important point, Sir. The agreement between the worker  
31 and Hays cannot impose an obligation on Hays.

32 THE CHAIRMAN: Well it would be part of the factual background you could look at in  
33 construing the agreement between Hays and the client.

34 MR. BREALEY: And vice-versa.

1 THE CHAIRMAN: And vice-versa.

2 MR. BREALEY: When one looks at the terms of the contract between the client and Hays you do  
3 not see a clause which says “Hays is providing the plumbing service, the engineering  
4 service, p.1735. The OFT has to point to some obligation ----

5 THE CHAIRMAN: Well I asked about the other one because you took us to it in your note.

6 MR. BREALEY: Well I have to, the Tribunal must have all the relevant information, and the  
7 three documents seemed to me to be the three relevant documents. The contract between  
8 the client and Hays – I take your point that the others can be used as a context – the OFT  
9 have to point to some specific obligation and clause 1.2 quite clearly reflects what the  
10 market believes is happening, which is that Hays is assigning the worker ----

11 THE CHAIRMAN: Yes, well you have made that point.

12 MR. BREALEY: -- to provide services to the client.

13 THE CHAIRMAN: We have the point in that context, you have made it orally and in writing.

14 MR. BREALEY: That is then the service of the provider, the Tribunal has the point that the  
15 service of the provider is not the service of the worker as such.  
16 Then Annex B, The Relevant Financial Metric. If we are correct that the service is the  
17 service of placing, and I emphasise the fact that it is the supply of the worker which is used  
18 in the decision. The decision does not venture into the sort of detail we are going through  
19 now, but once we are into annex B: what is the relevant financial metric? There I have set  
20 out the accounts, and you saw me cross-examine Mr. Allen yesterday and he accepted that  
21 net fees was used as an indication of the amount of money being earned by the specialist  
22 department.

23 THE CHAIRMAN: Yes, you brought that out, Mr. Brealey, very clearly in your cross-  
24 examination of Mr. Allen .

25 MR. BREALEY: The factual evidence was set out, the first witness statement of Paul Venables,  
26 p.19, witness statement of Mark Shepperd again was unchallenged, on net fees, and then we  
27 have the expert evidence, and again I do emphasise for the purposes of our ground 1 the  
28 acceptance by Mr. Allen that due to the characteristics of the recruitment industry, the very  
29 last paragraph on p.22:  
30 “ . . . the market considers the Net Fees figure to be the equivalent of the turnover  
31 figure for most other industries.”  
32 and I would ask the Tribunal to accept that. In this industry, the net fees figure is the  
33 equivalent of the turnover figure. Why is that relevant? It is relevant because, as I  
34 submitted in opening, and I we repeat in the first part of this submission – I am looking at

1 paras. 13, 14, and 15 – in the decision the OFT expressly state that net fees is irrelevant, it is  
2 not material. All it will look at is a turnover figure that appears in the accounts. In my  
3 submission the OFT has to have a step back, accountants live in the real world but a lot of  
4 other people do too, and it has to ask itself what in the real world is the proper metric to  
5 determine the scale of activity of Hays in this market and that is net fees.

6 Those are my submissions on ground 1. I have five minutes really to do the rest.

7 Seriousness we have set out at tab 2. We emphasise that the scale of the agreement was just  
8 over one year.

9 THE CHAIRMAN: Is that relevant to the percentage, given that that is separately dealt with at  
10 Step 2?

11 MR. BREALEY: It is in duration but if something has gone on for years, in my submission, that  
12 would probably reflect the seriousness, because ----

13 THE CHAIRMAN: No doubt if you were appearing for someone whose infringement went on  
14 for years you would be saying that would be double counting because you are dealing with  
15 it at Step 2 by multiplying it out. If you put up Step 1 that would be most unfair.

16 MR. BREALEY: Like tomorrow. (Laughter).

17 THE CHAIRMAN: I hope not tomorrow!

18 MR. BREALEY: I take your point. Joking apart, if an agreement is going on for a sustained  
19 period of time, yes, for duration, but it may have a greater impact on the market, there is a  
20 flavour of the more serious the longer it is, but I take your point ----

21 THE CHAIRMAN: That is your point (c) is it not, ineffectiveness?

22 MR. BREALEY: It was ineffective.

23 THE CHAIRMAN: Yes, well I understand that point, but it seems to me it might be ineffective  
24 because of duration, but you put duration as a separate point.

25 MR. BREALEY: The market factors, we emphasise that this is a consideration that the OFT  
26 should be looking at. The participant did have only a 13.6 per cent share of the market.

27 THE CHAIRMAN: The 13.6 share of the market ----

28 MR. BREALEY: Of all of them.

29 THE CHAIRMAN: -- how is that calculated?

30 MR. BREALEY: That is by turnover?

31 THE CHAIRMAN: Turnover?

32 MR. BREALEY: Yes.

33 THE CHAIRMAN: Gross turnover?

34 MR. BREALEY: Yes.

1 THE CHAIRMAN: But I thought that is not the relevant metric?  
2 MR. BREALEY: It is not.  
3 THE CHAIRMAN: So why are you using it?  
4 MR. BREALEY: That is the OFT's position.  
5 THE CHAIRMAN: But you do not accept that.  
6 MR. BREALEY: No, I do not, but ----  
7 THE CHAIRMAN: So what is it on net fees?  
8 MR. BREALEY: I can give the Tribunal the figure. We will do that ----  
9 THE CHAIRMAN: You have not got it at the moment.  
10 MR. BREALEY: I do not have it to hand, no. We are taking the OFT's case at its highest.  
11 THE CHAIRMAN: Yes, but you are asking us to cast that aside.  
12 MR. BREALEY: I am.  
13 THE CHAIRMAN: You cannot then say, "And it is only a small part of the market", saying we  
14 should look at the market differently, on a different metric.  
15 MR. BREALEY: With respect, I should be able to do, because I am saying it is wrong. We will  
16 give you the figure.  
17 THE CHAIRMAN: You will get us the net fees.  
18 MR. BREALEY: We will. I am informed that we may not have those figures. This is the OFT's  
19 case against us and they say, "You have a 13.6 per cent market share", and we say, "If that  
20 is the case that is not the sort of market share that should attract 9 per cent". That is our  
21 case. The ball is being thrown at us by the OFT and we are trying to bat it back. We are  
22 saying, "On your case, all the participants have a 13.6 per cent market share, and if you are  
23 right on the market share that is not sufficient for 9 per cent". The point is as simple as that.  
24 I do emphasise, if one goes back a page, that there is no evidence of any impact on  
25 consumers. In its Guidance the OFT says that is an important factor.  
26 That is seriousness. On the schedule that has been handed up by the OFT, we are still  
27 looking at that, Sir. We are unclear whether that is truly representative of all the cases.  
28 THE CHAIRMAN: When you say "representative", we understood, and hoped, that it was not  
29 just representative, but complete.  
30 MR. BREALEY: So did we. It may well be that some cases are missing. It may well be that  
31 some of the information on the schedule is incomplete. The reason I say that is that certain  
32 members in this room have appeared in some of these cases. They are confidential. It may  
33 well be that the people in this room that have appeared will have to submit in confidence to  
34 the Tribunal.

1 THE CHAIRMAN: You are referring not to the list of cases but the descriptions and factors as  
2 not being complete?

3 MR. BREALEY: We are trying to check. We believe there may be one that is missing, and  
4 certain market share figures are missing.

5 THE CHAIRMAN: You have only just had a chance to look at this, so you have not obviously  
6 been able to work through it properly, if you have comments on it you can send them in the  
7 first instance to the OFT. One would hope that this could be something that can be agreed,  
8 because really it is just reciting what comes out of decided cases and you can have an  
9 agreed version. I appreciate you have not had time to do that. Equally, they did not have  
10 time on your one. We could get that in the course of next week.

11 MR. BREALEY: We will try and agree with the OFT and then ----

12 THE CHAIRMAN: In the course of next week.

13 MR. BREALEY: Yes.

14 THE CHAIRMAN: Thank you.

15 MR. BREALEY: Very quickly, senior management. We have set it out in writing. I would urge  
16 the Tribunal – although this note is attached, it is not actually, but it is at NCB 3, volume 1,  
17 and I am looking at para.6 of tab 3 of the note handed up this morning. Paragraph 6, tab 3,  
18 senior management. There is a table or a chart, whatever one calls it. It is p.336 of NCB 3,  
19 volume 1. There we try and show that there was Mr. Simon Cheshire. He was on the C&P  
20 board. The blue is what we would call the senior management. How senior do you have to  
21 be before you are going to attract a 10 per cent increase. He is not sufficiently senior.  
22 I would just emphasise two further points, which we make in the note. The first is that the  
23 only evidence is that he was acting on his own. So, yes, he was on that C&P operations  
24 board, but he was acting on his own. So there is no suggestion, although at times  
25 Mr. Unterhalter tried to make the suggestion, there is no finding that collectively that C&P  
26 board was guilty of the infringement.

27 THE CHAIRMAN: That is correct, yes.

28 MR. BREALEY: The very fact that one of the managers on that C&P board has been misguided  
29 means that everything in the blue must come into the equation. Again, one looks at the  
30 schedule of the Annexes to the decision, there is no employee of the Plc anywhere in the  
31 blue who is responsible for the infringement. So the fact that there is one small person  
32 down on that board, in my respectful submission, just does not merit a 10 per cent increase  
33 based on worldwide turnover. That is a very important point, and it is £4 million.

34 THE CHAIRMAN: That is because of MDT.

1 MR. BREALEY: Yes, MDT and gross/net fees. It is a lot of money for one person who is not on  
2 those blue charts.

3 THE CHAIRMAN: I think in you quote Mr Lawson's witness statement, sub para (f) of para.57,  
4 he had no responsibility beyond the South-East of England. I think Mr. Lawson accepted  
5 that is not correct because he was had responsibility for national accounts. That was  
6 Mr. Lawson's evidence. He said that in his statement and he accepted, when asked about  
7 that, that that was not correct. He did not know Mr. Cheshire and he did not know the other  
8 gentleman.

9 MR. BREALEY: He did accept it. We do not hide the fact. It is in the evidence. We put that in  
10 at para.4. He did have involvement in national accounts, we accept that.

11 THE CHAIRMAN: Which presumably is why he was the person invited to the CRF.

12 MR. BREALEY: The last ground is compliance. Obviously that dovetails with MDT. What we  
13 have tried to do is summarise at para.6 the extent to which Hays went about introducing its  
14 compliance. It was not just in the property and construction business, it was rolled out  
15 worldwide – 20 presentations to key managers ----

16 THE CHAIRMAN: We will read it, in the interests of time, so you do not have to take us through  
17 it.

18 MR. BREALEY: I do emphasise the extent of it and the scale of it.

19 THE CHAIRMAN: Yes, Mr. Harris?

20 MR. HARRIS: Sir, with the Tribunal's permission, I have 30 minutes available to me to make  
21 brief concluding submissions on four topics. Three of them are delightfully short. When I  
22 have finished the fourth, I will also spend two minutes with my own version of a table as to  
23 what we respectfully submit ought to be the nature of the fine to be applied to Eden Brown,  
24 taking the submissions in the round.

25 Taking them in order of brevity, as to topic number one, seriousness, I respectfully and  
26 gratefully adopt the submissions of Mr. Brealey, including his written note. Eden Brown  
27 only adds one point, which is that in their case they are not a big player, quite the opposite,  
28 they are a small player, one can see that from the respective net fees figures. That is all I  
29 have to say on topic one, seriousness.

30 Topic two, mitigation: that is fully argued out in the skeleton arguments. The basic point is  
31 extremely clear and has never been answered by the OFT. That point is that we have done  
32 more than simply adopt a compliance policy, and yet, by way of mitigation, we have only  
33 been credited with having adopted a mitigation policy. The two specific elements ----

34 THE CHAIRMAN: A compliance policy?

1 MR. HARRIS: Yes, I do beg your pardon, a compliance policy. We have done two things that  
2 are additional. One is we have apologised. That is in the chairman's unchallenged  
3 statement, it is an express apology. That does not form part of a compliance policy; nor, as  
4 is suggested at one point in the OFT's skeleton, does that sort of thing form part of leniency.  
5 With respect, that is just wrong. We have done more than is required by compliance, more  
6 than is required by leniency, we have apologised and no credit has been given for that  
7 whatsoever. The OFT simply do not answer that point.

8 Last but not least, they also do not answer the point at all that we have made an offer to  
9 provide training on compliance and competition matters to the respected industry body,  
10 the REC. Of course I accept that although that offer is outstanding and Eden Brown remain  
11 willing to comply with it, it has not yet been taken up by the REC. Very briefly on that  
12 front, of course, we, Eden Brown, are entirely in the REC's hands on that front. We cannot  
13 force them to accept a particular date.

14 THE CHAIRMAN: We understand that.

15 MR. HARRIS: I will move on. That is topic number two. Topic number three will detain us for  
16 just a few minutes longer. It is a discrete topic to Eden Brown. It is the question of the  
17 correct year of relevant turnover at Step 1 of the fining process. Again, this argument is  
18 very fully argued out in the skeleton so I do not propose to traverse the way in which it is  
19 set out in the notice of appeal, the defence and the respective skeletons. It is, if I may say  
20 so, extremely clear. What I do propose to do is just deal briefly with the three points that  
21 are put against me in the OFT's skeleton, which currently is the last word on the topic. In a  
22 nutshell, as I said in opening, the dispute is not just discrete, but very short and simple.  
23 What we say is that the phrase "last business year" at Step 1, that means, properly  
24 interpreted, the last business preceding the end of the infringement. In contrast, the OFT  
25 says the words "last business year" mean the last business year preceding the decision. The  
26 point I made in opening remains good, which is that of these competing interpretations – it  
27 is common ground that this is an interpretation argument, as a matter of law – certainly the  
28 interpretation that I advance is capable of being correct because it is the very interpretation  
29 that for many years the OFT itself used to adopt.

30 The OFT has changed its interpretation. That alone, we respectfully submit, ought to set the  
31 alarm bells ringing since the words have not changed, but be that as it may the OFT now in  
32 its skeleton argument puts forward three responses to my suggestion that they should not  
33 have changed and the interpretation has not changed. The first is at CB2, tab 11, pp. 350-  
34 351, paras.15 and 16 of their skeleton argument ----



1 THE CHAIRMAN: Just give us a moment. That is CB2.

2 MR. HARRIS: That is right, CB2. The skeleton against Eden Brown is tab 11.

3 THE CHAIRMAN: You say it is paragraph?

4 MR. HARRIS: Paragraph 15 is where ----

5 THE CHAIRMAN: Page 350, para.15.

6 MR. HARRIS: Yes, and you will see the opening words of para.15 are, “As a matter of applying  
7 ordinary principles of interpretation”, so what the OFT says in its skeleton is that on  
8 ordinary principles of interpretation they should now succeed. We do not, frankly,  
9 understand this point. What the OFT seems to be saying is that there is a principle of  
10 interpretation such that one should copy the definition of a phrase from a piece of  
11 legislation and use that in a different document, namely the Guidance, that is prepared for  
12 and directed to a different purpose. So the legislation and the Turnover Order are directed  
13 to the back-stop. We are not concerned here with a back-stop. That is Step 5. We are  
14 concerned with the relevant turnover at Step 1. So it is a different purpose and a different  
15 context, and yet the OFT’s first point is that somehow, copying and having consistency  
16 between the two is an ordinary principle of interpretation. It is not a principle of  
17 interpretation known to us, that one should copy things between different documents in  
18 different contexts for different purposes; and, unsurprisingly, there is no authority cited for  
19 it.

20 On the contrary, we say that the Tribunal should adopt the orthodox purposive approach to  
21 the words “last business year”, and ask yourself, “What are those words intended to  
22 achieve?” As we set out in our skeleton, and indeed what we thought was common ground  
23 with the OFT was that Step 1 is supposed to be a measure of the seriousness and extent of  
24 the wrongdoing. After all, that is what it says in the Guidance.

25 We submit, very simply, that plainly measuring the seriousness and extent of the  
26 wrongdoing cannot be done by looking at a period of time that bears no relationship to the  
27 seriousness or the extent of the wrongdoing.

28 That is my response to the OFT’s first point.

29 The OFT’s second point is to be found in the following paragraphs, 17 and 18 of the  
30 skeleton, and the heading is useful. It says, “*Policy arguments do not point clearly ...*” so  
31 they are suggesting there are ambiguous policy arguments. With respect, again, we find this  
32 point extremely difficult to follow. In para.17 they accept that it would be “reasonable” –  
33 that is their word – to select a turnover figure that is closely related, or indeed falls within,

1 the period of the infringement. So that is the OFT itself saying that that is reasonable. That  
2 is exactly what I urge upon this Tribunal.

3 Just to remind you, the infringement dates in respect of Eden Brown were November 2004  
4 to January 2006. That is the 1.25 years for our case.

5 THE CHAIRMAN: And everyone, is it not, 1.25?

6 MR. HARRIS: No, I think some parties got one year.

7 THE CHAIRMAN: The three appellants here?

8 MR. HARRIS: That may be right. As across the CRF, I think some people fractured out of it -  
9 this ineffective cartel - at an earlier stage. In any event, that is the period of time. The dates  
10 are more important than the duration – November 2004 to January 2006. Our case is that  
11 the relevant business year, bearing in mind that you are attempting “serious” and “extent” of  
12 the wrongdoing, is the business year ending in March 2005. So our business year that we  
13 advance is 2004/05, ending March 05, and that falls slap bang in the middle of the period of  
14 our infringement. In contrast, of course, the OFT’s proposed year, that preceding the  
15 decision, is mandatorily years after the end of this wrongdoing. It does not fall anywhere  
16 within it.

17 Secondly, in pointing to these other reasonable options – these are the parentheses in CB2,  
18 tab 11, page 351, para.17 – the OFT is here hypothesising some other possibilities. What  
19 they say is, “On Eden Brown’s argument you could have some of these other possibilities”.  
20 So on their policy reasoning it does not support their case.

21 That is problematic, we respectfully say, for the OFT, because, number one, it is clear that  
22 the alternatives that the OFT now put forward, which of course are not their case to you  
23 today, these are just hypotheticals, would, in fact, reflect the purposive approach which we  
24 urge upon the Tribunal. So either, if it occurs over a number of years, you take the year at  
25 the end, or you take the average. Both of those alternatives support my approach, the  
26 purposive approach, of locating within the focal time period; and secondly, and in any  
27 event, it is difficult to see how, on anybody’s interpretation, either of those could fall within  
28 the phrase “last business year”. They do not bear any resemblance to the three words “last  
29 business year”.

30 Last but not least, the OFT’s third point is to be found in para.19. Do you see at the bottom  
31 of para.19 (CB2, tab 11, page 352) the OFT says that it stands by its using the year before  
32 the Decision. That is their case –

33 “... is ‘calibrated to the seriousness of the infringement ...’”

1 With respect, that is obviously not right. There are two major flaws in it. The first, very  
2 straightforward point is that an undertaking could have a completely different size at the  
3 date of the decision than it had at the date of the infringement. Indeed, I put it as high as  
4 this, it would be, frankly, a matter of pure fluke or coincidence if it happened to be literally  
5 identical in size some years later when the decision was made. So, it is not calibrated to the  
6 seriousness of the infringement. The final point on this issue is that we do regard it, as we  
7 say in our skeleton argument, as illegitimate for the OFT to purport at this stage – and this  
8 most relevantly comes out at CB2, tab 11, page 353 para. 21 of their skeleton argument – to  
9 purport to bring in a stage, the deterrence objective. We are here arguing about Step 1, what  
10 year relevant turnover to take at Step 1. But it was abundantly clear, if I may put it like this,  
11 from Lord Pannick’s submissions yesterday, that deterrence does not form part of Step 1;  
12 and yet here is the OFT purporting to bring in deterrence at Step 1 in order to support what  
13 we say is the flawed choice of relevant year. There they say, in para.21, that does not mean  
14 that Step 1 has nothing to do with deterrence”, but that is not to be found in the Guidance,  
15 and as Lord Pannick explained yesterday, it is certainly not how they behaved in the  
16 remainder of this Decision. Indeed, – I do not know whether the right word here is “irony”  
17 or “inconsistency”, but the final sentence of para.21 is most revealing. That says that on the  
18 contrary, penalising undertakings by reference to the seriousness of their infringements *is*  
19 apt to deter infringing behaviour. Well, that plays right into the hands of the submissions  
20 that were made by the appellants on MDT. That is their very point. So, it is difficult to see  
21 quite where the OFT stands on this issue of deterrence, blowing a little bit hot and cold.  
22 But, in any event, the basic point is that they cannot have their cake and eat it. They  
23 proceed throughout the entire remainder of the Decision on the basis that deterrence is not  
24 relevant to Step 1, and yet when it is exposed that their principles of application to year of  
25 relevant turnover are flawed, all of a sudden they appear on the face of it to change tack  
26 completely and pray in aid deterrence at Step 1, notwithstanding the inconsistency it has  
27 with the remainder of their case. My case is quite simple – deterrence has nothing to do  
28 with it at Step 1, it cannot be prayed in aid by the OFT at Step 1, and that further underlines  
29 the inability on the part of the OFT to point to any issue of principle in support of their  
30 choice of the year of relevant turnover.

31 So, that is what I have to say on the third issue.

32 THE CHAIRMAN: Can I just ask you, in your notice of appeal, which is at tab.4 of this bundle,  
33 that is to say core bundle 2 where the OFT skeleton is.

34 MR. HARRIS: I am sorry, my Lord, would you mind repeating -----

1 THE CHAIRMAN: In your notice of appeal, which is in this bundle at tab.4, you deal with this  
2 (it is ground 4, starting at p.172, section 7). That is where you make this point.  
3 MR. HARRIS: Yes.  
4 THE CHAIRMAN: And then at the end of that, at 7.16, you give the confidential figures that  
5 would apply for what you say is the year that should have been used. That is right, as  
6 opposed to the ones the OFT used.  
7 MR. HARRIS: Yes, I believe so. And I have just been prompted about this – my instructions are  
8 that the OFT have never denied our submission about the the figures.  
9 THE CHAIRMAN: No, I do not think the figures are in issue. Those figures are gross turnover.  
10 MR. HARRIS: Yes.  
11 THE CHAIRMAN: If we were with you on your ground 1, I do not know if it is your ground 1,  
12 but on the net fees issue.  
13 MR. HARRIS: Yes.  
14 THE CHAIRMAN: Of course the relevant year is the separate point – have you given us the net  
15 fees figure for what you say is the right year, namely the year ending March 2005?  
16 MR. HARRIS: I believe that that will be part of the table that I was going to hand in for the  
17 relevant year, if we win.  
18 THE CHAIRMAN: Yes.  
19 MR. HARRIS: Yes, so the table I hand in at the end does include the net fees figure for 2004-  
20 2005.  
21 THE CHAIRMAN: Right. That was my question. So we will get ----  
22 MR. HARRIS: Yes, I will deal with that briefly at the end.  
23 THE CHAIRMAN: Yes. That is just getting the figures, that would be helpful.  
24 MR. HARRIS: Yes, I am grateful.  
25 THE CHAIRMAN: Also, if you are, if you have finished with this point.  
26 MR. HARRIS: Yes.  
27 THE CHAIRMAN: Mr Harris, you appear not only for Eden Brown but I think also for Hays.  
28 MR. HARRIS: Yes, sir.  
29 THE CHAIRMAN: Do you, wearing your Hays hat, adopt for Hays the argument you have just  
30 presented, wearing your Eden Brown hat?  
31 MR. HARRIS: No, sir, no. This is a discrete argument advanced by Eden Brown, and Eden  
32 Brown alone.  
33 THE CHAIRMAN: But, do you then, wearing your Hays hat, disagree with it?

1 MR. HARRIS: Wearing my Hays hat, I take no – I have no instructions on the point – I take no  
2 stance on behalf of Hays. You may wish to ask somebody else, but my position is that this  
3 is advanced by Eden Brown and Eden Brown alone and I have no part of my Hays hat on in  
4 making this submission.

5 THE CHAIRMAN: Yes, I understand that. Then, I think I should ask Mr Brealey, to spare your  
6 embarrassment, and obviously we have not heard the OFT, still less reached a view, but if  
7 we were to be persuaded that this argument is correct and that that is the year that should be  
8 used, would it not be right that that year, this is a point of interpretation of the Guidelines,  
9 has to be used for at least the appellants who are before us if we are to make any – if we do  
10 make any change to the penalty? I can see that if we dismissed your appeal on all grounds  
11 and just did not disturb the penalty – Mr Brealey, I will let you take instructions after asking  
12 the question, if you will just listen to the question.

13 MR. BREALEY: I do apologise.

14 THE CHAIRMAN: I can see that if we dismissed your appeal completely and said therefore the  
15 Decision stands, one might say, “Well, you do not then interfere in the Decision on a  
16 ground not advanced. But if we are persuaded by one or more or all of your arguments that  
17 the penalty imposed cannot stand and therefore the Tribunal has to calculate the penalty, if  
18 Mr Harris is right on this, it seems to us it would be a bit odd then to apply a year which we  
19 are in our judgment saying is the wrong year.

20 MR. BREALEY: Can I -----

21 THE CHAIRMAN: Can you take instructions?

22 MR. BREALEY: I am grateful. (After a pause)

23 MR HARRIS: Sir, perhaps I could just complete the other submissions while -----

24 THE CHAIRMAN: Well, no -----

25 MR HARRIS: I just wondered whether he needed a few moments.

26 THE CHAIRMAN: And, Miss Kreisberger, we will be asking you, of course, the same question,  
27 so, if you need to take instructions?

28 MR. BREALEY: We are not pursuing that ground of appeal, and therefore we would want any  
29 fine to be calculated, I think by reference to ----- We are not advancing an argument similar  
30 to Mr Harris, the date of infringement. We would ask the Tribunal to calculate our fine by  
31 reference to net fees in the accounts you have just got.

32 THE CHAIRMAN: We understand you are not pursuing it. It is not in your grounds of appeal,  
33 but if we do re-calculate your fine and exercise our jurisdiction to do so, do you submit that  
34 we are precluded from applying what, on this hypothesis, we hold is the right year, just

1 because it has not been in your ground of appeal; and that we as matter of jurisdiction have  
2 to apply what on this hypothesis we hold is the wrong year?

3 MR. BREALEY: Usually the appeal, even on fine, is by reference to the grounds of appeal, and  
4 in the absence of a ground of appeal, the Tribunal should be fixing the fine by reference to  
5 our grounds of appeal. I understand the point that you are making to me, sir.

6 THE CHAIRMAN: Yes.

7 MR. BREALEY: We do say you have a full jurisdiction on the merits, that is part of our case.

8 THE CHAIRMAN: Yes.

9 MR. BREALEY: Whether you as a matter of jurisdiction preclude it, your jurisdiction is  
10 probably, so far as Hays is concerned, fixed by reference to our grounds of appeal. I think  
11 that is all I can say.

12 THE CHAIRMAN: Yes.

13 MR. BREALEY: I am not instructed to -----

14 THE CHAIRMAN: I understand that you do not advance the argument, I fully understand.

15 MR. BREALEY: As to whether the Tribunal has jurisdiction -----

16 THE CHAIRMAN: Yes, I think we would, nonetheless, ask that you would please supply us with  
17 the gross and net for the year that would be the last business year on the alternative  
18 argument, even though we fully understand that is not what you are urging. Yes.  
19 And, Miss Kreisberger, same question.

20 MISS KREISBERGER: Sir, we of course say that the Tribunal is not precluded from applying  
21 this to us, and we do not argue that the Tribunal is so precluded. What we would say is that  
22 it cannot be assumed that the same reference year should be applied across the board. And,  
23 actually, that is something which arises out of a case I am going to be addressing in my  
24 closing submissions in ten minutes or so. Having said that, we do not have a good reason  
25 for the Tribunal as to why a different reference year should apply to CDI, and so we are in  
26 the Tribunal's hands on this.

27 THE CHAIRMAN: Yes. Thank you. And, Mr Unterhalter, we will in due course ask you the  
28 same question.

29 MR. UNTERHALTER: Indeed.

30 MR. BREALEY: Can I just on that, very very quickly, obviously we can go back to our accounts  
31 and have a look at the net fee figure. But I am told it took Hays about six weeks to work  
32 out its net fee figure in the relevant market. So, it will take -----

33 THE CHAIRMAN: Yes – that was not supplied in the response to the SO?

34 MR. BREALEY: It was not, no. So, we will do our best, but it will take some months -----

1 THE CHAIRMAN: I think six weeks will not cause problems.

2 MR. BREALEY: No. But it costs thousands of pounds, I am told – can I take instructions?

3 THE CHAIRMAN: Yes, you can come back after lunch and explain.

4 MR. HARRIS: Thank you, sir, I am grateful. That leaves me, then, just with two topics: one,  
5 some concluding remarks on gross net, and then just handing up my table.

6 If I could perhaps just spend five or ten minutes on gross net – with this in mind, that of  
7 course Eden Brown’s case on gross net is substantively the same as Hays, and therefore  
8 I adopt the submission both oral and in writing -----

9 THE CHAIRMAN: Yes.

10 MR. HARRIS: -- that Mr Brealey said on behalf of Hays in so far as they apply to Eden Brown.

11 So, it leaves me only to provide some different points – I am not going to duplicate  
12 anything – and one or two points of emphasis, in this sense in no particular order, because  
13 he has already had an opportunity to go through it. But, taking them item by item, the  
14 *Cable & Wireless* case, can I just invite the Tribunal’s attention to the OFT’s skeleton  
15 against Eden Brown which is CB2, tab.11, and in particular to paras.42-43 which are on  
16 pp.359-360. Picking it up, if I may, at the end of para.42, the OFT’s case – this is literally  
17 identical to the case against Hays, it is a cut and paste job here – there is a chain of contracts  
18 between the work seeker and Eden Brown’s client, not as Eden Brown’s analysis infers,  
19 merely one contract with Eden Brown acting as a payment conduit. And, as the OFT stated  
20 at para.5.140 of the Decision (CB1 page 256):

21 “When supplying temporary workers [Eden Brown is] linked with the temporary  
22 worker by an agreement for services – there is a purchase of services by the  
23 recruitment agency from the worker, which are then supplied under a different  
24 contractual arrangement ... This contrasts with the placement of permanent staff,  
25 where an employment contract is signed between the worker and [Eden Brown as  
26 client] and the hirer”.

27 So, what the OFT is doing here in part of its case in support of its choice of gross over net  
28 is, it is identifying what it claims is a linear relationship as opposed to the direct relationship  
29 between the worker and the client in the case of permanent staff. What they say, as you  
30 know, and this is brought out as well in Mr Allen’s expert’s reports, is effectively sub-  
31 contracting. The analogy is with a sub-contracting relationship. You will recall the  
32 example of Chime Communications that Mr Allen gives. And where we say it is relevant to  
33 have regard to *Cable & Wireless* is that, on a legal analysis, notwithstanding what might be  
34 described as “linear contractual relationships”, nevertheless there can, as a matter of law be

1 a true triangular relationship, or one bends the line into a circle – either into a triangle or a  
2 circle – the point being that it is the contrast that the OFT seeks to rely upon here of there  
3 being no link between member of staff and client, is a false contrast. And, perhaps it is  
4 most succinctly put by the Court of Appeal at one of the paragraphs we have not looked at,  
5 para.31 of *Cable & Wireless v Muscat*. What the Court of Appeal there is reciting from is  
6 the *Ready Mixed Concrete* case, the well known “basic requirements of a contract of  
7 employment”. And the one to which I would invite your attention in particular is one where  
8 there is a contract of employment a critical component is:

9 “(i) that the servant agreed in consideration of remuneration to provide his own  
10 work or skill in performance of service for the master”.

11 So, what it is saying is that notwithstanding the linear relationship of two contracts,  
12 nevertheless, the legal analysis can be - depending upon the facts and circumstances of each  
13 case, I accept that - a direct relationship between the end worker and the client; and it has to  
14 be part of that relationship, because otherwise it could not be an employment relationship.  
15 It simply must be part of that relationship that the worker is:

16 “providing his own work or skill in the performance of service for the master”.

17 So, that is the point that I just wish to draw out from *Cable & Wireless*.

18 My next point relates to *Manpower*, the French case. I am happy to turn that up if the  
19 Tribunal would like, but I would simply just want to remind the Tribunal that the key  
20 paragraph is para.168 of the Decision. That is the one to which I took the Tribunal in  
21 opening. That is the one that says that the French Competition Commission has chosen  
22 gross margin because that is proportionate in the circumstances of this sector, bearing in  
23 mind “their very specific activity”. And that is the point upon which I rely, and nothing that  
24 the OFT says in its latest note alters the basic proposition that, in order to be proportionate,  
25 they have founded themselves upon net fees, not gross turnover. So, I obviously do not take  
26 issue with the fact that there are differences in the way it is put in France. What I would  
27 draw to the Tribunal’s attention, and I invite them respectfully to take cognisance of in its  
28 own time in NCB2 at tab.13. That is a letter from my client setting out submissions on this  
29 very case at the SO stage. We relied upon this case at the SO stage and have continued to  
30 do so ever since, to put the two basic points emerging from this letter is, as it says in the  
31 final major paragraph on p.309, that case was infinitely more severe than this case. I will  
32 leave the Tribunal to have regard to the details, but under no stretch of the imagination  
33 could the CRF be equated on seriousness scale with the Manpower cartel. It is like chalk  
34 and cheese. But then, over the page, the other thing just to draw to the Tribunal’s attention,



1 is that although they do not spell it out in the Decision, the basic starting point for the  
2 penalty, then adjusted for various other factors, is 6 per cent. These are my figures at the  
3 bottom of p.310. And, 6 per cent of what? Well, 6 per cent of net fees.

4 THE CHAIRMAN: Yes, we do not know much about how the percentages are applied under  
5 French law.

6 MR. HARRIS: No, I have performed those calculations myself.

7 THE CHAIRMAN: No, but whether 6 per cent is what they do for a very serious case, and  
8 whether they operate the same way, I mean, your first point on the Decision, namely that  
9 they use net fees because that is proportionate calculation. You say, "Well, that is the same  
10 point, you can read it across". The 6 per cent – not sure we can really read that across.

11 MR. HARRIS: Perhaps that is my mistake in putting the point forward. What I mean to say by  
12 drawing the Tribunal's attention to the 6 per cent is that the end result that the Commission  
13 has reached, taking express account of the need to be proportionate is that even in a much  
14 more serious case it is all at or around this figure of 6 per cent of net fees. You have the  
15 exact figure because that was on a different table I handed in earlier. That is my point, it is  
16 a proportionality point rather than if they have a Step 1 starting percentage, that is not my  
17 point.

18 I would just like to deal with one more issue on gross / net, and then I will hand up the  
19 table. Mr. Brealey took you to various of the terms and conditions of Hays. I am happy to  
20 turn up again the Eden Brown terms and conditions, but I am slightly conscious of the time.  
21 They are in NCB2, relevantly at tab 7 and tab 9. They are the standard terms, with the  
22 client on the one hand and with the temporary worker on the other. It may be that the  
23 Tribunal remembers without having necessarily turned them up certain of the critical points,  
24 thus for example, in Eden Brown's terms and conditions there is express reference to  
25 "commission", the commission we earn for our service, that is revealing and highly  
26 indicative as we went through Mr. Allen, of an agency relationship. There is express  
27 reference in more than one place to passing on the wages from the client to the temporary  
28 worker.

29 THE CHAIRMAN: Yes.

30 MR. HARRIS: Last, but not least, there are those definition sections, the Tribunal has the point,  
31 and I would just like to finish on this issue by reminding the Tribunal of a passage of  
32 evidence that we had with Mr. Herron in re-examination. Do you recall the issue arose as to  
33 why it was that Eden Brown, and for that matter Hays have provisions in their respective  
34 contracts about, for example, being informed when there is sickness, or being informed

1 when somebody is going to terminate, or being informed when there is a health and safety  
2 incident, or that sort of thing. The evidence that Mr. Herron gave (transcript, day 2, p.46,  
3 lines 13 to 21) was that it is a key commercial opportunity for a provider of labour to know  
4 what is going on with the labour that it provides and, in particular, whether it is no longer  
5 there, or it might no longer be there, or it is having problems.

6 Therefore, Mr. Herron's view is that that is the reason why those sorts of provisions are in  
7 there, it is not because they somehow engaged the services of the client. Unless there are  
8 any questions upon those four discrete grounds I would just like to end by handing up and  
9 across an indicative table to assist the Tribunal in its ruminations about the level of fine in  
10 the case of Eden Brown.

11 If I may open with these remarks which is that I share Miss Kreisberger's predilection  
12 towards optimism, and therefore the foundational assumptions for this table can be seen in  
13 the bullet points in the right hand column at the top, which is it is "relevant net fees", so it is  
14 a net fees not gross turnover, and it is from the year of relevant turnover that I advance. The  
15 starting percentage is reduced to seven from nine, and for the reasons I have advanced Eden  
16 Brown ends up getting 10 per cent for mitigation, which effectively at Step 4 means a net  
17 adjustment of zero, because we were upgraded at that level for senior management and we  
18 do not appeal on that ground.

19 THE CHAIRMAN: So what you call "turnover" is actually net fees in your third column?

20 MR. HARRIS: Yes, that is not intended to be a slight of hand.

21 THE CHAIRMAN: No, I understand that, but just to be quite clear. We have the turnover figure  
22 in your notice of appeal. These figures are confidential, are they?

23 MR. HARRIS: Perhaps we should proceed on that basis, I am not sure.

24 THE CHAIRMAN: Well they are quite historic.

25 MR. HARRIS: Perhaps I will just take instructions on that. Can I give you the reference for the  
26 turnover figure at the top of the right hand column? No, Sir, they are not confidential. The  
27 relevant net fees figure for financial year 2004/05 is taken from the spreadsheet which  
28 appears at Michael Sterling 2, it is an exhibit to Michael Sterling's second witness  
29 statement, and I will provide in due course the precise page reference (NCB3, tab 10, page  
30 758).

31 Can I just explain one thing, unless there are questions on this document, Sir? You will see  
32 the suggestion is made that at Step 3 there is a non-adjustment either way.

33 THE CHAIRMAN: Yes.

1 MR. HARRIS: That is because, for the reasons I advance, in the case of Eden Brown the  
2 proportion that is arrived at for Eden Brown, when one has dealt with Steps 1 and 2 is  
3 obviously higher than for any other party. I do not want to repeat those submissions, but it  
4 remains true even on this figure. Plus, for example, £464,291 as a proportion of the net fees  
5 figure is 8.7, if somebody could just do that again for me – I wrote it on a piece of paper and  
6 I do not know where it is now – I think it was 8.75 per cent. Our submission will be that if  
7 one adopts an optimistic approach to the other appellants then we are likely, even on this  
8 approach to remain significantly higher as a proportion of net fees at this Step 3 than any  
9 other appellants.

10 THE CHAIRMAN: As Step 3 is looking at deterrence, your current position is important. You  
11 made the point when addressing us on the relevant year to be used at Step 1 saying that Step  
12 1 is not concerned with deterrence, and you criticised that part of the OFT's skeleton, where  
13 they said one reason for using the most recent year's deterrence and you made the point,  
14 "No, that is not part of the Step 1 exercise". The Step 3 exercise, which is deterrence, the  
15 current year, the most recent year would be relevant, would it not?

16 MR. HARRIS: Our case is that the most relevant metric there is current profit.

17 THE CHAIRMAN: Whether it is profit, or net fees, or gross fees, it is the current position,  
18 not ----

19 MR. HARRIS: I do accept that but that is because what is being measured by deterrence, as Lord  
20 Pannick says ----

21 THE CHAIRMAN: The future, forward looking.

22 MR. HARRIS: The future, it is forward looking and its impact. I would simply repeat the point  
23 that he made, which is it is one of the relevant factors to take into account at that stage. It is  
24 not determinative, but what has gone wrong is that the OFT have ignored it as if it were  
25 irrelevant.

26 So, Sir, just to confirm the percentage that one arrives at by placing £464,291 at the Step 3  
27 box over the turnover figure of £5.3-odd million, is 8.75 per cent. Therefore, I do feel able  
28 notwithstanding the apparent optimism to submit that it would be open to the Tribunal not  
29 to rest with a nil adjustment, but actually to maintain at the Step 3 a downward adjustment  
30 which, after all, is what the OFT itself considers is appropriate. I accept of course that the  
31 equation and flavour is altered by what one does with the net fees etc.

32 Those are my submissions unless I can assist further.

33 THE CHAIRMAN: Thank you. Yes, Miss Kreisberger?

1 MISS KREISBERGER: I would like to cover the ground 1 point: temporary wages. I can say a  
2 few words at the end on the other grounds, but I will not be addressing them in any  
3 substance at all.

4 On temporary wages I would like to cover three points in my submissions today. First, is  
5 the purpose for which turnover is calculated at Step 1. I can be brief on this, I am aware the  
6 Tribunal has been addressed on this already. Secondly, the intermediary principle, and the  
7 *Endesa* case, which is an argument only CDI advances; and thirdly, the nature of the  
8 recruitment services supplied by CDI, and that is a factually distinct point I would like to  
9 make for CDI AndersElite.

10 Dealing first with purpose, just to develop some comments which I made in opening. We  
11 say in fixing the amount of the fine it is not permissible to lose sight of the purpose and the  
12 objectives for which the fine is fixed, and if I may just take the Tribunal to *Britannia Alloys*  
13 briefly, and that is at authorities bundle 2, tab 32 and p.4456 of the judgment. This is the  
14 case I had in mind on reference year, although that is not the point I am addressing here.

15 You will see at para. 20, it was an issue between the parties as to how to determine the  
16 concept of “preceding business year”, and in that case it was because there had been  
17 substantial changes in the economic situation of the undertaking between the infringement  
18 having been committed and the Commission’s decision. The Court of Justice held at  
19 para.21 that it should be pointed out according to settled case-law that it is necessary:

20 “ . . . in interpreting a provision of Community law to consider not only its wording  
21 but its context and the objectives pursued by the rules.”

22 At para. 22 the Court refers to the Commission’s power to impose fines, to carry out the  
23 task of supervision, and then if one turns the page at para. 23, the court held that:

24 “ . . . the Commission is required to take into account the gravity and the duration  
25 of the infringement . . . ”

26 In the light of those factors, the Court has stated that the limit relating to turnover  
27 . . . seeks to prevent fines imposed . . . from being disproportionate in relation to  
28 the size of the undertaking concerned.”

29 Then we have the conclusion at para. 25, and I will read this out in full, it is important:

30 “It is clear from the above considerations that, in determining the ‘preceding  
31 business year’ the Commission must assess, in each specific case and having  
32 regard both to the context and the objectives pursued by the scheme of penalties  
33 created by Regulation No 17, the intended impact on the undertaking in question,

1 taking into account in particular a turnover which reflects the undertaking's real  
2 economic situation during the period in which the infringement was committed.”

3 THE CHAIRMAN: The issue there was whether it should be the year preceding the decision ----

4 MISS KREISBERGER: That is correct.

5 THE CHAIRMAN: -- or Mr. Harris's point.

6 MISS KREISBERGER: Exactly.

7 THE CHAIRMAN: This, you say, supports Mr. Harris's argument.

8 MISS KREISBERGER: It does, it does. We do not rely on it for the specific point of the

9 reference year, we rely on the approach that the Court of Justice confirms as to the

10 interpretation of provisions. We also rely on it as to the need for individualised

11 consideration on which Lord Pannick has addressed you, and I also suggest the Tribunal

12 there turns up para.44, perhaps we need not look at it now, but for the note it refers to the

13 need for the differentiated treatment of undertakings concerned.

14 I should say on the point of reference year, the Tribunal would need to be in a position to

15 take a decision on the facts so it is a matter for the Tribunal as to whether it can take a

16 different decision from the OFT not having heard argument on this particular point, but the

17 point made at para. 44 is it is always a question of individualised treatment. That is true for

18 reference year, it is true for turnover, and it is true for the other aspects of penalty

19 assessment. It is a fundamental precept of fining.

20 Coming back to the issue here, we say that the purpose of setting fines by reference to

21 affected turnover is to give an indication of the scale of the infringement. I do not need to

22 take the Tribunal to this, and Lord Pannick took the Tribunal, I think yesterday, to para. 121

23 of *Musique Diffusion française*?

24 THE CHAIRMAN: Yes, I think it is quoted somewhere.

25 MISS KREISBERGER: He quoted, but the relevant wording is an indication of the scale of the

26 infringement, that is why one looks at affected turnover, turnover in the services which were

27 the subject of the infringement. For the note, Sir, that is authorities 4, tab 57, p.1909 at

28 para. 121.

29 As I mentioned in opening, that is also reflected at para. 2.9 of the penalty Guidance.

30 Again, I do not suggest the Tribunal turn it up now. The reference is authorities 1, tab 15,

31 p.9, but para. 2.9 says: “Where an infringement involves several undertakings ...” the

32 starting point is assessed for each one individually “... in order to take account of the real

33 impact of the infringing activity of each undertaking on competition.”, that is the point.

34 That is why a careful assessment needs to be taken of relevant turnover at Step 1, that is

1 why we do this. As I said in opening, it is a simple point, the more effective turnover an  
2 undertaking generates, the higher it can expect the fine to be.

3 In my submission, in assessing turnover at Step 1 the OFT was required to have regard to  
4 the facts of this case, the facts being AndersElite's function as a recruitment agency, the  
5 essential nature of which we say is unchanging, whether it is placing temporary or  
6 permanent candidates. We say the OFT failed to do this because it adopted a formalistic  
7 approach, it closed its mind to commercial reality in opting to place absolute reliance on the  
8 accounts. I think this is a point that the Tribunal already has, that the OFT says the position  
9 is dictated by the 2000 order, which says turnover should be construed in accordance with  
10 GAAP. Whilst there may be good reasons why the limit, the statutory maximum should be  
11 set by reference to reported turnover, we say it does not follow that that is determinative of  
12 the question of affected turnover, which may be something less than the headline figure in  
13 the accounts.

14 I should just make clear here that we are not advocating a measure for Step 1 other than  
15 turnover, such as profitability. All we are saying, we are making a narrower point here, is  
16 that deductions should be made to the overall firm, AndersElite's reported turnover, in order  
17 to reflect the substance of its commercial offering in the market.

18 If I may, I will turn now to my point two, *Endesa* and the intermediary principle. We have  
19 heard an awful lot about accounting standards. Our position is that those are matters which  
20 are not determinative. We say that for two reasons. One, because it is a determination  
21 made for a different purpose, whether an entity account is a principal or agent. The second  
22 reason is because the correct approach, and I will come on to explain why, is, first, to define  
23 whether an entity is, on the facts, an intermediary; and then decide how to treat turnover in  
24 the accounts. What the OFT has done is to put the cart before the horse.

25 THE CHAIRMAN: Then decide how to treat turnover – you said turnover in the accounts.

26 MISS KREISBERGER: Yes, so if one takes the headline figure in the accounts as the reported  
27 turnover and whether a deduction is necessary. We rely on *Endesa* and the Commission  
28 Notice which is construed there for the principle that in certain circumstances it is  
29 appropriate to make deductions to the headline figure of reported turnover in the accounts in  
30 order more accurately to reflect the scale of the undertaking's activity.

31 I should mention at this stage, and I will come back to this, that the OFT rely on *Endesa* for  
32 the decision which the court there reached on the facts. In my submission no analogy can  
33 sensibly be drawn, but I will come back to that.

1 We say it is perfectly proper and in line with the requirements of fairness to treat  
2 AndersElite for these purposes as an intermediary, and that is where I will turn to the case  
3 because we say that the Tribunal, in our respectful submission, should have regard to the  
4 Commission practice in the context of mergers for the assessment of turnover.  
5 Could I ask the Tribunal to turn up, first, the Commission Notice, which is authorities  
6 bundle 1, tab 19, p.35. The Tribunal will be familiar with these paragraphs. We had a  
7 rather creative interpretation, I would suggest, from Mr. Allen, the OFT's expert, but he  
8 effectively resiled from that yesterday. My submission is that if one looks at the wording,  
9 just going through it, para.157 begins by saying that the concept of turnover is usually sales,  
10 the figure that appears under sales in the accounts. At 158 they say that is normally the  
11 right approach for services as well, but things may be a little more complex for services. It  
12 is straightforward where you have one undertaking providing the entire service to the  
13 customer, but in other areas, such as package holidays and advertising – that is the example  
14 given at 159 – the service may be sold through intermediaries, even if the intermediary  
15 invoices the entire amount to the final customer, the turnover of the intermediary consists  
16 solely of the amount of its commission. Then an important paragraph at 160:

17 “The examples mentioned ...”

18 travel agents, media agencies –

19 “... show that, due to the diversity of services, many different situations may arise  
20 and the underlying legal and economic relations have to be carefully analysed.”

21 We rely on that specifically. That is why I said earlier, first, what the Commission here is  
22 saying is, first, you determine if an entity is an intermediary, and you do that by reference to  
23 the underlying legal and economic relations. Then, if it is, you construe turnover as the  
24 commission element of this payment. That is what we say should be done here.

25 So what we say is that when you look at all of the circumstances in the round, AndersElite  
26 should be treated as an intermediary.

27 If the Tribunal could keep open the Commission Notice, but also turn to the *Endesa* case,  
28 which is authorities bundle 3, tab 38, p.2608. Given the importance of this, I will just read  
29 it out. Paragraph 208:

30 “... it should be noted first of all that ... the concept of ‘turnover’ ... refers  
31 explicitly to ‘the amounts derived from the sale of products and the provision of  
32 services’. ‘Sale’ as a reflection of the undertaking’s activity is thus the essential  
33 criterion for the calculation of turnover, whether for products or the provision of  
34 services.

1 Furthermore, the requirements of legal certainty and speed which apply in the  
2 context of control of concentrations mean that both undertakings and competition  
3 authorities can in principle rely on a foreseeable criterion and immediate access.  
4 In those circumstances, the turnover to be taken into account in order to determine  
5 the authority competent to examine a concentration must, as a rule, be calculated  
6 on the basis of the published annual accounts. It is therefore only by way of  
7 exception, where particular circumstances so justify, that certain adjustments  
8 should be made in order to best reflect the financial position of the undertakings  
9 concerned.”

10 Then at 210 the court refers to the notice and says that it:

11 “... envisaged the possibility, in certain circumstances, of calculating the turnover  
12 in a different way than by reference to the aggregate of sales of products or the  
13 provision of services.”

14 Then they quote the notice.

15 THE CHAIRMAN: It is the earlier version.

16 MISS KREISBERGER: It is the earlier version of the notice, yes.

17 THE CHAIRMAN: Is it effectively the same?

18 MISS KREISBERGER: They are effectively the same. We do have both appended.

19 THE CHAIRMAN: We have got the quote here, and you have given us the new one. I am  
20 wondering, have they changed in any way?

21 MISS KREISBERGER: No, they are not different in substance at all. They confirm at 211 that:

22 “... the Notice concerns a particular category of intermediaries with the services  
23 sector only, whose sole remuneration is the amount of commission they receive. It  
24 is, therefore, an exception to the general rule that the relevant turnover must be  
25 calculated on the basis of the total amount of sales. The concept of intermediary  
26 must therefore be interpreted strictly.”

27 So the importance of the judgment, we say, is that it upholds the principle that whilst  
28 turnover is usually relied on, overall turnover, based on the overall sales figure in the  
29 accounts, the court says, and we accept, that it is by way of exception and where particular  
30 circumstances so justify, but certain adjustments to the overall figure of turnover or revenue  
31 in the accounts should be made to reflect the undertaking’s financial position.

32 We say that when you look at the circumstances of AndersElite as the recruitment agency, it  
33 should be treated as falling within the exception for the purposes of penalty assessment, or  
34 at least some adjustment should be made to the fine to reflect that fact.



1 I think I must turn to the facts of *Endesa*, as I mentioned that the OFT rely on the finding on  
2 the facts there. Can we just look at the reasons on which the ruling was based, because we  
3 say there is no comparability on the facts. This is dealt with at paras.213 to 216, so carrying  
4 on on p.2610:

5 “In addition, in the absence of any evidence of a legal nature put forward by  
6 Endesa to the contrary, the legal relationship existing between Endesa and the end  
7 customers must be regarded as a contract for the sale of electricity. Such a sale is a  
8 commercial act which involves the transfer of ownership.

9 The same applies as regards the legal relationship existing between Endesa and the  
10 electricity generator providing electricity ...”

11 and they give some reasons why that is, which I do not think I need read out. Then at  
12 para.215 they reject the argument that the distributor is not the owner of energy. They  
13 conclude at 216:

14 “Therefore, as the activity of distributors [Endesa] involves, in particular,  
15 purchasing electricity or gas from their suppliers and then distributing it and selling  
16 it to the end consumers, it cannot be classified as the provision of services limited  
17 to supplying a product on behalf of [the electricity] generators ...”

18 So it is not an intermediary for that reason.

19 “Endesa cannot therefore from a legal point of view be regarded as a mere  
20 intermediary ...”

21 and it does not fall within the exception.

22 Could I just ask the Tribunal to look back to the Commission Notice, footnote 116, p.36,  
23 where we were, refers to *Endesa*, it refers to para.213, which I just taken you to:

24 “An undertaking will normally not act as an intermediary if it sells products via a  
25 commercial act which involves a transfer of ownership.”

26 So, in my submission, there is nothing surprising at all about the court’s rejection of  
27 Endesa’s claim that it should be characterised as an intermediary. In fact, *Endesa* is the  
28 most straightforward of cases.

29 Endesa acted as a distributor of widgets, whatever. Two points: the first is that electricity  
30 is a good, albeit an intangible one. It is not a service. Second, and I think I have laboured  
31 the point enough, Endesa bought that good from the generator, acquired ownership in it, and  
32 sold it on to customers. You can substitute any product you like. Mr. Allen mentioned cars  
33 yesterday. If you buy something and you sell it on, you cannot claim to be an intermediary,

1 because if you are an intermediary everyone is an intermediary. So that is all we can take  
2 from *Endesa* on the facts.

3 THE CHAIRMAN: That is the legal analysis. They go on, do they not to consider,  
4 notwithstanding that, on the facts might it be said that they act as an intermediary, the  
5 economic reality, as it were. That is 218.

6 MISS KREISBERGER: Yes, and if one looks, for instance, at 223 – this is a point which the  
7 OFT relies on, and they say ----

8 THE CHAIRMAN: Do you want to say something about that?

9 MISS KREISBERGER: Yes, I will

10 THE CHAIRMAN: This is your chance.

11 MISS KREISBERGER: Yes, I will now, I am about to. I would like to make one little point  
12 before I do, which is what the Commission and the Court of First Instance did not do in  
13 *Endesa* is say, “The answer lies in the accounts, and we do not need to make any  
14 investigation”. They did what para.160 of the Commission Notice says they should do.  
15 Taking my opportunity to take a shot at this, the main point the OFT takes here is that  
16 *Endesa* bears the risk of non-payment, and that starts at para.223 and the conclusion is at  
17 226. They conclude that on the facts *Endesa* carried the credit risk, and that was a factor  
18 which also pointed against *Endesa* being an intermediary. We do not shy away from this  
19 but, first of all, the court looked at this after the issue of the transfer of ownership point.  
20 The question became whether, notwithstanding that there is a transfer of ownership in a  
21 good, could *Endesa*’s challenge be saved by the fact that it did not bear the risk of non-  
22 payment. The answer to that from the report was, no, it could not.  
23 Perhaps a more fundamental point is again coming back to the Commission’s indication at  
24 160. You have got to form a view on the basis of the legal and economic relations. You  
25 have to look at matters in the round. The answer does not lie in a single indicator.  
26 Can I come on now to discuss the considerations which we say point firmly in favour of  
27 *AndersElite* being an intermediary and why a different conclusion from that reached in  
28 *Endesa* should apply here, but one factor does not tell you anything in itself.

29 THE CHAIRMAN: Yes. Can we put *Endesa* away?

30 MISS KREISBERGER: Yes. I will try very hard not to duplicate here, but of course I must just  
31 draw together the evidence as it relates to *AndersElite*. Our first point is that, as has been  
32 said many times, *AndersElite* supplies a recruitment service, it acts as a middle man  
33 whether supplying a temporary or permanent candidate. The OFT says, “But the services  
34 fundamentally differ”. We say that is not borne out by the facts as they apply to

1 AndersElite, and I rely on the following, and the first is not an AndersElite specific point,  
2 the others will be. The first is the Decision itself. I do not think the Tribunal need turn this  
3 up, but for the note it is CB1, p.40, para.2.128. At 2.128 under the heading “Recruitment  
4 Agency services supplied to the Construction Industry” – perhaps the Tribunal might prefer  
5 to have that in front of it. The OFT explained that recruitment agencies combine two  
6 functions, the search function, which is the identification and the sourcing of candidates;  
7 and the selection function, selecting and matching candidates with vacancies. The OFT  
8 tells us there in terms that the positions filled by recruitment agencies may be permanent or  
9 temporary.

10 So the service supplied is recruitment, and there is no suggestion here that agency supplies  
11 the labour services, the building service or the architectural service.

12 I would also like to draw attention to – and here I would ask the Tribunal to turn it up –  
13 para.5.25 of the decision, which is at p.220. This is important because here the OFT defines  
14 “relevant turnover”. It says:

15 “... relevant turnover for the purposes of the imposition of financial penalties  
16 relates to the supply, by Recruitment Agencies, of Candidates with professional,  
17 managerial, trade and labour skills required by the Construction Industry in the  
18 UK.”

19 There is no division there at all, no distinction between temps and perms there.

20 The relevant market, I accept, has only been defined for the purposes of penalty assessment,  
21 so it is not a detailed economic assessment of market definition. Nonetheless, if one looks  
22 at para.5.23 the OFT cites *Replica Kit*, the Tribunal’s judgment there, that confirmed that  
23 there can be a consistent grouping of products where it reflects commercial reality.

24 I would suggest that it does not, therefore, lie in the OFT’s mouth to say that the two  
25 services fundamentally differ when, as a matter of commercial reality, they appear to take  
26 the view that they do not differ at all.

27 Could I ask the Tribunal to take core bundle 3, I am now turning to the CDI specific points  
28 on AndersElite’s role. And tab.14 of core bundle 3 is Mr Ballou’s statement. And I would  
29 ask the Tribunal to have regard to paras.5.

30 THE CHAIRMAN: Tab 14, you say.

31 MISS KREISBERGER: It is tab.14, p.140, paras.5-10 and also para.15, just aware of the time,  
32 just to summarise effectively what Mr Ballou says is that, really, the choice of whether a  
33 vacancy ends up being temporary or permanent is often arbitrary. It can change over time.  
34 It is determined after the candidate has been selected, effectively, the same consultants,

1 AndersElite recruit for both temporary and permanent, and at para.10, the hallmark of  
2 recruitment is that the workers are under the control, supervision, direction of the customer.

3 THE CHAIRMAN: Yes.

4 MISS KREISBERGER: I will not turn it up now, but for the note, sir, I would also rely on  
5 transcript day 2, p.23, line 8, to p.24, line 4, on the type of service supplied. Mr Ballou  
6 there says very much the same thing. Actually, I may just quote from a bit of that chunk.

7 THE CHAIRMAN: We will look it up.

8 MISS KREISBERGER: I am grateful, sir.

9 THE CHAIRMAN: The case is short enough that we can still remember its outlines.

10 MISS KREISBERGER: So, we say, “Well, the only material distinction is the question of on  
11 whose payroll does the temp sit” – and the matters which flow from that. And we say,  
12 looking at matters in the round, this is not a factor of sufficient importance for it to mean  
13 that it is wrong to treat AndersElite as an intermediary. I will, just very quickly, read out  
14 from the transcript, this is transcript day 2, p.29, line 10, just a very brief point which  
15 Mr Ballou made, which is, when I asked about the payroll services he said:

16 “We have seven clerical employees, we’ve outsourced it to India and [the seven  
17 clerical employees] working in India provide the payrolling services for the  
18 contractors ... It costs some tens of thousands of pounds. I’m not sure of the exact  
19 number, but it’s in the tens of thousands of pounds.”

20 And the ball park figure was, this is across 500 or 600 contracts”.

21 So, we say then, let us say it costs AndersElite £250,000. It may well be less, seven clerks  
22 in India, even £250,000, that is £50 per contract per annum. It is a drop in the ocean. It is  
23 an ancillary service which does not justify treating temporary recruitment services as to very  
24 different to permanent recruitment services to the tune to CDI of £70 million of relevant  
25 turnover.

26 Now, Mr. Unterhalter, and this is something the Tribunal has heard from Mr Brealey on  
27 today, attempts to suggest that there is this linear supply of services from the worker to the  
28 agent to the construction company, and we say as far as AndersElite is concerned, this is a  
29 fiction. It truly is a triangular relationship. And I would like to refer the Tribunal here to  
30 AndersElite standard terms and conditions which were not put to Mr Ballou. They are in  
31 NCB3, vol.2, tab.15, p.1153 – tab.16, 1153.

32 THE CHAIRMAN: Right at the end.

33 MISS KREISBERGER: It is the first page of tab.16 at the back. It is a document called “Client  
34 terms of business”.

1 THE CHAIRMAN: I do not think we have seen this.

2 MISS KREISBERGER: You have not seen this, sir. It was not put to Mr Ballou, and this is an  
3 area, sir, where we urge individualised consideration on the Tribunal. If I could draw the  
4 Tribunal's attention to the following:

5 "Definition of Applicant", means the person or Contractor introduced to provide services to  
6 the Client". That is the construction company.

7 'Assignment', means the period during which the contractor or temp is supplied to the client  
8 to provide services.

9 'Client' means the person, firm or corporate body requiring the services of the applicant.

10 'Perm' [further down] means an individual who is introduced to provide services to the  
11 client on a permanent basis".

12 I also draw attention to 'Temp to perm', which shows that temps can switch to perms.

13 I would also just ask the Tribunal to look at p.1155 which is the terms of engagement for  
14 temporary workers. It is appended to the letter of engagement you see at 1157. These are  
15 the standard terms and conditions to which it refers, and you will see very much the same  
16 sort of thing – "Assignment" means the period during which the temp is supplied to the  
17 client to provide services. "The client" is the person requiring the services. So, it is quite  
18 clear, according to AndersElite's terms and conditions, that the service is to supply direct  
19 from the worker to the construction company. This is not an *Endesa* case. There is no  
20 transfer of ownership of the goods, there is a chain of contracts, yes, but AndersElite simply  
21 pays the workers to supply services to construction companies. Uncontroversial.

22 And just, perhaps, for a bit of colour, it might be helpful for the Tribunal to note that  
23 Mr Unterhalter, perhaps inadvertently, was describing as far as CDI's activities are  
24 concerned, outsourcing. I will not take the Tribunal to it now, but it is covered in  
25 Mr Ballou's statement at paras.11-12. The point about outsourcing is that is where CDI  
26 supplies a product or a service direct to the client using CDI employees. Sometimes they  
27 are situated at the client's premises, the example Mr Ballou gives is running a client's mail  
28 room, for instance, but they are under CDI's control ----

29 THE CHAIRMAN: Yes.

30 MISS KREISBERGER: -- and CDI contracts for the provision of what is referred to in the Form  
31 10K as "a deliverable". So, a product for a service. And whilst you have the T&Cs open  
32 there, I would also just ask the Tribunal to take account of paras.13.3-13.4 under the  
33 heading "Liability", under which ----

34 THE CHAIRMAN: This is in?

1 MISS KREISBERGER: This is p.1154, so it is the terms of business. It is the standard terms  
2 with the client. At 3.3: “AndersElite is not liable for the negligence of a temp”. And, as  
3 I have already said: “Temps are under the supervision, direction and control of the client”.

4 THE CHAIRMAN: Yes. I am not sure how far that helps one way or the other, that sort of  
5 exclusion, because the other way of looking at it is the reason they have to exclude it is that  
6 otherwise they would be. Or, you say, “No, they would not be, and it is just there for  
7 abundance of caution”. But it does not really, then, cut to the heart of the question.

8 MISS KREISBERGER: Yes, I refer to it for completeness. I think the main point here is the  
9 triangular point.

10 THE CHAIRMAN: Yes.

11 MISS KREISBERGER: The other point I should just briefly make on outsourcing is, we have  
12 heard the expression, I think, “On the bench” employees on the bench. That is exactly what  
13 happens in outsourcing. CDI does manage the workforce for outsourcing. They are on the  
14 bench. They are ready there to do the work. But the absolutely key consideration is that  
15 CDI only engages a temp once a construction company has accepted the supply of the  
16 candidate. It does not have the employees on the bench. The arrangement with the client  
17 comes first. The temp is then engaged so it can provide services to the client. When the  
18 assignment is over, so is the contractual arrangement with the temp and, just for the  
19 Tribunal’s note, that is Terms and Conditions, p.1155 that we were just looking at para.10.4;  
20 it is also referenced in CDI’s form 10K, and that is NCB2, tab.17, p.335.

21 We say this is at the very heart of this case, and it really undercuts the OFT’s claim that  
22 AndersElite manages a workforce. It does not. Not for temporary workers. It does for  
23 outsourcing. Yes, it provides ancillary payrolling services. Yes, it carries the risk of non-  
24 payment and pays tax, but it does this pursuant to employment law obligations. But none of  
25 this converts it into a supplier of labour services, architectural services, whatever one is  
26 talking about. That is a fiction. And the suggestion made for the first time in the defence  
27 that AndersElite acts as a recruiter of labour for perms, and the provider of labour for temps,  
28 which is not a distinction drawn in the decision, I say is highly unsupported; and I would  
29 just note this is covered in our skeleton, but my solicitors did write to the OFT on 24<sup>th</sup> May  
30 asking for the source of this new factual allegation, this factual distinction, and none was  
31 forthcoming. The response my solicitors received was that the OFT did not consider that  
32 the defence required further elaboration. The correspondence is NCB2, tabs.22-23. But we  
33 say this just simply does not correlate with reality, AndersElite provides recruitment  
34 services and some minor ancillary services in relation to temps under the employment law

1 framework. So, to conclude on this ground, we say it is a manifest failing that the OFT  
2 refused to look beyond the accounts and closed its mind to commercial reality. We say this  
3 is a serious error of approach. We say the small differences which exist in the arrangement  
4 between temps and perms which arises through operation of law for the protection of the  
5 temporary worker do not justify the treatment of turnover resulting in a fine at Step 1 of  
6 almost five times greater than it would otherwise be, £8.3 million to what we say should be  
7 £1.8 million. And we say this could at any step have been cured by the OFT stepping back  
8 and effecting a downward adjustment of the fine to reflect that commercial reality and to  
9 comply with the requirements of fairness. So, those are my submissions on ground 1.  
10 Perhaps if the Tribunal has any questions on that ground?

11 So, for completeness, then, on seriousness we adopt the submissions of Mr Brealey, and  
12 have nothing to add.

13 THE CHAIRMAN: Yes.

14 MISS KREISBERGER: On totality I dealt with that in my opening statement, and I have nothing  
15 to add in addition to the comments I made on Monday. And, on ground 4, I have had an  
16 indication – this is the specific ground – from Mr Unterhalter, but I think it would be most  
17 efficiently dealt with by me if necessary in reply to Mr Unterhalter. And then, just the very  
18 last thing, although we will wait to hear from Mr Unterhalter on that, I am going to carry on  
19 with my bout of optimism and hand up the table I mentioned yesterday, which simply  
20 makes the ground for adjustment.

21 THE CHAIRMAN: Yes.

22 MISS KREISBERGER: Again, those are confidential figures.

23 THE CHAIRMAN: So, this is another, as it were, reiteration of the table that you gave us.

24 MISS KREISBERGER: Yes, sir.

25 THE CHAIRMAN: With the grounds for adjustment.

26 MISS KREISBERGER: Precisely. That appears on the table as “Less net ground for  
27 exclusions”.

28 THE CHAIRMAN: Yes.

29 MISS KREISBERGER: And, very lastly, simply since I mentioned the -----

30 THE CHAIRMAN: I think the figure of the exclusion is not confidential, is it?

31 MISS KREISBERGER: No, I do not think the figure is.

32 THE CHAIRMAN: It is in your notice of appeal.

33 MISS KREISBERGER: The confidential figure is the cost of service for temporary workers,  
34 CDI’s cost of service.

1 THE CHAIRMAN: Yes.

2 MISS KREISBERGER: And, lastly, I mentioned Keller Group accounts. I just hand that up, just  
3 to ----

4 THE CHAIRMAN: This is from Makers?

5 MISS KREISBERGER: This is from Makers. Just to firm up on that from yesterday's  
6 submissions on the Keller Group, the parent company's revenue, the figures that I gave in  
7 the accounts for 2005 which is £685 million.

8 THE CHAIRMAN: Yes.

9 MISS KREISBERGER: You just have that there in the accounts. Sir, that completes my  
10 submission.

11 THE CHAIRMAN: So, we will return at ten to two.

12 (Adjourned for a short time)

13 MR. BREALEY: Sir, if I could just trouble you on this net fees issue for 2004/05?

14 THE CHAIRMAN: Yes.

15 MR. BREALEY: We have tried to come to some agreement with the OFT but I understand that  
16 has proved fruitless. Can I just explain the position? I would ask the Tribunal not to order  
17 us to recalculate the relevant turnover. If I can make the points and then just very quickly  
18 show you why.

19 The first point is that it is highly unlikely that we have the data available – we are now 2010  
20 and this is relating to 2004. I understand that the worker placement databases have been  
21 replaced, so it is highly unlikely that we can do it, that is the first reason.

22 The second reason is that it will be hugely time consuming and expensive, and if I could  
23 very quickly ask the Tribunal to look at CB3, tab 1, which is Mr. Venables' first statement.

24 THE CHAIRMAN: Yes.

25 MR. BREALEY: Page 22, paras.64 to 68 but particularly para. 66. You will see there when we  
26 first did this exercise in response to the s.26 notice in particular it ----

27 THE CHAIRMAN: It does not actually say when you did it, but presumably you did it in mid-  
28 2008, early 2008?

29 MR. BREALEY: That is right, but we did it for the year that is before the Tribunal. If one looks  
30 at para. 68 it says:

31 "We allocated a team of 5 Hays employees to work nearly full time for a period  
32 of 6 weeks to review thousands of placement records, complete 26 spreadsheets  
33 and review underlying financial data . . ."



1 So that is the sort of exercise we went through to get the relevant turnover, which is only  
2 some of the candidates in the construction industry, not all of them, so you have to separate  
3 those out. It was an extraordinary amount of time and expense which Hays will be put to if  
4 Mr. Harris's point is successful and the OFT have made an error. So that is the second  
5 point.

6 The third point is that it is not part of our appeal. The fourth point – and I can only put this  
7 forward as some sort of compromise, we have put this to the OFT but at the moment there is  
8 no agreement – it may, and I just emphasise the word 'may', it may not make any  
9 difference. The reason that I say that is that if you look at, for example, the net fees for the  
10 UK and Ireland for 2004/05, and the accounts are in the bundle ----

11 THE CHAIRMAN: Yes.

12 MR. BREALEY: -- it is £354 million, that is net fees. For 2009 accounts it is £330 million, so  
13 there is £20 million difference, so it is slightly higher for 2005 than for 2009, but of course  
14 that is for UK and Ireland.

15 But we have, we say, £33 million net fees for 2009, that is what we say our figure is in the  
16 relevant market. That is a tenth of the £330 million net fees. So if you are looking at  
17 tenth ----

18 THE CHAIRMAN: That is in which year?

19 MR. BREALEY: 2009. The net fees for UK and Ireland for 2009 was £330 million.

20 THE CHAIRMAN: So it is 10 per cent of the total.

21 MR. BREALEY: It is 10 per cent. For 2004/05 it is £354 million, if you took 10 per cent of that,  
22 that is ----

23 THE CHAIRMAN: Another way possibly, because I appreciate what you have shown us at para.  
24 68, I think without turning it up that the accounts break down the net fees by sector. Indeed,  
25 you made use of that in cross-examining Mr. Allen.

26 MR. BREALEY: In 2009, I have not gone back to see whether that is by sector in 2004.

27 THE CHAIRMAN: Just to finish, you know where I am going, I think, that one could look at the  
28 construction sector in 2008/09 and look at what proportion of that is the £33 million,  
29 namely what percentage had to be stripped out and then if one had the construction sector in  
30 2004/05 one could say on a broad brush basis probably the same proportion would be  
31 stripped out and that would be a simple way of doing it and clearly a little bit more refined  
32 because the total net fees cover all other sectors where the performance may have changed.

33 MR. BREALEY: Another compromise is to take a percentage of the Plc's turnover. All I am  
34 saying is that if it is broadly similar we should not be disadvantaged without all the analysis

1 coming through, and what I would urge the Tribunal to adopt is if Mr. Harris wins on his  
2 ground that the Tribunal treat 2009 as if it was 2004, because ----

3 THE CHAIRMAN: That would be a bit odd when you have just pointed out the figures are  
4 different.

5 MR. BREALEY: Well they are different, but are they so different – in order to get the accurate  
6 figure we would have to do this six week exercise which, on one view we cannot do.

7 THE CHAIRMAN: How does the £33 million compare to the figure in the accounts for  
8 construction?

9 MR. BREALEY: There is no breakdown in the accounts. For 2009?

10 THE CHAIRMAN: Yes, but I thought the £33 million is 2008/09.

11 MR. BREALEY: Yes, it is but I do not have that figure for 2004.

12 THE CHAIRMAN: No, no, I am asking you, that is the figure of relevant turnover after taking  
13 out certain categories.

14 MR. BREALEY: Yes, it is.

15 THE CHAIRMAN: How does that £33 million compare with the figure in the accounts for  
16 construction net fees in 2008/09?

17 MR. BREALEY: It will be NCB4, vol.1, p.131. That is net fees C&P, 131.

18 THE CHAIRMAN: That is worldwide, is it not?

19 MR. BREALEY: No, we have UK and Ireland. 131.

20 THE CHAIRMAN: 131 is just UK, yes. 75.7, is it?

21 MR. BREALEY: My main point, Sir, is that if it is going to be against us, and it could be slightly  
22 higher, we would be forced to spend £200,000/£300,000 as I understand it for the six  
23 weeks' work in order to get the correct figures.

24 THE CHAIRMAN: That is why I am wondering about, if this were the line we took, doing it this  
25 way.

26 MR. BREALEY: You can hear from behind me, it is a lot of work, I am told it could be six  
27 weeks, it could be three months. The amount of detail you have to go through, if it  
28 exists ----

29 MR. UNTERHALTER: Perhaps I could be of assistance to my learned friend, there is apparently  
30 a figure for 2005 and 2006 in the annual accounts, for 2006 on a breakdown basis. It is  
31 p.411.

32 MR. BREALEY: That is 2006, as I understand it.

33 THE CHAIRMAN: It goes to the next year, does it not? 411?

1 MR. BREALEY: 411, on 410 there are 2 people, one of which you will maybe recognise. Then  
2 on 411 in the left hand column, we see year ended 30<sup>th</sup> June, 2006 and 2005, 411.

3 THE CHAIRMAN: Is that UK and Ireland.

4 MR. BREALEY: Yes, it is, you will see that from the bottom of 410.

5 THE CHAIRMAN: So the equivalent, what was £75.7 million in 2008/09 was £97 million in  
6 2004/05.

7 MR. BREALEY: But, as I say, one does not then have any smaller breakdown as to what is  
8 relevant turnover.

9 THE CHAIRMAN: No, but one might assume that the same sort of percentage would apply if  
10 you do not want to do the work.

11 MR. BREALEY: Or can do the work.

12 THE CHAIRMAN: You said it is very unlikely, you are not saying for certain, you need to make  
13 further investigation.

14 MR. BREALEY: Obviously Hays has to go back and ask its technical team whether it can be  
15 done, and again one has to take on board that if this is an error on the OFT's part, then this  
16 is the first time we have been put on notice of that error and we should not be prejudiced by  
17 it, particularly when we are not taking the point on appeal.

18 THE CHAIRMAN: You heard what I said before, I was trying to see if that is a quicker way,  
19 unless it is said that the elements that have to be stripped out were of a wholly different  
20 proportion than a few years before and ----

21 MR. BREALEY: But one just does not know.

22 THE CHAIRMAN: Well your clients will have some idea of that because they know what their  
23 business is, will they not? I do not want to spend more time on it, but I think we would like  
24 to know whether it can be done, you say it is highly unlikely they have the data.

25 MR. BREALEY: Those are my instructions.

26 THE CHAIRMAN: That is what you have been able to establish over lunch.

27 MR. BREALEY: My last point then is that if I come back and say: "It can be done, but it is going  
28 to be extremely expensive" ----

29 THE CHAIRMAN: Yes, well then you can give us an estimate.

30 MR. BREALEY: -- and we could ask for the costs from the ----

31 THE CHAIRMAN: Well you can give us a broad brush figure of costs.

32 MR. BREALEY: The best thing to do, Sir, is to leave it to the Tribunal, given our position.

33 THE CHAIRMAN: If you say that either cannot be done or is very expensive, perhaps you can  
34 make a constructive suggestion of how one can get at a reasonable estimate.

1 MR. BREALEY: And the OFT can as well, if it is their error, they should ----

2 THE CHAIRMAN: No, it is this Tribunal which is fixing the fine and we want to know what is a  
3 reasonable basis on which we can do so. We are not interested, on this assumption, on how  
4 the OFT might have done it.

5 MR. BREALEY: I take your point.

6 THE CHAIRMAN: Yes, Mr. Unterhalter?

7 MISS KREISBERGER: Sir, could we just make our point on that as well very briefly indeed.  
8 Our position is that we see the force in the argument, we certainly do not argue against it.  
9 The position for CDI is that the data does exist and we think we can do the work to access  
10 it.

11 THE CHAIRMAN: Do you know how soon you can supply it?

12 MISS KREISBERGER: If I can just take instructions. (After a pause) We think at most a  
13 month.

14 THE CHAIRMAN: A month is satisfactory. We are bound to say that this a point that occurred  
15 to all of us on the Tribunal when we read the notices of appeal. So we are a little surprised  
16 that at least some of the parties have not been prepared to address it as we had expected, but  
17 there we are.  
18 Mr. Unterhalter?

19 MR. UNTERHALTER: Thank you, Sir. We have prepared a note to assist in these closing  
20 submissions. It is not comprehensive note, it simply seeks to address some of the issues,  
21 particularly where there are issues of evidence where we have tried to assemble some of the  
22 relevant citations. Perhaps I could just indicate what it does not contain. It does not deal  
23 with MDT, which is what I shall commence my submissions with. It refers tantalisingly  
24 under (d) to the argument concerning turnover in respect of CDI, as to which I will make a  
25 very brief submission. Other than that, those are the topics that are covered. The only other  
26 matter that I will be addressing that is not reflected here is the year of turnover debate.

27 THE CHAIRMAN: Yes.

28 MR. UNTERHALTER: Can I then commence by dealing with the challenge on MDT grounds.  
29 There are three basic criticisms that are offered, the first being the most significant, at least  
30 in conceptual terms, and that is that there is no link to the concept of the culpability. The  
31 second is that if there is to be an uplift it should be an individualised assessment and not a  
32 mechanical formula. Thirdly, it is too singular in its focus because there are other  
33 dimensions that should be taken into account for the purposes of making a deterrence  
34 assessment, and that engages questions such as profit and the like.

1 Let me begin with the first of those, which is the thesis that there is no link to the concept of  
2 culpability or the determination of culpability, and so there is a problem with  
3 proportionality and a failure properly to apply what the Guidance requires.

4 It was notable that in our learned friend's address on this score he came at the end of his  
5 address on this matter to refer to what he took to be the preferred outcome, which was to  
6 say that there should be an approach applying multiples of what had been determined at  
7 Steps 1 and 2. That is, of course, a commitment to the proposition that somehow or another  
8 the work of deterrence is better done on a principle of multiplication from what is  
9 determined at Steps 1 and 2. When one probes what is the foundation for that notion, other  
10 than saying that it begins from Steps 1 and 2 there is no rational principled basis upon  
11 which that multiplication exercise takes place. It seems that Hays allows for the fact that  
12 that multiplication may be many times over in certain kinds of cases, but why it is set at that  
13 level and what the rationale for it is, at least on the argument, wholly unknown.

14 The first question one poses is, what is it about that connection between the point arrived at  
15 Steps 1 and 2 and multiplications from it that is properly and proportionately doing the  
16 work of deterrence; whereas the MDT is not doing that work. We want to submit that if  
17 one looks at that offering as to how deterrence should be done, one sees indeed a much  
18 cruder principle of deterrence being applied. We say that for this reason: what has been  
19 determined at Steps 1 and 2 is, firstly, along the one dimension a determination of  
20 seriousness; and secondly, an allowance as to relevant turnover which is in effect the  
21 impact of the infringement in the relevant market. So one is asking a very limited question,  
22 which is: what is the scale of the undertaking in the relevant market?

23 It is said for Hays, and those who adopt its argument, that that is somehow a proper basis  
24 for working out what will deter an undertaking. The question is: why is that so? Why is  
25 the relevant variable there? The extent to which the undertaking has engaged in activity  
26 within the relevant market, the crucial variable for the purposes of constituting the  
27 foundation from which one determines deterrence.

28 This is where one comes to the second proposition that we would offer, which is: what is  
29 one trying to do by way of deterrence? One is not trying to do the same work by way of  
30 deterrence that one is trying to do in capturing the notion of seriousness. It is, as everyone  
31 has said, an instrumentalist or consequentialist approach to penalties. We are looking to use  
32 this offender for the purposes of dissuading this offender for the future, and indeed others  
33 who might be tempted to act in a similar way given what this offender has done.

1 So there is no question that we are not trying to, as it were, capture the same topic again in  
2 deterrence. We are trying to do something different and that is why the Guidance is plain  
3 on this subject. It say, “You may adjust”, and you may adjust precisely because there is a  
4 different object that is to be served by this next step in the analysis.

5 So when one thinks realistically about what Hays is proposing on this score, they are saying  
6 that it is a necessary aspect of proportionality and necessary for the purpose of complying  
7 with the Guidance that the question of deterrence must be rooted in the proposition of how  
8 much this undertaking has engaged in activity within the relevant market. There are only  
9 two matters that are determined at Steps 1 and 2, the seriousness percentage and the relevant  
10 turnover. Those are the only two things that are being determined.

11 THE CHAIRMAN: Step 2 is duration.

12 MR. UNTERHALTER: Step 2 is duration, but from the perspective of Hays – I should correct  
13 myself, it is Step 1 that is considered to be the culpability factor which is said to be at the  
14 heart of Hays’ proposition, and it is really made up of those two points.

15 In our submission, that is a very bad indicator in many circumstances for the purposes of  
16 doing the work of deterrence. We say that precisely for the reason that the MDT has been  
17 created, which is that a very large undertaking that operates in many markets and has the  
18 ability and potential to do very considerable harm across a range of economic activities, it is  
19 that kind of undertaking that must be deterred, at least by way of specific deterrence. If  
20 such an entity has a relatively small turnover in the relevant market, it seems to be an  
21 altogether counter-indicator to use that relatively small amount of turnover in the relevant  
22 market as the conceptually right basis for deciding how to deter a very large undertaking.  
23 That is the central proposition about MDT. MDT is not of invariable application. MDT is  
24 of application in the case where the margin of deterrence will not be great enough because  
25 the participation of the undertaking in the relevant market is too small relevant to its overall  
26 size.

27 All that the Hays’ proposition stands for is to say, “It is an inclusive indicator of deterrence  
28 for the purposes of working out the foundation for the multiple. What is the extent of  
29 activity that the undertaking has engaged in in the relevant market? That is what this  
30 proposition comes down to. The question is: why is that rational? We would submit that it  
31 is often entirely contingent. It is not rational at all.

32 In many circumstances – we know from having assessed many cases, certainly across the  
33 construction sector – one finds that undertakings of different size are wholly differently  
34 situated in respect of how much of their turnover is accounted for in the relevant market.

1 You have medium sized undertakings that have very significant turnover in the relevant  
2 market, or small undertakings that do so, and you have very sizeable undertakings that have  
3 very little relevant turnover. It is an entirely contingent matter depending on how the  
4 relevant market is defined and how much activity is taking place in a particular year on that  
5 market. Those are commercial variables that have very little to do with the question of the  
6 consequentialist, forward looking issue as to how deterrence is going to work.

7 We submit that the Hays' proposition is actually the contingent proposition and does not  
8 offer a very satisfactory account as to how deterrence should work.

9 The OFT's policy is a defensible one and perhaps I should indicate why we say it is rational  
10 and defensible. It has a number of features. The first of them is that it takes the turnover  
11 figure that is generated at Step 1 and, after the duration is applied, Step 2, and it asks itself  
12 this question: how much of the overall undertaking's turnover is captured by what we have  
13 assessed at Step 1 and 2? Where it accounts for a sufficiently sizeable amount of the overall  
14 size of the undertaking then we do nothing more. We are not required to because we are  
15 quite satisfied that that penalty will also serve deterrence purposes. We have captured  
16 enough of the undertaking's turnover.

17 In circumstances where that is not the case then something more is required, because too  
18 small a part of the undertaking is being impacted by reason of these contingencies that  
19 affect relevant turnover. So a figure is arrived at for the purposes of working what is  
20 enough that is representative of a sufficiently sizeable part of the undertaking's activities to  
21 be the base as to which we would apply deterrence.

22 So it is a policy that is only triggered where there is a judgment that not enough is captured  
23 and therefore it is a policy at the margin, it is not of invariable application. That is the first  
24 feature of it, so it is tailored to the circumstances of the undertaking and the particular  
25 features of how relevant turnover relates to total turnover.

26 The second feature of the calculus is that it does not lose touch with seriousness at all. In  
27 those circumstances where there is no warrant to apply MDT because enough of the overall  
28 size of the undertaking is captured at Steps 1 and 2, then Steps 1 and 2 serve the purpose,  
29 nothing more is done, and in that sense what counts for seriousness counts for deterrence.

30 In circumstances where the MDT is an application, there is still a link to seriousness  
31 because, of course, it is the seriousness percentage – in this case the 9 per cent – that is  
32 applied to the 15 per cent, and that is an invariable feature of the MDT. That is not  
33 contingent at all. So the linkage continues to be in place.

1 There is a third feature of MDT, which was not remarked upon at all by any of the  
2 appellants. That is that all of the objectives that are sought to be served by the penalty  
3 regime have to be situated within a universe, and that universe is dictated as to its  
4 extremities by a cap that is calculated in terms of 10 per cent of worldwide turnover.  
5 It postulates this: it says, “If you assume the very worst kind of infringement by the most  
6 sizeable and potentially dangerous undertaking, it would in those circumstances, other  
7 things being equal, be circumstances where 10 per cent of worldwide turnover would be a  
8 competent penalty to apply”. It is always the case in setting penalties that one is trying to  
9 get a sense of where does this case lie as between the most trivial and the most serious.  
10 Because that limit is a statutory injunction, it is not a matter of Guidance, that is how  
11 Parliament has determined that the universe should look at its extremities, in those  
12 circumstances it is unsurprising that the standard that is relevant here is worldwide turnover,  
13 it is not the importation of some oddity and some overly expansive conception of turnover.  
14 That is the very notion that is intrinsic to the exercise because you are situating this case  
15 within that universe.

16 We say for that reason too it bears a strong relationship to what the exercise is intended to  
17 capture.

18 Then there is the quite separate feature as to what is deterrence about, not as a general  
19 matter but particularly in circumstances where we are concerned with competition law  
20 infringements. This touches to some degree on the many submissions made which have  
21 said in a variety of ways, “We mean to be good citizens, even if we were not in the past, and  
22 see as evidence of that the rigorous nature of our compliance programmes”. There is the  
23 point already made by the Tribunal concerning the difference between an *ex post* adoption  
24 of a compliance programme and an *ex ante* one. One can understand a rigorous programme  
25 adopted *ex ante* which fails, but nevertheless there was a determined effort to make it  
26 succeed; and an *ex post* effort, which says, “Now that we have been caught red-handed, we  
27 will try to be better”. That is no doubt laudable, but does it have a very strong bearing upon  
28 the question of deterrence? We want to submit to the Tribunal that in the context of  
29 competition law infringements it is a peculiarly weak indicator of future conduct for this  
30 reason: cartel behaviour is not irrational behaviour for profit maximising firms in markets.  
31 It is a constant feature of those interactions within market transactions, that there is a  
32 temptation to coordinate, because in certain circumstances that can be a perfectly rational  
33 thing to do if you can fix a market by so doing. We know it is unstable, as indeed most  
34 cartels are, but that does not avoid the temptation. So, if one is thinking about firms from



1 an economic perspective, which is what this legislation is intended to engage, one is  
2 thinking about undertakings where those who are charged with making decisions to profit  
3 maximise, to ensure their margins, are constantly open to the temptation of some species or  
4 set of combinations and co-ordinations. And the way to make sure that firms understand the  
5 gravity of giving in to that temptation, is to affect the bottom line of the firm. It is to say  
6 “Your turnover is at risk here, and if you are tempted again into this kind of conduct, then it  
7 will directly bear upon your ability to be a profit maximising firm. Understand that”.  
8 And there is another feature of deterrence also much spoken about but, again, which  
9 warrants some emphasis, which is that cartels are enormously difficult to detect. When they  
10 are detected it is extremely important that, quite simply, an example needs to be made for  
11 deterrence purposes, because it is the only systemic way that we have to bring home to  
12 undertakings the gravity of what is being done in these circumstances. And so, we have  
13 parties and appellants before you now seeking to use every means they can to diminish the  
14 amount that they should pay for their wrongdoings and seeking, as it were, and we have  
15 heard now Hays suggesting that on their most optimistic forecast of the outcome of the case  
16 that they should be paying, I think it was suggested, around £3 million or £4 million, which  
17 would be a very small amount even of their profits in a year. We submit that that is a  
18 wholly incorrect framework within which to be thinking about deterrence. For a firm, for  
19 an undertaking of the size of Hays, from its own perspective it has to know that if it is  
20 tempted into this sort of behaviour again, significant turnover is at stake, not some 10 per  
21 cent or so of its profits for any particular year. And so we have a very great difference as to  
22 the practical significance of deterrence and what work needs to be done to impress upon  
23 those who infringe the Act as to what the consequences will be of those infringements. And  
24 that is just in respect of Hays. There is the entire universe of other undertakings in every  
25 part of the economy that must look upon these occasions and say, “We are fearful. We are  
26 very fearful as to what will happen. We cannot ever make an economic calculation that  
27 would allow for the possibility that we can absorb this loss, because the basic calculus is not  
28 very difficult if one thinks about it in a cynical way. If 10 per cent of your profit stream is  
29 at stake and the probabilities of detection are extremely low, then it is actually a bargain  
30 worth taking. What deterrence is intended to do, is be a corrective to that cynical calculus.  
31 It is intended to say to undertakings, “However low is the risk of detection the consequences  
32 will be grave”, and that is why the sorts of figures that are being bandied about are, with  
33 respect to our learned friend, simply not sufficient on any basis to do what is required.

1 There is one final feature of the MDT that we wanted to indicate conceptually as to why it is  
2 the right way of going about this task – which is that it works with worldwide turnover and  
3 it is therefore a transaction-based measure. Now, I am going to make some brief  
4 submissions about profitability in a moment, but there are clear advantages in adopting a  
5 transaction-based measure because of course at the level of deterrence it is the entering into  
6 of tractions that constitutes the cartel behaviour. It is the arrangement to disintermediate  
7 park and set up arrangements under tractions with Vinci to their exclusion that presents  
8 itself to managers for the purposes of them making decisions. And turnover, as we have  
9 seen through the many iterations of that subject over the last few days, is a transaction-  
10 based measure. And worldwide turnover is the summation of the sales activities of an  
11 undertaking. So, when one is asking, “How big is this undertaking?” “How much activity  
12 does it engage in?” “How risky is it for the future?” Worldwide turnover is unashamedly  
13 the correct way of looking at this, because size here speaks to economic power, and it is the  
14 corrective to the abuse of economic power that lies at the heart of what MDT and any  
15 deterrence regime is about. And we submit that therefore MDT meets all the requirements  
16 for the purposes of ensuring that proper deterrence is done. It is individuated because it is  
17 concerned with the specific features of the size of the entity concerned. It is applied to the  
18 particular percentage, through the 9 per cent of the 15 per cent, which is individual to this  
19 entity and what it has done and the seriousness of what it has done. And it is also concerned  
20 not to apply deterrence gratuitously, because if that has already been captured at Steps 1  
21 and 2, nothing more needs to be done, and that is of course the most important corrective  
22 for any lack of proportionality. So, in our submission, far from being a disproportionate  
23 ungrounded conception of deterrence, it is a well thought through conception, and it has  
24 much much more to be said for it than the conception that is offered by Hays.

25 THE CHAIRMAN: You say it does not lose touch with seriousness because the percentage is  
26 applied and the percentage is calculated on seriousness, and I understand that. But, the  
27 seriousness may be the percentage, but the Step 1 is looking at and regards as relevant when  
28 one is considering culpability, not only the character of the infringement, which is the  
29 percentage, but the scale of it, and one can see why with good reason. Once you substitute  
30 MDT for relevant turnover, the link to the scale of the infringement is gone, is it not?

31 MR. UNTERHALTER: Well it is, but for a very very compelling reason, and a warranted reason  
32 in order to do the work of deterrence, and this is why seriousness is not the same enterprise  
33 as deterrence. The reason that one applies the worldwide, one looks at worldwide turnover,

1 is precisely because if you are too small a participant in the relevant market, though very  
2 big overall, you are not going to do the work of deterrence.

3 THE CHAIRMAN: It means that whatever the scale, as long as it produces something that is  
4 below 15 per cent worldwide turnover, you end up with the same result. And that seems  
5 strange.

6 MR. UNTERHALTER: Well, for a very good reason. Which is that if the amount of turnover  
7 that is generated amounts to something more than 15 per cent of worldwide turnover in  
8 respect of Steps 1 and 2, then one is saying that deterrence is served because the size of the  
9 entity that is captured by the penalty is represented in that figure already. So, there is no  
10 substitution. It is not as if, as was suggested, that one is abandoning what has happened at  
11 Step 1. One is saying, "Is it doing enough?"

12 THE CHAIRMAN: That, I understand – that one asks that question. But if the Step 1 result  
13 affects 1 per cent, ½ per cent of worldwide turnover because the scale is so small. Or on the  
14 other hand it affects 12 per cent because the scale is so big, either way you end up with a  
15 penalty through applying MDT that is exactly the same.

16 MR. UNTERHALTER: Yes, indeed.

17 THE CHAIRMAN: And that is where it is said, and speaking for myself I can see why you have  
18 lost the link to one important aspect that you have very properly considered in Step 1 – even  
19 though, I take your point, seriousness in terms of character of the infringement is still  
20 preserved through the percentage.

21 MR. UNTERHALTER: In our submission the answer to that is that you do not need to maintain  
22 that link for the purposes of deterrence. Because, what is the point -----

23 THE CHAIRMAN: You may not need to maintain it for the purpose of deterrence, if that is the  
24 only purpose of the fine. But it is not the only purpose. There are two purposes, and are  
25 you not then losing an element – one of the two elements – of the -----

26 MR. UNTERHALTER: With respect, not. Because, if it is serving seriousness at the, say, the  
27 2 per cent level, or the 12 per cent level, then what you are asking is a question at the  
28 margin. You are asking, "Is something more necessary?". Now, the fact that the amount  
29 more that is necessary, in the one case where there is 1 per cent, as I say, or for argument's  
30 sake, well, there you need 14 per cent, and the other you need to make up a smaller  
31 increment, is only because what you are really concerned with is whether 15 per cent is the  
32 right amount to determine how much of the overall turnover you need to capture to do the  
33 work of deterrence. In other words, there is no reason why one has got to use relevant

1 turnover percentages to then decide how much more is required for deterrence. The issue is  
2 simply one of size, because that is what is relevant to deterrence.

3 The only alternative is the Hays proposition which says, “Well, somehow this contingent  
4 figure about relevant size, or size in the relevant market, is somehow a determining factor  
5 for the purpose” -----

6 THE CHAIRMAN: But it is not yet. That is the one they put forward. It is not yet. One could  
7 also look at that figure and say, “We think this is too low, we are not going to apply a  
8 percentage to it, we are going to add £X million having regard to worldwide turnover,  
9 profit, any other special features”. Now that would also be, they are all, there is no sort of  
10 limit to the number of ways one can look at that, trying to achieve deterrence.

11 MR. UNTERHALTER: Yes, indeed. We accept, and it is to be recalled that MDT is not, it is a  
12 technique that is utilised in this case. The question is, there may be others, the question is,  
13 is it in any measure either unlawful in the sense that it is not permitted by the Guidance, or  
14 if it is permitted by the Guidance, its application in this case is somehow problematic.

15 THE CHAIRMAN: Yes.

16 MR. UNTERHALTER: We say neither is the case, and we submit that that is so because, when  
17 you have determined (forgive me if this is repetitive) but when you have determined the  
18 percentage participation that the firm has in a relevant market, you are not saying anything  
19 of significance that is relevant to the matter of deterrence, because it may or may not be  
20 enough for the purposes of registering the size of the entity, which is the critical  
21 consideration for deciding what you need to do to deter. And that is why the notion that  
22 you have to link it in is a proposition which we submit is unreasoned and therefore the  
23 notion that you are committing an act of disproportionality because you do not keep the  
24 linkage is itself unwarranted, because unless you can show why the capturing of relevant  
25 turnover must matter for deterrence, and thus you need to start from that premise, it is not  
26 availing for the purposes of saying that it is a necessary foundation without which no  
27 proportionality can be done. We submit that neither on the Hays suggestion, nor any  
28 conception that is premised on the percentage of relevant turnover is a meaningful basis for  
29 doing the work of deterrence, and that is our fundamental conceptual argument in respect of  
30 the defence of MDT.

31 There are two lesser categories of objection that are raised. The first is that it is not  
32 individual, it is not specifically tailored, and here this is a very puzzling argument in our  
33 submission, because it seems that from Hays’ perspective what is achieved at Step 1 and 2  
34 is absolutely fine, and so they would simply apply a multiple to Step 1 and 2 and therefore

1 on assumption it is tailored, sufficiently tailored. And how is it tailored? It is tailored on  
2 the two, let us perhaps just for the purpose of exposition keep it at Step 1. It is tailored as to  
3 percentage and it is tailored as to the percentage of that percentage applied to relevant  
4 turnover. That is what that argument means by way of being individually targeted. Now.  
5 Let us compare that with MDT, for the percentage is still utilised which was the one feature  
6 that was tailored and is apparently acceptable in the Hays argument. And what is then said  
7 not to be, or insufficiently, tailored is something presumably about the use of 15 per cent, in  
8 other words, the difference between the amount generated on the relevant turnover standard  
9 and the total turnover standard.

10 But what is not explained is what is wrong with 15 per cent? One has to arrive at some  
11 level that captures sufficiently the size of the undertaking in respect of which some  
12 deterrence needs to be applied. Now, we would allow for the fact that no doubt there may  
13 be some argument that one could use 12 per cent or 10 per cent. But there is a great risk in  
14 this particular debate to try and render, as it were, something scientific that at best can mark  
15 out some rational lines of demarcation and not much more. And that is illustrated by Hays'  
16 difficulty that their multiplier is just, because we think that that is about right, it is the  
17 intuitive judgments that I addressed in my opening, which is said sometimes to be what is  
18 required for proportionality. It is actually just, it is just recourse to subjectivism in one form  
19 or another.

20 THE CHAIRMAN: Given the huge difference, particularly when you are going from worldwide  
21 turnover to between, as you said, one could have an argument to use 10 per cent or  
22 15 per cent, a vast difference, you have only got to look at Hill McGlynn to see the scale of  
23 that. What we do not find in the decision, is what is the thought process that led to the  
24 presumed considered conclusion that actually really it needs to be 15 per cent.

25 MR. UNTERHALTER: The demarcation at 15 per cent is reasoned on the basis that you need to  
26 work with a base of - well, there are two components. The one is worldwide turnover. The  
27 second is: what is the percentage?

28 THE CHAIRMAN: Yes.

29 MR. UNTERHALTER: As to worldwide turnover, that is to capture the entirety of the  
30 undertaking's commercial engagement.

31 THE CHAIRMAN: Yes, I understand that.

32 MR. UNTERHALTER: So, in our submission that is entirely rational and acceptable basis for  
33 doing the work of deterrence. Then the question is "Well, why is 15 per cent of that number  
34 a sufficient or a sufficient basis for doing the work of deterrence?" And the answer to that

1 is simply that it is enough for the purposes of creating serious incentives for those who  
2 might be tempted to commit these very grave kinds of wrongs.

3 THE CHAIRMAN: On what basis does one conclude that it is enough, as opposed to very much  
4 more than enough? No doubt on that basis one could say, “Well, 30 per cent would be  
5 enough, it would be a very effective deterrent”.

6 MR. UNTERHALTER: It is not a judgment that, I mean, one can never – I cannot reason deeply  
7 on this point, nor can anybody around these matters, but it is not a reason to suggest that the  
8 alternative that is being proposed is an acceptable one, which is just to say some multiplier  
9 is right, or some other set of intuitive judgments, 15 per cent is a judgment that is made on  
10 the basis that it is a significant portion of that turnover, but not so large as to start doing  
11 terminal damage to the business. In other words, we want it to be something that is healthy,  
12 that is large enough to make a major impact, but not so big as to potentially irretrievably  
13 damage the undertaking, because that would be, if I may put the point this way, it would be  
14 wholly irrational for a competition authority to seek to cause damage to undertakings that  
15 are meant to operate competitively for the future.

16 So those are the considerations. Now the Tribunal may conceivably reach a judgment if it  
17 says “Well, worldwide turnover is the right standard to begin with”, and that of course is the  
18 very matter upon which the appellants will have nothing. They will not allow for a  
19 worldwide turnover standard. They want to work from a relevant turnover standard.

20 THE CHAIRMAN: I do not think that is right. I think if it is net fees, in this case they would  
21 accept that worldwide net fees is a relevant consideration. That was my understanding.

22 MR. BREALEY: Sir, can I make it very clear, I thought I had expressly accepted that it is not just  
23 profit that is relevant, I accepted that turnover, worldwide turnover, is certainly a relevant  
24 factor.

25 MR. UNTERHALTER: We are encouraged, then, by that. It means, in our submission,  
26 worldwide turnover is the correct framework to which to apply a deterrence issue. It is not a  
27 seriousness issue but a deterrence issue. And once you accept that, then it is a question of  
28 “Well, what is the percentage?” Some of these percentages seem more daunting than they  
29 are, because of course you are still going to apply the 9 per cent to the 15 per cent, so you  
30 end up with a percentage of worldwide turnover which is usually between 1 and 2 per cent.

31 THE CHAIRMAN: Yes.

32 MR. UNTERHALTER: So, sometimes these figures, you know, appear to be large, when they  
33 finally are done, it is not what it seems. I have indicated what the considerations are as to  
34 big enough to make a significant impact upon the turnover of the company, but not so big as

1 to impede its future ability to trade in markets. And that is where 15 per cent comes from.  
2 Now, there may be other judgments to be made on that score, but we have not heard from  
3 the appellants by way of assisting the Tribunal, how you achieve a better metric of how that  
4 work is done. Is 10 per cent the right figure?

5 THE CHAIRMAN: Well, I think they say it is, of course it is a point you are about to come to,  
6 that it is too singular.

7 MR. UNTERHALTER: Indeed.

8 THE CHAIRMAN: I do not want to take you out of your order.

9 MR. UNTERHALTER: But indeed, the world that the appellants inhabit is a multi-factoral world  
10 where, in effect you just look at a lot of different things and effectively you come to a  
11 somehow or another judgment because very often one is comparing very differing things in  
12 that mix. So in their conception you would look at relevant turnover, worldwide turnover,  
13 profitability, you would look at compliance programmes, and put all of this somehow in the  
14 mix and come out with an answer. Our submission is that that is an unprincipled basis for  
15 approaching deterrence, and it is going to yield a plethora of objections of the kind that  
16 says: "I cannot see, against this multi-factoral world, how you have achieved a particular  
17 number" because you are often just comparing very different things. How does one  
18 compare the question of a compliance programme against some conception of profitability,  
19 against some notion of worldwide turnover? I raise these questions rhetorically because if  
20 the Tribunal is to be tempted into this world it will have to itself seek to engage that world,  
21 and we would submit it is a very difficult one to understand and navigate one's way  
22 through.

23 THE CHAIRMAN: There is always, as you have acknowledged, an element of subjective  
24 judgment, 15 per cent is the subjective judgment.

25 MR. UNTERHALTER: The difference in our conception is there is an element of having to draw  
26 a line. It is within an explicable and principled universe, in other words there are clear lines  
27 that are drawn and it is against a reasoned account as to why worldwide turnover is being  
28 utilised, and why size in that sense is significant. The other world is simply one in which  
29 you look at all these different things and somehow measure them up to make a judgment.  
30 We would submit that that would be a retrogressive feature of ----

31 THE CHAIRMAN: One might say 2.11 of the Guidance is saying that. There are a lot of factors,  
32 some more relevant in some case than in another, and in some cases one might be  
33 completely irrelevant, but it is a multi-factored debate, and it is undertaking, or at least  
34 adopting the task of looking at not compliance, because the compliance programme I fully

1 take your point that is not dealt with here at all, but certainly one which does not  
2 particularly arise here, but its benefit may and that is something which you may take  
3 account of when looking at deterrence, because if it is a case where the undertaking actually  
4 has made this cynical calculus you might want to say: “It has to be shown to everyone that it  
5 does not pay”. So there is that element to multi-factored approach in the Guidance.

6 MR. UNTERHALTER: There may be circumstances in which, for example, on the benefit  
7 proposition there are specific features where one can show the cynical calculus, and then  
8 that might be, but bearing in mind the MDT is a “minimum deterrent threshold”, so more  
9 may be required by way of deterrence in respect of certain dimensions such as the benefit  
10 theory for example. But that is a very particular and calculable reference point. But if one  
11 looks at the key variables here, special characteristics including the size and financial  
12 position of the undertaking in question. The one that is raised to prominence in this  
13 example is exactly what the total turnover standard is intended to capture.

14 THE CHAIRMAN: Some might think size and financial position might bring in questions of  
15 profitability.

16 MR. UNTERHALTER: The question is really this, whether one must necessarily look at  
17 profitability. In other words it is a mistake if you do not, and our submission is it is not an  
18 error not to do so, it may be a factor that in certain circumstances could be looked at, the  
19 question is whether MDT is fundamentally wrong because it must, as an obligatory matter  
20 have regard to profitability in every circumstance and any failure to do so is to close one’s  
21 mind to something that is necessarily relevant and our submission is that that is not so.

22 THE CHAIRMAN: Might there be circumstances where it would not be appropriate to look at  
23 MDT – well MDT is just a concept, but to look at 15 per cent of worldwide turnover and  
24 not apply that at all?

25 MR. UNTERHALTER: In our submission it would always be necessary to have regard to the  
26 overall size of the undertaking.

27 THE CHAIRMAN: But not to say that it must be 15 per cent at least.

28 MR. UNTERHALTER: It is quite possible that there may be industries that present themselves,  
29 or circumstances that present themselves where one could have a debate as to why 15 per  
30 cent may be too much or too little.

31 THE CHAIRMAN: Take Professor Bain’s example from the other case.

32 MR. UNTERHALTER: About the Shell cases and so on. It may be that one could be confronted  
33 with the facts of that kind, which make one say “perhaps 15 per cent is too much”. In our  
34 submission it would never be wrong.



1 THE CHAIRMAN: You need to ask that question, and look at the figure you get and say:

2 “Looking at the nature of the infringement, have we got something that is just too much?”

3 MR. UNTERHALTER: In our submission, there are always cases at the extremes and because  
4 you can generate extreme cases it does not show that there is anything fundamentally wrong  
5 about what lies at the heart of the methodology. When the case comes along where it is  
6 said, but this multi-national is so big, and operates in markets so far flung that you are going  
7 to be doing some grievous financial harm to this company.

8 THE CHAIRMAN: Well you will not be doing that because you made the point you do not get  
9 above 10 per cent of 15 per cent, so you will not be doing grievous financial harm, but you  
10 just end up with a number and some might think that your argument would have had a little  
11 more difficulty if Hill McGlynn had not been the immunity applicant and was standing here  
12 saying “How can it be right that £160 million should be imposed, on the scale of the world  
13 today, for this?”

14 MR. UNTERHALTER: The OFT accepts that there will be extreme cases, and where there are  
15 outliers that those are cases that would need to be carefully considered when a reasoned  
16 case is put up as to why that is too much on some reasoned basis, but these appellants do not  
17 make that kind of argument, they are not saying that Hays is a far flung Empire covering  
18 deserts and forests and multi-sectoral engagements across many markets. It is a focussed  
19 company that operates worldwide and why is 15 per cent wrong?

20 Our submission is that we do not say one cannot work with different percentages and test  
21 them against reasoned argument but we have not heard those arguments, what we have  
22 heard is that MDT is fundamentally problematic, and we submit it is not fundamentally  
23 problematic, it engages the very heartlands of what deterrence has to do.

24 I have dealt with the individual aspects of how MDT is tailored, but if I could just deal with  
25 the factors that are said to warrant special consideration and were not specially considered.  
26 The first of those is the question of profit, and it is said: “We are not suggesting profit alone  
27 should count, but it should count for something”.

28 May I just indicate a number of reasons why adopting a profitability standard has many,  
29 many disadvantages when one thinks about deterrence? The first problem with profit is  
30 which standard is one going to adopt? If the issues over gross and net have seemed  
31 tiresome and certainly long-winded, the question over the adoption of the correct  
32 profitability standard will tower above those because there are many different ways of  
33 looking at profit, and, more particularly, there are many, many different ways in measuring  
34 profit. For example, when one is considering the profitability of a company, and this turns

1 out to be the usual difficulty in this area, how does one account for different kinds of costs,  
2 and particularly the way depreciation policies and other matters are accounted for which can  
3 yield up very, very different profitability figures.

4 So we will have the published accounts, and we will have the kinds of arguments that you  
5 have had paraded before you over the last few days, which is: “But that is not a proper  
6 account of our true underlying profitability, because in fact we would ordinarily have  
7 committed ourselves to a capital project and that would have greatly shrunk our profits, so if  
8 we happen to delay it by a year you are looking at a completely unrealistic view about the  
9 profits and profitability of this entity.” It is an intrinsically difficult standard to work with.  
10 The second is, as we pointed out, it is a highly variable standard. Our learned friend, Lord  
11 Pannick, said “So is turnover”. He is not correct. Turnover is generally a relatively stable  
12 financial metric. It does go up and down, but if you look at financial reports year on year  
13 you will see that turnover is not a figure that drastically changes, but profitability does. So  
14 to use illustrative examples you can have an undertaking such as British Airways, take a  
15 series of years, it is sometimes highly profitable, and in many years it makes losses, it is the  
16 nature of that particular industry, its turnover is huge, and it is generally relatively stable;  
17 that is another reason why profitability is not a very useful standard.

18 There are also reasons of principle about profitability as a standard and particularly in a  
19 competition law context. It can offer entirely perverse incentives to adopt profitability as  
20 the basis upon which one imposes penalties, because it is a tax upon efficient firms. If you  
21 are an inefficient firm and have low profits you get a low penalty by reference to this  
22 criterion. If you are highly efficient you get a high penalty, you are taxing the efficient  
23 firm, which is a very perverse result for a competition penalty regime, and so we suggest  
24 that that too is a reason why competition authorities throughout the world are usually very  
25 wary about using a profitability standard. So it is there but we would invite the Tribunal not  
26 to go down that road.

27 One feature of what Mr. Woolland had to say was that in respect of materiality – I do not  
28 need you to turn it up – but in fact the fine that was being proposed was not likely to have a  
29 material bearing on Hays’ ability to engage successfully in markets; that is another  
30 consideration.

31 The second suggestion made by our learned friend was to say that gross turnover itself  
32 should not be used as the standard because it effectively exaggerates the position, and so at  
33 the deterrence level one should not have regard to gross turnover. That is really just another  
34 way of saying that one should look at margins because it is effectively by looking at net fees

1 one is looking at the gross margin, and that is just another way of looking at a profitability  
2 standard, it is not a different argument it is just an example of one measure of profitability  
3 which is “Look at gross margins”. So it does not seem to stand on a different leg, it is just  
4 one other reason why you might want to look at profitability.

5 THE CHAIRMAN: That links really on to the gross/net issue which you will come on to.

6 MR. UNTERHALTER: Which I will address fully. The critical point for us is that conceptually  
7 for all the reasons I have given it is worldwide turnover that is the proper approach, and it is  
8 hard to see why one would want to mediate that notion, because that is the best sense of  
9 size. Absent a consideration around financial hardship, which is something that is looked at  
10 at Step 3, although it is not of application to any of these appellants, there is no warrant, we  
11 would submit, to adopt a second measure, as it were, and examine profitability.  
12 Lastly, there is the question of compliance, and I am not certain I need to say much more on  
13 that score because in our submission it is a different consideration that figures elsewhere in  
14 the Guidance and can adequately be dealt with in the place that it is, for the purposes of  
15 imposing a penalty.

16 That in general terms is our submission on MDT. There is just one matter that I must deal  
17 with at a general level which is, of course the question of how to treat *Makers*? It is, of  
18 course, the case enjoyed least by appellants both in this Tribunal and, of course, in the  
19 construction cases which have been heard, because in various ways various efforts are made  
20 to distinguish it and find ways for suggesting it does not stand for what we submit it does.

21 THE CHAIRMAN: Do you say it binds us?

22 MR. UNTERHALTER: We say it is an authority – I am not certain that it is binding in the sense  
23 that you would be free to differ if you thought it was clearly wrong, but, in our submission,  
24 it is a very strong and authoritative statement of why MDT as a methodology is consistent  
25 with the guidelines and is perfectly lawful.

26 Could I ask the Tribunal to turn up this authority which is at volume 4, tab 54.

27 THE CHAIRMAN: Yes, we have not actually been taken to it although it has been mentioned  
28 quite a bit.

29 MR. UNTERHALTER: The relevant reasoning proceeds from para.128 on p.38 of the judgment.  
30 The OFT was criticised by the Tribunal because it had not properly explained how the MDT  
31 had been applied and the Tribunal found that that was a perfectly warranted criticism to be  
32 made of the OFT. If one picks up the reasoning at para.131 it says:

33 “In its defence dated 6 June 2006, the OFT attached an Annex setting out how it  
34 had calculated the penalties. The explanation of how it arrived at the uplift at Step

1 3 was based on the assessment of a ‘minimum deterrence threshold’ applied to all  
2 the parties to the decision in order to determine whether there should be an uplift at  
3 Step 3.

4 The MDT depended on comparing the undertaking’s turnover in the relevant  
5 market (used in the calculation of the starting figure at Step 1) with the  
6 undertaking’s total turnover. The OFT considers that if the undertaking’s turnover  
7 in the relevant market is less than 15% of its total turnover, then the figure arrived  
8 at by Step 1 will not act as a sufficient deterrent.”

9 The very opposition that we have been debating.

10 “In such a case, therefore, the OFT calculates what the figure arrived at by Steps 1  
11 and 2 would have been, if the undertaking concerned had derived 15% of its total  
12 turnover on the relevant market. An amount is then added at Step 3 to bring the  
13 overall figure up, broadly speaking, to that threshold figure.”

14 So there is a description as to the method by which MDT proceeds.

15 There is then a calculation that is done in respect of how that method was applied to  
16 Makers, and that is captured in 133. The figures appear. I will not read them unless you  
17 wish me to. In 134 the following is said:

18 “We therefore reject Makers’ assertion ...”

19 THE CHAIRMAN: The previous sentence gives the figure they get to.

20 MR. UNTERHALTER: I am sorry:

21 “If 15% of Makers’ total turnover of £69 million [odd] had been derived from the  
22 relevant market, then the figure resulting from the application of Steps 1 and 2  
23 would have been £522,585. This figure is 0.75% of the total turnover, which is the  
24 same as 5% (which was the starting percentage used by the OFT at Step 1 for  
25 Makers) of 15% of the total turnover ...”

26 Then it says, on the basis, and it gives the calculation.

27 “We therefore reject Makers’ assertion that the uplift of £520,000 imposed at Step  
28 3 of the calculation of its penalty was arbitrary or unjustified.”

29 Here are, in our submission, the important words:

30 “The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate  
31 way ...”

32 in other words, it is dealing with the means, not how this happens to capture in this  
33 particular case –

1 “... in which to ensure that the overall figure of the penalty meets the objective of  
2 deterrence referred to in the Guidance. However, there is justification in Makers’  
3 complaint that the reasoning disclosed in the decision was inadequate, since the  
4 existence of the calculation of the MDT did not become apparent ...”

5 In our submission, it is very hard to read this decision on the basis that you can apply the  
6 MDT because this is a special case in which we have only addressed to the UK parent and  
7 not to the ultimate holding company, or because we have generated such an utterly trivial  
8 amount for relevant turnover, you can apply it in these circumstances. The reasoning is that  
9 here we have teased out the method you have applied, there is a problem because the  
10 amount of relevant turnover is insufficient in relation to the totality of the size of the  
11 undertaking, and we approve, under the Guidelines, of the method.

12 In our submission, that is an authority strongly supportive of MDT as a method, as a means,  
13 of doing the work of deterrence. Whilst the Tribunal could, of course, come to a different  
14 conclusion, it is a method that has been approved for some time and has been applied in  
15 many cases.

16 THE CHAIRMAN: Has it been applied in many cases?

17 MR. UNTERHALTER: In the construction cases.

18 THE CHAIRMAN: But quite a lot of those are under appeal.

19 MR. UNTERHALTER: That does not mean that it was not applied. It may be right or it may be  
20 wrong, but it was certainly applied.

21 THE CHAIRMAN: This is the only consideration of this methodology by this Tribunal, as I  
22 understand it.

23 MR. UNTERHALTER: Yes. There are then some slightly different issues which are raised by  
24 Eden Brown on the one hand and by CDI on the other. Perhaps I could just take the Eden  
25 Brown proposition first. It is a curious argument that says, “We need more of a reduction  
26 because although nothing more was required by way of deterrence, we must get a reduction  
27 to bring us in line with the overall figures that are being imposed upon Hays and the like”.  
28 It is a strong claim for, as it were, uniform treatment in respect of percentages. Our  
29 submission is that this is a submission that simply fails to understand the scheme within  
30 which the OFT has applied the penalty regime. Eden Brown suffered a penalty at Steps 1  
31 and 2 simply by reason of the seriousness of what it had and the extent to which it did it on  
32 the relevant market. Save for the net/gross figure debate, there is no suggestion that --- I  
33 correct myself, there is an issue about seriousness. Making an assumption for the moment  
34 that those issues are resolved one way or the other there is no conceptual challenge to the

1 notion that those two dimensions of judgment, which is the percentage judgment and the  
2 relevant turnover judgment, are in any way wrong for the purposes of judging seriousness.  
3 The question then is, nothing more was required by way of deterrence. That was the  
4 judgment that was reached by the OFT. So conceptually we can see no reason whatsoever  
5 why, in fact, Eden Brown is entitled to some additional reduction because everything that  
6 was needed to be done could have been wholly justified at Steps 1 and 2 without any  
7 alteration of the figure. The fact is that the OFT nevertheless did reduce it by the  
8 percentage indicated. It did not have to do so, because nothing about the Guidance required  
9 it to do so. That was conduct sufficiently serious in relation to the activity engaged upon in  
10 that market that generated that figure.

11 THE CHAIRMAN: If the figure generated is significantly more than required to achieve  
12 deterrence, does the Guidance not require the OFT to consider a reduction? Is that not what  
13 2.12 is saying?

14 MR. UNTERHALTER: The question is, what would it be reducing it for in those circumstances?

15 THE CHAIRMAN: Because it is a figure that is so much more than is necessary for deterrence,  
16 otherwise I do not see on what basis 2.12 says there might be a reduction.

17 MR. UNTERHALTER: The reduction might arise, for example, in a hardship case.

18 THE CHAIRMAN: Is that not in 2.12?

19 MR. UNTERHALTER: Hardship, as I understand it, is dealt with at Step 3. That accounts for  
20 what is sought to be done at 2.12. It is hard to conceive, since deterrence is a forward  
21 looking consideration, if you determine that by dint of seriousness a particular fine is due,  
22 deterrence is something more that you are trying to achieve and sometimes you will require  
23 an uplift for that purpose, but it is hard to conceive conceptually as to why you would get a  
24 reduction by reason of not needing to do anything more to secure deterrence. This is where  
25 the two objectives are served and each is sufficient for the purpose. There is no warrant to  
26 reduce. There may be a warrant to further increase, which is the judgment that was reached.

27 THE CHAIRMAN: You say hardship is encapsulated in Step 3?

28 MR. UNTERHALTER: Yes. It is financial ability to pay, which is one of the standard  
29 considerations.

30 THE CHAIRMAN: That is set out, financial ability to pay?

31 MR. UNTERHALTER: It is the financial position of the undertaking, which is in 2.11.

32 THE CHAIRMAN: I read that in the context of 2.11 dealing with deterrence.

33 MR. UNTERHALTER: Yes, deterrence is only one of the matters that might be relevant to Step  
34 3.

1 THE CHAIRMAN: Hardship is ability to pay, that is the basis for reduction. You judge ability to  
2 pay on turnover? Is that the right metric for ability to pay?

3 MR. UNTERHALTER: The cases say on financial hardship that is a question really as to whether  
4 the viability of the undertaking would be significantly impaired by the imposition of the  
5 penalty. There is a fair amount of case law on that subject. Effectively it is a viability  
6 standard. If the entity can show that it is going to be significantly compromised to the point  
7 that it will find it difficult to continue in business, then that the essential issue that arises.

8 THE CHAIRMAN: Was that the basis of the reasoning?

9 MR. UNTERHALTER: No, that was not the basis.

10 THE CHAIRMAN: I have looked at the reasoning such as there is.

11 MR. UNTERHALTER: It was simply said in the decision that it seemed excessive, it seemed to  
12 be too high.

13 THE CHAIRMAN: It is said to be too narrow the range of penalties. That is the only reasoning,  
14 nothing to do with ability to pay, it is to do with the range of penalties.

15 MR. UNTERHALTER: I am making this submission as a matter of what the Guidance permits of  
16 and what it does not. In effect, what the OFT did is that it looked at this and it said that it  
17 seems a bit too high. Maybe that is a residual discretion it has, and perhaps it is one that the  
18 Tribunal would, of course, have judging this matter on the merits as well. It is not a  
19 function of getting a reduction for deterrence, which is essentially the argument that Eden  
20 Brown is seeking to advance.

21 THE CHAIRMAN: I do not think they are, I think they are saying, “We want equal treatment and  
22 this is inconsistent, because we get to a point that is now higher; even with your 40 per  
23 cent, we are still above the others on what is said to be a minimum level”. Mr. Harris, is  
24 that a fair summary?

25 MR. HARRIS: The Decision says quite clearly at para.5.254 that it would result in an excessive  
26 penalty as the penalties would be greater than necessary in order to achieve deterrence.  
27 That is the rationale which is employed. It is not to do with these other things.

28 MR. UNTERHALTER: To be clear, it is to do with a number of things in the way that this is  
29 reasoned in the Decision.

30 THE CHAIRMAN: I think Mr. Harris is right, is he not, the only reasoning is 5.254 as to why –  
31 that is the reason for making an adjustment; and then the nature of the adjustment, the  
32 reasoning is 5.256. Then there is just a statement that 5.260 that this the appropriate one.  
33 The only reasoning of the nature of the adjustment is to know the range of penalties.

34 MR. UNTERHALTER: If one has regard to 5.385, that says:

1 “The OFT has granted Eden Brown a reduction of [percentage given] ...”

2 THE CHAIRMAN: I think you can read it out.

3 MR. UNTERHALTER: Very well:

4 “... 40 per cent of its penalty at Step 3 to ensure that the penalty is not excessive  
5 (given Eden Brown’s large proportion of total turnover generated in the relevant  
6 market) but is still sufficient in order to achieve deterrence.”

7 In other words, you are not getting a reduction for deterrence, it is saying, “We do not need  
8 to do anything more by way of deterrence, but we do not want to be excessive”. It seems to  
9 be a residual effort by the OFT not to cut down a tall tree.

10 Conceptually, and as a matter of the Guidance and its proper application, if a penalty is  
11 warranted because of seriousness at Step 1 and 2 then it is a justified penalty. If that serves  
12 deterrence you do not get a reduction because it serves deterrence. If I may submit, on that  
13 score, there is no inequality. If you happen to have engaged in more serious conduct by  
14 reason of the fact that you have been more engaged in the relevant market where the  
15 infringement took place, you cannot complain if you end up with a higher penalty than  
16 those who were not as involved. This is the oddity of seeking to, as it were, level it down to  
17 the kinds of stock percentages that others derive.

18 This is the very opposite of what Hays and Eden Brown are seeking to contend for, which is  
19 that you must tailor the penalty to what has actually been done by the particular parties. If  
20 you happen to have committed your infringement where you are more active, then that is a  
21 very important differentiating reason as to why you get a higher penalty at Steps 1 and 2,  
22 and that does not seem to be problematic at all.

23 So, in our submission, Eden Brown’s approach to this does not give rise to any lack of  
24 proportionality or any discrimination because they are actually getting a substantial discount  
25 in circumstances where it is not technically required by the Guidance at all, and certainly  
26 not required by way of doing something by way of a reduction in the interests of deterrence,  
27 because that, for the reasons given, makes not conceptual sense whatsoever. So, to the  
28 extent that the OFT relied upon that reason it was not an availing reason for coming to that  
29 conclusion.

30 Can I very briefly deal with CDI, because I must move to other matters, in our  
31 submission, as far as CDI is concerned, theirs is a case where they were on the cusp, as it  
32 were, between – they came just over the 15 per cent level and so no MDT was applied to  
33 them. The consequence of the arguments that are now being addressed in respect of the net  
34 gross issue and the like is that they are going to, assuming MDT is a good policy, they are



1 going to come under that threshold, and if MDT is applicable in the way that we suggest it  
2 is, either in its current form or in some variant that the Tribunal approves, then it cannot  
3 somehow escape the application of a deterrence factor for the purposes of the Tribunal  
4 arriving at the right figure. The burden that rests with the Tribunal is that it has a  
5 jurisdiction to engage these matters afresh on the merits, and arrive at the correct figure on  
6 the facts as they present themselves to the Tribunal. Well, that sometimes works to the  
7 detriment of the OFT and sometimes not. But CDI certainly cannot avoid the consequence  
8 that it cannot escape the need that something is done by way of deterrence as far as it is  
9 concerned. And so we would submit that if the OFT does not prevail on some of the other  
10 issues that would bring it below the threshold and MDT in its present form is upheld, or a  
11 variant of it, then the Tribunal would apply the MDT to CDI, whether on a gross or a net  
12 basis depending on where that argument comes out, and that would be the appropriate  
13 penalty to apply. So, those are our submissions as far as CDI is concerned.

14 May I proceed, then, to the gross net topic, which is the next major item. We have here  
15 sought to capture some of this in the note that we have offered to you.

16 One must begin this analysis by having regard to what the concept of turnover is, because  
17 that is the standard that is to be found in the Guidance, and it has a meaning and we submit  
18 that there is perhaps very little difference that now arises in respect of what that meaning is,  
19 but certainly the OFT's position is that whether one is applying one or other of the  
20 accounting policies which we have examined, UK GAAP or others of the standards, the  
21 basic concept is always the same. And that is the concept that is applicable as it is set out in  
22 the Turnover Order and as it would be applied to relevant turnover, the concept of turnover  
23 has a very well understood meaning. And, as we have set out in the note, one can trace a  
24 number of the ways in which it is measured, and we have set out those definitions at para.12  
25 and thereafter. But it all begins with an appreciation of what good or service is rendered in  
26 respect of which a consideration becomes payable constituting an economic benefit which is  
27 then registered as turnover? That is what the concept amounts to. And it has entailments,  
28 because one begins by asking the basic question which is, "What good or service is being  
29 offered that permits the firm to register turnover as for consideration?" We have heard a  
30 whole variety of arguments to suggest that this is – the true contractual relationship that  
31 exists is triangulated, and the true service that is being rendered is in fact that by the worker  
32 and it is not by the employment business.

33 But there is one enormous difficulty with all of these submissions, which is that they  
34 account for these matters as turnover, and that is not rigid formalism, it is not simply being

1 transfixed by company accounts, as we have heard from everyone, that is a judgment that  
2 those charged with the business have made, and it is a considered judgment because it has  
3 to be made against the relevant accounting standards. And, probably more important than  
4 anything else, as Mr Allen confirmed in his testimony, it is a judgment of substance. So, of  
5 course the Tribunal can examine all of the contracts and those that are somewhat more  
6 suggestive of an agency relationship and those that are more suggestive of a principal  
7 relationship, and one can stack up those contractual indicators in any way that one likes, but  
8 at the end of the day the irrefutable fact on this issue is that those who are actually charged  
9 with the business and have compiled their accounts, have made their determination. And  
10 when those very persons now come back to the Tribunal and say, “No, no, no. We received  
11 no economic benefit. This is all simply a pass-through, and that is not the true nature of the  
12 services that are rendered”. They are simply saying things which are wholly inconsistent  
13 with the judgments that they have already made. And that is something that simply cannot  
14 be allowed. The point of financial statements is to tell the world and most especially in the  
15 case of public companies, to tell everybody, what it is that they do and what income they  
16 receive for the things that they do; and they have; and they have made that clear. None of  
17 them have said that they have made an error. So the judgment that has been made has been  
18 made in a considered way against the relevant accounting standards on advice of qualified  
19 auditors with board approval of the highest level, and they have made that determination  
20 that they are acting as principals. That is not a matter of legal form, that is a matter of  
21 substance, because otherwise their accounts would have been materially mis-stated and they  
22 cannot avoid the consequence that there is an economic value that has flowed to the entity,  
23 because otherwise they could not account for it as turnover.

24 So, until such time as they correct their accounts and make material alterations and now say  
25 what they thought was a principal relationship is indeed an agency relationship and they are  
26 going to allow for these material alterations to their accounts, they are bound by their  
27 determinations that they have made; and in a sense that really is the beginning and end of  
28 this debate, because no amount of scrutiny of the contracts, no amount of people coming  
29 along and saying, “Actually, you don’t understand the way the business really works, it  
30 really works this way, notwithstanding what our contracts say”, none of that can get away  
31 from the basic proposition, and that is the proposition that Mr Allen has adhered to  
32 throughout, which is, “They have made the decision. They must live with the decision that  
33 they have made”.

1 Now, we have set out in some detail why it is on the contracts that this is a principal  
2 relationship, and we submit the Tribunal does not really need to go there. It is enough that  
3 the accounts say what they do. They speak to substance. And then there is the  
4 consideration which, again, many witnesses seem to put to one side, which is that when you  
5 act as an employment business you are required to act as principal. It is not, as it were,  
6 some witnesses perhaps said, "Well, that is just a question of law". It is not just a question  
7 of law. It goes fundamentally to the obligations that you are required to undertake as a  
8 principal. And the difficulty with all of these arguments is, if you are undertaking  
9 obligations as a principal, then you must be rendering some service in respect of which you  
10 can then account for what is returned as revenue, and one comes back to the same issue time  
11 and time again, what that really is, that lies at the heart of it.

12 It is true, as we have heard, that it is a judgment that needs to be formed; it is a judgment  
13 that is made against various criteria; but the one thing which seems perfectly plain is that  
14 these undertakings take on risk. It is perfectly clear. And they take on risk for the obvious  
15 reason that they employ the services of these workers. They are required to pay them  
16 irrespective of whether they are paid or not, and that is a question of risk, exposure, not risk,  
17 mitigation. And given that they employ the services of the worker.

18 THE CHAIRMAN: They employ the worker.

19 MR. UNTERHALTER: They employ ----

20 THE CHAIRMAN: Employ the services.

21 MR. UNTERHALTER: I beg your pardon. They employ the worker, they hire the services of the  
22 worker.

23 THE CHAIRMAN: No, they hire the worker ----

24 MR. UNTERHALTER: To render the services.

25 THE CHAIRMAN: -- to render the services, that is right.

26 MR. UNTERHALTER: I am corrected, yes.

27 THE CHAIRMAN: Might be a different ----

28 MR. UNTERHALTER: Indeed, and having done so, they must then do something with what they  
29 have thereby acquired, and what they do is they enter into the agreement with the client.  
30 And that is why we do say this is a back to back arrangement, and it is the fundamentals of  
31 the way in which this works. Our learned friend did suggest, our learned friend Mr Brealey,  
32 suggested that this back to back point had not been made in the decision. That is not  
33 correct. It was. And we have cited the relevant passage of the decision in these notes. It is  
34 at 256 at para.5.140, it is the final dot on that page:

1 “When supplying temporary workers, the Parties are linked with the temporary  
2 worker by an agreement for services – there is a purchase of services by the  
3 recruitment agency from the worker, which are then supplied under a different  
4 contractual arrangement”.

5 So, with respect, I think our learned friend is not correct on that score. There is, of course, a  
6 very considerable body of evidence that you can of course have regard to in respect of what  
7 various witnesses have had to say concerning the nature of the services that they render,  
8 what difference it makes as to the time over which they are rendered, what credit risk has to  
9 say. We have sought to capture the essential points on this score, and I am not certain that it  
10 would be profitable to repeat that summation of these points. We have set them out at p.8 in  
11 paras.22 and thereafter.

12 Might I just make one supplementary submission concerning it, which is if these kinds of  
13 arguments around gross net issues become a norm, which is to say that when the OFT looks  
14 to the published accounts and it sees that certain determinations are made and it relies upon  
15 closed determinations, but then one has this kind of enterprise, which is to look behind the  
16 accounts and seek to, as it were, reason away-----

17 THE CHAIRMAN: We are not looking behind the accounts, the net fees are all in the accounts.

18 MR. UNTERHALTER: Yes, well -----

19 THE CHAIRMAN: We are looking behind the gross turnover at other figures in the accounts.

20 MR. UNTERHALTER: Yes, to fasten upon another item, as it were, in the accounts as the proper  
21 basis for approaching turnover – and this is where the question is, “Has the definition of  
22 turnover been properly applied?” If that question is always going to give rise to this sort of  
23 enterprise, we are going to end up in an extraordinary circumstance where the Tribunal is  
24 going to be faced with endless accounting disputes of this kind, because parties will come  
25 along and say, “Well, I know that there is a definition of turnover in the Guidance, I know  
26 that my accounts say that turnover is represented by a particular figure, but now you must  
27 understand that that is not the proper way of understanding turnover for the purposes of this  
28 inquiry”.

29 THE CHAIRMAN: I understand that point, Mr Unterhalter. But there are two, as it were,  
30 separate questions. One is that as regards Step 3, the word “turnover” is not used; what is  
31 used is the size and financial position of the undertaking in question. So, that is not limited  
32 to turnover, and therefore it may be said that where you have a particular feature of an  
33 industry, whether it is a travel agents or whether it is recruitment agents, where in fact it is  
34 well recognised that the turnover includes a large element of charging for the fees or

1 temporary wages of temporary workers which are then passed on and therefore everybody  
2 in associated companies, and comparing one with another, as Mr Allen recognised, looks at  
3 net fees, but when you are looking at the size and financial position of the undertaking, you  
4 should not for the purpose of Step 3, say “All we are interested in is turnover. All we need  
5 for turnover is necessarily the magic number”. That is the first question. The second one,  
6 which you may be coming on to, which is really a lesser question which is, even though  
7 Step 1 does say turnover, of course the statute does not require you to apply that literally.  
8 The OFT must consider whether, having regard to what is said in the Guidance, Step 1,  
9 there are particular circumstances in this industry that make it appropriate or indeed  
10 necessary to depart from that and apply a different measure – albeit one that is in the  
11 accounts and audited and therefore does not involve, as it were, going behind the accounts,  
12 which I fully understand, would create a lot of difficulty.

13 MR. UNTERHALTER: Perhaps I could deal with, I could look at both those propositions. The  
14 first is that of course the burden of the argument that has been made on this issue is not  
15 directed to Step 3, although it has implications for Step 3. It is largely devoted to a  
16 calculation of turnover in respect of relevant turnover. That is the first place that this  
17 engages; and we have submitted that it is, say, relevant turnover is a concept that is to be  
18 understood by reference to the Turnover Order, and that is the legal question. Separate is  
19 whether you should depart from the Guidance in respect of it, but that is a point I shall come  
20 to in a moment. In Step 1 and 2 there is undoubtedly reference to a “concept turnover” and  
21 it must be applied in its terms, unless there is warrant to depart.

22 The second is that although Step 3 does not mention turnover, the inquiry there is whether  
23 there is reason to increase the penalty that is derived at Steps 1 and 2. So, it must be a  
24 material question as to, I mean, one is looking at two benchmarks. The first is what have  
25 you derived at Steps 1 and 2 by reference to a particular meaning of “turnover”, Steps 1 and  
26 2, and your ultimate limitation which is in respect of worldwide turnover which is the  
27 extreme limit as to where you can go by way of an uplift. That is the area that you are  
28 considering, and that is all bounded by a concept of turnover. So, when one is looking at  
29 Step 3, the ordinary way in which one would consider this would be naturally to say, “Well,  
30 is an increment required, and how close is it getting to the limit?” That would be the natural  
31 way of considering a Step 3 adjustment, to us the same coin, as it were.

32 THE CHAIRMAN: Why would you think how close to the limit? You think what is necessary  
33 for deterrence? Indeed the OFT does not anywhere, I think, refer in its consideration of  
34 Step 3 to the limit.

1 MR. UNTERHALTER: Conceptually, when you are asking how much does one want to uplift  
2 by, you are of course wanting to do the work of deterrence, but you know it has a limit.  
3 You cannot be, sort of, unbounded as to what you can do by way of deterrence, both as to  
4 concept and as to statutory limit. So, I am simply submitting that the framework is wrong  
5 that is bounded by turnover considerations.

6 Now, the next point about Step 3, though, which is in our submission conceptually linked to  
7 turnover, is because the general indication of size is a turnover related concept, and that is  
8 one of the key provisions in Step 3, it is about size.

9 The important difference there is the difference between size and performance. It is said  
10 that for other purposes you can judge comparably across sectors by reference to net fees  
11 because that is a performance indicator, it does not mean it is an indicator as to size, which  
12 is the critical consideration conceptually in relation to deterrence, because you are trying to  
13 work out: how can I use a metric that will reach enough of this entity for all the reasons that  
14 I have already developed under the MDT analysis.

15 When one comes to what is happening in Step 3 ----

16 THE CHAIRMAN: You said it can affect the bottom line of the firm?

17 MR. UNTERHALTER: Yes.

18 THE CHAIRMAN: Which, it may be for a recruitment agency is more in terms of net fees than  
19 gross turnover, because the difference is entirely one that is automatically recouped, as it  
20 were, it is not incurred unless it can be recouped.

21 MR. UNTERHALTER: The bottom line certainly that I intended to convey was not a bottom line  
22 around marginal profitability, the bottom line that I was intending to convey is one around  
23 the transaction values of the enterprise, because it was in that context that I had sought to  
24 indicate that you want to reach transactions because that is the way in which infringements  
25 are engaged in markets, that was the conceptual link that I sought to draw. So we submit  
26 there are a number of principled reasons why when one is concerning oneself with size one  
27 is much more likely to be looking at Step 3 at a turnover calculus which would also then  
28 allow you to make a much more simple commensuration as to what the relationship is  
29 between Step 1 and 2 and whether any increment is warranted, because that is the exercise  
30 that is confronting the regulator under Step 3. The question is what uplift is warranted?  
31 What adjustment is being made? And it is very hard to engage that exercise without saying:  
32 "We have generated a certain amount by reference to turnover at Step 1 and 2, now what  
33 more do we want to do?" The natural way of doing that, apart from the conceptually  
34 relevant way of doing it, is by reference to turnover. So, in our submission, Step 3 is largely

1 connected to and for principled reasons connected to a turnover consideration. That does  
2 not mean that for no purpose could one ever not look at profit in certain circumstances, that  
3 is possible, but I have indicated all the disadvantages that accrue doing so, and in adopting  
4 that standard, so it is not impossible to do it but there are many disadvantages that attach to  
5 doing so.

6 THE CHAIRMAN: Well if it is profit only, for reasons you eloquently explained, I follow that.  
7 When it is net fees in this particular industry, those disadvantages of applying profit  
8 standards generally do not seem to apply.

9 MR. UNTERHALTER: It is a gross profit figure, that is what it stands for in the accounts. The  
10 fundamental question still remains: why would you want to adopt a different standard to  
11 reach the size of the enterprise given, for accounting purposes and substantively, the actual  
12 scale of the undertaking in respect of temporary workers is reflected by the turnover figure.  
13 So there is not a special reason to depart from that standard in this case simply because net  
14 fees is widely used for comparability purposes in assessing performance. Unless one  
15 considers that performance is somehow relevant to deterrence, but in our submission it is a  
16 very weak indicator in relation to deterrence. A stronger indicator in relation to deterrence  
17 is: how big are you, and what is your transaction size? The transaction value of the  
18 enterprise is indicated by its turnover figure. So we do submit that there is every reason to  
19 develop a concept of turnover at Step 3 and generally not to deviate unless there are some  
20 very compelling reasons to do so.

21 We have set this out in rather more detail but I shall not trouble you – given what I still need  
22 to cover – with more detail on this issue. We have, at p.14 dealt with the *Endesa* issue, and  
23 that is effectively seeking to advance the proposition that even if your Guidance in this case  
24 by reference to merger control indicates a particular standard, there may be circumstances to  
25 deviate, so the claim would be – and this would necessarily have to be an alternative  
26 argument – that the appellants are advancing, which is to say “Not that you should apply  
27 your Guidance, but that you should deviate from it”. The question is: when is deviation  
28 warranted? In our submission both as to the terms in which the merger notice is framed,  
29 and also the reasoning that is suggested in the *Endesa* decision, we suggest that deviations  
30 are generally exceptional in nature, and they are entirely linked to specially indicated  
31 circumstances where there is going to be some reason why you are not capturing size,  
32 because that is at the heart of what the merger notice is trying to get at. In other words, if  
33 one is considering the size of a concentration one wants to know whether it is going to meet  
34 certain thresholds and you would ordinarily take the turnover figure but if there are very

1 special circumstances which may not be indicative of size you might deviate. But *Endesa*  
2 does not appear to be saying anything more significant than that, so the question here is, is  
3 there any reason to deviate either for the purposes of Steps 1 and 3, or for the purposes of  
4 Step 3? In our submission, there is absolutely no warrant to do so, because these are  
5 principal relationships, they do reflect the transaction values that these entities have  
6 engaged in. They are a reflection of size for the purposes of Step 3, and the *Endesa*  
7 reasoning is simply unhelpful.

8 THE CHAIRMAN: Is the concept of deviation used in *Endesa* because the legislative framework  
9 was rather different? There you have a regulation which effectively says: “You shall use  
10 turnover”, then you will have a notice which says, by way of interpretation of that  
11 regulation, “notwithstanding the way you might exceptionally use something else”, so there  
12 it is real deviation.

13 MR. UNTERHALTER: Yes.

14 THE CHAIRMAN: In this case you have a Statute equivalent to the regulation which says you  
15 must have regard to your Guidance, so you are not, as it were, under the same normative  
16 framework in quite the same way ----

17 MR. UNTERHALTER: Yes.

18 THE CHAIRMAN: -- and so if you say: “We are not going to use the turnover in the accounts  
19 here”, you have to explain why not. You have to have regard to the fact that the Guidance  
20 says that is what you do, but you are not really deviating in quite the same way that one can  
21 say in *Endesa* there really is a deviation from the regulatory text.

22 MR. UNTERHALTER: *Endesa* is prayed in aid by CDI, and we are effectively saying it is not  
23 particularly helpful to CDI’s case because, apart from the fact it is in a very different  
24 context of merger control provision, but that aside, it simply speaks to the need to bring  
25 yourself within an exception which, with respect, Sir, you are pointing out, is a different  
26 normative construct. We accept this is Guidance ----

27 THE CHAIRMAN: So it is easier for you to depart from turnover when appropriate?

28 MR. UNTERHALTER: We are not in the grip of the same statutory limitation.

29 THE CHAIRMAN: But a bit more flexibility, which means it is more open to you to say:

30 “Actually, yes, that is the general approach which we have said we would take and we have  
31 regard to that, but when we look at this industry it has particular characteristics, and  
32 therefore here we think it should be net fees.”

33 MR. UNTERHALTER: The chain of reasoning under the Guidance, it speaks about turnover,  
34 what is the concept of turnover? And how does that apply in the ordinary case? Then there



1 would have to be reasoning which says: “Why, given the work that is intended to be done at  
2 Steps 1, 2 and 3 thereafter, is there reason to deviate from the Guidance?” because this is  
3 the case, as I indicated, of deviation, of a requirement to deviate. Here, one would certainly  
4 want to invoke some margin for the purposes of making the judgment as to whether a  
5 deviation is warranted, but in our submission substantively there is absolutely no reason to  
6 deviate, because these transactions are done on a principal to principal basis in the  
7 conception of the industry, and across the industry, that is the treatment that is given to  
8 these matters, and so if one is asking: “What are you trying to work out at Steps 1 and 2 in  
9 respect of relevant turnover?” You are trying to work out what is the scale of the  
10 infringement in the relevant market, and if that is what you are trying to do then the scale of  
11 the infringement must link to the kinds of transactions that are being undertaken, and those  
12 are ones which yield economic value, for all the reasons that we have given, substantively,  
13 because it comes back to the basic proposition the accounting treatment is a substantive  
14 determination of what these undertakings are doing in the market. They are receiving an  
15 economic benefit and that is why it is accounted for as turnover, that is the transaction. So  
16 to the extent one is seeking to capture transactions for the purposes of scale in Steps 1 and  
17 2, and for the purpose of size in Step 3 there is no warrant to deviate, in fact quite the  
18 contrary, one would be under counting very significantly.

19 It is also pointed out to me that the deviation in *Endesa* is a deviation from the accounts, in  
20 other words, the published accounts that reflect turnover in a particular way, it is not a  
21 deviation from the concept of turnover. In other words you are still, for the purposes of the  
22 regulation capturing turnover, you are just trying to reason why turnover can be differently  
23 understood, whereas I understand the proposition that is being put to me under the Guidance  
24 is, you could have a concept of relevant turnover as a matter of legal interpretation, but a  
25 deviation from that standard might be warranted. In other words, that one would not work  
26 with relevant turnover as defined, and I accept that that is possible under the Guidance by  
27 reason of the normative character of Guidance.

28 Might I then move to the question of the year of turnover? That is not captured in this note,  
29 Sir, I am afraid it is reflected in oral argument.

30 THE CHAIRMAN: That is perfectly acceptable.

31 MR. UNTERHALTER: We accept that this is a question of legal interpretation and there must  
32 be a right answer that is yielded up as to what is being referred to by the “last business  
33 year”.

1 We do submit that when one is seeking to construe that language in 2.7 of the Guidance,  
2 one needs to see the Guidance within a hierarchy of statutory norms, because there is a  
3 concept of turnover ,and the last business year for that purpose which derives from the  
4 Turnover Order itself, which refers to the year before the decision rather than the year prior  
5 to the infringement, and it is precisely for that reason if I could refer you to 2.17 of the  
6 Guidance, which says:

7 “The final amount of the penalty calculated according to the method set out above  
8 may not in any event exceed 10% of the worldwide turnover of the undertaking in  
9 its last business year.”

10 - the exact language that one reads in 2.7. That has been included in the Guidance at Step 5  
11 by reason of the formulation of the matter as reflected – if one wants to follow the trail it is  
12 footnote 20, which in turn refers to footnote 10, and footnote 10 says: “... calculated in  
13 accordance with the Competition Act and it is the Turnover Order that is there referred to.  
14 The Turnover Order speaks about the turnover of an undertaking for the purposes of s.36(8)  
15 being the applicable turnover for the business year preceding the date on which the decision  
16 of the OFT is taken.

17 Our learned friend, Mr. Harris, was puzzled as to why we thought there was a hierarchy of  
18 norms that was relevant here. That is the reason. In other words, one situates the Guidance  
19 in the light of the Turnover Order, and its determination as to what that language of the last  
20 business year means.

21 The Turnover Order which issues from Parliamentary enactment, by way of the powers that  
22 are given to the Secretary of State has made a determination as to what “last business year”  
23 means for the purposes of calculation. When the Guidance is issued it brings itself into  
24 conformity with the higher legal norm for that purpose, and therefore not only does the  
25 Guidance state that that is the case in 2.17, but the identical language, which is this last  
26 business year, is one which is formulated, if one is going to have a consistent interpretation,  
27 by reference firstly to the Turnover Order, and then the implementation of that order within  
28 the scheme of the Guidance by way of the repetition of the language of the statutory  
29 Turnover Order reflected in the language of the Guidance itself.

30 Our submission is that when the Guidance is published in 2004, as a result of the changes  
31 that have occurred by way of the Turnover Order, and specifically incorporate the language  
32 which refers to the date of decision, rather than the date of infringement, that is a very clear  
33 indication as to what the meaning of the Guidance is when it is published in 2004 because

1 for that purpose it is seeking to make it perfectly plain what the relevant year is for that  
2 purpose.

3 THE CHAIRMAN: The inclusion of footnote 20, which makes clear in 2.17, this is by reference  
4 to the order, there is no equivalent in footnote 14 to 2.7.

5 MR. UNTERHALTER: That is certainly true. The point though is that the same language – the  
6 identical language is used – and so one is being offered two interpretations. One is a  
7 coherence interpretation, which is the one that we argued for, which says you have the same  
8 language used, and there is a reference to the year prior to the decision for the purposes of  
9 stipulating how that concept is to be understood and it should be consistently applied  
10 throughout the document.

11 THE CHAIRMAN: Accepting that for a moment as one approach, which is, if you like, the purist  
12 or the literalist approach to interpretation, the alternative approach is to say that there should  
13 be a slightly more purposive approach, especially as this is Guidance and not statute, and  
14 when looking at turnover in 2.7 one should understand that in the context of Step 1 is  
15 seeking to achieve, and in particular the explanation in 2.9 that it is designed to take account  
16 of the real impact of the activity. The real impact of the activity is, of course, in the year  
17 when it is carried out, not possibly many years later.

18 MR. UNTERHALTER: There are a number of submissions to make around that, and the first of  
19 them is that one of the reasons to prefer a coherent interpretation rather than a segmented  
20 one, as it were, is because what occurs at Steps 1 and 2 has significance for the steps that  
21 are then to follow and the comparability exercise that necessarily has to be done, which is,  
22 “Are you exceeding a limit?” It is a matter of statutory obligation that the OFT cannot  
23 exceed the statutory limit and that is determined by reference to a worldwide standard.

24 THE CHAIRMAN: The purpose of the limit is so that you do not do terrible economic damage to  
25 the company which obviously is relevant to it now.

26 MR. UNTERHALTER: Yes, indeed, but for the purposes of trying to have a coherent approach  
27 to these matters, it would be an oddity that you work on year of relevant turnover for Steps  
28 1 and 2, you then apply that or some other notion of turnover at Step 3. Of course, Steps 1  
29 and 2 may suffice for deterrence purposes, so one has got to have a concept of turnover that  
30 can be utilised at Step 3, and the Guidance does not speak to a concept of turnover at Step 3,  
31 so that has to be determined; and which concept is that? Is it worldwide turnover prior to  
32 the decision or prior to infringement? One would have to take a view on that. Our  
33 submission is that the right view is, of course, a consistent view. In the Step 3 phase if you  
34 need to consider an uplift you should consider an uplift, but it is within the overall scheme

1 of turnover under the Guidance. In other words, one should work with one concept at each  
2 level, otherwise one could conceivably have a situation where you generate a relevant  
3 turnover figure by reference to the year of infringement. You then have to potentially  
4 consider an uplift not by reference to that concept of turnover but by reference to some  
5 distinctive concept of turnover, and then compare it to a concept of turnover at Step 5,  
6 which is different again. We submit that the simple approach and the consistent approach is  
7 reason it logically and consistently in accordance with the statutory instrument under which  
8 this Guidance falls.

9 One can see why there is a temptation to think that relevant turnover should be more closely  
10 linked to the year of infringement rather than the year of decision. Even that is not an  
11 argument of the force that perhaps our learned friend considers, and for this reason: this is  
12 effectively a penalty or sentencing regime, which necessarily is decided many years after  
13 the infringement. There are often good reasons why you would want to use up to date  
14 turnover material. We have already seen the kind of issue that can arise about having to go  
15 back long periods of time to look into financial information which may or may not be  
16 available. The fundamental feature of the penalty regime is that you want to apply it at the  
17 time to the entity as it now exists. That is certainly relevant for the purposes of deterrence.  
18 So it would be an oddity to apply a turnover standard by reference to the year before the  
19 infringement in respect of doing the work of deterrence which is future looking,, and at least  
20 should take account of the undertaking as it is now constituted. That poses the difficulty  
21 that you could theoretically have a different standard for conceptual reasons at Step 3 and a  
22 turnover standard at Steps 1 and 2, which was by reference to the year of infringement, and  
23 that would be a statutory mess, in our submission.

24 Our submission is that, for these reasons and those that we have relied upon in our skeleton  
25 argument, the interpretation is one that should be coherent.

26 It is also the case that the OFT has always sought to interpret those words consistent with  
27 the position that applied under the statutory order. That has always been its touchstone for  
28 engaging in interpretation.

29 THE CHAIRMAN: That does not, of course, bind us in any way.

30 MR. UNTERHALTER: No, it does not bind you, it is simply to explain how the OFT comes to  
31 the interpretative judgment on that score.

32 Might I then proceed to seriousness?

33 THE CHAIRMAN: Before you do that, is there anything you want to say on the jurisdictional  
34 question that I asked Mr. Brealey and Miss Kreisberger? If we were against you and

1 accepted Mr. Harris' submission, do you see any – and Miss Kreisberger said she does not –  
2 impediment to the Tribunal applying what we say in our view is the right year if we are  
3 having to reassess the penalties on other appellants in this appeal, even though they have not  
4 raised that as a ground?

5 MR. UNTERHALTER: The position of the OFT on this score is that we do accept that once an  
6 appellant comes before the Tribunal and can upset the decision that has been made in  
7 respect of them on a particular basis, the Tribunal must then determine what is the right  
8 penalty. It may seem inconsistent for the Tribunal then to have different outcomes  
9 depending on which point of appeal was raised at which time. We have some reservation,  
10 only on this score, and it may not really arise around the year of relevant turnover  
11 proposition, but it would be an oddity if, in respect of every ground of appeal no matter  
12 whether an appellant raises it or not, every single determination that is made in the appeal  
13 would then become applicable to every other appellant on every occasion. That would  
14 suggest that there would really be very little discipline that arose in relation to what  
15 particular errors were being identified for the purposes of pursuing an appeal, you could  
16 literally come here with one matter and, as it were, get this yield of all the determinations  
17 that were made across the range. There is some conceptual difficulty, in our respectful  
18 submission, about taking that view, but we do accept the basic proposition, which is that the  
19 Tribunal must come to a determination which it considers to be consistent treatment across  
20 cases that it is now having to determine on the merits.

21 Whilst on that subject, there have been, in the course of the submissions made by our  
22 learned friends for the purposes of putting all the figures all the Tribunal, certain figures that  
23 have been yielded up which are now simply effectively statements made, in one case under  
24 oath, as to how these figures have been culled by some financial officer who says that is  
25 how the relevant turnover has been determined on a basis. As one will perhaps have seen  
26 from the statement of objections and the administrative process, the way in which relevant  
27 turnover was calculated was a very, very detailed process of determining almost contract by  
28 contract whether you are in or you are out. Now we have a situation where, in effect, the  
29 Tribunal is simply being offered up statements as to how a process that took many, many  
30 months – and this is in a sense is Hays' difficulty, in part one suspects with exercise –  
31 parties are now simply putting up figures to the Tribunal which certainly the OFT has not  
32 had an opportunity to scrutinise, and neither, in a sense, does the Tribunal know the status  
33 and the methodology by which some of those figures are being put to you. It certainly was

1 a process that took an enormous amount of time and took many persons at the OFT and  
2 their interlocutors a great deal of effort to try and work out.

3 We would simply indicate that when the Tribunal wants to be fully informed, which we  
4 completely understand, it is being presented with figures in this way. That might suggest to  
5 the Tribunal, depending on how the legal issues are resolved, that some other process is  
6 required to pin down some of these figures with greater transparency as between the parties  
7 as to how they are arrived at. It does not apply to all of them. Some of them are derived  
8 from published accounts and there is no issue about that. If one is going to change the year  
9 of relevant turnover on a net fees basis, that is an enterprise of a rather different kind. There  
10 are only two ways of doing it. Either the Tribunal would need to engage the parties in that  
11 process, which is a lengthy and complex one, or there is some agreed or quick fix way to try  
12 and get through it, but we would not want to under-estimate the difficulties of what that  
13 entails.

14 Whilst I am dealing with these arguments perhaps I could just make one or two other  
15 submissions on some points that go to issues that have been raised. One other consideration  
16 which no doubt the Tribunal will take account of on this question of consistency is that the  
17 appellants are here joined together for convenience. These could have come as sequential  
18 appeals. There would have been no issue raised then as to how this applies across unless,  
19 having made a determination in the one appeal, again when you are at large to determine the  
20 right penalty you would then feel obliged, as it were, to use that reasoning in another  
21 appeal, even though the point had not been raised. Our general submission is that we  
22 entirely understand, as the regulator, because ultimately we will be guided by what the  
23 Tribunal says on this score to apply matters consistently. There are some complications  
24 around how this works.

25 Just apropos ground four in respect of the CDI issue, if I could just indicate what our  
26 position is concerning that matter. We are not contesting that ground of appeal, but by that  
27 we should not be understood to be admitting it either in the sense that from the OFT's  
28 perspective there is a very lengthy and highly resource intensive process that is undertaken  
29 with parties in order to try and arrive at turnover figures that are meaningful in relation to  
30 the categories that are under consideration for the purpose of relevant turnover. It is very  
31 problematic from the OFT's perspective to have a situation in which parties do not respond  
32 within the terms of the notices that are issued so as to allow the OFT to come to a proper  
33 judgment on the matter, and then to come later by way of an appeal before the Tribunal and  
34 say, "Now that we better understand what this is all about, here are the figures and they are

1 true and correct". The reason that the OFT does not consider that this is process is  
2 appropriate for that task is that we could have spent days, no doubt, with all the source  
3 documentation agonisingly going through the process of working out worker by worker,  
4 contract by contract, whether it falls on one side of the line or the other. That is the process  
5 that was undertaken in the administrative process. The OFT's judgment was that that was  
6 not a proper use of its own resources or indeed those of the Tribunal. Whilst it leaves this  
7 matter with the Tribunal to determine, it does wish to indicate that this way of proceeding is  
8 not one that it considers to be appropriate for the purposes of Tribunal proceedings.

9 I am also instructed that as to these questions where there are figures that are being put up to  
10 the Tribunal for consideration in relation to penalties, relevant years of turnover, and the  
11 like, these are matters where the OFT would like to scrutinise the documents. We have  
12 been given them but more or less as counsel have made submissions on this score. We may  
13 want to make such comments as we can, though in some instances they lie within the  
14 knowledge of somebody in America who works for CDI who has apparently been looking  
15 at a database to try and derive these figures.

16 THE CHAIRMAN: Certainly you can put in observations on the figures and if you need to ask,  
17 by correspondence, questions to clarify a figure then of course you can do so. Equally, if  
18 Mr. Brealey puts in a suggested more rough and ready, but nonetheless fair methodology,  
19 you can comment on that saying that you do not think it is fair or it needs adjustment.

20 MR. UNTERHALTER: Yes, and we will obviously endeavour to be of assistance by way of  
21 trying to get to what the right figures might be as far as that is concerned.

22 Can I then proceed to seriousness. This is a topic that we have addressed at p.16 of this  
23 note.

24 THE CHAIRMAN: You addressed on this, and very eloquently, if I may say so, in your opening  
25 submissions. Although it may seem now a long time ago, it was only on Monday! We have  
26 not forgotten what you said.

27 MR. UNTERHALTER: I certainly will not repeat any of those matters that were advanced as far  
28 as that is concerned.

29 THE CHAIRMAN: You have set it out.

30 MR. UNTERHALTER: We have set it out in some detail. The key features, and this is partly  
31 what we would perhaps want to say by way of general submission, is that there is always  
32 the temptation to engage in this approach to the matter of seriousness, which says, "If I can  
33 discern some element in some other case which was not on all fours with this case, then  
34 ours must be less serious". Of course, the difficulty with that approach is that, as we have

1 heard so often, a judgment of seriousness is an all things considered matter and it has to deal  
2 with all of the factors that are relevant to the particular infringement. It cannot be this rather  
3 superficial approach which says, “In a particular case you found that this was a consumer  
4 good and so that is relevant and that is more serious”. This is not a consumer case. Just to  
5 illustrate that point, this happens to be a case, as I did indicate on Monday, where we are  
6 dealing with over 6 per cent of the UK GDP, and we are dealing with a huge industry where  
7 the construction sector is vastly dependent upon these services. Is it seriously being  
8 suggested that because this is not a classic consumer product but is a service in a key sector  
9 of the economy in respect of which this is a key service, that is somehow less serious? This,  
10 we would submit, is simply to look unhelpfully at categories without digging into the  
11 content that is relevant to it.

12 We have set out the factors here. We do submit that this is a case where there is  
13 compounding, both by way of the exploitative abuse and the exclusionary abuse.

14 As to the issue of effects, which is one of the grounds upon which complaint is made that  
15 this is not serious enough. But we would just make two submissions: the first is that where  
16 a matter is serious enough to be judged and condemned by object because its potential harm  
17 is so great that it is per se and obviously serious, there is no requirement – not just as a  
18 matter of liability to look at effect, but effects are understood by reference to the  
19 characteristics of the infringement to the potential for harm is necessarily part of the  
20 infringement that has been discerned. And so the absence of any detailed treatment of  
21 concrete effect is not something which makes it less serious; it is not necessary because it is  
22 so serious. That is our first submission as far as that is concerned.

23 The second is that although the OFT goes no further in the Decision than to say that they  
24 may have been significant effects, in fact there is a reference to the whole of the analysis  
25 that is offered in Part 4 of the Decision when the question of seriousness is considered, and  
26 as I indicated in opening, that includes the very significant admissions that were made by  
27 the parties that went directly to effects, because they acknowledged that they were  
28 bargaining on a preferential basis that might have put Vinci and others, I think in that  
29 instance the admission is in respect of Vinci at a disadvantage in the bargaining process.  
30 Well, it is hard to imagine what is a more concrete effect. And, lastly, the notion that this  
31 cartel came to an end without intervention is not an indicator that it is not serious. Cartels  
32 often, well, cartels are almost as a matter of course unstable, and they frequently come to an  
33 end in acrimony because they are still built around a very conditional kind of self interest,  
34 which can easily break down. It breaks down because of self-interest. It does not break



1 down because parties suddenly believe they must become lawful actors again. And that  
2 goes to seriousness. So it is not that suddenly there was an outbreak of virtue; it has  
3 continued to be an application of self interest and that was as serious as one can imagine to  
4 be. So, we do submit that 9 per cent is a perfectly proper penalty. We have set out a table  
5 where we have indicated the factors as to how it is situated in the universe of other  
6 infringements, but we say two things: that one needs to be cautious about how one situates  
7 within that universe, because those are cases decided on their own facts; and, secondly, we  
8 point to the policy which says that the OFT can permissibly increase penalties and indeed  
9 probably should be in circumstances where, if after a number of years of this regime there  
10 are still firms that continue to engage in this kind of conduct, it is clear that more needs to  
11 be done. So, the fact that seriousness increases is perhaps a very natural consequence of the  
12 fact that once a regime has been in place for a reasonable period of time parties such as  
13 these should act differently and have not.

14 And then, I believe lastly, I hope subject to any further instructions, but, just on this  
15 question of the senior management.

16 THE CHAIRMAN: You need not address us on that.

17 MR. UNTERHALTER: Those, then, are our submissions.

18 THE CHAIRMAN: Thank you very much.

19 LORD PANNICK: Sir, should I reply on MDT now, would that be convenient?

20 THE CHAIRMAN: Yes.

21 LORD PANNICK: The submissions the Tribunal has heard on MDT confirm the vice. The vice  
22 is that the penalty is being identified by reference to what is needed to secure deterrence,  
23 effectively divorced from culpability and without an assessment of the individual  
24 circumstances of the company concerned. As I submitted yesterday, the OFT can increase  
25 the penalty for deterrence, but in order to satisfy proportionality there are two essential  
26 requirements which Mr. Unterhalter has addressed but which, in my submission, he cannot  
27 address adequately.

28 The first requirement is that the fine must remain linked to culpability in that the culpability  
29 figure at Step 2 must be the foundation for the fine. The fine must be built upon it and the  
30 Step 2 figure must not be discarded. That can either be done by percentage, which is what  
31 Mr. Unterhalter addressed or I would accept it can be satisfied by adding a further amount  
32 of money to the Step 2 figure as Mr. Davey put to me yesterday.

1 The second requirement of proportionality is that the OFT must give individualised  
2 consideration to what penalty is required to secure deterrence in the circumstances of this  
3 company.

4 Those requirements are imposed not just by principle, proportionality can require no less  
5 than this, but it is also as, Sir, you put to my learned friend, the requirements of the OFT's  
6 own Guidance, and my friend really has no answer to this point. Paragraph 2.12 of the  
7 Guidance speaks of a need to adjust the penalty, and it cannot be consistent with the  
8 Guidance to set aside the penalty at Step 2, and proceed then to look at gross worldwide  
9 turnover.

10 Paragraph 1.4 speaks of the twin objectives of culpability and deterrence, and that again  
11 requires that one cannot set aside the Step 2 culpability figure based on turnover in the  
12 relevant market, and proceed to look at something else. The Guidance at para. 2.12 says:

13 "The assessment of the need to adjust the penalty will be made on a case by case  
14 basis for each individual infringing undertaking."

15 Paragraph 2.11 adds as, Sir, you pointed out to my friend, that consideration will be given  
16 to: "...the size and financial position of the undertaking in question."

17 My friend says there are three links to culpability. He says that first of all Step 2 is applied  
18 where it is sufficient for deterrence, but that does not establish any link to culpability where  
19 Step 3 is applied which, of course, is our case. It does not assist him that there is a link  
20 when Step 3 is not applied. His second argument, as to his link to culpability is that the  
21 seriousness factor, the 9 per cent is applied at Step 3, but of course it is applied to a total  
22 worldwide turnover figure, which we all agree has no connection to culpability. Step 1  
23 looks at relevant turnover because that is the relevant figure for culpability.

24 My friend's third point on the alleged link with culpability was to point out that there was a  
25 10 per cent cap based on total worldwide turnover. Sir, members of the Tribunal that  
26 cannot establish that the figure arrived at within the cap is a proportionate figure linked to  
27 culpability. The existence of a cap cannot sensibly be said to validate any principles which  
28 lead to a result within the cap. The figure arrived at must be proportionate by reference to  
29 culpability.

30 Then my friend turned to why he says there is individualised consideration but his argument  
31 here – his only argument – was that there was individualised consideration because the  
32 specific worldwide figure of this company is used as the basis for Step 3, but of course that  
33 does not address our complaint, because our complaint is that other factors relevant to  
34 the economic condition of the company i.e. factors other than its worldwide turnover, are

1 ignored by the OFT, and they are ignored despite the fact that the Guidance requires  
2 reference not just to the size of the company, but requires reference, para. 2.11 to the  
3 “financial position of the undertaking in question”. It is despite the fact that the European  
4 Court of Justice in *Musique Diffusion Française* (authorities vol.4, tab 57, para.121) says  
5 expressly that worldwide turnover gives “an indication albeit approximate and imperfect” of  
6 economic power, and so is impermissible to fix a fine as “a result of a simple calculation  
7 based on the total turnover”. My friend, perhaps understandably, said nothing at all about  
8 the ECJ decision in *Musique Diffusion Française*.

9 The 15 per cent figure – 15 per cent of gross total turnover, and these are his words: “cannot  
10 be rendered scientific.” He conceded, and I wrote down his words they were so striking, that  
11 he could not “reason deeply” on why 15 per cent is used, and not some other figure. Of  
12 course, our complaint is not just that 15 per cent is used without any rational explanation.  
13 Our complaint is that indicators of economic strength other than worldwide turnover are  
14 simply ignored and no assessment is made of the economic position of this undertaking and  
15 what figure for deterrence is needed. A pure assumption is made, and it is no more than an  
16 assumption that 15 per cent of worldwide turnover is required for deterrence. We submit,  
17 this is the essence of our case, that will not do, and it will not do when the object of the  
18 exercise, let us recall, is to identify what extra penalty is required above culpability by  
19 reference to the economic power of this undertaking and it is in the context, let us not  
20 forget, that the exercise that the OFT has undertaken results in an increase for my clients of  
21 a fine of £15 million to £41.3 million. One really cannot do that without at least a careful  
22 assessment of the individual circumstances of this company.

23 Then my friend said it is “unprincipled” – his word – to look at all factors to assess  
24 deterrence. Well why is it unprincipled? You look at all the relevant factors as the OFT if  
25 you are concerned that the culpability figure is inadequate and you make a judgment, and  
26 that is precisely what para. 2.11 of the Guidance requires, it is precisely what *Musique*  
27 *Diffusion Française* says is required, and it is precisely what any notion of fairness and any  
28 notion of proportionality requires, and that is especially so when Mr. Unterhalter himself  
29 accepts the OFT’s approach – “let’s take 15 per cent of worldwide turnover – is itself a  
30 subjective analysis. There is no science about the OFT’s approach. Therefore, if one is  
31 going to adopt a judgmental approach, as one must, do it in a fair and proportionate manner  
32 linked to culpability.

33 Then my friend said there are problems, and again I wrote down his words: “in adopting a  
34 profit standard”. I sought to make clear, and I repeat our case is not ----

1 THE CHAIRMAN: You are not urging a profit standard.

2 LORD PANNICK: I am certainly not urging a profit standard. My submission is, I hope, a more  
3 modest one, that all factors are relevant including total worldwide turnover, but also  
4 including other factors which are relevant in the judgment of the Tribunal in the economic  
5 circumstances of the particular company. We say in this context profit is plainly relevant to  
6 an assessment of what sum is required for deterrence. We say that the actual net turnover is  
7 also plainly relevant to what sum is required.

8 THE CHAIRMAN: Yes, we have that point.

9 LORD PANNICK: The Tribunal has that point. The compliance programme Mr. Unterhalter says  
10 is of little relevance because, he points out, cartel behaviour is rational, albeit unlawful, very  
11 difficult to detect, and we are seeking to mitigate the wrongdoing. Two answers: the OFT  
12 has itself accepted that we have adopted effective compliance programmes, deterrence is  
13 concerned with practical reality as to the circumstances of this company and we do not need  
14 a larger fine for deterrence purposes because we already have, in the OFT's view, effective  
15 programmes.

16 THE CHAIRMAN: Has the OFT accepted that you adopted an effective programme, or just a  
17 thorough programme?

18 LORD PANNICK: They said they were appropriate programmes, by which I understand them to  
19 mean appropriately effective. A programme cannot be appropriate without it being  
20 effective.

21 THE CHAIRMAN: Yes, "appropriate" was my recollection. You say "appropriate" means  
22 effective?

23 LORD PANNICK: Well it must do. In my submission it is para. 5.337 (CB1.p.302)

24 THE CHAIRMAN: One would like to think it means "effective".

25 LORD PANNICK: They say:  
26 " . . . appropriately active measures to introduce compliance measures that are  
27 appropriate for the size of the company or company group in question."  
28 Two other points, Sir, if I may. First, Mr. Unterhalter suggested that the Professor Bain's  
29 example, Shell and BP, simply shows – this is my friend's submission – a difficult case at  
30 the margin. In my submission, what it actually shows is that it is wrong in principle simply  
31 to take a percentage of total worldwide turnover. To be proportionate it is vital to look at  
32 the circumstances of the individual case. The hard case of Shell and BP simply  
33 demonstrates the lack of proportionality in the OFT's analysis.

1 Finally, I make three points about the *Makers'* case. First, it was a very special case on its  
2 facts, (see paras. 122 and 133 of the judgment. Authorities bundle 4, tab 54) because of the  
3 derisory sum that was arrived at after Step 2, £6,500.

4 The second point we make, and I hope it is fair to say, that the arguments which we have  
5 advanced in relation to Step 3 were advanced there.

6 Thirdly, and no doubt for that very reason, there is if, I may respectfully say so, a very  
7 cursory analysis of the Step 3 issues by the Tribunal at para. 134. Prior to the construction  
8 cases and these cases, *Makers* is the only case in which the MDT has been addressed by the  
9 Tribunal. We would respectfully submit that if our submissions on MDT otherwise have  
10 force, the *Makers'* judgment can provide no comfort whatever for the OFT.

11 Sir, unless there are other matters that my friend raised on which the Tribunal would wish  
12 me to have the opportunity to respond, that is what I want to say on behalf of Hays. Thank  
13 you very much for the opportunity to do so.

14 THE CHAIRMAN: Thank you very much, Lord Pannick.

15 MR. BREALEY: Sir, just three points by way of reply. The first concerns materiality, the second  
16 seriousness, and the third gross/net.

17 On the issue of materiality Mr. Unterhalter just slipped in a submission that, according to  
18 Hays the fine was not material. I just make this by way of reply, that is incorrect and is  
19 raising an issue which is dealt with in the evidence, if I could just give the Tribunal the note.

20 THE CHAIRMAN: This is the debate about what is said in the report?

21 MR. BREALEY: That is right. It is Venables 2, paras. 47 to 51, and Mr. Woolland at tab 6, and  
22 that deals with the issues of materiality and insider dealing. The evidence is quite clear that  
23 the fine is material to Hays, but I felt I had to make that point.

24 THE CHAIRMAN: Yes.

25 MR. BREALEY: The second point, Sir, is seriousness and the issue of object and effect. The  
26 submission is made by the OFT essentially that because an agreement has as an anti-  
27 competitive element as its object, therefore it is of the utmost seriousness, and really that is  
28 the end of the case.

29 As the Tribunal knows, where there is an object agreement the OFT does not have to prove  
30 anti-competitive effect, because the agreement usually has, by its very nature, a distorting  
31 effect. But the principle, in my submission, is that where you have an object case if the  
32 infringer can prove that there has not, in fact, been an effect, that reduces the seriousness of  
33 the infringement – that is actually quite an important principle.

1 So even in an object case, if the infringer can prove that the agreement did not have an anti-  
2 competitive effect, then that reduces the seriousness of the infringement, and as to that I  
3 would remind the Tribunal that Hays adduced the evidence of a Mr. Jellicoe from Vinci,  
4 and that has remained unchallenged (tab 4), and particularly at paras. 16 and 17 he says it is  
5 nonsense to suggest that the CRF had any effect on him and the rates being charged. So I  
6 would ask the Tribunal to consider the evidence of Mr. Jellicoe from Vinci when  
7 considering the seriousness of the infringement.

8 The last issue by way of reply concerns gross/net. Essentially I have two points here. The  
9 first is the nature of the service provided, and in my submission it is still quite vague as to  
10 what the OFT is actually saying. I refer in particular to para. 27 of their skeleton argument,  
11 which has just been handed up. It says: “It is Hays itself that owes obligations to the  
12 client . . .”, it does not define obligations, and then it says: “. . . even though obviously it is  
13 not Hays itself which does the building or plumbing work”.

14 In the same paragraph it refers to the paragraph in the Decision 5.140, which again is quite  
15 vague when you actually go back to it, it talks about purchasing services and the OFT in the  
16 Decision does not actually define what service is being purchased. My simple point is that  
17 if the OFT, at para. 27, is saying that Hays itself does not provide the service, and Hays is a  
18 legal person, if it is not as a legal person providing the service it cannot be purchasing those  
19 services from the worker. That is the ambiguity on the service provided.

20 The second point by way of reply is this “beginning and end” point. It is said by Mr.  
21 Unterhalter that really the accounts are the beginning and the end. They may be the  
22 beginning but they are certainly not the end.

23 As to the beginning ----

24 THE CHAIRMAN: You are not going behind the accounts?

25 MR. BREALEY: No, but I would go further and say that when one looks at the accounts, Hays’  
26 accounts, Hays is quite clearly telling the market – and this to a certain extent was accepted  
27 by Mr. Allen – that the service it is providing is placement, and the money that it earns from  
28 placement is net fees. So that is the beginning, even on Hays’ accounts in my submission,  
29 although we are not going behind them it is plain the message being sent to the market is  
30 that it is earning money from the activity of placement.

31 As to whether it is the end, it is not the end, and I again refer the Tribunal to paragraphs  
32 5.22 to 5.25 of the Decision and the *Argos* case, and in particular the *Football Kit* case  
33 where the OFT says we have to look at the relevant market from a group of services which  
34 reflects commercial reality.

1 Again, if one goes to 5.23: “In *Replica Kit* the CAT confirmed the OFT’s approach  
2 consisting of grouping products ...” we can substitute “services”, “... in one relevant  
3 market where it reflects commercial reality . . .” and the commercial reality in this case is  
4 that the net fees constitutes the scale and magnitude of Hays’ activity. One can see from all  
5 the evidence that Hays has attached to the note that was handed up this morning from Hays  
6 itself, from Mr. Shepperd, that the commercial reality is that the relevant metric is net fees,  
7 not the gross wages of the temporary workers, that is the end, the commercial reality.

8 Thank you.

9 THE CHAIRMAN: Thank you, very much. Mr. Harris?

10 MR. HARRIS: Sir, yes, with the Tribunal’s permission I have five very short Eden Brown  
11 specific points by way of reply. First, Step 3, the fact is that it is common ground between  
12 Eden Brown and the OFT that there is a significant over deterrence, the number needs to be  
13 reduced because it is too high and excessive (Decision CB1, page 286, para. 5.254). What  
14 my learned friend, Mr. Unterhalter, did not deal with was my point that, as a matter of  
15 proportionality, there is no justification for Eden Brown to end up after the Step 3  
16 adjustment, at a level of fine that is significantly higher, substantially higher than any other  
17 party to this same cartel, by any of the relevant measures, whether it be proportion of net  
18 fees, or worldwide turnover, or whatever, and he simply did not deal with that point.  
19 My second point – equally short – is my learned friend mentioned material misstatements.  
20 If you recall a central part of his thesis on gross/net was that if the appellants are now right  
21 it must follow that their accounts are materially wrong and in error, but that wholly failed to  
22 grapple with either the Robert Walters’ example, that I put to Mr. Allen and features in Mr.  
23 Hall’s report, that is of course the recruitment company that changed its accounts, and there  
24 is no suggestion at all that in restating their accounts they had committed a material error.  
25 On the contrary, this issue was addressed in terms by the finance director of Eden Brown,  
26 Mr. Sterling, and you will recall his evidence – I gave the citation at an earlier stage – that if  
27 he were, as he says he could, to present the numbers for Eden Brown, it would simply be a  
28 question of altering the labels applied to the very same numbers, and that would not have  
29 any effect on any, even uninformed, reader of the accounts, let alone the informed and  
30 diligent reader that we are directed by IAS 8 to conceive of as the reader of a company’s  
31 accounts for these purposes.  
32 My third point is that Mr. Unterhalter said at one stage that the gross/net issues – and I  
33 jotted down these words – “was located at Step 1”. He then went on to make some  
34 submissions about its relevance at Step 1, and this was following some questions from an

1 intervention from the Tribunal about the relevance of Step 3. Of course, in opening, and I  
2 very deliberately used the phrase: “my major point” on behalf of Eden Brown was the  
3 double disproportionality. One needs to take account in our respectful submission of the  
4 disproportionality that arises from using gross turnover in this case rather than net fees,  
5 somewhere within the calculation, somewhere within the methodology that eventuates in  
6 the bottom line figure, the outcome figure. So therefore, we do not accept that the relevance  
7 of gross/net is limited or located only in Step 1. For proportionality purposes, provided it is  
8 taken full account of that is what matters.

9 My fourth point relates to year of relevant turnover. My learned friend’s case effectively on  
10 this amounts to two points, his coherent strategy or interpretive technique and his hierarchy  
11 of statutory norms. I will take them in reverse order.

12 With respect we say that the hierarchy of statutory norms upon which he places so much  
13 reliance is meaningless if the norms within that hierarchy are directed to different purposes.  
14 They self-evidently are directed to different purposes within the Steps of the Guidance.  
15 Year of relevant turnover is at Step 1, that has a certain purpose, size, extent and  
16 seriousness. Step 5 is completely different.

17 A fifth and final point, and then one postscript about a sub-issue. Still on year of relevant  
18 turnover, my fifth and final point is that my learned friend suggested that there was an  
19 oddity in having different measures or metrics of turnover at different stages of the  
20 Guidance, notwithstanding their different purposes. We respectfully say it would be odd  
21 the other way around. It would be odd to have the same turnover when the purposes are so  
22 transparently and obviously different. He finished on this score by saying – this seems to be  
23 a new point, it is not ventilated anywhere else in any document at any stage in these whole  
24 proceedings, but he submitted that it would be odd for there to be a turnover standard of one  
25 type at one point in time for the purposes of Step 1 (year of relevant turnover), but then to  
26 be a different turnover standard for deterrence purposes at the Step 3 stage at a different  
27 point in time.

28 With respect, we find that a very odd submission for the OFT to make, because on our  
29 understanding of what they used to do, before they changed their interpretation, that is  
30 exactly what must have happened. On their case deterrence requires a look at the most  
31 recent number going forward, but on their former practice they did not take that standard for  
32 the purposes of the year of relevant turnover. So the very issue that he is saying prevents  
33 me winning is something that they used to do.



1 THE CHAIRMAN: I seem to recall the previous version of the Guidance made that point, that it  
2 was using different turnover.

3 MR. HARRIS: Yes, but it still does not get around this issue of having different standards, and as  
4 I understood the submission that was made: “You cannot really be right because it means  
5 having different standards ----”

6 THE CHAIRMAN: This is a point in your favour! (Laughter)

7 MR. HARRIS: I am so “enthusiastic” – to take Mr. Unterhalter’s word. Perhaps I will wrap it up  
8 very briefly then. The point is made, I think through Mr. Unterhalter’s mouth on behalf of  
9 the OFT that there may be a lack of clarity and it is unfortunate where certain figures have  
10 come from net fees and what have you, we cannot believe that this point applies to Eden  
11 Brown because the only figures that we put forward in the calculation table that we handed  
12 up are drawn from the sworn second witness statement of Michael Sterling which is CB3,  
13 tab 9, page 115, and not only has the OFT had them since November ----

14 THE CHAIRMAN: Just one moment. (After a pause) Yes.

15 MR. HARRIS: So, Sir, if one has regard to p.1, of the second statement of Michael Sterling, do  
16 you have, Sir, the financial year “2004/05” at the bottom of p.1?

17 THE CHAIRMAN: Yes.

18 MR. HARRIS: And the “Relevant Net Fees” figure of a certain amount.

19 THE CHAIRMAN: Yes.

20 MR. HARRIS: That is the figure that then appears on the table that I handed in, and those figures  
21 have not only been in the OFT’s possession since November 2009, but they are supported  
22 by the exhibits to Mr. Sterling’s statement, and if you would like the reference to those, the  
23 reference is NCB 3, volume 2, tab 9.

24 THE CHAIRMAN: I do not think we need that reference. Your figure is not a new one that was  
25 handed up.

26 MR. HARRIS: I am grateful. Unless I can be of further assistance, those are the submissions in  
27 reply for Eden Brown.

28 THE CHAIRMAN: Thank you. Miss Kreisberger?

29 MISS KREISBERGER: Sir, I am feeling the weight of responsibility having the last word in this  
30 hearing. Sir, can I take it that the Tribunal does not want to hear from me on ground 4?

31 THE CHAIRMAN: Yes, one can understand, as it were, the note of caution that the OFT  
32 sounded, whether on the facts that applies in the particular case of your client or not, is not  
33 something we are going to reach a view on. One can appreciate why Mr. Unterhalter and  
34 the OFT have that concern, and their concern would resonate particularly strongly if that

1 were the only reason an appeal were brought and the only ground of appeal might then have  
2 very significant consequences in costs even if an appeal were successful, but I think in this  
3 case, given all the other matters it means that I think the OFT accepts – while it does not  
4 accept the background as set out in your grounds and evidence, which it has not cross-  
5 examined on – that the figure can be adjusted, that is my understanding of the position, so  
6 you need not address us further.

7 MISS KREISBERGER: I think in that case I need say nothing more. I will take MDT very  
8 briefly indeed. All I propose to say on that is that of course CDI accepts that the Tribunal is  
9 entitled to consider deterrence, and frankly, we would be on a hiding to nothing if we  
10 thought to argue against that, but Mr. Unterhalter failed to address CDI's central point on  
11 MDT, which is that CDI is in a unique position, for the reasons I have already given (and do  
12 not propose to repeat) and is therefore not comparable to Hays, and on that basis there is no  
13 call to apply to particular methodology which was applied to Hays in the decision because  
14 of the need for individual consideration which has not been given to CDI if the relevant  
15 figure is the net fees, the gross profit figure, that simply has not been looked at, so it cannot  
16 be assumed that the calculation applied to Hays, if they fail on this ground, should  
17 automatically, mechanically be applied to CDI in respect of figures which have not been  
18 considered – they should have been, but they have not been considered. That is all I  
19 propose to say on MDT.

20 On CDI's ground 1 (the gross versus net issue) like Mr. Brealey I was also going to pick up  
21 on the accounts and the beginning and the end comment but to make a slightly different  
22 point. If that comment is tantamount, and we know that it is in the way in which it applies  
23 to CDI, to saying that reported turnover is the figure, it is not simply looking at the  
24 accounts, because the answer is in the accounts. But if the answer that is being given is that  
25 reported turnover is always the answer, we say that is precisely where the OFT has gone  
26 wrong.

27 In my submission, this is the fundamental misconception on the part of the OFT as to the  
28 job it needs to do on penalty assessment, and it is a failing that we find deeply troubling  
29 because (i) it does not admit to the possibility of exceptions; and (ii) it ignores economic  
30 reality. Yet, the Commission says, even in the context of merger control which, Sir, you  
31 pointed out is a less flexible area when one is dealing with turnover, and a more rigid  
32 framework, even there the Commission says it is necessary to have regard to economic  
33 reality, to context, in the Notice and we have the ruling from the Court of Justice in  
34 *Britannia Alloys*, and that is in the context of penalty assessment – regard must always be

1 had to the economic situation of the undertaking in the light of the penalty assessment  
2 exercise. We say that it is this failing on the part of the OFT, and with respect we say it is a  
3 failing which infects both Step 1 and Step 3 of the calculation which really underlies the  
4 flawed assessment that we are looking at here.

5 Mr. Unterhalter admitted that *Endesa*, on which we place such reliance, is concerned with  
6 the construction, construing the meaning of “turnover”, and I say as an aside that that is  
7 exactly why CDI’s case does not lead to endless accounting disputes which Mr. Unterhalter  
8 referred to on the gross versus net debate. We are talking about turnover, and *Endesa* says  
9 that you construe turnover in the light of the economic circumstances, legal circumstances  
10 in order to determine whether the entity that you are dealing with should be treated as an  
11 intermediary. Then you decide how you are going to treat turnover by taking the position  
12 that the answer will always be reported turnover, regardless of circumstances. The OFT has  
13 shut its mind to economic reality as a matter of principle, and so fails to meet the obligation  
14 incumbent upon it to give individual consideration in order to achieve the objectives of the  
15 penalty regime. It is because the OFT has adopted that approach that it has put itself in a  
16 position of having to justify this blind devotion to the figure of reported turnover, which has  
17 meant that the OFT has had to engage in certain contortions as regards the facts of  
18 *AndersElite*’s case to attempt to fit it into the box of *Endesa* in which box it does not fit  
19 because, as I have already discussed, the facts are so different.

20 That was all I was proposing to say. Sir, those are the submissions of CDI in reply, unless I  
21 can be of any further assistance.

22 THE CHAIRMAN: Thank you, Miss Kreisberger. I think that as regards further matters to be  
23 addressed, there is the table of prior decisions that the OFT produced in response to our  
24 request which the other parties will be looking at and give any comments, and we ask that  
25 that can be done if at all possible by agreement with the OFT regarding revisions, and if we  
26 could have that by the end of next week, please?

27 The CDI figures, Miss Kreisberger, net fees for 2004/05 you said you are going to produce  
28 within a month, and again if they can be submitted to the OFT for them to look at those  
29 before they are sent to us – again, we hope there is no argument about those.

30 Mr. Unterhalter, as regards *Eden Brown*, as Mr. Harris pointed out – of course this always  
31 was in *Eden Brown*’s appeal – those figures you have had and so I do not think there is need  
32 for anything further.

33 Then Hays, Mr. Brealey, you will consider further (a) whether there is the data; and (b) if it  
34 would be a major exercise to prepare it whether there is an alternative means – slightly

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rough and ready, but these are only starting point figures – to arrive at a fair estimate of what they were in that year, and again if that could be submitted to the OFT, and if that can be done also within a month.

I do not think there was anything else due to be supplied, in the light of which it just remains for us to thank all counsel and indeed the legal teams working with them, for all the help that they have given us in this case, and also to the shorthand writers who have been producing a very rapid transcript. We will of course consider our decision and you will be notified when it is ready.

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