IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1118/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

MARCUS SMITH, QC
DR. ADAM SCOTT OBE TD

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GMI CONSTRUCTION HOLDINGS PLC
(2) GMI CONSTRUCTION GROUP PLC Appellants

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING
DAY TWO

APPEARANCES

Mr. Aidan Robertson, QC (instructed by McCormicks) appeared on behalf of GMI Construction Holdings PLC.

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

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THE PRESIDENT: Good morning.

MISS BACON: I was on infringement 228 yesterday evening, and I had almost got to the end of my submissions on that. I have a few more minutes of submissions on that and then I wanted to make some final concluding remarks about the totality of the infringement.

I had shown you the contemporaneous evidence for infringement 228 and, as Mr. Robertson said, there were three relevant witness transcripts from the leniency witnesses. We had gone through Mr. Miller, who was the one who had given direct evidence of the infringement, Mr. Kirby, who was the commercial director, and that leaves Mr. Rhodes. You have actually seen the transcript of the interview with Mr. Rhodes. All I really need to do is explain how this transcript got into evidence. Actually we did not attach it to our liability defence because it was not one of the transcripts specifically referred to in the decision in the section on infringement 228. We had Mr. Miller who spoke to the relevant infringement.

GMI then attached it to GMI's skeleton argument to make the submission that Mr. Rhodes' evidence contradicted our case. So at that point they were saying Mr. Rhodes' evidence was positively probative and it was probative in their favour. It was at that point that we focused on what the witness was saying because when we saw GMI's skeleton and we went back to the transcript we could see that it just did not make sense as it was written, so at that point I asked those instructing me to get the tape and compare it with the transcript. That is how we found out that it looked probable that the transcript was mis-transcribed. Mr. Robertson is right to say that the relevant bit is not very clear, but he does not dispute that the transcript as recorded is not the right transcription of the tape. So it looks like Mr. Rhodes was, in fact, corroborating the OFT's case.

When GMI received our skeleton argument making this point they of course said: "Mr. Rhodes' evidence is completely irrelevant so you do not need to look at it at all. The answer to that is we accept that Mr. Rhodes was almost certainly not involved in pricing that particular tender. It came into the commercial division as Mr. Miller has said. Mr. Rhodes was in the public division so we have never taken a point that Mr. Rhodes was involved in the tender. What you can do is look at his general evidence as to how the contemporaneous documents are to be interpreted. For what he is worth he looked at the contemporaneous documents and said: "That is consistent with what we did at the relevant time", although he was not involved in it he said: "This is my understanding of what the annotation would have meant", so that is for what it is worth. As I said, it is not a transcript

that was relied on in the decision and we only went back to it because it was referred to in GMI's skeleton argument. That is all I need to say on the three leniency witness transcripts. Turning to GMI's case in relation to infringement 228. They say several things starting with the oral evidence of Mr. Shann and Mr. Naylor yesterday, that was that they simply did not take cover prices since the mid-1990s and, as I said yesterday, this was not something that was said in those terms in the 2008 affidavits, nor was it something that was said in Mr. Naylor's case in his 2010 witness statement, but it would have been the obvious point to have made if it were true. There is no reason why they would not have made that point either in 2008 when they were sitting down with their solicitors to prepare their affidavits in response to the statement of objections, or in 2009, or 2010 when they have been preparing witness evidence for use in this appeal. The first time this point was made, and it was in oral evidence yesterday and I will come to that also in my concluding remarks. The second point in GMI's case is that they rely on the letters annexed to Mr. Shann's affidavit, and I have already set out the OFT's position on those letters yesterday, which is that they do not prove in relation to the 228 infringement that it was not GMI's policy of returning tenders, or deciding midway through a tender not to price a project. What they really prove is that at the start of many tenders GMI return the papers at the outset, so there is only one letter that goes to the position of what happened mid-tender and that is the January 2004 letter, which I took the witnesses to.

Most importantly though, GMI says in relation to infringement 228 that it has put forward an alternative plausible explanation which is that Mr. Naylor had a post-tender conversation with Totty about the project and that is how Totty came to know about GMI's tender price and record it on its tender summary sheet.

On that, the first point to make is again one I put to the witnesses yesterday that this is Mr. Naylor's recollection. He says he discussed it with Mr. Shann at the time, but Mr. Shann himself does not have any independent recollection of the incident, so all we have to go on is Mr. Naylor's recollection of it, that Mr. Shann reports in his affidavit. The main problem with this story is that it is completely inconsistent with the contemporaneous document, as well as the unambiguous statements of Mr. Miller. The story about a post-tender conversation simply does not explain the presence of the word 'cover' on the document. There is no reason why somebody recording a post-tender discussion between Totty and GMI would write down that GMI had taken a cover for it. It just does not explain that word there. So, in our submission this is the most plausible explanation of the annotation on the Totty tender document. What happened was that assuming, to give GMI the benefit of the

doubt, the words 'GMI (cover)' were written before the figure - so, there are two -- I have said yesterday that we do not have the original, so let us give Mr. Robertson the benefit of the doubt and assume that the two annotations - 'GMI (cover)' on the one hand and then the figure were made at different times with a different pen -- We say the most likely explanation is that the words 'GMI (cover)' were written to record that Totty would be giving a cover price to GMI. Then, when they had actually had the conversation and given the cover price, they wrote down the figure that had actually been given to GMI. We say that that is the most likely explanation, even giving GMI the benefit of the doubt as to when the annotation was made, splitting it into two.

DR. SCOTT: Just to be clear, what you are saying is that the figure written down was the figure being given to GMI, not from GMI.

MISS BACON: Sorry. Did I ----

DR. SCOTT: No. No I just wanted to make sure that we were clear which direction the figure was going in.

MISS BACON: Given to GMI by Totty. So, let us assume that they were written at two separate times. Somebody - Mr. Miller said it was him - wrote 'GMI (cover)' to indicate that they knew they were going to give GMI a cover price. You will have seen from the leniency transcripts that they said what often occurred was they had a discussion in which it was said, "We will give you a cover price". They then had to wait until the eleventh hour when they had finalised their figure and only then did they actually give it. So, that would be a good explanation of why, if those two parts of the phrase were written at different times, they were written at different times. First of all, he records, "We are going to give GMI a cover price" and then he records the cover price that has actually been given once they have had the conversation.

DR. SCOTT: We are considering this against what is apparently the case that there are four competitors who are known about on 20th.

MISS BACON: Who were known about when the tender summary sheet was printed.

DR. SCOTT: That is right. And then not approached. So, what you are saying is that somewhere between 20th and 22nd GMI are approached.

MISS BACON: It could be the case that when the tender summary sheet was printed they knew about the four genuine tenders, and then at some point someone writes down, "Well, GMI is another competitor. We know that they're a competitor, but they're getting a cover and they write it arm in hand". It does not really establish when the 'GMI (cover)' was written. But, the figure could only have been written at the last minute because that was the

consistent evidence. If someone was taking a cover price, it would be taken and given by the person giving it at the last minute. So, regardless of when 'GMI (cover)' was written, we know that the figure must have gone in at the last minute if it was recording a cover price being given. There is no reason why somebody knowing that GMI was putting in a genuine price, and knowing what that price was, would have written that price next down to the words that say 'GMI (cover)'. It is just not plausible. Why would you do that? You see the words 'GMI (cover)'. You find out that GMI are getting genuine price. Surely what you would do is you would delete out the word 'cover' and would say 'GMI - this is the price that they are going in at'. You would not just sit there with the word 'cover' and then write on the price.

DR. SCOTT: If you knew that the GMI price was the figure that appears in the document, then that would provide effective cover to you with a lower price. Do you see what I am saying?

MISS BACON: I am not sure that I do, Dr. Scott.

DR. SCOTT: Let me explain. They are going in at a figure which is 4 per cent below GMI's price.

MISS BACON: Yes - or, in other words, that the GMI price was 4 per cent on top of Totty's. Yes.

DR. SCOTT: That is right, but what that means is that if they know that GMI have gone in at 4 per cent higher, they know that there is a price higher than theirs. The suggestion yesterday was that they do not know that other people are above or below them until later on when the figures go in bottom left.

MISS BACON: I think your suggestion is that if they knew that GMI were taking a cover from somebody else and if they knew what that figure was, then they would know that they could undercut it. There is no evidence anywhere which suggests that they both knew that GMI were taking cover and knew the figure that had been provided to them.

DR. SCOTT: No, but if the GMI figure was a genuine figure, and we have some evidence that GMI were working towards a figure, then that would effectively provide them with cover, not in the conspiratorial sense but in the practical sense, because there was a price above theirs.

MISS BACON: Yes, but first of all the evidence is not that they knew at the time of the tender submission from GMI that GMI was going to put in a genuine bid at that price. On your hypothesis, and we take Mr. Naylor's evidence at face value, he had a post-tender conversation. That would not explain why they would have written those words in a pre-

tender sense. They would not have known before the tender that GMI were going to go in at this price unless that was a price that they were giving them.

The other point to make is that the word "cover" is a term of art that is used across the industry. People wrote "cover" down to indicate that a cover was being either given or received. There is no suggestion in any of the documents that it was ever used in a kind of loose sense, in the sense that, "We know that someone else is tendering at this amount and therefore we have cover, in the sense that we can go in under it". That would not really work out.

One of the alternative explanations put forward by GMI was that Totty knew from somebody else, let us say a sub-contractor, that GMI was taking a cover. Again, that is inconsistent with Mr. Miller's evidence that they gave GMI the cover price.

DR. SCOTT: Thank you.

MISS BACON: We say that all of the alternative explanations are not borne out by either the contemporaneous record or Mr. Miller's very unambiguous evidence.

That really leaves the question of how the Tribunal evaluates Mr. Naylor's evidence of his post-tender call to Totty. What he said was that GMI was interested in the job, they were keen to know where they stood, and even if they did not come lowest they would still want to know where the market was. That is at p.19 of the transcript. What he says is:

> "This particular job we were interested and it was a reasonably – looking at the value, quite a big job, so we were keen to know where we stood, and we are keen to know where we stand on any jobs, because we wish to know where the market is, so even if you do not come lowest on the job, if you come last, or whether you come third, it gives you a feel for the market in terms of where people are pricing jobs these days, yes."

So he said he made the phone call because he wanted to know where, among all of the competitors, he stood. That is not borne out by the fact that he, on his account, only phoned Totty, which would have only told him of where he stood in relation to Totty. It would not have told him anything about where he was overall. That is the reason I asked him the question, whether he had telephoned other competitors. So on the one hand he is saying he wants to get feedback, he wants not only to know if he has come last, but he wants to know maybe if he has come third; on the other hand, his evidence is that he only phoned Totty, and he did not phone the one person who could have told him where all of the bids were coming in at, which was the client's quantity surveyor. We know that Totty did phone the quantity surveyor and the quantity surveyor told Totty what the other bids were. So we

know that the quantity surveyor has done it for Totty. There is no reasonable explanation as to why GMI just did not phone up the same person and get exactly the same information. We say that that adds to the picture of this not being a credible account of the post-tender conversation, quite apart from the fact that it is contradicted by the contemporaneous record and the leniency evidence of Mr. Miller.

So the OFT's position is that in those circumstances the Tribunal should prefer the logical inference to be drawn from the contemporaneous record, which has the merit in this case of being fully supported by very unambiguous leniency evidence. On that basis we invite the Tribunal to uphold the finding of liability for that infringement.

Unless the Tribunal has further specific questions I just want to make some points regarding both infringements. I have got three points. The first point is that in both cases, in relation to both infringements, the witness evidence has improved remarkably over time. What Mr. Naylor and Mr. Shann now say regarding their business practices was not said in 2008, and it was not said in any of the witness statements that had been produced in 2009/10 for the purposes of this appeal. That is, in the OFT's submission, a serious point for the Tribunal to take into account when deciding what weight to give to the story that has now been told by the witnesses.

The second point I want to make is that the story that is particularly about the nature of the work changing from the mid-1990s is entirely undermined by the claims that are now being also made about the post-tender conversation with Totty. Can I take you to the transcript, if you have it, because it is very revealing? The first passage in the transcript that I would like you to look at is on pp 10 to 11, starting at line 27 on p.10, when I asked Mr. Naylor what the turning point and why things changed he said:

> "There wasn't a turning point, it was a gradual turning point whereby the nature of tenders changed."

And he talks about negotiated work and two stage tenders. Over the page, at the top of p.11 on lines 4 to 7 he says this:

> "In terms of general tendering, we probably price design and build tenders which meant that it was no longer a 'first past the post' situation with tenders because it wasn't just the price that the client took into account - it was the design of the building, the strength of the company."

And then line 12:

> "So, the nature of tendering changed. In-house we decided that it was not really appropriate to give or take covers any more. It was no longer a conveyor belt of

bills of quantities. We're talking more complex jobs. It was quite possible, if you put a tender in and you were second or third, that the client may well call you in for a discussion to go through your price."

Then line 18:

" …from our point of view, and I am only talking about GMI here, the nature of our work became very difficult. If we'd wanted to, it would've been very difficult to give or take covers. It sort of naturally died out."

Then the same comment at lines 28 to 30, "the industry has changed." "It virtually died out", at line 30. If that was the case then it is very odd that in 2005, a decade after he says this change either had started or had finished he was pricing up a job which he admits was a bill of quantities job for which it would have been perfectly easy to take a cover, and not only that, but he is phoning a competitor after the tender has gone in, so he says, to find out where they stood on price because he would have regarded that as important. Then if you bear in mind what he has just said about this not being a first past the post system, I have already taken you to p.19 of the transcript where he explains why he made the phone call to Totty. Then if you look at p.20 of the transcript, and this is the most interesting part, I asked why he would have ruled himself out just from making a phone call to Totty without speaking to any of the other contractors, and his answer starts at line 16 on p.20 where he says:

"Because it wasn't a design and build job. I think on a bill of quantities, if you're £200,000 out on a bill of quantities then it's highly unlikely that you're gonna get called to an interview."

Then if you carry on reading on, I then ask him:

"Soon straightforward bills of quantities jobs around the relevant time period between 2000 and 2005 price was essentially the determining factor?"

And he replies:

"It was very much more the determining factor rather than on a design and build job because everybody had priced the same quantities and in theory if the QS [quantity surveyor] had done his job correctly it really should be a first past the post situation . . ."

So in the course of his evidence he first says that from around 1995 onwards it was not a first past the post situation and he then says that in 2005 a decade later on this tender it was a first past the post situation and that is why he had the telephone call.

THE PRESIDENT: I must say I thought he was saying that their work up to about mid-90s there had been an awful lot of bills of quantities, first past the post cases, and more and more they moved towards the negotiated procedures, and design and build procedures, not that he had, as it were, stopped doing bills of quantities – I did not understand that he had completely stopped doing them.

MISS BACON: No, my submission is not that he was saying that he stopped doing it, but he is saying the nature of their work changed so much that in his words: "it virtually died out". That from his perspective the practice of giving and taking cover prices had died out because he said "The nature of our work became very difficult. If we'd wanted to, it would've been very difficult to give or take covers." He said because they were doing things like design and build it was not a bill of quantities work, it was not first past the post. A decade later we have an example, and this is a case where the evidence is likely to be fragmentary. We do not have a complete list of what GMI were doing at the relevant time. What we do have is an example which we have obtained through the leniency evidence and the dawn raids of a case where, a decade after this enormous sea change in the industry or gradual sea change in the 1990s, clear evidence that GMI was doing exactly the kind of work which he said was almost not done, and which cause cover pricing to have almost died out. This was a case where patently it was clear they could have taken a cover for the job and that really undermines what you were saying earlier about this not being possible for the kind of work that he was doing. So this means that not only was cover pricing in 2005 entirely practical and effective for that kind of job, a straight forward bills of quantities job, but GMI were doing that job in 2005. We say that is the second point I wanted to make, that this undermines what is being said earlier about the change to the nature of their work. The final point is this, that if the Tribunal finds that the OFT has proven on a balance of probabilities that a cover price was given by Totty to GMI on this occasion then that also in itself undermines the general evidence given by GMI that cover pricing was not something that they engaged in and by implication it undermines their claim that because of their change in business policies on practices they would not have given a cover price five years earlier in 2000.

Unless the Tribunal has any questions, those are our submissions on the liability case.

THE PRESIDENT: Thank you very much, Miss Bacon.

MR. ROBERTSON: President, Members of the Tribunal, I will first deal with our points in reply on liability. I can then move on to the penalty part of this appeal.

As you have heard from Miss Bacon the OFT has criticised the coverage of Mr. Naylor's affidavit. That affidavit was prepared along with Mr. Shann's affidavit in 2008 for the purposes of the written response to the SO. It was not prepared for the purpose of this appeal. The written response to the statement of objections which is exhibited by Mr. McCormick to his witness statement, was intended to be read as a whole hence the lack of formal exhibits, and hence also the way the affidavits dovetailed with each other. So when Mr. Naylor does not deal with the point it is dealt with by Mr. Shann in his affidavit. That deals with the criticisms of the affidavit in relation to infringement 14. Mr. Shann dealt with that point in his affidavit, and the written response to the statement of objections itself denied cover pricing full stop, that is para. 71 of the statement of objections response, and if I could just take the Tribunal to that. It is in the first of our files, tab 5, para. 71, if I can just ask the Tribunal to read that you will see that GMI has consistently denied involvement in cover pricing.

THE PRESIDENT: "AIs" mean "alleged infringements"?

MR. ROBERTSON: Correct. (After a pause): We are particularly aggrieved by this point being taken by the OFT because we have always sought to be as co-operative as possible. The OFT could have engaged in extensive questioning of GMI personnel had it accepted our request to meet to discuss the allegations during the administrative procedure, but our request to meet was met with a blank refusal by the OFT. The references to that -- I do not think you need to go to the correspondence, but it is dealt with in Mr. McCormick's witness statement which is there at Tab 5. It is in the Notice of Appeal at Tab 4, p.2, para. 6, and the letter to which he refers is at Tab 5, p.39. The OFT also had the opportunity to ask questions of GMI at the oral hearing (see McCormick, para. 11, Bundle 1, Tab 4, p.3). That is the relevant passage of my instructing solicitor's witness statement.

So, when my learned friend says that we have been engaged in some sort of practice of trying to improve the evidence, I am afraid there is no foundation for that. Our response to the Statement of Objections demonstrates that we have been consistent in our response. We would have liked to have met with the OFT to explain things from our point of view in advance of the Statement of Objections, but they refused to meet with us.

The Tribunal has heard from Mr. Shann and Mr. Naylor. In our submission both witnesses were thoroughly straightforward and clear in their evidence. Counsel for the OFT, in our submission, continually misrepresented aspects of their evidence yesterday and the Tribunal picked her up on that. The correct summary of the position is clearly that any motivation that GMI had to engage in cover pricing had come to an end in the mid-1990s, well before

this period, due to the nature of its work and clients. They no longer had anything to gain by the practice and so it died out. It was not a sudden change, as my learned friend was saying was their evidence yesterday. That was not their evidence, as you pointed out. There was no reason to assist Irwins in 2000, but in any event our case is that no contact was made by Irwins. If there had been, both witnesses were clear that they would have responded as they did respond in 2002. The reason why Irwins was assisted, if I can put it that way, in 2002 was to secure an advantage to us by showing Irwins up in front of someone who was a very important client to us - that was Mr. Naylor's evidence - and thus also ensuring that the tender process was not delayed; that this was tender which we wanted to secure, which we did.

Nor was there any reason to require assistance from Totty five years later.

So, that is our witness evidence. The OFT, on the other hand, has not adduced any witness evidence whatsoever, despite the number of factual issues raised in our appeal. The OFT continues to refer to the fragmentary nature of evidence in cases such as this. That may be the case for certain contemporaneous evidence - tender sheets, tender submissions - that sort of thing, but it is not an excuse for failing to put factual issues to the relevant individuals. Those individuals - the OFT knows who they are; they are named in the interviews with personnel from leniency applicants. Those individuals work, or used to work, for leniency applicants. As we have explained in our skeleton, leniency applicants are under a continuing duty of co-operation throughout the appeal procedure. So, if the OFT had contacted Totty - that is particularly an issue in the Totty case - or contacted its parent company, Propensity, to be precise - and asked to speak to those individuals, they would have been under a duty to put the OFT in touch with the individuals so that the OFT could put these points to them and seek to put in witness statements before this Tribunal.

The paucity of the evidence in this case is the OFT's fault. We have heard no explanation at all as to why it has not done the most basic of tasks, which is to put a case to the relevant witnesses and assist the Tribunal with witness statements which could then be cross-examined.

Dealing with infringement 14, the alleged cover to Irwins, and dealing first with Mr. Nelson's explanation as to why he thought GMI would get that tender, I noted that my learned friend yesterday did not respond to our case on this, that he has plainly mistakenly extrapolating the current position back to 2000. I should also note that in his interview, to which we went yesterday, he referred, when questioned, to "us getting Evans' design and build work". The evidence yesterday from Mr. Shann was that at that time, the 1998 to

2002 period, Evans' work was all single stage tenders work awarded by Mr. Turner on the lowest price, it was not design and build work, and that is another reason why Mr. Nelson's recollection is wrong.

The OFT tried to maintain the tender register is demonstrating some form of correlation between the notes column and the entries "C" or "cover". I explained why not, there is not a correlation. The OFT referred to infringements 62 and 94 in their skeleton, and I explained why neither of those showed a correlation.

I should add that in relation to infringement 62 I am reminded that Lotus – I said they had not appealed – went into administration and that is recorded in the decision a para.II.929.

My learned friend criticised me for taking you to infringement 165, which she relies upon. I may have missed the reference, but I cannot see it referred to in the OFT's skeleton or its defence, which is why I did not respond to it.

The decision, and that is para.IV.4625, asserts that Mr. Nelson stated the final column indicates that the cover came from Stainforth. You looked at the transcript yesterday with my learned friend and it shows no more than Mr. Nelson assenting to leading questions as Dr. Scott observed to Miss Bacon. The reference to that in the transcript is p.69, lines 22 to 23.

So infringement 165 does not do anything more than infringements 62 and 94. Neither of them demonstrate a correlation, neither of them demonstrate Mr. Nelson explaining that the reason why a name appears in the final column is because he took a cover from that construction firm. That is, in fact, not his explanation, and I took you to that yesterday.

I would remind you, in relation to Stainforth, 165, that Mr. Nelson stated he had previously worked with Stainforth's managing director and estimator and had taken covers from Stainforth on several occasions. That is why we think that, in fact, they are the likely candidate for providing a cover to Irwins on that occasion.

That means that the tender register does not assist the OFT; nor does the unexplained annotation on the tender submission; nor does Mr. Nelson's general reference to GMI as one of the kind of contractor he might try to take a cover from. That is explicable by alleged infringement 101, one where he did make contact with us, but it is not of any relevance to infringement 14.

As against Mr. Nelson, you heard from Mr. Shann and Mr. Naylor. There was a consistent practice of GMI declining to tender. The documentary evidence before you is not just the letters that we have been able to recover from the IT system, we have also provided you with a schedule that Leeds City Council kindly provided to us. That schedule shows us

declining to tender some three-quarters of the invitations that we received from the Council. So there is strong corroboration for Mr. Shann and Mr. Naylor's evidence that GMI decided at the beginning of a tender process whether or not to put in a tender and do the work or to decline to tender.

As to the allegation that there is only example of declining to tender during the middle of the tender process that my learned friend made yesterday, and she says there is only one letter, it is not the only example. She relies upon this as somehow showing that that was just exceptional. It was not. Mr. Shann gave evidence to you that there were other occasions on which they halted a tender process half way through and returned the tender. His evidence on that is on the transcript at p.29, line 27, and goes on to p.30, line 10. He explained to you it was a rare occurrence, he said a couple of times in the four year period. His evidence was perfectly clear, GMI would decide whether or not to tender at the outset, and if they were going to do it they would do it properly. They might find themselves coming up to a deadline short of some information, but Mr. Naylor explained to you that if that were relating to matters such as utilities he could put in provisional figures based on experience, everyone if he had not got the quotes back from them.

Dealing with infringement 228 now, the alleged cover from Totty. As to this allegation, it is now accepted by the OFT that we are entitled to the benefit of the doubt over the Totty tender sheet. I will deal, first of all, with Dr. Scott's question about the level of covers provided by Totty. The question is recorded on the transcript at p.58, lines 24 to 27. Unfortunately, the answer is that we can provide no assistance, because there is not any information in the decision that we can see. The decision records three infringements attributable to Totty. Only one is the provision of cover price, and that is this infringement. So I am afraid we are unable to assist.

Our case is that the figure appearing on a Totty tender sheet was the product of legitimate post-tender discussions. Mr. Naylor's clear recollection is that he rang up Totty. We say he is demonstrably telling the truth. Those type of post-tender discussions, as I explained yesterday, were a regular occurrence. Mr. Shann, Mr. Naylor and Mr. Rhodes described them to the OFT in its leniency application. So they were regular. My learned friend's point is, "Well, why did you not just ring up the quantity surveyor?" Mr. Naylor said, when asked that question, "Quantity surveyors are notoriously secretive with their figures". We can see that from the Totty tender sheet where we get three figures, but they do not disclose whose bid is who. I am told that, in fact, quantity surveyors will normally only release the figures some time after the decision to award the tender, whereas the advantage of speaking

to someone immediately after the tenders have gone in is that it is fresh in your mind. Totty was chosen because, as Mr. Naylor explained in his witness statement, it was "comparable", they were a comparable firm to GMI and that is why he chose to contact them to see where they might be.

Then dealing with the notations, "GMI (cover)" and then the figure. "GMI (cover)" is clearly written first and the figure is written subsequently. The OFT's case is that the figure must have been added very soon after "GMI (cover)" because the figures were written sometimes after the sheet was printed but before the tender deadline. Of course we cannot deal with this with the person who wrote the figures because there is no witness statement, he is not available for cross-examination, and he, in any event, said he was told about the cover, but he did not supply it himself. Miss Bacon said there are other candidates who could have supplied the figure, but the OFT has made no attempt to contact them and to find out whether they did. We are just left with loose ends. It is not Mr. Rhodes, we now know that; it is not Mr. Kirby, he says so. So we get no explanation, no assistance, from the person who supplied these figures to Mr. Miller. We say that is just not good enough, at the very least the writer should be here to explain and should have provided a witness statement to the Tribunal otherwise we are just left with speculation of the sort that my learned friend was engaging in this morning.

We say that the figure that appears (the numerical figure) was supplied by us post-tender, so it was noted down after the tenders had gone in. It is not, as my learned friend says, the cover price that was given to GMI. We say that is consistent with Mr. Naylor's evidence. It is also consistent with the fact that the figure appearing on the Totty tender sheet is too low to be a Totty cover, particularly on a difficult to price project, according to Totty, where one might expect Totty to have allowed for a greater margin of error.

Miss Bacon referred you yesterday to Mr. Nelson on the level of cover prices to be provided, but that is entirely irrelevant when what you have here is evidence from Totty personnel about their practice, and that is the only evidence relied upon in the decision in relation to this infringement. The OFT in the decision cite Mr. Miller and his 5 to 7.5 per cent figure.

We say the only reason for this figure to appear on the tender sheet is that we supplied it post-tender. If that is correct it cannot simultaneously be a cover price supplied by Totty, it is our figure not theirs. If we had taken a cover from them why on earth would we ring up post-tender and discuss it with them. The OFT's case therefore rests on the slender thread of Miller's evidence in the leniency interview. He says he put down the figure pre-tender,

but as the President noted yesterday he was being asked, like us, to look at a photocopy and, in particular he does not have it put to him that this is a figure from a post tender discussion and that therefore must mean that the reference to GMI cover is him recording that he has been told that GMI has put in a cover from a third party. If he was here in the box we would have put that to him, he is not and there is no explanation as to why there is no witness evidence from him. The fragmentary nature of the evidence, I am afraid, is down to the OFT's ability to put together a proper case for this Tribunal.

There is no direct evidence to say that Totty gave a cover to GMI. Mr. Miller said he did not speak to GMI and he did not know anyone there. The candidates that he advances to the OFT – Mr. Goodyear, he had left, Mr. Rhodes was not involved. The other contenders referred to by Miss Bacon yesterday they go nowhere, because the OFT has done nothing to pursue this with the leniency applicant. The evidence is that Totty personnel did not know GMI personnel and vice-versa, and that is hardly a promising scenario for cover pricing. We say that is simply not good enough to discharge the burden of proof.

As against this, you have all the evidence from yesterday that GMI decided whether or not to pursue a tender at the outset, and once it had decided to do so that is what it did carrying out a substantial exercise involving obtaining "from a myriad of sub-contractors".

Mr. Shann and Mr. Naylor both gave evidence that on this contract GMI did not take a cover and we say that evidence must be accepted.

The OFT's case is inconsistent with GMI's method of business, and it would be completely contrary to GMI's practice and ethos to take a cover on a tender which GMI was keen to secure and where the documentary evidence shows that it had gone out to subcontractors.

There is one other point on the contract, and that is the point that Miss Bacon makes about this tender being the sort of bill of quantities tender that GMI had said it no longer did. Just to refer the Tribunal to the evidence, it is in the transcript, p.19, lines 12 to 25 from Mr. Naylor, and the evidence is that by about 2000 60 to 70 per cent of its work was negotiated, this was the move away from single stage tender contracts to negotiated partnered work, repeat business with valued clients. There is no evidence that there was a complete abandonment of this type of contracting.

Sir, unless I can assist you further on liability, I now propose to turn to penalty.

THE PRESIDENT: Yes, thank you.

MR. ROBERTSON: On penalty the Tribunal has given an indication of time, and I think I can be pretty brief on penalty submissions. These are being advanced obviously in the alternative if the Tribunal does uphold one or both of the infringements against GMI. The submissions

that I am going to advance are submissions that Lord Carlile's Tribunal and Miss Rose's Tribunal have heard in seven previous appeals, so of the points I am making many will have already been covered in two of the appeal hearings it was with Miss Bacon as my opponent, so we have covered a lot of the ground already.

THE PRESIDENT: You are well rehearsed then – like clockwork!

MR. ROBERTSON: Yes, and the submissions are in the transcripts for those hearings. For this aspect of the hearing although we have put in some confidential evidence I will not refer to it in the hearing and therefore there is no need for me to ask to go into a private hearing. I am going to address my submissions under five topics:

(i) the impact of the penalty,

(ii) the Tribunal's jurisdiction,

(iii) the seriousness of the infringement,

(iv) the flaws in the OFT's penalty calculation; and

(v) mitigating factors.

To deal first with the impact of the penalty. The OFT has imposed a penalty on GMI of £1,752,584. All but £2,760 of that penalty is attributable to an infringement in June 2000, three months after the entry into force of the Act. This sum, on any analysis is an extremely harsh penalty. In 2008, the year that the OFT has taken as its basis for penalty calculation, it is equivalent to 24 per cent of GMI pre-tax annual profit. It has a considerably greater impact now as a result of the economic downturn.

If we look at GMI's year ended September 2009 and look at post-tax profit, which is obviously the profit that is going to have to pay the fine it represents 180 per cent of that post-tax profit. The reason why we draw the comparison with pre-tax annual profit in 2008 is that there are other decisions by the OFT to impose penalties for more serious infringements of the Act which have affected the recipients of those penalties rather less seriously. The examples that we have cited in our pleadings have been *Sainsbury* in the milk and cheese case, and *Imperial Tobacco*, now an appellant before this Tribunal, both of whom received penalties that we have calculated as being 5 per cent of their pre-tax annual profits.

The *Tobacco* decision has now been published, it had not been published when I made submissions on this point in previous appeals – it was publish a week ago on 6th July. Most of the figures used in the penalty calculation from *Imperial Tobacco* are redacted so it is difficult to have much of a precise comparison, but one can see that *Imperial Tobacco* had a

step one starting percentage of 7 per cent, i.e. comparable to those involved in compensation payments in the present case, as opposed to GMI's 5 per cent starting point. The OFT has simply refused to engage in a comparison between these cases. The OFT is unwilling and unable to explain why there should be such disparity in treatment between us and more serious infringers. As to the impact of the penalty upon us now, the position is the construction industry has been hard hit by the recession. GMI was no exception, you have witness evidence from Mr. David Shann, which was served with our skeleton argument – his second witness statement which was served with the notice of appeal. There was some response from the OFT in its skeleton argument, particularly para. 89. Mr. Shann served a third witness statement on the Tribunal last week, which brings the current financial position fully up to date. There is one correction I would ask you to make to Mr. Shann's third witness statement, and that is that on p.3, para.7 he refers to the date "2010" and it should be "2011", so when you come to look at that witness statement I would ask you just to make that correction.

His statements, as we said when serving them, contain some confidential information, I do not propose to refer to them in open court, the Tribunal will read the statements and will understand the current financial situation as he has explained it.

We say quite simply we have sought to be co-operative, as I have already said we asked to meet with OFT officials to discuss the allegations before the SO came out but we have simply been, at the end of the day, clobbered with a disproportionate and unfair penalty. We have set out our arguments fully in our notice of appeal and skeleton argument. You have seen the parties' respective submissions and I am not going to go through all of those in detail, I just want to concentrate on what seems to us to be the principal substantive points of difference highlighted by the OFT's skeleton argument; obviously to the extent I do not comment orally on submissions advanced in writing by the OFT that is not to be interpreted as any acceptance of them.

The second of my headings is the Tribunal's jurisdiction, this is addressed in our skeleton argument at paras. 136 to 154. Quite simply the point is this, your jurisdiction is a full appellate one; we say you are not inhibited in exercising your jurisdiction by anything the OFT has done by way of penalty calculation, and if you think the OFT has gone wrong you are not bound to respect any so-called margin of appreciation which the OFT purports to arrogate to itself. That is all I need to say about the nature of the Tribunal's jurisdiction on penalty.

Thirdly, the seriousness of the infringement. Our submissions are set out in our skeleton argument at paras. 155 to 168. Our case is simply that the OFT implies in its skeleton argument, para. 44, that this is a case of a most serious infringement of competition law. It is not. The OFT said the Step 1 starting point at 5 per cent, and that seems to us on a scale of 0 to 10 per cent for penalties, it is in the middle, it is an infringement of middling seriousness and therefore it does not justify such a swingeing penalty.

We have invited the Tribunal to considerate justice of the penalties in comparison with penalties imposed for serious infractions of criminal law, such as corporate manslaughter. This topic has been considered in detail in the *Sol* hearing – we are really intervening in support of Sol on this point. That hearing took place on 6th July before Panel chaired by Miss Rose. The transcript of that was only made available on the Tribunal website last night. We propose to put in further written observations on the comparison with criminal penalties in pursuance of para. 3(f) of the Tribunal's order of 25th January and I would rather do that having considered the debate that Mr. Thompson will have had with Miss Rose in that hearing.

Our basic point is that even if you use criminal fines in cases of corporate manslaughter or causing death through breaches of health and safety legislation -- even if you use that as only the broadest of cross-checks as to the justice of penalties, it is clear that even for the most serious criminal offences the GMI group would not face a fine of £1.75 million, particularly for offences committed ten and five years ago respectively. This is not a case of extreme seriousness. We are only at the mid-point of the scale of seriousness.

Turning to the fourth of my headings - the flaws in the OFT's penalty calculation - this is set out in GMI's skeleton at paras. 169 to 292. We have set out where we think the OFT's penalty calculation went wrong and ended up with such a high figure. Firstly, tendered and non-tendered work. This is a topic that the President has heard submissions on in the Thomas Vale appeal. There are also detailed submissions on this point in the Tomlinson appeal, heard by Miss Rose on 6th July.

We have the following submissions to add to the basic point that cover pricing did only and could only have affected single stage construction work. The OFT has excluded turnover from certain types of construction work based on type of procurement from its penalty calculations - that is turnover in construction work procured through PFI and other public/private partnerships. We submit that the same logic should apply to exclude turnover, equally not affected by cover pricing. That is turnover procured through negotiation, for construction work procured through framework agreements. It is the case

that cover pricing only affected single stage tenders. We have served evidence specifically in support of this point from an independent quantity surveyor, Mr. John Burnley, and that is attached to our Notice of Appeal (Bundle 2, Tab 4). He addresses this specifically at paras. 8 to 13.

You also heard evidence yesterday from Mr. Naylor on the difference between single stage and two stage tenders. Again, that supports what we have said in our written Notice of Appeal. The relevant passage of Mr. Naylor's evidence is in the transcript at p.10, line 28 to p.11, line 11.

The second flaw, we say, is that the OFT has failed to take into account that the construction industry is one characterised by high turnover, but in comparison to turnover low margins. We say a turnover-based approach to penalty in such an industry will lead to a disproportionately severe penalty. To be clear, because my learned friend Miss Bacon, in one of the hearings before Lord Carlile, asserted that we were submitting that penalty should be calculated by reference to profit. We are not submitting that turnover should not be the basis for penalties but not all turnover is equal. It has to be understood for what it is. It has to be used as a tool for penalty calculation in an intelligent manner. A high proportion of turnover in the construction industry is simply payment to subcontractors. The figures before the Tribunal in the various appeals showed that between about 60 to 80 percent of construction turnover is simply payment to sub-contractors. We invoiced the client for work carried out by subcontractors. We received payment. Then we paid the subcontractors. It has to be accounted as our turnover. Mr. David Shann deals with that in his second witness statement at paras. 25 to 28. But, it is little more than money flowing through our books. As Mr. Shann pointed out in his first witness statement at para. 24, when the Office for National Statistics collects statistics in its monthly business survey pursuant to its statutory powers under the Statistics of Trade Act 1947 in order to estimate UK gross domestic product, it instructs construction firms to disregard subcontractor turnover. The obvious reason why the ONS does that is to avoid double-counting because when subcontractors report their turnover it should not also be reported by a construction firm. But, the point that Mr. Shann is making there is that when the ONS is estimating UK GDP, looking at the financial strength of the UK, it gets construction firms to take out subcontractor turnover, and that is reported separately by subcontractors. It is an indication of their financial strength. It is not an indication of our financial strength.

The OFT has said that low margins in this industry are not exceptional. We say to that, "Well, just simply look at the outcomes in the *Tobacco* case and the milk and cheese case.

Whatever the precise margins might be, the outcome in these circumstances is a fine out of all proportion".

The third of the flaws is that the OFT has failed to take into account that there was no effect on price as a result of cover pricing. The OFT submits at para. 57 of its skeleton that lack of effect is simply not relevant to penalty calculation in an object infringement case. They refer in support of that submission to the Commission's horizontal co-operation guidelines. Those paragraphs have nothing whatsoever to do with penalty calculation. They merely reflect the test for finding infringement by object rather than effect. The same goes for the OFT's reference in its skeleton at Footnote 84 of its skeleton to the *Glaxo Smith Kline* case. It is exactly the same point.

The Court of Justice has said in *T-Mobile* case (authorities bundle 8, Tab 115, para. 31) that in an object infringement case the effect is not relevant to establishing infringement "whether and to what extent in fact such anti-competitive effects result can only be of relevance for determining the amount of any fine".

So, anti-competitive effects can be of relevance to determining the amount of any fine. Now, the fact is that the OFT has not just demonstrated anti-competitive effects resulting from any of the infringements. There is no evidence that price has increased as a result of cover pricing. We say it is not legitimate for the OFT to suggest that the effects of infringement might have been capable of being proved. The fact is that in the Decision there is no such finding.

It appears to us from hearings in front of Lord Carlile two weeks ago that the OFT had failed to realise that it had a discretion to take lack of effect on price into account. I refer the Tribunal to the transcripts of those hearings. They are the Hobson & Porter and JH Hallam appeal hearings. The most useful passage is to be found in JH Hallam at p.14, line 15 to p.15, line 16.

Moving on to multiple penalties and arbitrary choice of infringements -- The arbitrary nature of the penalties is well illustrated by GMI's two penalties.

THE PRESIDENT: Just pausing for a moment. What do you say the effect should be? They have not made any findings of any effect on prices - certainly not in your case. I think that is accepted. Your argument is that it is a mitigating factor - there is no effect. If we found there was no effect, or ----

MR. ROBERTSON: The OFT's case is that it is simply, as a matter of law, irrelevant; therefore, they did not exercise any discretion. We say they did have a discretion. They failed to

realise they had it. That is why they did not just exercise it. If they had exercised it, it could only have led to a reduction in the fine.

THE PRESIDENT: It is another factor, in addition to the other ones you have mentioned, that you say goes to mitigation of the fine effectively.

MR. ROBERTSON: Yes. We say, "Contrast the *Tobacco* case and the milk and cheese case", both of which were cases about essentially collective enforcing of resale price maintenance. In milk and cheese I think the OFT's case - there is no final decision; it is only a press release at this stage because they have not got to the final decision - at the press release stage was that there had been collectively agreed price increases in milk and cheese to consumers, and those were implemented on supermarket shelves. Consumers, as a result, paid more for milk and cheese as a result of the infringements. There there was a demonstrable effect. Here there is none. Why should our penalty be so much more relatively severe?

THE PRESIDENT: It is hard to imagine that it would not be the other way round - if there were obvious effects - damage to consumers - as a result -- It would be odd if that was not taken into account in aggravation.

MR. ROBERTSON: Yes. That is the point the Court of Justice makes in *T-Mobile*. "Look, it is a relevant factor, but only to fines in an object infringement case". The OFT referred to the case law on object infringement. They referred to the *Apex* Decision of this Tribunal. But, that is about establishing infringement. That is about explaining why cover pricing is an infringement by object. That is not disputed.

THE PRESIDENT: I think the OFT's case is that there are other effects in relation to cover pricing - not necessarily directly on price, but other undesirable effects.

MR. ROBERTSON: There are reasons why it is undesirable, but there is no finding that anyone lost out -- paid more than they would otherwise have done as a result.

Going to the arbitrary choice of infringements, and the decision to levy multiple penalties -- Well, as to the arbitrary nature of the penalties, GMI's two infringements are a pretty clear example of that. The penalty for giving cover in 2000 is £1.75 million. The penalty for taking cover in June 2005 is £2,760. The first fine is obviously far too high. The second is nominal. The fact that penalties veer from one extreme to the other in this fashion shows that the whole methodology was not fit for purpose.

When it comes to the decision to levy multiple penalties -- We have received two penalties. The position is that three addressees of the Decision received one penalty; twelve (including us) received two; the remaining eighty-eight had three. The OFT, in the penalty defence,

had given us the impression at para. 252 that the OFT was seeking to use the number of penalties to correlate to the extent of infringing behaviour. They state there that,

> "Where three infringements have been committed, a more serious penalty was imposed than if the undertaking had committed only one infringement. This is clearly sensible and proportionate".

In hearings in front of Lord Carlile, it is argued: how can that be when there is evidence from a company such as Irwins, of every third or fourth tender being submitted with a cover price, whereas for others the evidence is far less extensive or there are only isolated examples? The OFT clarified its position through Miss Bacon at the Francis hearing on 29th June in front of Lord Carlile. The OFT's position now is that it could not reach a conclusion as to the scale of infringement by any particular undertaking. Miss Bacon put it for the OFT (and this is at the Francis transcript, p.13, lines 32 to 33),

> "The truth is that the OFT will never know how many infringements certain parties committed."

Then, at transcript p. 14, lines 14 to 16,

> "There is simply not enough evidence, and the OFT has not got the resources, to make a comprehensive finding as to which parties are more culpable than others in this investigation and in these three infringements".

That seems to directly contradict para. 252 of the penalty defence and on the case now advanced by the OFT we submit that there is no justification for doubling or trebling the penalty for some undertakings but not others because the OFT has no basis for making a distinction between them. They all must be assumed to be, as it were, equally serious infringers of the Act.

This is not like the OFT just simply making a mistake. In one of the hearings - Renew - Mr. Beard appearing for the OFT in that case said (Transcript p.34, lines 5 to 10) that the OFT did make a mistake in the fine on Strata Homes. Lord Carlile observed (transcript, p.42, lines 22 to 26) that that was different from a case such as Renew where there was a cognitive process (to use his term) to fine by different multiples of penalties.

Simply, we say the OFT's decision to impose multiple penalties does not stack up because there is no basis for making a distinction between the undertakings as to the scale of their infringement.

Our next point on the flaws in the penalty calculation is the decision to divide the country – I say the country, I mean England, because the OFT did not go into Wales and it did not go into Scotland or Northern Ireland – into nine regions and they took product turnover,

relevant product turnover, region by region. For those firms, such as us, who are regional contractors, most, or nearly all, of our turnover is earned in a single region. In the case of GMI we are based in Leeds. Most of our turnover is earned in Yorkshire and Humberside. The first infringement in this case was in product market in which GMI derived a large proportion of its turnover in 2008, even though the infringement was 2000, and so that accounted for 1.85 per cent of GMI's total turnover. The OFT say, "We have adjusted for this for national firms because we have levelled things out with an MDT threshold". That threshold is only 0.75 per cent of total turnover, but we have been fined nearly 2 per cent of total turnover. The reason for that is our turnover is derived in Yorkshire and Humberside. A national firm's turnover is derived nationally, and so they do not get such a large proportion of it caught for any single infringement.

We further complain about the comparison of the impact of the fines when compared with undertakings involved in compensation payments. We set out the figures in the skeleton argument. We have said if you compare us with those companies who were fined for engaging in compensation payments they have a 7 per cent starting point, so you would expect to see more serious fines. We have only got a 5 per cent starting point, but we have been relatively much more hard hit. The OFT does not dispute our calculations, they simply say, "We made a distinction at step 1 and that is sufficient". We say, "Look at the ultimate outcome and we have been harder hit".

THE PRESIDENT: Just remind me, Mr. Robertson – I am sure Miss Bacon will help us if you cannot – I had understood that the way they chose which penalty to impose the MDT on was that they usually adopted the later one. I am obviously wrong about that in your case, because it is not, it is ----

MR. ROBERTSON: We did not receive an MDT.

THE PRESIDENT: I am so sorry, you did not, because you were within the 0.75 per cent.

MR. ROBERTSON: That is right, if you look at infringement 14 ----

THE PRESIDENT: I am looking at it now.

MR. ROBERTSON: -- it is office building in Yorkshire and Humberside, the fine is £1.8 million.

THE PRESIDENT: I just assumed, because of the disparity in the two fines, that this was an MDT case, but it is not.

MR. ROBERTSON: If it was 0.75 per cent it would be considerably less. Why is it 1.85 per cent of total turnover? It is because it is office building in Yorkshire and Humberside. That is an area in which we derive a large proportion of our total turnover. If we were a national firm building offices nationally it would then be one-ninth of our turnover in offices.

THE PRESIDENT: You did not fall so that you needed to be capped, you fell ----

MR. ROBERTSON: No, we were not up at the 4.5 per cent cap.

THE PRESIDENT: The 4.5 per cent, no. We have had one that was.

MR. ROBERTSON: There are others. The Hallam case is an example of that.

THE PRESIDENT: Yes, it was not that, it was another one.

MR. ROBERTSON: No, Hallam was not in front of you. You will see submissions about the 4.5 cap which are that it is just way too high. It is not an issue for us. 1.85 per cent of total turnover is far too high as well in an industry where in good times margins are 1 to 3 per cent on average across the industry.

THE PRESIDENT: It is a slightly odd result where you do something six months after the Act comes into force, allegedly, and you get fined £1.8 million; you do something several years later, when people ought to know better on one view, and you get fined £3,000 for the second of the two offences. Anyway, there we are.

MR. ROBERTSON: That actually bring me on to the final flaw in the OFT's penalty calculation which is the use of last business year turnover. This is where Miss Bacon's clients criticise us for raising this objection based on "undisguised self-interest". When you are faced with a fine of £1.75 million, forgive us for unpicking it and seeing how the OFT has arrived at that.

You have already made the observation that it was for an infringement committed – the Act came into force on 1st March – within the first three months of operation of the Act. The OFT's original fining guidance also came into force in March 2000.

The original fining guidance said that you take as the base year of turnover for doing a fine calculation the last business year before the date of the infringement. That has not been applied here because the OFT changed its fining guidance in December 2004 and then moved to its approach of using the last business year before the decision is adopted.

There is a point about whether that was properly consulted on, the change in the guidance. We note from the transcript of the Renew hearing that Lord Carlile has asked the OFT to supply the responses to that consultation. The consultation was an OFT paper, OFT 423A. You have got that in the authorities bundle. If you look at the draft there is nothing that flags up that the OFT is changing the basis of its fine calculation. There is no big red hand saying, "Warning, this is a change at step 1 from what we have been doing up to now and what the European Commission does". Lord Carlile has asked for the responses to the consultation on that draft. The transcript reference in Renew is p.25, lines to 13. We would invite the OFT to confirm at this hearing that it will supply those responses not only to the

Tribunal in the Renew case but to all appellants in all appeals before the various Tribunals who raise the year of turnover as an issue because that will enable us to exercise our ability to make further submissions pursuant to para.3(f) of the Tribunal's order.

THE PRESIDENT: If it is going to be looked at by one of the Panels and if the same point arises before us we clearly ought to look at it.

DR. SCOTT: Just to be clear, my understanding is that there was not at any stage an explanation of what one might describe as the transitional position of those who were found to have infringed at a stage where one view of turnover is taken, but who were then going to be fined at a stage where a different view of turnover had been taken.

MR. ROBERTSON: That is correct, that is our understanding. Obviously I think that is for Miss Bacon to deal with when she addresses this point, but that is our understanding.

You will also have seen that a point has been raised in Apollo and Galliford Try, a submission that Mr. de la Mare is responsible for. He says that paras.1.15 to 1.16 of the current guidance show that the OFT did not appreciate that it was making a change because they are inconsistent with the new basis, but there are submissions in that hearing and I will deal with it if we see fit pursuant to para.3(f) by way of observations in those cases, but just to flag up to this Tribunal that that is an issue in those cases.

We have set out in our notice of appeal and our skeleton that this change in basis for the fine is contrary to Article 7 profit the ECHR, because the change in the fining guidance in 2004 has the effect of retrospectively increasing the maximum penalty that could have been imposed on us. The OFT have, when this point has been raised before, sought to rely on the *Archer Daniels Midland* case, which is in the authorities bundle 1, tab 11. That is a case under Article 15 of Regulation 17 where the European Commission enjoy a broad discretion as to how to fine, and they may change their policy from time to time.

The OFT does not enjoy a broad discretion as to how to fine. It enjoys a very narrow discretion, it says, under s.38 of the Competition Act. Section 38 says that the OFT **must** have regard to its guidance when imposing a fine. So it is constrained by its guidance pursuant to s.38. Section 38 has not relevantly changed. So at the time when we committed this infringement on the OFT's case, June 2000, the OFT was required to fine us by reference to turnover in the business year prior to the date of the infringement. It could not have used as its base the approach that it has now used in this decision. We say that is a retrospective increase in the maximum penalty.

The OFT has said that there are good policy reasons for not applying the guidance in force at the time of this infringement. It is said that it may be difficult to get historic turnover

figures now for events that took place back in 2000 or 1999. However, the OFT did require addressees of the statement of objections to produce sector specific turnover figures from the year 2000 onwards, and we had no trouble in supplying those figures. You can see them, they are there in the annex to our notice of appeal, file 1, tab 5, pp.181 to 199.

The OFT asserted in the Seddon appeal before Miss Rose that the reason why it obtained those figures was simply to check that it was not exceeding the statutory cap. If that was the case it only needed overall turnover figures. The OFT instead required us to supply turnover broken down by product and geographic market definition and we provided it. When we provided it we rather thought that the OFT was going to go back, recognise that this was a long drawn out investigation and apply its original fining guidance. We turned out to be wrong.

THE PRESIDENT: I am sure you tell us somewhere in the skeleton, but what would the result have been – the starting point result?

MR. ROBERTSON: I do not think we have actually given you the specific figure, but it would have been much, much lower.

THE PRESIDENT: If you have not got it, it does not matter.

MISS BACON: Sir, I can help you in part because the OFT did a calculation based on what the relevant turnover would have been had the old rules been applied, and what they did was not say what the fine would have been but say what the fine as a percentage of the relevant turnover would have been then. You can see that in GMI's case at p.1761. It is a line that appears in every single one of the fine calculations where they say that penalty is a percentage of pre-1st May 2004 turnover. That means the turnover that would have then been relevant under the old guidance. It only applies in this case for the first of the infringements because the second was after that date anyway.

THE PRESIDENT: Yes, that was your cross-check.

MISS BACON: That was the cross-check, exactly, so we do not calculate what the fine would have been but the cross-check is there for every case and you see it is 4.42 per cent.

THE PRESIDENT: Yes, 4.42 per cent.

MISS BACON: In the case of GMI. That is a partial answer to your question.

THE PRESIDENT: Yes, yes, you do in para. 260.

MR. ROBERTSON: That is the overall turnover figure. What we have not done is provide the recalculated fine.

THE PRESIDENT: Yes, thank you very much.

MR. ROBERTSON: The position is the OFT say "If we recalculated the fines there would be winners and losers" the implication being it would all come out in the wash. That is incorrect because the evidence I have seen from all appellants that I act for is that turnover has increased during the first 10 years of this century, peaking in 2008 and then, as a result of the financial crash, precipitated by the Northern Rock crisis at the end of 2007 we have gone into a recession and Mr. Shann's witness evidence gives you the figures on turnover and so on there.

Unfortunately, the OFT's decision to use last business year as an approach at the time it took this decision captured the peak year of turnover for most if not all construction firms, the same with all of my clients.

As to the OFT's winners and losers argument, they have the figures because addressees of the SO were required to supply them, and all my appellants supplied those figures – I have not understood there was difficulties with anyone else supplying those figures – the OFT could pretty simply, it would be a day or twos work, recalculate the fines for the appellants on the basis of the original guidance rather than the existing guidance. So the OFT is in a position to assist the Tribunal on this point but has not done so. The furthest it has gone is Mr. Beard in the Robert Woodhead appeal before Lord Carlile on 30th June said there are some cases where earlier turnover would have been higher (p.14 of the transcript, lines 22 to 27). I am willing to bet Mr. Beard a point – or several – that that number is a tiny proportion of the total, but the basic submission is that the OFT is in a position to assist the Tribunal on this point and has not done so.

THE PRESIDENT: The question of winners and losers can be dealt with by adjustments, anyway. This is the problem with a mechanistic approach, the assumption seems to be that you cannot vary anything to make it fair, and once the formula has produced a figure you are very reluctant to move away from it.

MR. ROBERTSON: I think that was a point that Miss Rose was putting to the OFT in the guise of Mr. Unterhalter last week in I think the Seddon case, in relation to MDT because she was saying MDT, the decision to apply it, at what point did the OFT ever stand back and say the figure we have arrived at pre-MDT is not sufficient punishment to deter. Mr. Unterhalter's response was "This is the methodology we adopted in an attempt to be consistent", but I refer you to the transcript of that hearing.

The final submission I have to make, and this is my final substantive submission, on last business year the OFT say notwithstanding it is a long, drawn out investigation and these infringements date back to 2000 that is our guidance and we apply it, I do just note that in

the *Tobacco* case the OFT accepted that the length of that investigation which is comparable, as far as I can see, to this case, was a reason for reducing the fine in that case by 10 per cent, and that is just a final reduction that they add at the end of the penalty calculation in that case. It is explained in that decision at paras. 8.122 to 124 and they explain why they have done it. It is not a matter identified as a consideration in their guidance. They have applied that reduction in that case, but nothing comparable in this much bigger case.

You have our financial hardship, financial situation submissions in writing, and I am not going to go into those, I just draw attention to the fact that Mr. David Shann's third witness statement picks up the OFT on the comparison with the *Northern Irish Livestock Auctioneers' Association* case where no fine was imposed in that case for two reasons, one of which was that the industry had had a hard time because of BSE in the 90s and the foot and mouth outbreak in 2001. Mr. Shann has gone back to the evidence about the impact on auctioneers in Northern Ireland, and has explained why the impact of the recession on the construction industry is in fact rather more severe in that case contrary to the OFT's assertion in its skeleton argument.

As to the matters that we say you should take into mitigation, this is our final heading, that is set out in our skeleton at paras. 293 to 330, and we really have little to add to that. We have consistently pointed out the OFT methodology would lead to absurdly high fines, and we invited the OFT – as did all my clients - in response to oral hearings, those that had oral hearings, but in response to statements of objections, to adjust its methodology to take into account the various flaws that I have outlined. The OFT made no adjustment at all, the OFT essentially just stuck to its guns and applied the approach that is set out in the statement of objections with the result that we have all seen for ourselves.

Sir, unless I can assist you further, those are our submissions on penalty.

THE PRESIDENT: Thank you, Mr. Robertson. Are you content to bash straight on?

MISS BACON: I think I should "bash" straight on in the interest of finishing before lunch time if possible.

The way that I want to approach this is more or less to reflect the order in which Mr. Robertson took his points, save that he started off dealing with the impact on GMI, I am going to leave that to the end when I take you through the figures on financial hardship, and we may need to go into camera for a short time at that point – we can discuss with Mr. Robertson if that is necessary. What I want to do is take you through the most recent annual accounts, that is 2009 accounts, so perhaps at that point Mr. Robertson can consider

whether the figures in those accounts are confidential. I do not want to go over the witness statements and they speak for themselves, and the Tribunal can take a view on that.

What I want to start off with then is making some comments about the Tribunal's role in this appeal, which was Mr. Robertson's first substantive submission, and then comment on the seriousness point, then go through the other arguments of principle that Mr. Robertson went through in turn, identifying what he says are the flaws in the penalty calculation. I have said right at the end that we will look at financial hardship.

Two points to make in relation to the Tribunal's role, and the first is the role of guidance. Mr. Robertson's position, as it has been in all of the appeals which he has brought to the Tribunal, is that the Tribunal is not bound by the penalty guidance, that is common ground. The difference between the OFT and Mr. Robertson for GMI and the other appellants is what that actually means in this case. What does it mean to say that the Tribunal is not bound by the guidance. Where we differ is how you reconcile the fact that the Tribunal is not bound with the fact that the guidance is there. It has been promulgated by the OFT following the statutory scheme in the Competition Act, and it has been proved by the Secretary of State, so you cannot ignore it completely.

In our submission, the way of reconciling this is to say the fact that the Tribunal is not bound means that it can say in a particular case that if the appellant advances the argument that the OFT should have departed from the guidance, because the guidance is wrong in law, the Tribunal can accept that argument.

THE PRESIDENT: Just help me on this, because we have had a lot of cases one sometimes gets them muddled. There has not been any full frontal attack on the guidance.

MISS BACON: That was the point that I was going to make next, yes, exactly.

THE PRESIDENT: So do we need to worry about it.

MISS BACON: The reason why I make the point is that that is an example of a case where the Tribunal would not be bound by the guidance. If an appellant comes along and says: "This bit of the guidance is erroneous in law, you should ignore it completely", the OFT could not ignore it completely because it has to take into account the guidance. The Tribunal can say: "I agree with you, it is wrong, and now we are going to ditch that out of the window, and we are going to look at it without taking account of that." But in this case, and in pretty much all of the other appeals, as far as I am aware, there is not a challenge to the guidance. What Mr. Robertson is saying in this case and all of his other appeals is not that the guidance is wrong, what he is saying that the OFT applied the guidance incorrectly; there is no specific challenge to the guidance. So the Tribunal then has to decide the case within the

parameters of the appeal that is brought, and if the appellant is saying: "You, the OFT, have simply applied the guidance incorrectly", then the Tribunal needs to actually ask itself: "Is that correct? Has the guidance been applied incorrectly?" So that the Tribunal cannot in that case say "We are not going to look at the guidance", it has to in order to decide the challenge that has been brought by an appellant in that particular case. That is why in this case the Tribunal cannot ignore the guidance.

THE PRESIDENT: I do not think the Tribunal would every ignore the guidance, but I think the feeling has been – and this emerges from some of the earlier decisions of the Tribunal, Sir Christopher Bellamy's decisions endorsed by the Court of Appeal, that we do not ignore the guidance but we can look at the fine independently, and so we can take account of the guidance and the way that the OFT approached it but that does not stop us looking at the matter in the round.

MISS BACON: The Tribunal is entitled to substitute its judgment if it thinks that the OFT has erred, but in order to find out whether the OFT has erred it has to ask itself in this kind of appeal, when there is no challenge to the guidance, whether the OFT has applied the guidance correctly. So the starting point is always going to be: look at the guidance, how did the OFT apply it? Did it get it wrong? If the Tribunal finds that the OFT got it wrong then it can substitute a figure which it says was right, but again, on the basis of the parameters of the guidance.

THE PRESIDENT: Leave aside the business year issue, and the change to the guidance, leave aside those points, but subject to that most of the argument, at least in the cases in which I have been involved, have revolved around the MDT, and you will not find anything in the guidance about the MDT.

MISS BACON: What there is is the ability to make an adjustment for deterrence.

THE PRESIDENT: Yes, and no one really takes issue with that. So most of the argument has not been about the guidance, and the guidance sits there, and may be perfectly suitable as far as the argument has gone. It is really what flesh has been put on the guidance.

MISS BACON: What flesh has been put on the bones. In this case there is not an MDT argument, but there are a number of other arguments where we say there is no challenge explicitly to the guidance, but what Mr. Robertson is trying to do is say that "Although I am not challenging the guidance, you should have done something different". I will come to that, but examples are things like geographic market definition, product market definition, relevant turnover.

The submission being made by GMI and by Mr. Robertson in his other appeals is that we should have departed from that in some way, but our submission is that we were not entitled simply to depart from it, we had to take account of the guidance. If we had departed from it we would have had to give very good reason for doing so, and there is no reason put forward by Mr. Robertson why we should have looked at the guidance, where it says, for example, you look at relevant turnover in the product market and the geographic market and then say: "I am just going to ignore that because actually we are just going to do a total turnover calculation", we are just going to say what is the total worldwide turnover? What is an appropriate level? 0.75 per cent, give everyone a 0.75 per cent fine. That would be to depart from the very careful methodology that is set out in the guidance and, in our submission, he can only advance that argument if he is mounting a challenge to the appropriateness of the guidance on this point.

DR. SCOTT: It seems to me, as the President has said, there are two lots of guidance, and there is the question about the legitimate expectation and the legal certainty of an infringer in circumstances where there was one lot of guidance available at the time of the alleged infringement, and a different lot of guidance at the time at which the OFT were calculating the penalty. So, that is one issue. The Guidance is guidance and there is an expectation that it will be applied thoughtfully. That expectation is recognised in the making of adjustments, and, indeed, in the setting of percentages and in the cross-checks that occur.

The fact that to depart from the Guidance means that the OFT must explain itself has obvious impact on the way in which the OFT behaves, but it does not mean that the OFT should not think, "Is the Guidance appropriate to the calculation we are doing in relation to this particular infringement"? Clearly, for reasons of fairness in a case like this it has got to think, "How do we deal fairly with the generality?" as well as, "How do we deal fairly with the particular?" But, it certainly does not mean that the OFT must feel bound by its Guidance. When we come to deal with it, yes, we should take the Guidance into account as the President has said, but, likewise, we must do so intelligently and ask ourselves, "Are there good reasons why at a particular stage either the Guidance should, for good reasons, not be followed, or that an adjustment should be made in looking at the overall impact of the mechanistic approach".

MISS BACON: That is absolutely correct, but it brings me back to my point about how the appeal is put. There may be cases where an appeal is put on the grounds that the OFT should, in the circumstances of this case, have departed from the Guidance. But, that is not the appeal that has been advanced by GMI. GMI is not saying that this was a case where it

was inappropriate to apply the penalty guidance. What it is saying is, "You did apply the Guidance. You should have applied the Guidance. But, you got it wrong in exercising your discretion applying that". In that kind of a case the starting point is to ask whether the OFT got it wrong - not whether the Guidance should have been departed from because that is not GMI's case.

THE PRESIDENT: No. The question is effectively whether -- The Guidance itself leaves plenty of scope for different decisions at each stage.

MISS BACON: Yes That was actually going to be my ----

THE PRESIDENT: The question is whether that has produced a fair and proportionate and reasonable result.

MISS BACON: That was going to be the next point actually. The other point I wanted to make about the role of the Guidance was the margin of appreciation. Mr. Robertson has said, "Well, the OFT does not have a margin of appreciation" -- It may be helpful to explain what we mean by that.

THE PRESIDENT: Yes.

MISS BACON: Cases such as *Argos* and *Achilles* refer to a margin of appreciation because, as you have just said, the Guidance does not give a mathematical formula that can be applied mechanically in each case. What it does is set out a set of broad parameters for the penalty calculation to show the way that it should be done and the kind of factors that should be taken into account - the broad parameters. So, that does not mean that we are saying the Tribunal can only intervene if the OFT has acted irrationally. It is obviously a merits appeal. So, the threshold for intervention is whether the OFT got it wrong. However, the effect of the Guidance setting out parameters rather than a precise calculation is that in applying the Guidance there will inevitably be a range of possible correct outcomes rather than one single correct outcome. That is what we mean. So, the Tribunal needs to say not whether the OFT's Decision was right or wrong by reference to a single correct outcome point, but by reference to the range of reasonable outcome values under the penalty guidance.

THE PRESIDENT: It used to be said that the Court of Appeal should not tinker with sentences in the criminal context. Tinkering. In other words, "We would rather have added a bit more on --" In other words, you should look for significant problems with the sentence.

MISS BACON: Yes, that is another way of expressing the same thing.

THE PRESIDENT: It would be tinkering to interfere with that range. I think that is what you are saying.

MISS BACON: Yes. One does not tinker within the reasonable range. You say whether it is so wrong that it falls outside the range of correct values, assuming, as we say, that there is a range rather than a single ----

THE PRESIDENT: Speaking for myself, I am attracted by that.

MISS BACON: Can I then move on to the seriousness? Seriousness is the opening gambit in all of Mr. Robertson's appeals. What he says is that he accepts the 5 per cent starting point, but the out-turn, applying that starting point, was too high. The first way that he puts that is to adopt, as he explained this morning, Sol's comparison between the scale of the fines and fines imposed for offences such as corporate manslaughter. We have dealt with that in our skeleton argument. Mr. Unterhalter also dealt with it extensively on Friday in the course of the Sol hearing. I do not propose to say anything more about that, save to just draw your attention to Lord Carlile's comment in the GAJ hearing on 29th June. He commented that,

> "Speaking personally, comparing a criminal penalty in these fines seems to me more like comparing apples and an obscure vegetable".

That is essentially our submission. It is not apples and pears - it is apples and obscure vegetable. Comparison with corporate manslaughter is simply, in our view, inappropriate. However, Mr Robertson has said that he will be putting in further submissions by way of written representations after he has seen the Sol transcript -- or, had a chance to go through it in detail. So, if necessary, we will come back to that.

THE PRESIDENT: We had some quite detailed submissions - Mr. Smith and I - I do not think Dr. Scott was involved in it - from Mr. Thompson. So, we will also look at those transcripts.

MISS BACON: Yes. Exactly. I do not want to re-invent the wheel. We are aware that it has been dealt with in a number of cases now.

The other way of putting the seriousness comparison is to say, "Well, if you stand back and look at other cases in the competition law field - such as *Sainsbury* and *Tobacco* - the out-turn fines were lower by reference to some metric or another, such as total turnover. In our submission, equally, looking at different cases with very different facts, very different market structures, a different legal analysis is not going to assist the Tribunal on the facts of this case The reason why, in some cases, the total fine is lower by reference to total worldwide turnover is usually predominantly because relevant turnover as a percentage of total turnover is less. That is the reason why there are variations within this appeal, within the decisions reached by the OFT on all of the different infringements in this case. That is why there are different fines, and why there is a range of between -- a very low fine by

reference to total worldwide turnover up to about 4 per cent which was where the OFT got to after it applied its capping methodology. I will come on to the cap bit later. So, the variance here is between very little and 4 per cent. That is just because different undertakings have different structures. Some have very concentrated relevant turnover. Others have much more disparate relevant turnover. It is the same with construction undertakings and other industries.

So, really, the only way that you can get round that is by saying, "Ditch the whole nuanced methodology for calculating the fine" which is by reference to looking at the relevant product market, looking at the relevant geographic market, looking at the relevant turnover in the year prior to the Decision applying and the starting point". You just ditch all of that and say, "Oh, I am just going to take a flat rate - a percentage by reference to total worldwide turnover". However, that, with respect, is something that has never been suggested would be a correct methodology. The European Court itself, quite early on in the *Musique Diffusion* case, said that it was simply not correct to carry out a calculation just based on turnover; a total turnover measure is much too crude. That is why the European Commission has a more nuanced fining methodology. That is the reason why we have a more nuanced fining methodology.

THE PRESIDENT: Unfortunately, we ended up in some of the cases - not this one - with fines that were almost totally based on total worldwide turnover because there was very little turnover in the relevant year in the UK, or in any of the relevant markets, and therefore one looked at turnover. There was one case where it was vast - in the billions - and so one got a vast fine. It is totally based on worldwide turnover.

MISS BACON: The reason for that is that the way the methodology works is you have a starting point that is based on relevant turnover and then the OFT has said that in this particular case, in the context of these decisions there were some companies who did have a vast turnover. That meant the fine would hit them enormously less than a company who had a large relevant turnover in a much smaller total worldwide turnover by comparison. Therefore there was an adjustment by reference to the total turnover. It was not a case of saying across the board, "We are just going to have a level out at 0.75 per cent".

THE PRESIDENT: No, certainly not. No. It was not across the board. It had that effect in some cases.

MISS BACON: If you are talking about the MDT it was an adjustment because the starting point was too low and it was adjustment made by reference to total turnover, but on no basis was the OFT saying, "Our fining methodology is just going to be based on turnover" which is

what you would have to do to produce some kind of parity of the kind that Mr. Robertson is saying that the OFT should achieve. In my submission, if he wants to say that, then he has to mount a frontal challenge to the fining methodology in the penalty guidance, because the penalty guidance has never said that a simple turnover-based calculation would be appropriate.

In our submission the causal reason for these different results in different cases, both within this Decision and by reference to other cases is simply a result of the fining methodology being nuanced, being not a crude methodology, but being a nuanced methodology that takes account of different relevant factors.

THE PRESIDENT: What we do not see, Miss Bacon, in any of these cases is a sort of step back, and to say, "This is what the formula has produced -- the steps have produced". We do not see at any stage a step back, and another step maybe, and saying, "Is this, albeit that it has been produced in a way that we hope is consistent as between all the different cover prices, actually on the facts of this particular case, given how long ago it was, given the size of the undertaking, given its present circumstances -- Does this look a right, fair, proportionate fine?" What we see sometimes are very odd results, such as in this case, where you get the offence back in 2000 being fined £1.75 million and an allegedly identical similar offence - an analogous offence - five years later where you are fined £3,000". I can see why they are different, but there is no mind being applied to whether that is a sensible result.

MISS BACON: Can I answer that in two ways. The first is that we would disagree that we have not stepped back. We actually did step back and that was what led to the two outlier adjustments if you like. Had we applied the methodology mechanistically we would not have had an MDT and we would not have had the cap. We would have had a range of fines that were based on relevant turnover with no adjustment, and then various adjustments for factors such as compliance or co-operation, and so on. You would have had quite large variants in the level of the fines with some very large undertakings having a low fine by comparison with total turnover.

THE PRESIDENT: So, you could have adjusted them.

MISS BACON: So, for that reason there were adjustments at both ends. So, there was the MDT adjustment at the bottom end to bring up, to bump up the fine because it was not sufficiently severe for the larger undertakings with an enormous worldwide turnover. At the other end there was an adjustment downward by reference to the cap which was the 4.5 per cent. So, the OFT did stand back and say, "What is the reasonable range of fines for this ----"

THE PRESIDENT: It did not stand back on the individual cases. It just applied the formula to the individual cases. It had a formula which was designed to deal with what you have just described, but it did not stand back and say, "In this case, with this company in its circumstances is that an appropriate fine?"

MISS BACON: To one extent it did, which was looking at the financial hardship representations. If a company did come along -- We say that that was the appropriate stage to take into account individual circumstances. But, we had 103 undertakings which were the subject of the decision.

THE PRESIDENT: That I know.

MISS BACON: Had we, on each individual case, not by reference to any of the others, looked at them and said: "Well, on this case we are going to have a fine that is 2 percent of turnover" or "In this case we are going to have a fine that is 4 percent of turnover" no doubt we would have had even more appeals on the basis that the OFT's methodology was arbitrary. The OFT had to strike a balance between taking into account the overall circumstances of all of the cases and arrive at a result that was fair and equitable across the different cases. You have already seen that Mr. Robertson says, "Well, by comparison with compensation payment cases we were too low – too high, and by comparison then with this other group we were too low". So, he has come along and sliced the cake in lots of different ways to show that if you do it in lots of different ways it is all terribly unfair. But, on the other hand, he is saying, "Well, it should have been even more unfair because you should have looked at each individual case in all the 103 and done it differently".

THE PRESIDENT: That is because you have brought 103 individual contracts - not one cartel, but individual contracts - and effectively put them through the same template.

MISS BACON: That is true. There are 103 cases that have been assessed using the same broad methodology. What the OFT did was to say, "What factors are relevant distinguishing features for each case?" It went through and them, and it thought, "This is the same kind of market, it is the same kind of infringement, there are several distinguishing features, one is that some undertakings were involved in compensation payments and others were not, so we will make a distinction on that basis". Other distinguishing features, different markets in which the infringements were committed, that is part of the fine methodology. It was not the case that we just put them all through the wringer mechanistically. The OFT looked at the submissions that were made as to what the distinguishing features of each case were and decided which of those, in its view, were relevant distinguishing features. The reason why it did not then take others into account by making an adjustment was that it considered those

and thought that the actual size of the undertaking, as an absolute unrelated to turnover, the number of employees you have got, for example, is not a relevant factor. The market share is not a relevant factor. What is relevant is looking at the total turnover, looking at the relevant turnover, in the various different markets. That is the way the fine was individuated by reference to the individual undertakings. It certainly was not the case that we just decided at the start, "These are all, 103, they have committed the same kind of infringement, so we will just apply this formula mechanistically".

The decision sets out in some detail what factors the OFT considered were relevant to merit adjustments and which were not.

THE PRESIDENT: I am sorry, we have taken you out of your course.

MISS BACON: I am just hoping that I manage to finish by one, but we will see how we go. Can I turn to the specific flaws in the penalty calculation. That was Mr. Robertson's next broad heading, tendered and non-tendered.

THE PRESIDENT: We are not limiting you to one o'clock by the way.

MISS BACON: I will do my best, but it may be that I cannot finish.

THE PRESIDENT: You are not limited to that.

MISS BACON: Tendered and non-tendered work: Mr. Robertson says that the step 1 calculation should have been carried out only by reference to turnover in tendered work, and should not have included turnover in non-tendered work. Some of the other appellants make this kind of argument on the basis of a challenge to the product markets defined by the OFT.

Mr. Robertson does not challenge the product market. GMI has not produced an analysis of supply or demand – substitutability, for example – or other legal economic arguments that would suggest that the OFT's product market was wrongly defined. The starting point has to be that the product market stands unchallenged. What he essentially seems to be saying is that, although the OFT had a product market that included both tendered and non-tendered work, for some reason the OFT should have departed from that in the circumstances of this case. The first response to that is, if you think the product market should have been different then bring a challenge to it and say why it should have been different.

Turning to the specific reasons as to why, even without bringing that challenge, he thinks that we should not have, on some *ex gratia* basis or discretionary basis, followed it. He says that we did exclude turnover for PFI and PPP projects, so we should exclude turnover for other kinds of non-traditional procurement. The short answer to that is that that was part of the market definition. As part of the market definition, which included a very extensive

market analysis involving surveys sent to clients, surveys sent to contractors, the OFT considered that for PFI and PPP projects supply size substitution was more limited and so it took the view that on that basis they fell outside the relevant market. In relation to tendered and non-tendered work, again on the basis of the OFT's market analysis, its conclusion was that, in fact, on both the supply and demand side consumers and suppliers could switch between different procurement methods. So it was justified in including that within the relevant market and therefore justified in including it within the relevant turnover figures.

The second argument that Mr. Robertson makes is that only single stage tenders were capable of being the subject of cover pricing. That misses the point that the reason for using relevant product market is that the OFT is looking not at the individual products which were or could have been the subject of the infringement but at the products which could reasonably have been considered to have been affected by the infringement, in particular as to the prices charged. This point was made in the Tribunal's judgment in the *Replica Kit* case, and perhaps I can just give you references rather than taking you to it. The first is *Umbro*, and that is at authorities bundle 4, tab 50, and the relevant paragraphs are 111, 113 to 116; and then *Argos* at tab 54 of authorities bundle 4, where the Court of Appeal approved the general approach of the Tribunal at para.173 and its specific conclusions at para.189.

In the light of those cases, in our submission, the argument on sub-division of the relevant product market goes absolutely nowhere.

Coming to the specific factual assertion that cover pricing could only take place in relation to single stage tender processes, that is not a submission that is accepted by the OFT on its facts. In cases involving two stage tenders it is self-evidently possible for a cover price to be given at the first stage of the tender process. In fact, in Quarmby's appeal last week we had evidence given by Quarmby that one of its infringements, which was infringement 233, was a two stage tender process. You will see that on the transcript. I merely refer you to that because it was quite surprising that this came up. The submission was made there too that you could not have cover pricing in relation to two stage tenders, and one of the tenders in the case was a two stage tender. That was what the witnesses said.

In any event, without even looking at specific cases, it stands to reason if you have a two stage tender that at the first preliminary stage you can have a cover price being given. It is more by negotiation with a select number of tenderers.

Another of the non-traditional procurement processes which Mr. Robertson says should have been excluded is a type of process which involves a framework agreement. In the first

place, if you have a framework agreement it has to be awarded, or it is often awarded, pursuant to a competitive tender process. So at the stage of awarding the framework you will often have a competitive tender pursuant to the European procurement rules.

Even after you have a framework agreement in place with one or more suppliers, there is often scope of mini-competitions when you call off particular projects under the framework agreement.

I just want to hand up some guidance on framework agreements which has been published by the OGC (Office of Government Commerce). I am not going to spend a lot of time on it, but perhaps I could just ask you to read pp.8 and 9 at some point which set out the mini-competitions that can occur and pull all projects under a framework agreement. (Same handed)

THE PRESIDENT: Thank you, pp.8 and 9.

MISS BACON: We do not have to go to it, but those are the pages that deal with mini-competition, para.4.8 and onwards, "Option to hold a mini-competition between capable providers".

Another procurement process might be a negotiated agreement. It is true that if you have a process where a client is negotiating directly with a single specific contractor there is not scope for cover pricing in that situation. There are several types of negotiated procedure, one of which under the procurement rules is a negotiated procedure with a call for competition which results in negotiations taking place between several undertakings. Even if you had a negotiated procedure without a call for competition, which is used in quite exceptional circumstances, that would often have been preceded by a competitive tender, because one reason for using a negotiated procedure under the procurement rules is that there has been a competitive tender that has failed.

Another reason why you might go down the route to a negotiated procedure is that there are unforeseen additional works or services that arise in relation to a contract that has been competitively procured. It is not the case that when you are in the realms of framework agreements or two stage tenders or negotiated agreements there is never any scope for cover pricing. It is not the case as a matter of fact and it is not accepted by the OFT. That point is made just for completeness, because the main point is that we did a market analysis, we found that there was a large amount of supply and demand substitutability, and on that basis tendered and non-tendered work, traditional and, to that extent, non-traditional methods of procurement were included in the same product market. So that, we say, is really the end of it.

The next specific argument made by Mr. Robertson was relating to high turnover and low margins in the construction industry. What Mr. Robertson said is that he is not suggesting that the OFT should have adopted a profit based methodology, but there should have been some kind of adjustment to take account of what he refers to as low margins consistently across the construction industry, and high payments to sub-contractors which are a cause or factor behind those low margins.

On the sub-contractors' point, we have dealt with that in our skeleton argument. We have referred to the *Outokumpu* cases where the European court said in terms that it rejected arguments made that adjustments should be made to take account of the input costs. It said what you should look at is the turnover figure. So a very similar argument was rejected by the European court there. I do not need to take you to that, it is in our skeleton argument.

The other point made is whether there are low margins in the industry. We have said that other industries have low margins, and that is a point that we have taken. It is a point that we continue to rely on, there are other industries with low margins.

Actually, that is not the only problem because even if you look at this particular industry it is very difficult to pinpoint what the margins are because they are very volatile. I am going to take you a bit later on to the 2009 financial statements that illustrates one of these points, but can I take you before that to Mr. Shann's second statement. That is in bundle 4, tab 8.

Behind that there should be a spreadsheet which is printed out on A3 and folded over (at least that is what I have in my bundle). If you look at the line which is near the top of the page, which is near the top of the page, which says "Gross profit", and it has got the percentage figures. If you just run along you will see that even within a single company within the construction industry the gross profit as a percentage is quite volatile. It varies 5.7 per cent on the forecast for the year ended 2010, 12.03 per cent for 2009, 10.02 per cent, then going along, 7.97, and so on, and then at the end we have got 11.03. Not only does it show that there is variance year on year within a specific undertaking, but that is very different to some of the figures that Mr. Robertson quoted in GAJ, for example, where he said in reply that across the industry margins were in the region of 0 and 1 per cent.

MR. ROBERTSON: That was not what I said GAJ. I have consistently that across the industry margins generally in good times were 1 to 3 per cent. That is generally. It was not the evidence in GAJ. GAJ's margins were different. There may be other construction companies with different margins. I just said that, as a general view, it is 1 to 3 per cent across the industry, and that seems to be accepted as the broad overview.

MISS BACON: We can give you the transcript references perhaps after lunch, but at the end of the day my submission is still the same. If Mr. Robertson is saying to 1 to 3 per cent, that is not borne out by the figures that we have got in this case. It is not the case that all construction companies have extremely low profit margins. As I said, I am going to take you to what GMI said about this in its own 2009 financial statements when it refers to its gross profit margins.

THE PRESIDENT: That is gross profit, is it not, before distribution costs, administration expenses, and various other things? Then they have an operating profit which is less, and then they have a profit on ordinary activities which seems to be less.

MISS BACON: Yes, and that highlights another problem, which is that if you are going to base any kind of adjustment on the basis of profit, which profit measure do you use?

THE PRESIDENT: I had in the back of my mind that there was something in the decision about the general profitability in the construction industry.

MISS BACON: There is, but there is also something in the decision – and I will try and get the reference, it will probably be over lunch – where the OFT explains why it cannot just carry out this kind of calculation. The problem is, what is the profit measure that you use? Which year do you base your profit on? Are you looking at the individual firm, or the industry as a whole? How do you correct for things like dividends versus salaries which adjust the profit margin? How do you take into account the fact that in some industries it is very common or, indeed, standard practice to move profit around companies for tax purposes, these are all very difficult problems that the OFT would have to grapple with and for these reasons the OFT thought it was appropriate to apply the penalty guidance which is based on turnover rather than profit, and not appropriate to make an adjustment because it was just simply fraught with so many difficulties that it would have been very problematic to arrive at a fair result.

The OFT's position is not that in every case it is impossible to make this kind of adjustment, it is certainly not that theoretically a profit adjustment is not possible, its case is it is very, very difficult to do that on any kind of rational and fair basis. and for that reason in this case it was appropriate to base the calculation on turnover without making a profit adjustment.

Mr. Singla is helpfully pointing out the section on turnover versus profit in the decision starts at VI.70 so that is where the OFT considered whether it should make a calculation by reference to turnover or profit, and we say the same arguments apply to the question of whether you should make an adjustment by reference to profit which is what Mr. Robertson is suggesting should have been done.

The way that we did take into account the profit margins is when we came to consider in the cases of those undertakings that had pleaded special financial situations, the financial hardship assessment, so it is the case that on a case by case basis when an undertaking came along and said: "We are in grave financial difficulties, these are our profits" that we did look at it and we looked it over a three year period, and also based on the most recent accounts, and I will come to that in GMI's case a bit later. We say that that was an appropriate – and the most appropriate in this case – way of looking at profits, and adjusting for profits if necessary.

The third flaw identified by Mr. Roberts, and it is the argument about no effect on price, and I am sure that has been canvassed in many of the other cases, the Tribunal will have seen that the penalty guidance does not require the OFT to measure in terms of quantifying the effect on the market and in particular does not require the OFT to adjust its penalty downwards in cases where it has not carried out an empirical assessment of the financial effects of the infringements. What it does say is that the OFT will consider the effect on competitors and third parties as part of a range of relevant factors. Mr. Robertson seeks to suggest that the OFT did not realise that it could take it into account, of course we realised that we could take it into account and we did. If you look at VI.130 to 158 of the decision, p.1,657.

THE PRESIDENT: Yes, "Impact on building costs and tax payers".

MISS BACON: If you look a couple of paragraphs above that, there is a preliminary point that we do not accept that we should base the penalties assessment on empirical evidence, and we make the point there about 'object' and 'effect' infringements. Then we go on to say in any event we have looked at these submissions, we have looked at the point as to whether there is adverse effect, and this is what we have concluded. It goes on to set out at paras. 130 et seq a very detailed, qualitative analysis of the effects on competition. Paragraphs 139 to 142 there is consideration of the specific consequences of cover pricing on the tenderee and competitors.

If the criticism is that we did not assess for each tender what the price would have been absent the cover price we will put our hands up to it, we did not. What we did was to look at a qualitative analysis of the effects of this conduct on competition and on third parties, and that is set out in some detail, so we do have a detailed consideration of the effects of the infringements that we are alleging.

The next point is the multiple penalties point and Mr. Robertson's starting point on that is the fact that there were different scales of penalties for different infringements in his case shows that the whole methodology was not fit for purpose.

Can I ask you to turn up the fine calculation for GMI which is on p.1761, p.VI.490 of the decision. You can see there, looking at the fine methodology, why it was that there were very different fines of the two infringements, and that is that the relevant turnover is different in each case. Our point on that is that we had a fining methodology which says that the starting point is relevant turnover on the defined product and geographic market. It so happened that in the case of infringement 14 GMI's relevant turnover was relatively high, and in the case of infringement 228 its relevant turnover was relatively low. That is just the fact that the two infringements that we say were committed by GMI occurred on different markets and, as I have said, there is no challenge to the product and geographic markets that were defined by the OFT.

The other point that is made by Mr. Robertson is that while the OFT should not have applied multiple penalties it should have just applied one penalty, because anything else was completely arbitrary, and this point has actually gone through a mutation over the course of the appeals, because the first way he put the case was that he said the OFT was not entitled to impose multiple penalties, and that seems to have fallen by the wayside.

Then he says, certainly in the appeals at the start of this whole process at the end of June (in court 2) "If I am not saying the OFT was not entitled to impose multiple penalties, what I am saying is that you should not have just differentiated between 1 and 3; exactly the opposite, you should have had a greater differentiation between undertakings that were more culpable and undertakings that were less culpable". He said the reason why there should have been greater differentiation was that some companies had many more suspect tenders than others, and that is why I made the response that I did that he quotes in the Francis' case, which was the first of the cases that I was dealing with against Mr. Robertson, in which this came up – the other case was GHA where they only had one penalty for one infringement whereas Francis had multiple penalties. I said the reason why the OFT could not gradate more than on a 1 to 3 basis was that we are not omniscient, we could not leave no stone uncovered, we could not spend public resources in such a way as to uncover every single instance of every infringement, so what we cannot do is to reach a comprehensive decision as to exactly how many times each undertaking had infringed the Competition Act by engaging in cover pricing. The distinction I made was between a case like this, where the evidence was limited, especially for the undertakings where we did a

dawn raid, and something like *Replica Kit*, where there is a small number of parties involved in the infringement, a small number of defined infringements over a particular time period, and you have evidence from everybody involved who comes along and says: "I was at that meeting, we decided this, the agreement lasted for this long", and "this is the time that Mr. Whelan's helicopter touched down on the lawn", we had that kind of evidence for those cases, so you can make a fairly specific finding of culpability.

In this case we had dawn raids of a number of companies, we did not dawn raid many others, and so what we had to do is ----

THE PRESIDENT: This is the problem, is it not? This is the problem that people are complaining about this in lots of these cases that their case was not really properly looked at individually because you could not, with your resources cope with it, you had started, as it were, so many of these cases and were investigating so many at once that actually you ended up with a one size fits all approach because that was all that was practical.

MISS BACON: I do not accept the criticism that because we had few resources we did not look at cases individually, I have dealt with that point, I am actually making a different point here which is that we cannot reach a conclusion as to whether an undertaking has infringed 200 times or 100 times, it is just not possible because we did not dawn raid every company. We do not know how many infringements GMI may have committed. What we need to do is to take the evidence that we have and say: "We have found evidence of two infringements so we are going to apply two penalties for the two infringements that we found", and we have a cut off at three. So for those undertakings that have committed three they get three penalties, it is just to do so. For those undertakings where we have evidence of a single infringement only they get one penalty, it is just to do so. There is no reason why we had to go further and say we are going to penalise someone else, because actually they had 20 or ----

THE PRESIDENT: Or 750.

MISS BACON: -- 300, or 750 because we cannot know, there is no way of knowing precisely, it is not a case like *Replica Kit* where you do know.

THE PRESIDENT: Well they had admitted them, so you knew there was quite a lot of them.

MISS BACON: Some of them we did know, and that is another reason why there was more evidence for some parties than others because they were leniency applicants, we did not have that for everybody. So at the end of the day we are saying candidly we were not omniscient, what we did was apply a cut off and it was reasonable to have the cut off defined at three rather than ten or twenty and sought to make a conclusion as to how many

up to twenty, and it would have required an enormous amount more resources than we could have devoted to the investigation, but we are not saying the lack of resources means we did not look at undertakings in a sufficiently individuated manner – I have answered the Tribunal on that already.

The next point of principle is that GMI was disproportionately penalised because the starting point captures proportionately more of its turnover than some other national firms. The first answer to that is that in large part is due to the geographic market definition which GMI has not challenged, and we adopted a cautious market definition, both in respect of the product and the geographic market. We could have defined the geographic market more widely and it would have resulted in undertakings having higher penalties because more turnover would have come within the relevant market, we defined it fairly narrowly. What that means is that the penalty may hit less an undertaking that has a lower relevant turnover by comparison with its total turnover, and that is exactly why we adjusted to pick up the outliers at the bottom end by applying the MDT. So it is not the case that we did not adjust for this, we took it into account. What we did not do is just to say "We will apply 0.75 per cent across the board", as I say, this would have been too crude a methodology that goes against the consistent principles of the OFT and the European Court and Commission. That would have been the only way to correct the point. We did correct for it in part by applying the MDT. I should add that it is not the case that it is only national companies that had the MDT applied because their relevant turnover was a small part of their total turnover. The first of Mr. Robertson's cases that I was responsible for, GHA was a case where there was a company much smaller than GMI, it too had an MDT applied, not because it was a big national company, but simply because Step 1 of the fine calculation resulted in its penalty being a small percentage of its total turnover, so it is not the case that this was a purely national point. The distinction was some companies had less relevant turnover by comparison with total turnover – some were national companies, some were small companies that for whatever reason the infringement occurred in a market where they had proportionately smaller relevant turnover. There are a number of other small and medium sized enterprises who were addressees of the decision that fell within the same category who had the MDT applied, so this is nothing to do with discrimination on the basis of size but simply a function of the differences between relevant and total turnover, and that was something that was corrected by the MDT. At the other end it was corrected by the cap which was applied to cases where the total penalty resulted in more than 4.5 per cent of total turnover and the cap brought it down to 4 per cent, so the range now is 0 to 4 per cent.

The point about discrimination by comparison with undertakings involved in compensation payments, the answer to that is similar, the problem is that statistics can prove everything and nothing. You can always slice up the Decision and find one group of undertakings with one characteristic who are penalised more or less than another group of undertakings with a different characteristic. It is certainly not the case that the OFT had some kind of policy of penalising undertakings with compensation payments less than undertakings who were not involved in compensation payments. Exactly the opposite. Those were found to be more serious infringements justifying a higher starting point (7 per cent) and a higher MDT (1.05 per cent). The reason why some undertakings who had been involved in compensation payments had a lower penalty by reference to their total turnover was just due to the facts of their case and in most cases the major factor would have been the difference again between relevant and total turnover. So, that was just how it worked on the basis of the markets on which they had committed their infringements.

Another reason for some of the undertakings was that they were leniency applicants who benefited from leniency in relation to some of their infringements. But, there is no systemic discrimination going on here. As I have said, it was the opposite, namely that in principle OFT fined undertakings involved in compensation payments using a higher starting point and higher MDT.

The last specific argument is last business year. On the point of the responses to the consultation, we are looking for them but we say that this is a complete red herring. In relation to last business year we say the starting point is one of statutory construction. Then there is an ancillary question of whether the fine would have exceeded the *Uttley* kind of limit. It would have been more than could have been imposed under the old Guidance. We did that cross-check and I took you to the cross-check with the case of GMI. So, that is the cross-check that the OFT did for every undertaking. That is why the OFT asked for the accounts of the undertaking going back to the relevant period. So, it was not just because we were curious; it was because we wanted to correct, to make sure that there were no cases where the fine was, on the *Uttley* principles, higher than it could have been under the old fining methodology. So, that really answers the point.

THE PRESIDENT: Does it? We may have to just have a word after lunch, but in public law you could not, without departing from your Guidance, impermissibly have done it on a different basis and therefore it would have been limited by the relevant business year pre-2004. If you could not have lawfully done it as a matter of public law rather than statutory maximums, then that brings in the principle ----

MISS BACON: I can answer that immediately. *Uttley* does not work, and those principles do not work, by reference to the methodology that you reach, but by reference to the outcome, the end result. So, Mr. Robertson says, "Well, you would have had to apply the different methodology". That is true. But, that does not mean that the outcome would have been different. That is a point I have made in some of the cases that I have done when I have said by reference to this whole point about looking at the penalty in the round that what is meant by that is that you look at the penalty in the round because you do not simply say. "Well, if one bit went down, that means the whole lot has to come down, because if one bit went down another bit might have gone up". That is the answer to this point. If the methodology had been different and the fine had been based on a different relevant turnover year, then that is not to say that the fine would have overall been lower because the OFT could have said, "Well, that is not sufficient. We are going to bump it up at Step 3, for example".

DR. SCOTT: So, in essence, what you are saying in answer to Mr. Robertson's point on the European Convention is that a prudent businessman in June 2000 should have taken into account the fact that they could have been fined up to the cap which you then tested in your process.

MISS BACON: Absolutely. That is the way one commonly advises clients. You advise them that they can be fined up to a maximum of 10 percent worldwide turnover. You do not say, "Well this is the fining methodology and the OFT might take this into account, and then I am going to give you a figure based on that methodology. If you look at these different years …" You say that the total fine could be up to this, and you have to be aware that that is the fine that the OFT might apply. At the end of the day it comes down to the outcome. It is what could have been applied. The *Uttley* test does not work by reference to what might in a different factual situation have been the outcome because you never know what the outcome will be. As I have just explained, if the fine had been lower but by reference to a different relevant turnover year, it might well have been adjusted in different ways to take account of deterrence. That is why one cannot base any *Uttley* kind of argument on what the methodology was, but, rather, what the outcome would have been at the end of the day - what the statutory cap was. That, we say, is a complete answer to the *Uttley* point. There is no case which suggests that you go back and try and do some crystal ball gazing and put yourself in a hypothetical mine that did not exist, and look at all different kinds of factors which may have been taken into account as a corrective mechanism.

I should just give you one further reference which is that in the *Degussa* case (Volume 8, Tab 99, para. 285 of the authorities bundle) the European Court explicitly endorses the policy behind the use of the most recent business year for penalty ----

THE PRESIDENT: I think we have been shown that in another case.

MISS BACON: Yes. I was not sure. So, I have just given you the reference.

THE PRESIDENT: Very helpful. If you want to reserve a word afterwards, in case there is something -- We need to finish now.

MISS BACON: I have not dealt with financial hardship and I do need to deal with that. I do not know whether we need to go into Camera for that. All I wanted to do was to go through the accounts.

THE PRESIDENT: Have a word over the break.

MISS BACON: We will let you know what the agreed position is.

THE PRESIDENT: Thank you very much.

(Adjourned for a short time)

THE PRESIDENT: Miss Bacon, I apologise that we are starting a bit late. The reason is that we have been entertaining Her Excellency, the Ambassador to Macedonia, who actually was listening towards the end of your submissions just before lunch.

MISS BACON: I hope she found them interesting and enlightening.

I only have one issue to deal with now, and that is the financial hardship question. I am not going to cover the same ground that has been covered in our skeleton argument. We set out what the relevant tests are. What I want to do is just hand up a sheet. I have done similar calculations for all the other appeals that I have been involved in. So, I thought you should not miss out! The sheet sets out our calculations which appear in our skeleton argument. The back-up source material is contained in the clips which are the 2009, 2008, and 2007 accounts. I really only want to take you to the 2009 accounts. The others are there for your information if you want to go back to the source materials.

At the top of the single sheet you will see the fine and then dividends that were paid. Those figures are then used to form the basis of some of the calculations that appear lower down the sheet. So, the first comparison is with profits. As we have set out in our skeleton, the way that we normally do this is to look at a three-year average profit after tax. The reason for taking an average is the point that I made to you this morning about volatility over a number of years. The aim is to get a fair picture, and three years seemed a reasonable point to pick. That is the way that we have done the calculation in all of the cases - by looking at

three average PAT. You will see there that this comes out at 54 per cent of the three year average.

Then, if you go down to look at the net assets we do not use an average comparison. We just look at the current position. We have used the most recent audited accounts. There are no accounts for the year to the end of 2010. So, the most recent that we have at this point in time are the 2009 accounts. We did not have those at the time of the Decision. So, the 2009 accounts are in a little clip. You will see that the net assets a at 2009 are £11,732,285. What the OFT then does is to add back in the last three years worth of dividends on the basis that this is money that has been taken out of the company.

THE PRESIDENT: That is how we get to the 14.

MISS BACON: That is how we get to the 14. Then, if you do a calculation of the fine by reference to the 14, that gives you the 12 per cent. That was really the reason for handing up the sheet, to explain how we got to the figures.

There have been some cases in which when one looks at the balance sheet one sees that the net assets are almost entirely made up of debt. The question has then sometimes (in some of the cases, not this one) been raised, "For that reason is it right to look at net assets?" In some cases one can say, "That makes looking at net assets in that case difficult. So, we will concentrate on the profit figure". In this case we have the profit figure, which is the 54 percent, but also if you look at the balance sheet here you can see that there are substantial liquid assets. If you look at p.8 of the 2009 financial statement.

DR. SCOTT: Just for the record, we are looking at 30th September, 2009.

MISS BACON: 30th September, 2009, yes. Just to explain, pp.8 and 9 look similar. The difference is that p. is the group balance sheet and p.9 is the balance sheet of GMI Construction Holdings, which is the parent company. Confusingly, the subsidiary is called GMI Construction Group, but it is not actually the parent. That is a subsidiary rather than the parent. So, the relevant accounts to look at are the Holdings accounts, which is the parent company of the Group. On p.8 there is the Group balance sheet. You will see there 'Cash at Bank - £9 million plus'. So, on our submission, on any view, GMI has sufficient assets, just looking at the cash in the bank, to pay the fine. GMI is not saying that the fine will render it unviable as a going concern. It is not saying that it is unable to pay the fine. What it is saying is that there is an overall downturn in the industry and on that basis the fine should be reduced. However, that is not, as you will see from our skeleton, a sufficient basis for reducing the fine on grounds of financial hardship. When you are looking at

financial hardship you are looking at a substantial threat to the viability of the undertaking if it has to pay the fine.

Can I just take you to one passage in the financial statement that deals with the effect of the recession? That is at p.2 where, about half-way down, you will see the statement that,

> "… despite the significant reduction in turnover, GMI Construction Holdings plc has remained profitable throughout the year to 30th September, 2009. In their previous report the directors predicted that the economic downturn would be an opportunity to consolidate and streamline the group. This has certainly been the case with gross profit increasing from 10.02 per cent in 2008 to 12.03 per cent in 2009. The Group has proved that it can adapt quickly to changes in market conditions and remain profitable even at a significantly reduced turnover".

So, it is beyond doubt that there has been a significant reduction in turnover, and that is borne out by their own profit figures, and what they are saying is that they have remained profitable and actually the profit margins have increased during that period.

Sir, in conclusion, the OFT's position is that this is not a picture of a company that is not going to be able to pay the fine. All it is saying really is that there has been a down-turn in the industry. But that is not, in our view, sufficient to substantiate a claim to financial hardship which, in our submission, can only really be made out in very exceptional circumstances.

Sir, unless I can assist the Tribunal further, those are our submissions on penalty.

THE PRESIDENT: Mr. Robertson?

MR. ROBERTSON: Sir, I have about half a dozen points in reply. First of all, my learned friend says that we did not mount any full frontal challenge to the Guidance. That is correct. What happened was this: one thing that I would not criticise the OFT for is a failure to explain its proposed penalty calculation methodology in the Statement of Objections. In earlier years the OFT did not set out its thinking on how it was going to calculate the penalty in a Statement of Objections, but in this case it did and it set it out in a lot of detail. What is in the statement of objections is almost identical to what has then emerged in the final decision.

The OFT consulted on its methodology, and this is more a case for my other appellants rather than GMI, because I was not instructed during the administrative procedure for GMI: for the other appellants to whom my learned friend has referred, we set out the reasons why the methodology will end up with a ridiculously high penalty. They are the same reasons that we are now advancing in notices of appeal. So we said, yes, we can see what you are

proposing to do, but because you have not taken account of these factors you are going to end up with a figure which is far too high for the seriousness of infringement, and therefore we invite you to revisit these aspects. You will see that if you look at, certainly for my other appellants, the written responses to the statement of objections and, for those that had oral hearings, the representations that were made in oral hearing. As I have said in the various notices of appeal, the OFT took next to no regard of what was said and essentially simply applied in the decision the fining methodology set out in the statement of objections. The one aspect of its fining methodology that it did not set out in the statement of objections, just to place on record, was its approach to financial hardship. The methodology that is now outlined in the OFT's defence, that did not appear in the statement of objections. Then dealing with the specific points taken by my learned friend, firstly, the distinction between tendered and non-tendered work, three points of reply there: firstly, the comparison with *Umbro*. *Umbro* in the Court of Appeal sanctioned a fining method that took into account turnover for all types of replica kit, even though the price fixing was just replica jerseys, or replica shirts. The reasoning for that was that the price of socks and shorts and goalkeeper jerseys could be expected to have been affected by the price fixing. We say this case is quite different because there is not any read-across from what was happening in single stage tenders to other types of tendering processes. The evidence is that cover pricing did only take place in relation to single stage tendered construction work. The second point is that my learned friend said we do have an example of cover pricing in a two stage tender. That was in the Quarmby case last week. My learned friend had the opportunity to put that to Mr. Naylor in cross-examination yesterday and she did not do so, so she is not entitled to advance it as evidence to this Tribunal. There is a witness who could have dealt with that, she did not put to him, she is not entitled to rely upon it now. The relevant passage of Mr. Naylor's evidence is in the transcript, it is p.10, line 28 through to p.11, line 11. As you will see there, he describes the first stage of a single tender as "putting in your preliminary costs, costs of site agents, cabins, security, that sort of thing, and the percentage". The evidence, as the OFT is well aware, is that it is the work of about an hour to put that together. It is not the week's work that you need to put together a fully priced tender. It takes an hour to put in those preliminary figures. You put them down on one sheet and send them through and then they decide whether or not to pursue negotiations with you. That is what happens in two stage tendering. There is not any incentive for cover pricing, and there is not any evidence of cover pricing in two stage tenders.

My learned friend then referred you to framework agreements and the idea that cover pricing could take place in relation to mini-competitions on frameworks. This is where you have applied to go on to a framework, you have been selected as a contractor on a framework, and you then are invited by the client to carry out work under the framework. It is a public sector issue and therefore it does not apply for my clients. My clients are not engaged in public sector construction work and they are not on any framework. So you will not find any evidence in this case about frameworks but you will find it in the Tomlinson case heard last Tuesday by Miss Rose and her panel, and the evidence that I would invite you to look at there is set out in the transcript of that hearing, p.8, line 30 to p.12, line 7, and you will see there evidence from a former managing director of Tomlinson that when you get to the stage of the mini-competition it is all done on an open book basis. That is that the client comes in, looks at the three contractors that it might want to carry out the work, and looks at all their workings out, their fully priced up tender, and discusses it with them. You simply could not take a cover and put in a price because you would be found out immediately. Why would you want to do that when you are on a framework? You are on a framework because you want work from that particular client. There is no sense in cover pricing. Not only is there no incentive, but it could not happen because you would be found out immediately.

Turning to the third of my points, profit margins: just to repeat, we are not saying you fine by reference to profits. We just say it is a factor to take into account and the level of margins across the industry generally is a factor that should have been taken into account. It is one of the points that was made very strongly in response to the statement of objections. You are applying a methodology here and you just have not taken that factor into account. As a result, you are going to end up with very high fines indeed if that is what has happened.

Fourthly, lack of effect on price: my learned friend took you through what is said in the decision. The point is that, as set out in para.57 of her skeleton, what the OFT did not do, they said the nature of the conduct was such as to reveal a sufficient degree of harm to competition, by which they mean the competitive process, but they did not go on to examine the consequences of the conduct. As we say, the consequence of cover pricing was not higher prices to end customers – contrast the milk and cheese case and the tobacco case.

The fifth of my points, multiple penalties: my learned friend says my case is mutated. I think it is her case that has been mutated. I feel like I have been shooting at a movable target. I took you to what the OFT have said in their penalty defence. They said that

multiple fining, once, twice or three times, was proportionate. It is not, it is just that they stopped at that particular point. It is a matter of chance whether you get one, two or three penalties. In this case it is a matter of chance that it is two for us.

My learned friend also said that we have not challenged the product or geographic market definitions. Not directly, that is correct, but we have pointed out that the use of them in this methodology leads to arbitrary results. It is just a matter of chance which infringements are selected. It is the different product sectors that led to the wildly disparate penalties in this case, and you can see examples throughout the decision.

Sixthly, the comparison with compensation payments. My learned friend says, "Well, you can do anything with statistics", and that I was not making allowance for the fact that some of the compensation payment clients got leniency. As to that, I would invite the Tribunal to look at the submissions that were made in the Hobson & Porter case before Lord Carlile. That was the first of the cases that Lord Carlile heard. If you go to the transcript at p.3, lines 15 to 26, you will see there that we drew a comparison between Hobson & Porter and Herbert Baggaley. Herbert Baggaley were one of the ones involved in compensation payments. Just to read out what I said at lines 22 to 26:

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

As I have said throughout, just look at the outcome.

THE PRESIDENT: And that was as a result of the imbalance between total and relevant, was it?

MR. ROBERTSON: I think it was just the happen stance of the product in geographic markets.

The fact that it was supposed to be a more severe fine than Baggaley, because they were involved in compensation payments just got totally lost in the wash.

My final substantive submission is in relation to last business year. My learned friend said that he would advise anyone under investigation that you could be fined up to 10 per cent of your total worldwide turnover by the OFT. That is pretty bad advice to give because it ignores s.38, you are not going to be fined in a case 10 per cent of your worldwide turnover, you are going to be fined in accordance with the guidance as applied pursuant to s.38.

THE PRESIDENT: Can I ask you something about this, it is something that has been raised in other cases, but if you look at the guidelines on starting points for penalties, the first thing at para. 2.4 it says:

> "The starting point will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point …"

and soon. Then at 2.5:

> "It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point . . . When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration."

All those factors, although not saying so expressly, one is looking at what happened in relation to the infringement and in particular to the damage that it caused to people, or may have caused, or was likely to cause and so on. When one looks at turnover, is there tension there between those factors are expressed and looking perhaps at relevant turnover m any years later when the markets may have moved on?

MR. ROBERTSON: We would submit there is not only a tension, there is complete disconnect. We are defining this on the basis of our 2008 turnover for conduct that was committed in 2000. The company has grown substantially since 2000.

THE PRESIDENT: I will ask Miss Bacon to comment on that as well.

MR. ROBERTSON: I think it is more a point for the OFT. We have pointed that out, and that has been pointed out in numerous cases not just by my appellants but other appellants.

THE PRESIDENT: It is not the same as your last business year, yours is more of a legitimate expectations' point.

MR. ROBERTSON: Yes, Lord Carlile said this is legitimate expectations and I said it is actually rather more than legitimate expectations, it is a right in that you have a right to be fined in accordance with s.38. The OFT cannot depart from s.38, that is what constrains their exercise of discretion.

THE PRESIDENT: Without good reason I think, or whatever it is.

MR. ROBERTSON: Yes. What we have here is a fundamental departure, their use of the base turnover, and I was asked what difference it would make in this case and I can now give the

figures as to the difference last business turnover would have made to the fine in this case. The bottom line is, applying the OFT's methodology, if you took the turnover in the last business year that ended before the date of infringement, that would have ended in September 1999. Our turnover then in the relevant product market was £7,608,429, that figure is set out at tab 5 of file 1 of the notice of appeal, p.182, it is one of the figures we supplied to the OFT, 5 per cent of that is £380,421, that is 0.96 per cent of worldwide turnover so you do not apply an MDT. There is a 5 per cent deduction and it leaves a final fine of £361,400, that is essentially a fifth of the fine that was imposed for that infringement – a very substantial difference.

The final point I wanted to make by way of reply is simply to observe on financial hardship my learned friend took you to the 2009 accounts, she said she could not take you to the 2010 accounts, well that is a year end September 2010 so we do not have them yet, but if you want to know the up to date financial position in relation to the appellants it is set out fully by Mr. David Shann in his second and third witness statements on which he has not been cross-examined, that gives the bang up to date position and also responds to the points that were made against us on financial hardship by the OFT in their skeleton argument. In particular I draw your attention to the paragraph I asked you to correct in his third witness statement, para. 7 which essentially summarises where we are now and in particular where we are ----

THE PRESIDENT: Which we corrected to 2011.

MR. ROBERTSON: It is 2011 and he is talking about the amount of work that is there in the pipeline, and that is the correct up to date position.

Sir, that is all I have by way of reply on penalty.

THE PRESIDENT: Thank you very much. Miss Bacon, I am sorry, the point that I just made to Mr. Robertson is something I meant to ask you about just for your comments on how those factors tie in with the last business year.

MISS BACON: I think your point is why does one take the situation of the undertaking now, rather than the situation of the undertaking then.

THE PRESIDENT: I understand why you do it for the MDT, because one is looking specifically at deterrence, then it could be argued – indeed it is argued – that one should take the position now. But when you are looking actually at those factors which are said to be the important ones, should you not be getting as near as possible to what happened at the time of the infringement?

MISS BACON: One immediate answer is one I think given by Lord Carlile or put by Lord Carlile in one of the other cases, and I cannot remember which one it is, but the comment was made if you are looking at the impact of an infringement on the market you certainly do not look at the year prior to the infringement commencing. This is a general point of principle, but if one is trying, in a case involving some kind of horizontal price fixing cartel, to measure or apply a fine by relation to a measure of the impact of that on the market you would logically look at the market after the time of the infringement, so that might certainly be a case in which you could say logically one should take stock of things at a later point than the infringement and a convenient point might be the last business year prior to the decision, that was just a general point of principle.

But the other answer is that the Step 1 starting point takes two parameters, it takes a measure of seriousness and then it takes a measure of the scale of the undertaking on the market if you like, and that is what is measured by the relevant turnover. The OFT takes the view that if you are applying that measure it ought to be the status of the undertaking as it is now rather than a historic situation. The OFT has never said that the Step 1 starting point is an attempt to, in some respect, quantify all of these different factors that are taken into account. Those are the factors taken into account in Step 1 and a lot of them feed into the seriousness percentage that is applied, which in this case was the 5 per cent, and then you apply that 5 per cent to the scale of the undertaking on the market. For the reasons given in the Degussa case, which I cited to you, the appropriate time for measuring the scale of the undertaking on the market is now because you are imposing the penalty on the undertaking now. It does not have to be because of any deterrence factor. It is simply that the penalty is now being imposed and it is appropriate to look at how the undertaking is now on the market. There has never been any suggestion that size, or other factors, should relate specifically to the undertaking at the time of the infringement.

THE PRESIDENT: If you are looking at the seriousness of the infringement, all the factors seem to be trying to get a handle on how serious is the infringement, and for that purpose you look at the market in which it occurred.

MISS BACON: That is where you get the 5 per cent from. You have a 5 per cent seriousness ----

THE PRESIDENT: You end up with 5 per cent because you are looking at -- The whole purpose of the exercise is to see how serious it is and, therefore, where on the scale of 1 to 10 ----

MISS BACON: Yes. Mr. Robertson accepts that 5 per cent was the right starting point, and then you apply that 5 per cent to some measure of the scale of the undertaking on the market. The question is: Where should that scale be drawn?

THE PRESIDENT: Why should you look at it as a scale on a market that has moved on, say, five years? I mean, it might have changed out of all recognition as, indeed, it has done in some of the cases we have had to sit on. The company's position that is being fined on the market is totally different. Indeed, some of those companies no longer existed, The subsidiaries have long gone. One is fining the parent and the parent is not on that market, or only on it in a very different way. So, what is the logic of that?

MISS BACON: Part of this debate gets divorced from the question of statutory construction. It is all very well to answer this in principle: Why should one apply relevant turnover now rather than then? Actually the real starting point is: What does the Guidance say? How should it be interpreted? We have the cap which is at 10 per cent of worldwide turnover in the last business year with last business year given a specific meaning. It would be very odd, we say, to have the two concepts of last business year - exactly the same phrase used in the same Guidance, used in a different way. So, that is an overall statutory construction point. Your question is: Is there a logical reason for having a different construction in this case? We submit it is not because whether you look at the end point or the start point, a consistent meaning should be given to last business year. The purpose of the end point is to look at the fine as it is imposed on the undertaking now. That, we say, should also be relevant for determining the starting point. I think that is essentially the OFT's position.

DR. SCOTT: I think my concern about that is that the view on the last business year has changed so that in terms of statutory construction the statute has not changed, but other things have changed.

MISS BACON: Can I reply to that? It is a question of semantics. On one view it has changed because the statutory cap has changed. So, one could say that that has caused a change in the policy. But, the policy has always been the same - that you apply the same last business year, whether it is Step 1 or Step 5. So, prior to the change in the statutory cap the policy was consistent. The statutory cap and the Step 1 were based on the year prior to the infringement. After the change to the statutory cap that caused a change to the OFT's policy. But, it is really a question of semantics whether that is a change or not. On one views it is a change; on the other hand, it is a consistent policy of giving the words 'last business year' the same interpretation in both parts of the document in which they appear.

THE PRESIDENT: Why should it be the same? One is a statutory cap, as you rightly describe it. That is related to what you can do to this company sitting in front of you now as an absolute maximum. You relate that to its position now. Not many companies are likely to be fined up to that cap, but it is there as a long stop. But, when you come to determine what fine is

appropriate for what it actually did, subject to deterrence, which I think, arguably - I can see the force of that - may raise issues about what has happened to the company since, I am still struggling a bit to see why you need to have the same -- you know, why relevant turnover needs to be based on the same year as the statutory cap.

MISS BACON: One point is that if it had intended to be given a different meaning, it should have said to -- it would have said so explicitly. It is exactly the same phrase used in two different parts of the Guidance.

THE PRESIDENT: It is not a statute, the Guidance. You can interpret it as you wish. It is your Guidance.

MISS BACON: It is not to be interpreted as a statute in the sense that it is not a statute - but it is guidance that has been promulgated under statute and approved by the Secretary of State. If it were not given a consistent interpretation, no doubt there would be appeals the other way.

THE PRESIDENT: You cannot say, "We are going to give it a consistent interpretation that is illogical" -- I mean, you can interpret this. It does not actually say, "The last business year before the Decision" in any event. It says, "The company's last business year".

MISS BACON: The last business year.

THE PRESIDENT: You are interpreting it as the last year before the Decision. You could interpret it differently.

MISS BACON: There is a whole load of reasons. One is the consistency point. The words 'last business year' appear at several different points. The second is a natural construction of the words 'last business year'. If you said to somebody, "What is your last business year?" they would think of the last business year as now - not the last business year ten years ago. There are a number of reasons which have been given, and there have been some of the appeals which have turned on a principle of statutory construction - I believe one of the appeals in Court 2. This is not a point that is being run by GMI. However, I take the point, and you say, "Why give it a construction that is illogical?" We say that it is a construction that is a natural meaning of the word; is consistent with the words where they appear elsewhere in the Guidance; and also is consistent with general European Court policies, and the Degussa case. If you look at the situation of the undertaking now at Step 5, why would you necessarily or logically have to look at the position of the undertaking now at Step 1, which is intended to be the starting point? In some cases it is the end point. It is the starting point in this case subject to some adjustments for compliance/co-operation. In other cases there is a deterrence uplift. However, for many undertakings who do not have an MDT uplift the Step 1 starting point will be more or less the fine that is imposed at the end of the day.

DR. SCOTT: I think you may have answered this in just the way you have answered the President's last point. It is this: In Step 1 you have not yet reached thinking about the minimum deterrent threshold. So, presumably you are at a stage of thinking about punishment fitting the crime, if you see what I mean. Now, it seems to me, therefore, that at that stage of thinking about the seriousness - I am using the word '*crime*' here in italics - you are looking at a punishment that fits the seriousness of the crime and the scale of the market place - and this is the question - in the market in which it took place. Now, because of the time taken to investigate, quite often by the time an investigation has taken place you have numbers for the market for the year before the infringement; numbers for the market in the year of the infringement; and numbers for the market in years running up to the time of the infringement. But, it does seem to me that there may be a difference conceptually and whether you start in terms of a punishment fitting the crime and then look at the deterrence of the company as it is today as two stages rather than starting by thinking of the company it is today in terms of deterrence.

MISS BACON: The OFT did not try and divorce those two stages. As I said, the parameters were a percentage for seriousness - that was the punishment fitting the crime element of it, if you like - and apply that parameter to a measure of the scale of the undertaking in the market. It was not the OFT's policy and it is not necessarily an implication from the Guidance that when you look at the scale of the undertaking in the market it should be by reference to the year prior to the infringement or at the infringement rather than the situation as it is now.

DR. SCOTT: Can you help me with one other point - the point of difference between you and Mr. Robertson on the European Convention point? What you were saying was that a solicitor advising a prudent businessman in the year 2000 should have said, "You could be fined up to 10 per cent of turnover". Mr. Robertson's answer to that is that a solicitor would say, "That is subject to s.38 and the guidance". There has been a noticeable change in Europe over the last ten years in that if we go back ten years fines were, how shall I put it, rather more modest than they were in Europe up to which they had gone. I suppose the question to you is this: how do you respond to Mr. Robertson's point that a solicitor advising a client in the year 2000 would probably have expected a fine rather more moderate than the then possible cap?

MISS BACON: The immediate response to that is that his case is not, unlike some of the other cases, put on a ground of legitimate expectation. It is put squarely on the European Convention point. On the European Convention point the answer is the *Uttley* case. It is

not what you might have expected under a different methodology, it is what was the maximum then applicable. His points about what you might have advised simply do not have a bearing on the case that he has put forward.

On a more general point, if the Tribunal is curious, as a diligent lawyer, one would have to advise the business that they could be fined up to 10 per cent of worldwide turnover on the relevant basis. It is simply venturing into the realms of speculation to try and second-guess what, on a different fining methodology, might have been the outcome. Mr. Robertson said, "If all things are equal, if all other aspects of the fine calculation were equal, our outturn fine under the old methodology would have been £361,400". That actually illustrates the answer, which is that it begs the question: "Are all things equal? Would the fine then have been exactly the same?" That was my "something goes down, something else might go up" point. You do not know what the methodology might have been in the old world, so to speak. You do not know what the range of fines would have been different. They would have different. Certainly the fines would have been different, undertakings had different turnovers then. There were undertakings who were winners under the new methodology. Mr. Robertson can bet pints here or there, but the fact is that there were a substantial number of undertakings who were winners under the new methodology. So it would have been a different world, one does not know how the fine would have panned out. You cannot say, just because this would have gone down for him, that the OFT would have applied the same methodology and everything else would have been equal. It would not, it would have been a different world. That is why you do not get into the realms of speculation, we say.

MR. SMITH: Miss Bacon, I have just got a question arising out of the area that the President was probing. Looking at the OFT methodology for assessing a penalty, how does the OFT take into account changes in, let us say, product market or geographic market profile of the infringing undertaking?

MISS BACON: I am not sure I understand the question.

MR. SMITH: Let us take infringement 14 where one has an infringement in 2000. We then have a penalty assessment based on turnover in 2008. Let us suppose that in 2000 the undertaking's product market was office. Over the ensuing decade office work diminished to practically nothing and it expanded on education.

MISS BACON: So your question is, what happens if, between the time of the infringement and the fine, the undertaking's turnover in one relevant market changes?

MR. SMITH: Correct.

MISS BACON: Our answer is that we base the fine on the basis of the current scale of the undertaking in the relevant product market. So it is based on the last business year prior to the decision.

MR. SMITH: So, hypothetically speaking, if back in 2000 the vast majority of an undertaking's work was done in, say, office products, and come 2008, when you are looking at the prior year turnover, there is pretty much nothing being done in that sector, the fine will be correspondingly lower?

MISS BACON: What happens then is, if there is absolutely nothing ----

MR. SMITH: MDT.

MISS BACON: -- proxies in some cases and MDT, you would apply the MDT. No one is suggesting that one is always going to get to a perfect result. The methodology necessarily has to be, to some extent, a broad methodology, the way that you work things out. There will be changes in undertakings and there will be winners and losers. The OFT has to plump for one or the other to be consistent across the board, otherwise you would get to a very arbitrary result that, as a result of various changes, some undertakings benefited and some lost. At the end of the day we have a consistent methodology. It has to choose one year or the other and it has chosen the statutory approach which suggests that the last business year should be consistent. The OFT decided it was not going to derogate from that. That is what it would have had to do, it had to say that, despite the natural meaning of the word, despite the statutory consistency point of view, despite the fact that, looking at the document as a whole, one should give the same phrase the same meaning across both parts of guidance, we are going to decide that we are going to give this unilaterally a different meaning in this case. We decided not to do that. We say that there are good reasons for doing that.

MR. SMITH: The short answer to my question though is that it is not just last year's turnover, but last year's definition of the market generally that you will be looking at, even if the infringement occurred many years previously?

MISS BACON: In terms of market definition, I do not think there was ever an exercise to try and analysis how the markets were defined in, say, 2000, if that is the question you are getting at. There was a market definition exercise as to what the relevant product markets were. The market analysis was done by sending out surveys and questionnaires. There was not a temporal dimension to the market definition aspect. The temporal dimension was which year's turnover in that market was selected, and it was the last year prior to the decision.

MR. SMITH: Yes, I see. I understand. Perhaps my question was not quite as clear as it might have been. Given that your market definition is temporally neutral, let us say, nevertheless in terms of how much turnover can be allocated to each particular segmentation that you have got, you look at the 2008 position rather than, in this case, the 2000 position.

MISS BACON: Yes, that is correct, but, of course, we were not in the business of allocating undertakings' turnover as between different sectors, we were in the business of identifying which relevant product market the infringement was committed in and then taking the relevant turnover in that product market in the year prior to the decision.

MR. SMITH: True, but there is the complete disconnect between what happens in 2000 in the product market in which the infringement occurs, and then what the company is doing X years later when the OFT finally makes its decision.

MISS BACON: I answered that in my answer to the questions of the President, that the OFT was not trying to impose a fine that had a relation to the scale of the undertaking at the time of the infringement. The fine was applied by reference to the scale of the undertaking now, because for all the reasons that I have given, the OFT considered that it was appropriate to look at where the undertaking is at now rather than where it was then because things have moved on. As I said, in some cases, things moved on for the worse for the company, and no doubt, had we come along and said, "We will fine you by reference to where you were at in 2000, despite the fact that you are now in a significantly worse position", we would have had lots of appeals from those.

THE PRESIDENT: You could have always adjusted it.

MISS BACON: In a sense, we applied the consistent approach and did adjust it. That is why we have things like the MDT adjusting upwards and the statutory cap adjusting downwards. If the answer is whether you adjust it, that is exactly what we did in this case with those undertakings who came off worse because of that.

THE PRESIDENT: It is interesting though, it is the infringement in 2000 that fixes, as it were, what market you are going to look at. So you look at 2000 to see whether the infringement was education or housing or whatever the different areas, and then you move away from 2000.

MISS BACON: We follow the guidance which says we do not just apply a crude turnover based approach, we look at the infringement in the relevant product and geographic market, and then measure the scale of the undertaking in that market. The question is whether we choose to depart in this case from what would be the natural construction of the guidance

and say we are not going to look at the market now, but we are going to look at the market then.

MR. ROBERTSON: Only one observation and it does not arise in any of my appeals, but I heard the word "proxy", you do not need a proxy for something that happened, that is the problem with the OFT's approach to the use of proxies. It does not arise in any of my appeals but it does explain why you would be better off looking at what happened taking turnover in the market that happened at the time.

MISS BACON: I am being reminded by those behind me that some companies did not have relevant records going way back, that is a point you have board.

THE PRESIDENT: I have had one of those cases.

MISS BACON: As a matter of practicality there are a lot of reasons, I gave you the main ones as best I could.

THE PRESIDENT: Well some did not have much in 2008 either, but anyway there we are.

DR. SCOTT: The Wall Street Journal had a beautiful cartoon and it shows people in a situation like this and they say: "If we had been as well organised as they say we were we would never have been in this situation", and the question now is: "Do you want people to keep beautiful registers with lots of columns in which it is clear what is in which column, or are they better advised not to do so?

THE PRESIDENT: Thank goodness we do not have to deal with that point! Thank you both very much indeed for your help. What should we do with the tender register? Is there somebody who is going to have the safekeeping of that?

MISS BACON: We are going to have to return it.

THE PRESIDENT: Well supposing we want to look at it in the meantime. I think we will keep it for the time being; we will keep it safe. Thank you very much.

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