IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 July 2010

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

DURKAN HOLDINGS LIMITED
DURKAN LIMITED
CONCENTRA LIMITED
(formerly known as Durkan Pudelek Ltd. in administration**)**

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

(DAY FIVE)

APPEARANCES

Mr. Mark Hoskins Q.C. (instructed by Jones Day LLP) appeared on behalf of the Appellants.

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

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THE CHAIRMAN: Yes, Miss Bacon?

MISS BACON: Just two short points by way of reply on the decisive control issue. The first is that this table, I understand, has not been entirely agreed by the OFT the multi-coloured green and red table. What we are going to do is try and sort that out with Jones Day as soon as possible and let you have an agreed version. I think there are just some lines missing and there are some lines where it appears there were no board directors at all at some of the meetings when there obviously were, and there are some other lines where I think someone is listed as being a director when they are not, but they attended a meeting, so we will sort that out and get you an agreed version.

The second is the point about the Shareholders' Agreement. I did get terribly excited when Mr. Hoskins in opening said he was going to keep his powder dry, actually as far as I understand it all he has done is to point to the mechanism by which Durkan Holdings could remove or add directors and the mechanism is a matter of common ground. Where we differ is the inference to be drawn from that. Mr. Hoskins says: "There is the stick and you never used it" and our response is "We did not need to brandish the stick to be exercising decisive influence during the relevant period because everyone knew the stick was there, so we could have used this mechanism during the period of the infringements in order to remove some of the directors and/or to add our own in order to assume a majority control over the board of directors. We never did that but that does not mean that there was not decisive influence for all the other reasons that I gave.

THE CHAIRMAN: So you are saying that even if that clause means that they could not have got rid of Mr. Pudelek and Mr. Simmons, it still gives them the power basically to pack the board with more directors?

MISS BACON: Absolutely, and as you will have seen until 1997 Durkan Holdings was in a majority on the board anyway, it was either 3:2 or 3:3 with the chairman's casting vote, so irrespective of the position of Mr. Pudelek and Mr. Simmons we could have appointed new directors from the Durkan Holdings' side or removed some of the other directors, whether Mr. Watts or whoever, so the mechanism was there and it does not have to have been exercised in order for Durkan Holdings to have exercised decisive influence during the relevant period. So we are on common ground as to the mechanism, disagreement as to the inferences to be drawn from that. That is all I really need to say about the Shareholders' Agreement, unless you have any further questions.

THE CHAIRMAN: No, thank you very much. I think now then we move to the Infringement 220.

MR. HOSKINS: There is just one final point on control, there was an exchange yesterday as to the interest of the respective companies in the public and private sector, and I referred to the evidence, I would simply like to give you the references for your note: first William Durkan para.9, first Danny Durkan para.5, first Pudelek para.10, first Simmons para.6, second Danny Durkan para.11, and the same witness statement para.33. Most of that evidence relates to what the companies did initially and what they intended to do, and my submission as I made it yesterday was there is no evidence that DP ever sought to move into the private sector or that was prevented from doing so by DH, we have a lot of evidence in this case and in our respectful submission we should not go speculating, there is enough evidence available to decide the issues.

Infringement 220: I have kept some of the narrative that I gave you in opening so that it reads as a story. But, obviously, you have heard me say that once, and I will not repeat myself. If I can pick it up with the question of the witness evidence. This is at para.5 of the note. You will have well in mind the fact that the OFT has chosen not to put in any witness statement from anyone means that there has been no cross-examination. The evidence has not been tested. What the Office tried to do yesterday was to try to turn the *Argos* judgment on the witness statements to its advantage. I do not know if you want the *Argos* case in front of you. It is at Bundle 5A, Tab 14. I am going to refer to paras.80 and 81. If you will remember, those are the paragraphs which I asked you to read yesterday? What happened in *Argos* was this: The OFT had not produced witness statements during the administrative procedure. They had not asked for witness statements from the leniency applicant, Umbro. When the appeal went in and the appeal was backed by witness statements from the Argos and Littlewoods' witnesses, the OFT went, "Oh! We are going to need witness statements". They produced some. They had to apply to admit them because they were new evidence that had not been put during the administrative procedure. What the Tribunal made absolutely clear - and we see it from para.81 - is that where a case may turn on the credibility of witnesses the Tribunal would expect the OFT to provide witness statements and tender those witnesses for cross-examination. So here we see the irony - the OFT here was arguing that the Tribunal had to have witness statements to do its job properly.

> "Secondly, we accept the OFT's submission that, in a case which turns, or may turn, on the credibility of witnesses it is undesirable that the matter should be considered by the Tribunal 'on the papers', as the appellants suggest. In our view, the Tribunal should exercise its powers to hear witnesses ... The notes of interview are not, in our view, satisfactory substitutes for witness statements".

THE CHAIRMAN: When you say that the witness statements were new evidence because there had not been witness statements in the administrative procedure, my recollection is that they were new evidence also in a different sense - namely, that they were actually related to things that had not been explored in the administrative procedure.

MR. HOSKINS: That is true. It was not simply that they had taken the interview transcript and put a statement of truth at the end. They also went further than that. That is absolutely clear. But, I do not think that anything turns on that for this point. The point that is made by the Tribunal is that it is clearly saying to the OFT, "Where credibility is likely to be an issue, we expect witness statements and we expect to hear cross-examination". That is the point.

But, in Argos, in the judgment in July 2003, one sees from para.80 that what the Tribunal said was, "Because this is the first case of its type to come before the Tribunal it would be too draconian to say, 'You, the OFT, having failed to get witness statements during the administrative procedure, we are not going to let you put them in now', so it was, if you like special dispensation because everyone, as Sir Christopher Bellamy used to say: "We are all finding our way and we all need to work together to see how this is going to work, and this is one of those instances."

In that case, special dispensation, the OFT is allowed to put in a witness statement so the formality was gone through that it was referred back to the OFT so it could go through the Rule 14 procedure. In fact, if I remember correctly *Argos Ltd. & Littlewoods* did not put any response in, it was a pure formality just to get the witness statements.

The crucial point from *Argos* is that as long ago as 2003 the Tribunal made it clear to the Office that in cases of this type it expects the OFT to produce witness statements, and it expects cross-examination to take place in relation to the witnesses. Having been made aware of that in no uncertain terms in 2003 and having chosen not to do that in this case, with respect, the OFT must bear the consequences. This is not the first time this has arisen, the Tribunal's position is absolutely clear and has been for some time. Indeed, the Tribunal's concerns as expressed in *Argos*, have been expressed in the context of these construction appeals, madam, you referred in your opening remarks to North Midland, and the Willis case. I have given the transcript reference to North Midland, the line that leaps out, the President's comments: "Speaking for myself I do not find that this is a very safe way to proceed." With all due respect the President is correct, and that has been the Tribunal's consistent view.

Again, a way to try and circumvent this problem, the OFT suggested that Durkan should have called Mr. Goodbun as a witness, but that is really not credible. The fact is, it is the Office that wants to rely on Mr. Goodbun's evidence, so it is the Office that has to call him to make good its case, and of course, if we had called Mr. Goodbun we would not have been allowed to cross-examine him, he would have been our witness.

The only possibility that I would have had to cross-examine him was to call him and then to ask to treat him as hostile. I think the court would look pretty askance at that way of proceeding. It is for the OFT to prove its case. If the OFT wanted evidence from Mr. Goodbun it was for the OFT to get a witness statement from Mr. Goodbun. We say that those considerations should weigh very heavily with the Tribunal when assessing all of the evidence before it.

I will move on, again this is a subject I dealt with at length in opening, so I can take it very quickly. The evidence relied on in the Decision – we have the Mansell leniency material, as I showed you in the leniency application itself, CMS Cameron McKenna accepted that errors might have been made. That is para.14(b) of the note. There was a City Road office summary. We learned that there was someone called Alan Armstrong employed in the City Road office, as well as someone called Phil Hart, you will remember the list of individuals whom CMS interviewed. There was the schedule of cover prices where we had "Claremont Close" and beside it the initials "AA", Alan Armstrong. The interim job report I will come back to again, and we have the interview transcript.

Madam, Mr. Beard pointed out that when these interviews are given there is a warning at the start about penalties if one gives false information but I should point out that Durkan is not suggesting that Peter Goodbun lied to the OFT. The question, as you put it, is: "What does this statement say?" In my submission, also very importantly: "What does it not say?" That is what this is about, it is not about the credibility of Mr. Goodbun at all.

The points that come out of it, again these are well established, pp.3 to 4, Mr. Goodbun was not generally directly involved in the preparation of tenders and pricing jobs. Steps to take a cover were taken very, very close to submission. There is no information recorded anywhere at all in the City Road office that a cover was taken in relation to this particular project. Some of the other Mansell offices had databases where they put a "C" on, etc.

THE CHAIRMAN: So the situation is that the City Road office did not have that practice, it is not that they had it but this one does not appear on it?

MR. HOSKINS: My understanding of reading the material is that they did not have the practice.

No golden rule, 5 to 15 per cent mark up, there or thereabouts for cover prices. Then we get

to the interesting bits. There is clearly confusion, there is a lack of clarity as to who was the estimator who worked on this job. Peter Goodbun suggests it was Phil Hart, that contradicts the schedule of cover prices provided by Mansell with the initials "AA". Mr. Beard handed up some documents intended to assist but, with respect, it actually just confirmed the confusion, because on those documents in relation to Claremont Close one saw Alan Armstrong's name, but no mention was made of Phil Hart's name. So it did not do anything other than confirm the confusion.

Mr. Beard also made the point that if one looks at the Builders' Conference interim report, there is the "received" stamp, someone has written PH. It may be that PH's initials are written because he was the estimator who was responsible for Claremont Close. It may be that within the office Phil Hart was responsible for distributing the interim job reports to the estimators who were responsible, we just do not know.

THE CHAIRMAN: There may be someone in their registry who also has the initials "PH".

MR. HOSKINS: We just do not know. The point is that the OFT has actually presented conflicting evidence to the Tribunal as to who the estimator is who is responsible for the job. This is all the Office's evidence, and it is conflicting.

What we do know is it was not Peter Goodbun who was responsible for the job in terms of being the hands-on estimator, because he told the Office that, and what we also know is that the Office did not interview either Alan Armstrong or Phil Hart.

Let us go then to the annotations on the interim report. Peter Goodbun indicated to the Office that the annotations were not made by him, he thought it was Phil Hart, but we see the problem with that, it may well be his recollection is defective, or maybe it is not – we just do not know.

The most important point is that regardless of whether it was Phil Hart or Alan Armstrong, what we do not know, because Mr. Goodbun was not asked was whether his explanation of the annotations were based on a direct conversation he had had with the author of the annotations or whether it was simply his attempt without direct knowledge to explain what they might mean, that is obviously of fundamental importance. It looks like the annotations were made by Phil Hart, or Alan Armstrong. They were not interviewed so we simply do not know, we have not heard from the author of the annotations what they mean.

The final point from Mr. Goodbun's statement is he does give an explanation of why he decided that a cover price should be sought from DL, but this is the point again about what he does not say. He does say it was not him who approached Durkan, thinks it was Phil Hart and what his evidence actually does, it goes no further than indicating that he decided

to tell someone to go and seek a cover from Durkan, but he does not actually know if one was received; he does not even know if Durkan was actually approached, that is simply not in the statement, we just do not know again.

Let us move on to the evidence of the Durkan witnesses. I stuck my neck out in opening and said that the OFT's case is already fragile, if the Durkan witnesses come up to proof their ship is sunk, and crossed my fingers as I said it. Well, you saw the witnesses, they all clearly came up to proof. The basic position set out in the witness statements by Durkan, the official policy was introduced in August 2004, Brian Sharpe was the estimator responsible for Claremont Close, he was aware of the official policy, be abided by it, and he was adamant that he did not provide a cover to anyone at Mansell.

Guy Copeland, James Briggs and Robert Clark in their witness statements all confirmed that they did not provide a cover price in relation to Claremont Close, nor did they have any knowledge of anyone in Durkan providing a cover price.

In my submission, it is quite clear that all of Messrs Sharpe, Briggs, Clark and Copeland were open, frank and patently honest in their evidence.

According to Mr. Sharpe, he described how the August 2004 policy was brought to his attention. There was a memo sent 'round, he said that Mr. Clark also came into the office and explained it to the estimators. The adoption and publication of the policy was confirmed by all the witnesses, Messrs. Briggs, Clark and Copeland, and I have given you the references to the transcript.

Mr. Sharpe as we saw, denied that he gave a cover price in relation to Claremont Close, but he also said that he would know if someone else in DL had given a cover, and I have set out the extract there.

> "Did you know or believe that a cover had been given to Mansell, but it was by someone else in the office?"
>
> "I would know, yes ----"

Then there is a discussion of whether it was pre or post-2004. Then, at the bottom of the quote,

> "But in relation to this job did you know or believe that any covers had been given by Durkan to Mansell by anyone in Durkan?"
>
> "Not as far as I know, no."

Mr. Sharpe's understanding of the implications of the policy was clear: If he breached it, he would get the sack. It was very telling, the way he put it. He actually volunteered the

information himself. This is the exchange I have set out at the bottom of p.8, going on to p.9. Mr. Sharpe volunteered,

> "Shall I tell you something? Say I'd still been working with the company and I'd gone against procedure I would've been sacked straightaway, which would've been correct. Apart from looking after my wife I had to look after my daughter and twin boys, her husband had run off, so I was in a position where there was no way I could do a thing like that."

So, he was under no illusions about the seriousness of a breach of the policy.

Now, the way that was put was it was suggested to him that if he had given a cover price to Mansell, then, of course, he would want to cover it up because of the terrible consequences. But, of course, the point is that it is partly because of the consequences that he had no incentive to give a price in the first place. The stakes were far too high for Mr. Sharpe.

Again, I have set out an extract that makes that clear. The second question in:

> "You would have been sacked if someone had found out about it would you not, Mr. Sharpe?"
>
> "Yes, I certainly would have been."
>
> "In those circumstances, if you had given a cover price, you had every reason not to tell anyone you had given a cover price, did you not, Mr. Sharpe?"
>
> "What am I going to gain by that because I'd've been sacked anyway. I couldn't get another job, I was not only supporting my wife, my daughter and twin kids that her husband left."

Then the final part of that exchange:

> "No, it did not. What's the point of Robert Clark coming 'round and giving us instructions when we can override it, what's the point in that? There's no point. I worked there for twenty-odd years, there was no point in me doing anything like that, was there?"

Mr. Sharpe is clearly a company man who did what he was told. That shone through from his evidence.

The lack of incentive to give a cover price was confirmed by the other witnesses. It was confirmed by Jim Briggs:

> "You have obviously emphasised a distinction pre. and post-2004 in that that was the watershed, but even with the new policy in place, it would still be possible for employees within Durkan, once the estimating process had been gone through,

indeed once the tender approval process had been gone through, to provide a cover to another company, would it not?"

Again, this is an example of the candour:

"Well, anything is possible, but I think as Brian made the point: why would he? What gain could Brian Sharpe in this instance have of giving a cover? Possibly losing his job. So, I would say, no, very unlikely".

Then the final comment,

"No, as I said previously, I can't see any – any circumstances where an estimator like Brian would do that. So, no.

And confirmed again by Robert Clark,

"... there is very little incentive for an individual to engage in anything like that".

So, absolutely consistent evidence.

It was suggested that the incentive for Mr. Sharpe might have been, "You scratch my back. I'll scratch yours". He had a relationship with someone at Mansell - he had a relationship with Peter Goodbun. Mr. Sharpe stated that he personally did not know Peter Goodbun. Of course, when one looks at Peter Goodbun's interview transcripts, he does not say that he knew Brian Sharpe. Now, he gives a description of why he went to Durkan. If the reason he went to Durkan was because he knew Brian Sharpe, he would have said so. But, there is no mention of that.

There was then the exchange in cross-examination where Mr. Copeland indicated that he had met Mr. Goodbun once or twice at some functions. He described them in this way,

"-- you would have 500 or 600 people from companies all over London in that particular room at the luncheon".

He said he thought it was 'pretty likely' that Mr. Sharpe was with him on an occasion when he met Peter Goodbun. But, of course, that does not contradict or undermine Mr. Sharpe's evidence that he did not personally know Mr. Goodbun in any way because Mr. Copeland was not asked if he knew whether Mr. Sharpe actually met Mr. Goodbun on those occasions. So, at its highest, what Mr. Copeland's evidence demonstrates is that it is pretty likely that Mr. Sharpe and Mr. Goodbun were in the same room at some point in time, along with 500 or 600 other people.

Mr. Sharpe also expressly denied that he ever had any dealings with Mansell - any personal dealings with Mansell. He did not have a relationship with them. This notion of the fear of the sack if Mr. Sharpe had given a cover, of course he would not own up because he would get the sack. He retired from Durkan in 2005 and he has consistently taken the view that he

did not give a cover. He did that in his unsigned witness statement in 2008 and his signed witness statement in 2009. So, the risk of the sack being a reason why he would persistently tell lies I am afraid simply does not stack up.

There was some questioning about the situation on giving cover pricing prior to 2004. Mr. Sharpe was quite clear that in his view he could not give a cover price of his own initiative prior to the introduction of the August 2004 policy. I have set out the exchange. But, of course, that makes it even less likely that he would give a cover on his own initiative after August 2004 because he would be transgressing in two ways. He made that clear. I have set out the exchange at the top of p.12:

> "So, if someone had called up and said, "I am Phil from Mansell. You are on the Claremont Close job. We are not going to do it. Can you give me a number?" it is entirely possible that you would have forgotten about that."
>
> "I wouldn't have given that cover without approval - and, anyway, we're talking about after this 2004 date, which didn't happen anyway".

So, it is doubly unlikely that Mr. Sharpe would have had to have broken two rules to do this.

The OFT started casting around because it was in trouble with Mr. Sharpe. So, what else could have happened? So, the suggestion we have had - certainly in closing - was that someone else, unspecified, at Durkan might have done this. But, we know from the evidence that a maximum of four people at Durkan would have been involved in finalising the DL tender for Claremont Close. They were Mr. Sharpe, Mr. Copeland and Mr. Briggs or Mr. Clark. We get that from the witness statement of Mr. Copeland and the cross-examination of Mr. Briggs which I have set out there. He describes it in this way:

> "What you say in your statement is that submission of a tender would need to be signed off by you and Mr. Clark. As I understand it, it would come up from Mr. Copeland, he having worked with an estimator, and you would then sign it off, you or Mr. Clark, before it was submitted; is that correct?"
>
> "The way we submit tenders is that there would be a tender adjudication meeting that would involve, in this case, Brian Sharpe, the estimator, Guy Copeland and then either and/or Robert Clark or myself ..."

And then an explanation of the sign-off process. So, a maximum number of four - probably just three: Sharpe, Copeland and one of Briggs or Clark would have been involved.

Now, in cross-examination the Office did not ask Mr. Copeland if he had given the cover. It did not ask Mr. Briggs if he had given the cover. It did not ask Mr. Clark if he had given

the cover. So, it is not entitled to submit that any of those individuals provided a cover. The truth is, and it is clear from the Decision, that the Office has pinned its colours to Mr. Sharpe. Mr. Sharpe's denial could hardly have been more forthright or convincing.

You will remember, Mr. Beard tried to say, "Well, actually, the finding in the Decision is simply that there was a cover price given". But, with respect, if one looks at the relevant paras. IV.6182 to IV.6188 the only alleged contact is with Mr. Sharpe. The way it is put - and this is reciting the evidence of Mr. Goodbun:

"PG also confirmed that BS would have been the contact at Durkan Ltd."

The Decision does not go any further. It might, at the formal line, say, "And therefore we find that there was a cover price moving". But, in terms of allegation as to how it happened, the only allegation is that Mr. Sharpe gave the cover, and no other case has been put to DL.

THE CHAIRMAN: So, if I asked you the same question I asked Mr. Beard, which is: if we were to find that it was not Mr. Sharpe who gave the cover price, do you say, "Well, that is the start and finish then of Infringement 220?"

MR. HOSKINS: That is because you have unchallenged evidence in the witness statements of Messrs. Copeland, Clark and Briggs that they did not give a cover.

THE CHAIRMAN: That was not challenged. Then you are left with the possibility that another estimator was asked for a cover price, went around the office and found the document that showed what the estimate was, and then gave that cover price.

MR. HOSKINS: Again, not put in the Decision. But, there is a more powerful point in relation to that, which is: The idea that someone unconnected with the Claremont Close job would covertly obtain confidential information in order to pass it to a competitor as a favour to an individual at that competitor, contrary to clear company policy and thereby risking the sack is inherently implausible. Again, what is the incentive for someone to do that – para.55 of the note.

THE CHAIRMAN: The difficulty we have with this is that that implausibility has to be balanced against the fact that Mansell did get a cover, so they say, they must have got it from someone, Mr. Goodbun says: "We would have approached Durkan", and the figure that appears on the Builders' Conference sheet is within 5 to 15 per cent of the Durkan figure, and I think it is not within 15 per cent of the other figure, so the question is: how strong a pointer is that to the fact that the infringement is established however it occurred?

MR. HOSKINS: That is what I am about to come on to.

THE CHAIRMAN: Good.

MR. HOSKINS: It is the plausible explanations' point.

PROFESSOR PICKERING: Can I just take this point in your address to us to raise two points, Mr. Hoskins that relate to where we are. Would you mind going back to para.38 of your speaking note, which is the bottom of p.7? At point (a) you say: "DL introduced an official policy not to receive or give a cover"? An official policy would be expected to be enshrined in a document, where is that document? It has not been put in with any of the witness statements?

MR. HOSKINS: Mr. Clark explained that he had not kept the original memo that he circulated. What one does have is the evidence from Mr. Sharpe and all the other witnesses, including Mr. Clark who implemented the policy, but also Mr. Briggs and Mr. Copeland, that such a policy was introduced, and you have evidence from them as to the way in which it was communicated i.e. a memo, articles and orally, and you also have the evidence of all of them as to the consequences of a breach of that policy, and Mr. Sharpe was certainly in no doubt as to the existence of the policy, and the consequences. With respect, that is overwhelming evidence as to its existence and effect.

PROFESSOR PICKERING: I would expect a paper trail I must admit, and if, for example, somebody were dismissed for allegedly having given a cover and they went to an employment Tribunal I would have thought that the evidence of absence of documented instructions would make it very hard for an employer to get a Tribunal to uphold such a dismissal.

MR. HOSKINS: That may well be right, but it may well be it should have been done in a better way, but the important point for this case with the issues before us is: was it done? Did Mr. Sharpe believe it was done, and did he understand what the consequences were? All those boxes are ticked. To find that there was not a policy would require disbelieving all four of the witnesses and, with respect, there is absolutely no reason to do that.

PROFESSOR PICKERING: Can I then invite you to look at point (b)? "Mr. Sharpe was the estimator who was responsible for putting the tender together." You told us this morning that the tender would be determined as to its overall value, and maybe some aspects of detail by more senior people after Mr. Sharpe, Mr. Copeland, Mr. Briggs, Mr. Clark. Mr. Sharpe, I think we have the evidence, was the estimator. What is the evidence that he was then responsible for putting the tender together?

MR. HOSKINS: This is my own caution that I gave yesterday, that is my summation of his witness statement.

PROFESSOR PICKERING: Should be aware counsel ----

MR. HOSKINS: That is my point, and I made that point against myself yesterday. Again, what is clear is that he was the estimator, he was the one who hands on, got the information together, he took it to Mr. Copeland, and they took it to Mr. Briggs or Mr. Clark for sign off. So the question is then: if it was not Mr. Sharpe could it have been one of the others who gave the cover, and I have made the point that they also have given evidence, backed by a statement of truth, that they did not give the cover and they were not challenged in respect of that.

PROFESSOR PICKERING: Although Mr. Sharpe was probably senior in years, my impression is that he was not particularly senior in the hierarchy in terms of taking policy decisions, such as: 'What is the overhead add-on?' 'What profit margin should we take in relation to this part of the work?' 'Are we going to be able to nail down the subcontractors'. Those would be the things that Mr. Copeland would be likely to pick up, would he not?

MR. HOSKINS: On our case, we accept that the final figure was known by three out of four people, Sharpe, Copeland, Briggs or Clark, all knew what the final tender offer was. It is possible that any of them could have given the cover, but the point is their unchallenged evidence is that they did not.

PROFESSOR PICKERING: Can I just ask you my final question which does not actually relate to para.38 but it relates to Mr. Sharpe, and employment arrangements. I wonder whether you can tell me whether Mr. Sharpe in this case, but anybody who has retired but is subsequently found to have engaged in behaviour that would constitute gross misconduct, was beyond the reaches of his former employer. In other words, if Mr. Sharpe was to have been found responsible would Durkan then have any right to withdraw his pension?

MR. HOSKINS: I do not know the answer to that because it has not been put in evidence, either by us or tested by the Office. If you want I can take instructions, but it will require me to give evidence on instruction. I am perfectly happy to do that if it assists the Tribunal.

PROFESSOR PICKERING: I hear what you say. Thank you.

MR. HOSKINS: That brings me on to the plausible explanations, p.13 of the note. Again, I went through this in opening so I can take it quite briefly. It is common ground that the *Aarlborg Portland* statement and the way that Mr. Beard put it in closing (I have set out at para.57) where you have unsupported evidence it is of course necessary to take into account whether or not there are any other plausible explanations for the evidence that has been offered. So are there any plausible explanations in this case which do not involve any infringement by DL, and I gave you the two examples. The first: Goodbun decides a cover should be sought from DL, he instructs, we do not know, Hart or Armstrong: "Please go and do this", so they

put a “X” beside the name to remind him to do it. They telephone up on the switchboard number, they ask who is responsible for the job and they are told it is Brian Sharpe, they write down his name, and that possibility was confirmed by Mr. Sharpe in his cross-examination, I have given the reference, but they are told Brian Sharpe is not available to speak to them. The cover is being sought very, very close to the time of submission, that was standard practice. So he thinks, “I need to get a cover. I’ll telephone someone else on the list”. He does. He notes the figure down. Madam, that comes then to your point which is ----

THE CHAIRMAN: Do I remember correctly that the evidence was that they would generally only actually come up with the figure at, sort of, nine or ten in the morning when the figure had to be there by twelve - unless they were having to transport the stuff up to somewhere else.

MR. HOSKINS: That is right. We are talking about a very small window of opportunity. As Mr. Beard said, it only takes a telephone call. But, it is within a very small window. So, you have Phil Hart or Alan Armstrong, and they know they have said they will tender for the job. They know they have not done the work because they are planning to take a cover. He needs to get a cover. Brian Sharpe is not there. They do not know when he is going to be back. What does he do? Telephone someone else. He has a list. The Tribunal quite rightly has raised eyebrows at this list that goes round with all the names of the contacts. You are sitting there. You have been told to get a cover. You know you have got an hour to go. You 'phone someone on the list. As I pointed out, the spread is somewhere between 5 and 15 per cent. I have given the figures: Mulalley - 3.5 percent; Dew - 14.1 per cent; Gunite - 1.8 per cent. All are possible ports of call. Mr. Beard tried to counter this by saying, “Well, if you look at Mr. Goodbun’s transcripts he says that he chose to seek a cover from DL because with the exception of probably two others, all the others were specialist contractors.

PROFESSOR PICKERING: Can I just ask another question on this. We have heard in evidence from both sides of this case that there are certain criteria that you would use in choosing who to approach. Besides the percentage uplift to what extent do the three companies that you cite there satisfy the other criteria in terms of similarity of size; type of business; and cost structure?

MR. HOSKINS: I am going to come on to that on the evidence we have. What we have is Mr. Goodbun saying, “I chose DL because with the exception of probably two others, the others were specialist contractors”. So, he recognised there were three companies who were not

specialist contractors - Durkan and two others - though he does not state what they were. He, for the reasons you have described, preferred to go to a non-specialist contractor. But, of course, what we do not know is that having gone to Durkan and having failed to get a cover from Brian Sharpe, whether the estimator responsible for getting this cover thought, "I have half an hour". The niceties of whether one gets a cover from a specialist contractor or a non-specialist contractor go out of the window because he is in real trouble if he does not get a cover in the next hour or half an hour. So, with respect again it is what Mr. Goodbun's evidence does not say. He tells us why he decided to go to DL, but we do not know what the author of the annotations did. It is perfectly possible, faced with time pressure, that he would have gone to anyone on the list. But, we do have some evidence about who the specialist contractors were, because Mr. Beard asked Mr. Briggs about that. He asked Mr. Briggs to confirm that Gunite, Yoldings and Makers were concrete repair specialists. Mr. Briggs agreed that they were. But, of course, if one knocks out Gunite on that basis, even if one assumes that the author of the annotations stuck to trying to find a cover from someone who is not specialist, it still leaves Mulalley and Dew as non-specialist contractors who could have been contacted.

PROFESSOR PICKERING: You are saying that they are non-specialist contractors of a similar type of business as ----

MR. HOSKINS: Professor, I am going on the evidence and the way it was put to Mr. Briggs is, "Were Gunite, Yoldings and Makers concrete repair specialists?" Answer, "Yes". Now, if the Office wants to make the case that any others were specialist, then, with respect, it is for them to make that case. Again, this is all about the evidence that is available. Insofar as evidence is not available it is to my advantage. It is for the Office to prove its case. Any gaps in its case are to my advantage.

THE CHAIRMAN: You say we do not know from the author of the notes whether he did in fact get the cover from Durkan. We also do not know whether if someone had gone back to Mr. Goodbun and said, "Look I know that's how you interpreted these annotations, but I have to tell you that the people at Durkan are absolutely denying that it was them. What do you say about that?", he might have said, "Well, maybe the annotations mean something different".

MR. HOSKINS: He might have said, "I'll try and get in touch with Phil Hart and get to the bottom of this". But, that did not happen. So, we are left with this incomplete picture. Now, there is the other possible scenario which is just a variation on a theme, which is how the cross came to be there. As I said, in opening, rather than when being instructed by Peter Goodbun, "Go to Durkan" and a cross is put to remind one to go to Durkan, the cross goes

on when one 'phones Durkan and asks for estimator (who is Brian Sharpe), ‘Can I speak to him?’ ‘No.’ Cross beside Durkan. So, variations on a theme.

THE CHAIRMAN: If Mr. Hart ended up going to somebody else, why did he not make a note of who in fact gave him the cover on the Builders’ Conference?

MR. HOSKINS: It may be he doodles. He was just sitting there on the 'phone. “Who is responsible?” “Brian Sharpe.” “I’ll take the name down.” But, then, when he gets the cover, he puts a box round it. It is not Brian Sharpe-hyphen-then the figure’. It is ‘Brian Sharpe [a figure] with a box round it. Now, it may well be that he gets the figure and he thinks, “I’ve got twenty minutes to go. I’d better run this up to the office. We’ve got to get the tender papers in.” So, one simply cannot assume that the annotations on that interim report are supposed to be a complete paper trail record which is going to go on the file. It looks like someone’s jottings as they go along in their day, along this process. It is not intended to be a file record. It is just the jottings.

Where does that take us? I am sure we all enjoyed our little walk in Regent’s Park when we looked at dogs and Alsatians that were unlikely to be lions. We looked at lions that were probably dogs. A nice way to spend an afternoon. But, Mr. Beard accepts, as he must, that the alternatives I have just described were - and I think his word was - possible, i.e. plausible. They clearly are.

Where does that fit in then with this notion of the burden of proof - the Office having to show whether something is more likely than not? Well, conflict on the evidence only arises on the Office’s case because on the Office’s case, of course, one is required to disbelieve the Durkan witnesses, and in particular, Mr. Sharpe. However, if the Tribunal thought that the Durkan witnesses were honest, and, in particular, that Mr. Sharpe was honest, then there is no inconsistency with the evidence available because as I have shown through the plausible explanations, the witness evidence of all the Durkan witnesses is consistent with Mr. Goodbun’s transcript interview because all he tells us is that he thought it would be good idea to go to Durkan to get a cover, but he does not know if that was done and if one was received, and the Durkan witnesses’ evidence is consistent with the interim report. Again, I have explained the plausible explanations.

In my submission, when, looking at the evidence, if the Tribunal believes the Durkan witnesses were honest, and, in particular, Mr. Sharpe was honest, then the plausible explanations are the most likely ones. In other words - and that is probably putting the standard too high against myself - the Office has not shown that it is more likely than not that a cover was given by Mr. Sharpe.

THE CHAIRMAN: And that it is more likely that one of your explanations is the right explanation than that A.N. Other estimator in the Office in that hour-long period, or however long it was, was contacted, managed to find the estimate, decided, despite the policy, off his own bat, to go and give a cover price ----

MR. HOSKINS: Madam, that point has not been put. That is why I make the point. On the evidence there were only three out of four individuals at Durkan who, on that morning, knew what the Durkan figure was. So, only three out of four individuals were capable of giving the cover. Their evidence was not challenged - save for Mr. Sharpe. That is why I put the stress on, 'if you believe Mr. Sharpe, you have to accept the other witnesses' evidence that they did not give the cover because the OFT did not challenge that'.

MR. BLAIR: There was evidence that it was an open plan office and everybody knew what was going on.

MR. HOSKINS: That is the only other thing that you are left with. It is not in the Decision. It was not the way it was put in the administrative procedure. It was something that suddenly came up at the end of a trial. It is inherently implausible. In my submission, if you believe Mr. Sharpe one of the reasons you will believe him is because of the way the incentives worked. He had no incentive to give a cover price. The way that works is even stronger in relation to someone who is unrelated to the job because not only is he going against the policy - not only is he giving a cover price without getting approval from further up, but he is doing it by sneaking on to someone else's desk and stealing the information. It is even less likely that A.N. Other would do it than Mr. Sharpe would do it. If you have further questions obviously I am happy to answer them, but those are my submissions on Infringement 220.

THE CHAIRMAN: There is one thing that arises from the table attached to Mr. Barclay's statement which is: What is the consequence so far as the fine is concerned if we are with you on the 220 infringement? I am not saying that we have arrived at any view yet. But, just to see where we get to with that, you have shown the re-calculation showing all three fines. But, you were in the slightly odd position that you were the beneficiaries of this capping that brought the outliers back into the 4.5 maximum cap because you had two infringements in the same relevant market. Now, we have this odd situation then that if Infringement 220 comes out, and perhaps I can put it like this: if you had only ever been prosecuted for the two - 240 and 135 - then subject to your other points on the fine you would not have got that 50 percent reduction on the 240 fine. But, what I am not sure about is how we deal with the fines for the three infringements in the event that we are with you

on 220. Do we just knock off the £2.7 million? Do we have to go through the exercise which I think would be rather to your disadvantage?

MR. HOSKINS: Madam, there are a number of possible outcomes of this appeal. There is the control issue; there is the 220; and then we are going to do the three penalty issues. Certainly I have not attempted - and nor have those who instruct me - to come up with, "Well, if the Tribunal finds for us on this, but not that; this, but not that, this is where the penalty comes out". I have had a brief discussion with Mr. Beard this morning. You have seen it in my skeleton argument. Certainly my suggestion is that the Tribunal gives its judgment on the various grounds of appeal, and then there are two options. If I remember correctly, this is what happened in the *Umbro* case, though I would advise that you do not take my word on it - it is my recollection of what happened a few years ago: the parties went away and sought to agree whether they can say, "Given the formula that was applied, taking the findings of the Tribunal, this is the new figure", and if they agree you come to the Tribunal and say, "This is what we think the figure is". If there is a disagreement, you will have further submissions on the points of detail. That is one way of doing it. The other way of doing it is a remittal. You send it back to the Office, and say, "This is our judgment on the points of principle. Go away and re-calculate the penalty." That is a bit more cumbersome because, of course, then we might have to appeal the remittal that gets you to the same place. But, certainly I was not envisaging that the Tribunal would sit down with its calculator and pick through these points, it might be possible on some of them – for example the correction of the errors might be more straightforward – if that is the only one we won on, because obviously I would rather avoid a second round if possible, it might be possible for the Tribunal to do that.

THE CHAIRMAN: I see.

MR. HOSKINS: But, I was not anticipating that you would have to go through that task. I do not think Mr. Beard was either.

THE CHAIRMAN: Thank you very much.

MR. BEARD: I am sorry, just in relation to that particular question, it was my intention to deal with some of these issues in the context of the corrections points this afternoon, because a similar issue arises in relation to them. So, if it would assist the Tribunal, perhaps at that point I could sweep up and deal with issues to do with the operation of the 4·5 per cent cap generally in relation to Infringement 220.

THE CHAIRMAN: Either we are going to hear submissions on the point or else we are not, but I do not think we can just hear them from you and not from Mr. Hoskins.

MR. BEARD: No, I am sorry. What I meant was that the manner in which the 4·5 per cent cap operated and how that was operated more generally by the Office is something that I was going to go through with the Tribunal briefly because, if in relation to the corrections argument Mr. Hoskins was successful, a similar point arises in relation to those matters. So, all I was saying was, when I deal with that I can deal with the same issue in relation to Infringement 220. I am not at all trying to keep Mr. Hoskins out of dealing with it, but it might be more sensible, since I was intending to deal with it in the course of the penalty matters, to deal with it then rather than launch into it now, if that would assist the Tribunal.

THE CHAIRMAN: Let us see where we get to, yes. Thank you very much.

MR. HOSKINS: If I -----

MR. BEARD: I am sorry. There were two points – of course, I apologise -----

MR. HOSKINS: I was happy for Mr. Beard to do it but, as I say, my intention was not to lock horns on that.

THE CHAIRMAN: Yes, we would not come up with a figure at the end of this round. So, that is the end of your submissions, then, on the Infringement 220.

MR. BEARD: I am sorry, madam Chairman , there were two factual points and one point about the OFT's case that I think it is important are raised in relation to the submissions that have just been heard. Firstly, in relation to a comment, madam Chairman, you made about the use of a 'C' marking on a spreadsheet by Mansell, I think it is important to be clear that different Mansell offices did things differently.

THE CHAIRMAN: Yes.

MR. BEARD: And it was not only 'C's. That was what some offices did. Others used parentheses or language on spreadsheets, and the City Road office did not use spreadsheets at all.

The second was in relation to Professor Pickering's memo questions. Mr. Clark gave evidence in relation to those matters (for your notes, Day 3 p.28 at line 32 through to p.29, line 11).

And the third most important point, perhaps, was – Mr. Hoskins suggested that the Office's case was that he would have to call Mr. Goodbun. Now, that was not what the Office said. Of course there is no property in a witness; so, of course, anyone can seek to call any witness. But, in my submissions I made it clear that the Tribunal has particular powers to summons witnesses and get witness evidence. And in those circumstances it is not right to say the possibility of cross-examination of Mr. Goodbun would not be open. The point that

was made by the Office was that no request had been made to the Office in that regard, or indeed to the Tribunal.

THE CHAIRMAN: Yes. Thank you. So, now I think do we go on to the penalty?

MR. HOSKINS: There is the penalty. I do not know if you want a break from my dulcet tones. I am happy to -----

THE CHAIRMAN: Yes.

MR. HOSKINS: – but, one point I was going to raise is that, as I said, Mr. Barclay is in attendance. Now, again, it is just the manner in which we proceed, we can treat penalty as a mini-trial in which I open, in which I call Mr. Barclay if you have any questions you want to put to him, Mr. Beard, then myself. Or, if you want to ask some questions of Mr. Barclay first, obviously, you can do that. It is simply in your hands as to whether you want to ask him any questions and if so when and at what stage.

THE CHAIRMAN: Let us rise for a moment, and then we will consider that. We will come back at ten to twelve.

(LATER)

THE CHAIRMAN: Yes, Mr. Hoskins. We have no questions to put to Mr. Barclay. Thank you very much for the second witness statement. No doubt during the course of your remarks you are going to explain how it, sort of, fits in with the various other points. Mr. Beard, are you dealing with penalty?

MR. BEARD: No. It was not the Office's intention to put any questions to Mr. Barclay. There are some observations to be made about the statement.

THE CHAIRMAN: I think we do not need to be too formal about that. Mr. Barclay is here. If something crops up, then I am sure if we ask him, then we will see where we get to.

MR. BEARD: Certainly. Thank you very much.

MR. HOSKINS: Thank you, Madam. I am aware for at least one of the Tribunal, certainly yourself, this is becoming fairly well trodden ground. It has also been well trodden in this particular case in the notice of application, for the defence and the various skeletons. So, I do intend to take things relatively quickly. I have tried to put everything that is relevant in the note, and I have no doubt that if I am going too quickly or not dealt with a point properly, you will tell me so and I can deal with it.

The penalty calculations for Durkan are at Decision VI.462-468, the centre table, and you will have seen that it comes up a total penalty for Durkan of around £6.7 million. It is p.1749 of the Decision. You also have seen from the pleadings that we have three grounds of challenge. We have a relevant turnover issue which has come up with some of the other

appeals; a correction issue which I think has come up in one of the other appeals; and then a compensation payments issue, which apparently we are the only ones who have come up with that.

I do continue to rely on the skeleton arguments. I do not intend to go through all the weeds in these submissions, but please, if needs be, refer back to that.

The relevant turnover issue, I put the heading "Common sense" at the top. I will explain why. I hesitated when I was saying it, because once one gets into the weeds on this common sense seems to be a distant touchstone. The way the point is set up is this: at the Step 1 starting point the OFT applies a percentage to the "relevant turnover", and one sees that in the table at VI.462 Step 1 starting point 7 per cent of £70 million etcetera, we see that is the various infringements.

Now, we know from Decision VI.78, that is p.1644, that the OFT has taken the relevant turnover as the turnover in the business year preceding the date of the OFT's final Decision. So, the approach adopted depends on the date of the adoption of the Decision, the Decision is dated 21st September 2009, and therefore the table for Durkan takes the relevant turnover figure as at year end 31st January 2009, the business year preceding the date of the Decision, and that gets us to the penalty of £6.7 million.

What if one did not adopt that approach? What would happen? Because we know that the events leading to the infringements in this particular place took place a long time ago. Infringement 135 was January 2003; Infringement 220 March 2005; and Infringement 240 February 2006. Now, another way of doing this, and I will show you in a moment where this comes from – another way of doing this is to take the relevant turnover based on the business year preceding the date when the infringement ended. So, there is a temporal connection of sorts to the infringement rather than to the date of the Decision. And if one adopted that approach in this case, then I have set out at para.10 what the impact would be in relation to each of the infringements. You will see that the effect would be very significant because, if one takes that approach and plugs it in, there may be a few frills round the edges, as you pointed out to me, but just to show the sort of materiality effect that this would have, one would end up with a total penalty in the region of £2.4 million rather than £6.7 million. So, in terms of Durkan's position, this is a very very significant point.

And we say that the approach adopted by the Office offends against common sense. The reason we say that is, why should a fine be effectively tripled just because of the date on which the office happens to adopt the Decision? If it has adopted the Decision two years earlier, we would have one figure, if it adopts it two years later we get another. But why?

What is the logical link with the date of the Decision? And we say there must be some logical and temporal link between the actual infringement and the approach to the relevant year for the purposes of Step 1. And as I say there are alternative approaches. I have not just plucked another approach out of the air which would help me, because one has the OFT's approach and the EC Commission's approach. Now, first of all, the current position with the Office is that it has a discretion under its own Guidance as to which business you have to take into account at Step 1.

THE CHAIRMAN: Really? Is that their position?

MR. HOSKINS: Well, that is my understanding of the position. That is the way that we have put -----

MR. BEARD: No, it is not.

MR. HOSKINS: Well, that is the way we have put it in our submissions, so maybe it would be helpful if Mr. Beard explained what their position is. As I say, I have not been present in the other appeals.

THE CHAIRMAN: No.

MR. HOSKINS: If that is not the position, then obviously I need to know.

THE CHAIRMAN: The position that – some of the other appeals, I mean, a lot of appellants have challenged this choice of what has been tagged "the Decision year" rather than "the Infringement year", and there have been a number of points that have been made pointing in the same direction as you are pointing us. One of the points raised by some of the appellants is as to what the actual interpretation of the Guidance, what the Guidance actually says about this, and whether one of the changes that was made in 2004 when the Guidance was re-issued just following the adoption of the new turnover, cap Step 5 order, whether the Guidance not only changed the year in relation to that Step 5, but also changed the year in relation to Step 1. And in relation to some of the appeals the Tribunal is going to have to come to a view as to what the Guidance means.

MR. HOSKINS: Yes.

THE CHAIRMAN: But, my understanding was that the Office's contention – and I think that must be their contention in all the cases, because I do not see how they can take a different view in some and not from others – is that what the Guidance says is that at Step 1 you take the turnover in the decision year. You are right, I suppose in saying there is some discretion in the sense that some of the appellants have said if that is what the Guidance says then you have to be terribly careful not to allow that to be overly disadvantageous because there are some appellants whose turnover has increased dramatically over that period. So I suppose

the Office would say, and Mr. Beard will say whether they are saying this or not, "yes", there is some discretion for them to choose some year other than that, but I think their primary case has been that according to the Guidance, subject to exceptions, it is the decision year. Is that a fair summation of where you are, Mr. Beard?

MR. BEARD: Yes, these are points I was going to go through in submissions. The Office's case is that the last business year used in the Guidance is used twice. It clearly means the same thing on both occasions, it clearly means the last business year prior to the decision, and that is the approach that has been applied by the Office, it has complied with its Guidance. It recognises that the statutory obligation is to have regard to the Guidance, but considers that it is only in exceptional circumstances it should depart from it. More generally, there is of course a discretion as to how penalties are set because the Guidance is not a mathematical formula. It has set out the stages that it has followed and the way it has applied them in these cases, and how it has considered the particular circumstances. So it is not that there is no discretion, but what there is not is a discretion as to the meaning of terms in the Guidance. Indeed, in a number of the other appeals it was suggested that the last business year term meant year before infringement, there was a legitimate expectation that that was the term, and actually the Office could not depart from that, so completely the opposite position from, I think, what is being maintained here, but these are matters I do not want to spoil the anticipation of submissions to come.

THE CHAIRMAN: Yes, I do not know if that is helpful, Mr. Hoskins?

MR. HOSKINS: It is very helpful but it does not make any difference to my submissions and I will explain why. Obviously this is one of the general issues that arises in a number of appeals that the Tribunal is going to have to determine. It will have to determine what this bit of the Guidance means, so Mr. Beard's primary submission is that "undertaking's last business year" means "last business year prior to the Decision", or it does not have a fixed meaning and therefore there is some sort of discretion on a case by case basis. Which ever it is, as Mr. Beard very fairly accepted in his intervention, even if the Guidance means last business year preceding date of the Decision as a matter of public law, as I will come on to, because it is merely guidance then the OFT cannot apply it a rule. It has to decide – and we will see the case law on this in each case – whether it is appropriate on the facts of the individual case to apply guidance. It is a well established principle of public law that one can have guidance, but it cannot be applied invariably, there has to be a cross-check. So whichever the approach is, either these words can be varied depending upon the justice of the case, or these words have a particular meaning but it is contained in guidance, and

therefore it has to be checked, whether it produces a fair result; the legal principles in my submission are exactly the same.

THE CHAIRMAN: Just wait one moment. (After a pause): Just to throw another coin in the fountain ----

MR. HOSKINS: Or "spanner in the works" even!

THE CHAIRMAN: No, I hope it will not be a spanner in the works. One of the issues that the Tribunal in its collegiate sense is going to have to grapple with, is in these various appeals that we are hearing, various people challenge various different steps for various different reasons, and if one reason for one challenge to one step, a particular step, finds favour with the Tribunal then there is the question: "Which of the other appellants can take the benefit of that success. One can take this in various stages, my own view just off the cuff is people who have not appealed obviously do not get the benefit of any successful point that is made, but there are other gradations, do people who have appealed, but have not, for example, challenged the year of relevant turnover, if it is decided that it should have been for whatever reason the year of infringement, do they then get the benefit of that in a reduction of their penalty? If the answer to that is "No", then one goes to the next stage: do people who have argued that it should be the year of infringement, rather than the year of decision but have only put forward arguments which the Tribunal does not accept, but somebody else has put forward what proves to be a winning argument on that point, and so wins that point, who else can ride on those coat tails. It may or may not therefore be relevant to know fairly precisely what arguments you are making in favour of the year of infringement point. It may not matter at all, it may turn out that if somebody has a winning argument on this point then the fact that you have challenged this turns out to be enough, or it may not be enough, do you see where I am going?

MR. HOSKINS: Absolutely, yes.

THE CHAIRMAN: I just, as I say, throw that out, whether it is a "coin" or a "spanner" I suppose remains to be seen, but it may be something that you want to bear in mind as we go forward through the submissions.

MR. HOSKINS: In terms of what my arguments will be, I am fixed with the notice of appeal, the skeleton argument and any submissions I make today.

THE CHAIRMAN: There is also this other point that because all the parties wanted to intervene and we dealt with that by saying nobody intervenes but you all have the chance to look at the transcripts and comment. Whether that stage entitles the parties to adopt something which has not been consistent with their notice of appeal at that later stage ----

MR. HOSKINS: I think there are two elements to the point that you put to me, because if it becomes important what people's individual cases are, as I say, we will have to accept my case is the one I set out. I must admit I am fully aware of the issues that you have raised, but I have not come prepared to say this is what the answer is, and I certainly ----

THE CHAIRMAN: No, no, I am not asking you ----

MR. HOSKINS: I understand you are not asking me to do so.

THE CHAIRMAN: No, no.

MR. HOSKINS: There are people far better placed than I am with an overview to make those submissions. I think I will just adopt the Mike Pudelek approach, obviously my client will take any advantage they can – I probably cannot make a more articulate submission than that.

If I can turn to the top of p.4 of the notes just to show that there are other approaches available so that if the particular approach of business year preceding the date of the Decision leads to an unfair result are there other ways in which it can be approached that might give a fairer result, and the answer is "yes". I have set out an extract from para.13 of the EC Commission's Guidelines. It says:

> "In determining the basic amount of the fine to be imposed the Commission will normally take the sales made by the undertaking during the last full business year of its participation in the infringement."

So there you see a closer temporal connection to the time of the infringement. The OFT's former practice, as you flagged up was to take the business year preceding the date when the infringement ended, and we know the practice has changed and we are where we are now.

Our submission is that regardless of how one approaches the interpretation of the Guidance there is an obligation to cross-check the final result and make sure that the penalty reached in relation to a particular applicant is fair. One sees that in the *Umbro* case, and could I ask you to turn it up please? It is at Bundle 5B Tab 23, p.31. If I could ask you to read to yourselves paras.114 and 115, and bear in mind this is referring to the previous policy, and so it was last business year preceding the date of the infringement.

THE CHAIRMAN: (After a pause): Yes.

MR. HOSKINS: The point that is being made here is that even under the old approach where the last business year was related to the date of the infringement, there could still be a degree of disjunct between the last financial year and the actual date of the infringement. So, for example, it is given that *AllSports* infringement took place between April and October 2000,

but the last business year preceding the date of the infringement ended on 31st January 2000, so the turnover upon which the penalty was based was not actually in the same year as the infringement. So under this approach there was still a level or a possibility of disjunct, obviously it was far less – it could be a matter of 12 months disjunct as opposed to a number of years under the approach applied in this case. But, the important point is what the Tribunal said, even with that limited degree of disjunct.

> "In those circumstances, when assessing the reasonableness of the OFT's calculation in a given case, the Tribunal is prepared to accept that such a calculation may contain an arbitrary element, provided of course that the overall penalty resulting from the totality of the calculation is appropriate to the infringement in question".

So, a degree of arbitrariness in relevant turnover is allowed as long as you do a cross-check on fairness at the end of the process. That is what the Tribunal said should be done in *Umbro*. Another way of putting that is that the Office is not allowed to adopt a wholly arbitrary figure. That, of course, is common-sense.

THE CHAIRMAN: The following paragraph, 116 ----

MR. HOSKINS: I think that was a different point, madam, that particularly arose in the case because we had different elements of football kit - shirts, shorts, socks. The question was whether they were relevant markets, etc. The actual agreements tended only to relate to the shirts.

MR. BLAIR: The *Umbro* quotations you have taken us to suggest that this is a Step 5 matter, whereas your submission is that it is a Step 1 matter.

MR. HOSKINS: What is being said is that the approach you adopt in Step 1, which is para.114 will lead to a certain result because what the Office does is that it has to follow through its guidelines. So, it starts at Step 1 and takes a particular approach, and then applies Steps 2, 3, 4, and 5. What the Tribunal is saying is that what you do at Step 1 obviously has an impact on what result you end up with at the end of the day. What the Office must do - and, indeed, what the Tribunal must do - on an appeal is to look and see if the approach adopted at Step 1 leads to a fair result or an arbitrary result at the end of the day.

MR. BLAIR: But there could still be an adjustment at Step 5 rather than going back up to the top and re-doing it.

MR. HOSKINS: But the point is - and I am about to come on to that - that the cross-check was not done in this case. I will come on to that. Before I leave *Umbro*, are there any other questions?

THE CHAIRMAN: No. Thank you.

MR. HOSKINS: That shows that there has to be that cross-check at the end of the day to ensure that the overall result reached as a result of the Step 1 approach is fair. In this case the Office has not denied, either in its penalty defence or in its skeleton argument, that it did not carry out that sort of cross-check. The result of that is, we say, that in our particular case one gets a very inflated sum that bears no relationship to the infringements. We say it is excessive and arbitrary. One of the important things to note is that, of course, when the Office does this it cannot start at a figure and say, "£6.7 million. We will work backwards through the Guidance". It has to work forwards through the Guidance. So, what it cannot do is say, "Well, if it had done a cross-check, it cannot say, 'we will do the relevant Step 1 this way and it comes to a figure of £6.7 million. Even if we are wrong on that, we could have had a deterrence figure of 100 per cent to get to the same result". It has to approach it logically through the Guidance. If one adopts, for example, the 'business year preceding date of infringement' basis instead of 'business year preceding date of Decision', then it would be effectively impossible, we submit, to come up with the same figure of £6.7 million because you would have to apply such high levels - for example, deterrence and direct involvement - because it simply would not be credible.

So, in our case, the crucial factor in the final amount is this starting point. Should it be related to the date of Decision or date of infringement?

Now, as I have said, the Office has not denied that it failed to carry out the cross-check in this case. It justifies the approach it adopted by saying that it needed to ensure consistency of approach amongst all the parties who had penalties imposed upon them. The legal position is that a desire for consistency across a number of cases cannot and does not excuse a result being reached in a particular case which is unfair or arbitrary because it is quite clear - it cannot be contested - that the Office has a duty to reach a fair result in each case.

PROFESSOR PICKERING: In *Umbro* - the passage that you took us to - the Tribunal said that the fine should be appropriate to the infringement. Are you saying that unfairness equates to appropriateness? You see, I wonder whether it does.

MR. HOSKINS: What we have is a figure of £6.7 million which is based, we say, on the arbitrary fact, or on the chance fact of the date when the Decision was adopted - at least a figure of £6.7 million. The Office has not said, "We did a cross-check and found that this was fair".

THE CHAIRMAN: Fair according to what? What factors should they have taken into account in carrying out ----

MR. HOSKINS: The reason I say it is arbitrary is because it is almost like a red hair test. The only reason it is £6.7 million is because of the date when the Decision was adopted. As I say, if the Decision had been adopted two years earlier it would have been different. Two years later, it would have been different. Now, you might say, "Well, what is wrong with that as a matter of fairness?" That is why I rely on *Umbro*, because what is required, according to the Tribunal in *Umbro*, is to step back and ask oneself whether the particular fine reached in that way is fair in the particular circumstances of the case. Now, the OFT has not done that. It accepts it has not done that.

THE CHAIRMAN: But is that not a step that we take because we are not bound by the Guidance. Whether or not it is something that the OFT ought to do we have to do that. But, it may be that you are coming on to this. What you are saying is that you get to £6.7 million and, yes, that seems terribly high ----

MR. HOSKINS: I do say it is high, but I also say it is arbitrary because it depends on the date of the Decision, and in a case such as ours, where the Decision comes many years after the date of the infringement, there is no reason of principle as to why the fine should be effectively tripled just because the Decision happens to be adopted six years after the first infringement.

PROFESSOR PICKERING: Would your argument be symmetric? So, if you had a client whose turnover had fallen, would you be addressing the Tribunal and saying, "Well, actually, the turnover should be based on their higher turnover in the year that they engaged in the infringement"?

MR. HOSKINS: The Office does that. It is not quite that point, but in some of these appeals that is the sort of approach that people are complaining about - that the Office has taken particular stages and has been unfair in that sense. The Office has said, "Well, look, if we do it in this way, it is not going to be a big enough fine".

PROFESSOR PICKERING: That is what 'appropriate to the infringement' presumably means.

MR. HOSKINS: That is right. But, the point is, as a matter of law, in this case the Office has not done the cross-check to check that it is fair. There are two stages to this. If I am right on that, it means that the Office's Decision is flawed because it has not complied with the public law requirement to ensure fairness.

MISS LESTER: So, you are arguing a procedural point.

MR. HOSKINS: I am. If I am correct in that, the next question is then: What should the Tribunal do? I will say that the Tribunal, in its full discretion, should not adopt an arbitrary Step 1 turnover year relevant to the date of the Decision - because there is no reason of

principle why the fine should be set by relation to that date. It could have gone either way, but Durkan may well have suffered simply because the Office decided to take on a large number of cases at once and therefore the thing took longer than would otherwise be the case. But, for example, that cannot be a reason why Durkan gets fined £6.7 million rather than £2.4 million. It cannot be a justifiable reason that a particular level of fine stems from organisational decisions taken by the Office.

I will come back to the justification that has been given by the Office. The justification is not, "We did do a cross-check and we think £6.7 million is fair". The justification that has been given is, "We needed to be consistent. So, we treated everyone the same way". The point I was making is that that is not a get-out clause because the penalty has to be fair in each case. That is what *Umbro* indicates - that it is a fundamental principle. We need *Umbro* to make good that point.

Madam, you said to me, "What does 'fair' mean?" Well this has come up in some of the other cases, not surprisingly. GMI Construction. I have a copy of the transcripts to hand. I have set out the relevant extract, but just so that you have it on your records, it was a comment by the President. It was Miss Bacon who was arguing the point in that case.

> "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 as, 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".

So, the President has encapsulated the problem there. That is what we say the problem is.

THE CHAIRMAN: Your client has been the beneficiary of one of the adjustments that was made to bring the outliers back by the 4.5 per cent cap. But, you say that was not enough.

MR. HOSKINS: No, because that was an approach that is part of the template that was applied, but still what had to be done at the end of the day was to say, "Was the figure of £6.7 million fair and appropriate?" That was not done.

THE CHAIRMAN: The reason why you say it was not fair and appropriate in this case was because the effect of taking the year of decision rather than the year of infringement made such a big difference to the relevant ----

MR. HOSKINS: It makes such a big difference and it is arbitrary because it simply depends on the date of the Decision. That is not an objective justification for fining a company three times more than would otherwise be the case. We are in public law field and what a public body has to do to justify its acts by relevance to objective factors, by objective principles. The only one which has been put forward here is consistency. As I will show you, as a matter of law, that is not good enough. Consistency does not trump fairness in a particular case. That is quite clear.

I am at p.6, para.27 of my note for those who are still following it. It is well-established as a matter of public law that a public body is required to exercise its discretion, and I use the word 'discretion' in both senses that we fleshed out at the start, namely whether there is discretion as to what the Guidance means, or discretion as to apply the Guidance given a particular meaning. But, it is entitled to adopt a policy to guide the exercise of the discretion. But, it is equally well-established that what it cannot do is apply that policy as a matter of rote automatically in every case with a closed mind. It must be prepared to depart from its policy in a particular case. Umpteen cases say that. A very useful one is *Ex parte Venables*, Bundle 5A, Tab 9. This is the *Venables & Thompson* case. The facts are obviously very far from this present case. We do not need to go into them. Can I ask you to turn to p.496? The heading 'Discretion and Policy - The Law'. Can I ask you to read that paragraph and the following paragraph which begins, "These considerations", please.

MR. BEARD: Sorry, just for ease, it might be sensible to carry on down to the bottom of the page, if that would be possible. Thank you.

THE CHAIRMAN: So, where do you want us to read from?

MR. HOSKINS: I would like you to read from the bottom of p.496 "Discretion and policy—the law". (After a pause) So, again a statement of the well-established principle, if you have a discretion you can have a general policy, but you must not apply it invariably and inflexibly. Now, in the present case we say it is clear from at least para.69 of the Penalty Defence that (it has been put in the skeleton as well), that the Office has automatically applied its discretion. I have set out a quote from para.69 of the Penalty Defence at the top of p.7.

> "Several of [the] appellants suggest that the OFT should depart from the approach adopted in the Decision in their particular circumstances. However, when it considers

its approach to Step 1 the OFT must, of course, adopt a consistent and fair approach in its methodology. It could not justifiably adopt two different approaches to the relevant turnover year in relation to infringement found in the course of the same investigation".

So, what the Office is basically saying is, "Consistency trumps". "We had to be consistent". "Our hands were tied".

But, as a matter of public law, it is not open to a public body to justify fettering its discretion by reference to the need for consistency. Again, that is very clear from a passage from **De Smith**. It is Bundle 5B, Tab 38. I have set out the extract. I am still in your hands, Madam, I do not want it to be said that -----

THE CHAIRMAN: I think we can go to -----

MR. HOSKINS: -- isolated, but I have set out the references.

THE CHAIRMAN: -- in due course.

MR. HOSKINS: And what **De Smith** is making clear is that consistency cannot trump fairness. In fact, it is the other way round. Fairness is always paramount, if there is a conflict between the two. Now, in the skeleton argument the OFT tries to lock horns on the law. It tries to get round this well established principle by citing three cases. The first of them is *Nicholds*, I think we probably should go to, it is 5B, Tab 28. Under para.32 of its skeleton, the Office cites *Nicholds* as purported authority for the proposition that, and here I am quoting from the skeleton:

"The 'no fetter' principle does not apply invariably, wherever a discretionary power is conferred upon a public body, and whatever the statutory context".

So that is the principle it is prayed in aid for. If we go through to – again, the facts are far removed from this one, but para.61, it is a judgment of Kenneth Parker QC sitting as a High Court Deputy, if I could ask you to read para.61, you will see immediately that the dictum is actually far more confined than suggested by the Office's skeleton. (After a pause) So, we see that what is in fact said is not simply that the principle does not apply invariably. What is actually said is, there are certain exceptional cases where a decision maker can apply policy without exception, but those exceptional cases only arise where:

"… to allow exceptions would substantially undermine an important legislative aim which underpins the grant of discretionary power to the authority".

Now, I doubt it is going to be contested by the Office that one of the legislative aims of the Competition Act is to ensure that penalties imposed for competition infringements are fair and proportionate and not arbitrary. And, what the Office has not done, it cited *Nicholds*,

but it has not suggested any possible legislative aim which would allow the office to impose unfair and arbitrary penalties in individual cases under the guise of consistency. So, it cites the possibility of an exception, but it does not actually then seek to justify why it is one of the exceptions.

THE CHAIRMAN: That phrase is in italics. Is that the learned judge's -----?

MR. HOSKINS: It is, the italics are in the original, yes.

THE CHAIRMAN: But, he is not quoting those words from somewhere else.

MR. HOSKINS: It may be a paraphrase but, no, I think it is his words, and he has chosen to put them in italics.

The second case referred to is a *Human Fertilisation and Embryology Authority* case. I am afraid that is in Bundle 5A at Tab 13. The procedural history of this case is complex.

I think I do need to ask you, please, to read the head note in relation to this so we can kind of "anchor ourselves" and follow what is going on. (After a pause) I have said on more than one occasion, "Beware Counsel's gloss", but to save us ploughing through the detailed procedural history, let me try and gloss it – accurately, I stress.

What happened was, an application was made in relation to a particular woman, citing reasons why the general policy should not be applied. She was turned down. A further application was made with new expert evidence as to why an exception should be made and that was turned down. The first decision, judicial review proceedings were brought against, but whilst they were still ongoing in the sense they had not been finally determined, the second decision was adopted, and so the process caught up with itself. And one sees the fettering of discretion argument. If one picks it up at para.53 on p.14, you will see here that what happened was that the process, the JR process caught up with the second decision, and the papers went before Lord Justice Sedley. He refused permission to appeal, and then we see his reasons for refusal for permission to appeal at 54. And the crucial point, and it is the one that is referred to in the OFT skeleton, is the sentence that begins:

> "The argument that the authority has fettered its discretion",

which is the second paragraph on p.15. And what Lord Justice Sedley is actually saying is, the fact you take a decision on a set of circumstances, and then you take the same decision on a different set of circumstances, or on additional circumstances cannot be said to be fettering discretion because you happen to reach the same result. So, with respect, this particular authority really does not even go to the point that we have in the present case. It is a completely different factual scenario from the one we have here.

And the final authority relied upon to try and avoid the application of this public law principle is the *Chief Constable of South Yorkshire* case. I am afraid we have to switch bundles again, that is 5B, Tab 20. If I can ask you to go to (again, we do not need to bother with the facts of this one) p.15, under the heading, "Issue (b): Discretion", you will see:

> "The nature of the policy adopted by the Chief Constable … is plain. It is to retain, save in exceptional circumstances, all fingerprints and samples taken from those who have been acquitted of criminal offences or against whom proceedings have not been pursued".

At 59,

> "Counsel for the appellants argued that this 'blanket policy' is unlawful".

And, the final sentence of 59:

> "He accepted that this would involve the examination of many thousands of cases and involve large numbers of decision makers".

I should say then that this is a speech of Lord Steyn, and his conclusion is at 60:

> "Such a system would probably not confer the benefits of a greatly extended database … [etcetera]. This suggested alternative is unrealistic and impractical."
>
> 61:
>
> "I would, therefore, reject the challenge to the policy. It is unlawful".

And what the office does is fixes on the words "unrealistic and impractical" and says, "Well, we rely on that in our case. It is unrealistic and impractical for the Office to look at the end of each case and see whether the overall result is fair". Well, with respect, we are far removed, again, in terms of what is actually happening in this case, with the background to this case, that the scale involved in the present case is far smaller, obviously, than the retaining fingerprints of all those acquitted of criminal offences or against proceedings that have not been pursued. You could imagine that runs into the hundreds, and eventually hundreds of thousands, whereas we are – I cannot remember how many companies -----

But equally, we say it is not open to the Office to justify an arbitrary result or a refusal to consider whether the result is arbitrary, more accurately, than in the case by reference to the way in which it chose to conduct this investigation. So, it cannot say "We accept that if we had taken you in isolation, we would, at the end of the day, have had to look to see whether a penalty was fair. But because we chose to lump you in with lots of others, we do not have to do that. Again, as a matter of public law, one needs principle, one needs objective justification. And the manner in which the OFT has chosen to conduct an investigation is not the justifying objective factor.

So, those are the applicable legal principles. And what we say is that what is clear is, the Office applied a common approach at Step 1. It tells us that is what it did. It did so, it said, in order to be consistent. But, as I have shown you, that is not sufficient. And what it did not do is step back and ask why in each individual case the result applying that approach was fair and reasonable at the end of the day. Madam, you have pointed out when you go through there are bits and pieces in the template where a common approach is applied across the parties for particular reasons, but it does not avoid the point that what still has to be done is at the end of the day to consider whether the penalty reached in relation to each particular company is arbitrary. We say, you heard my submission at the outset, the result is arbitrary because the difference, the figure of £6.7 million is very largely dependent upon the fact of when the Decision was adopted. For the Office to justify that it had to do the cross-check, and it has not done it, it would have to say now because the Tribunal has a full discretion, "£6.7 is fine because …" and give a reason; we have not had that. No reason has been given. Mr. Beard may attempt to do it, but with respect it is going to be too late if he does it now on his feet.

What one has is a very odd case in which, in a sense, the OFT has not challenged the fact that this figure in relation to my client is arbitrary. That is what we have said from the outset, we said it in the notice of application and in the skeleton. The defence that has come back has not been "Hang on, it is not arbitrary, £6.7 million is justified." The only defence that has come back is "We had to do this to you because of consistency", and it boiled down to a simple proposition. What that means the OFT is saying is: "We are entitled to impose an arbitrary fine on an individual company solely in the interests of consistency", and our submission is that that clearly offends against commonsense. Also, this is one of those cases where it offends against the law as well.

I accept that if you accept those submissions it leaves the Tribunal with the task of deciding what is a fair penalty. There are all sorts of factors that could go into that and it is very difficult, because the Office has not sought to justify at any stage £6.7 million in relation to my client. So what do we fall back on? I say you have a choice, you can look at the approach at Step 1 being year preceding date of decision with the very large amount of arbitrariness that that involves, or you can go to one of the alternatives, particularly the one the European Commission currently applies as a touchstone, and apply that, and that brings you out to the figure of around £2.4 million. So that is the touchstone if you accept my submissions and you get to the stage of "What figure should we impose?" that is the approach I suggest you adopt.

PROFESSOR PICKERING: Mr. Hoskins, I infer that you got to the end of para. 41. Could I ask you this? Without being obviously in a position to say whether the arguments that we have heard from you persuade or not, it seems to me that if you want to go back to basing the penalty on the year's turnover in which the infringement occurred, but recognising that the payment of the penalty could, as in this case, be a number of years forward from there, surely you are not just asking us to agree that OFT should impose a penalty as at 2003 prices. Is not at the very least the corollary that you would be expecting there to be some sort of index linking maybe by a test discount rate or something to up-rate the value to the present day, the year in which the penalty was paid?

MR. HOSKINS: Professor, as the *Umbro* case shows, which ever approach one adopts there is always a degree or a potential degree of arbitrariness in these decisions. In *Umbro* it was far less because the temporal gap could be a maximum of 12 months as opposed to years here. If you accept my submissions on the law and it comes to what should the Tribunal do then you may well take the position that, "yes, this temporary gap is too big and it is not justified, so we will base our approach on, for example, the way the European Commission has adopted." You may well take the view that in order to take a fair result we will do some index linking to take account of inflation. It would be arbitrary then, so that would be absolutely acceptable, but it will avoid the vice that one sees in the Office's approach.

I was going to move on and deal with the correction issue. I am going to take this relatively quickly because in fact there is very little dispute – I will show you what it is – as between the Office and my clients on this, and we have set out the position – you have the skeleton argument, and you have the witness statements. What the evidence shows is that there were inadvertent errors in the turnover figures that Durkan provided during the investigative procedure, and which one then finds reflected in the final penalty.

I should say that in relation to this point, just as a road map, if you are with me on the first point this does not arise because the errors only arise in relation to figures as to the turnover in the year preceding the date of the Decision. So if you are with me on the first point you do not even have to consider this point, it becomes irrelevant. If you are not with me on the first point then this arises.

The nature of the mistakes is set out in Mr. Barclay's witness statements, you have the Grant Thornton certification as well. The Office has not challenged that the mistakes were inadvertent, so that is one area of common ground. Nor has the Office challenged the accuracy of the revised figures. I will qualify that, in terms of the nature of the errors made it may well be that the final figure that Mr. Barclay has come up with, plugging the new

numbers into the formula, reallocating the pot is something that will have to be revisited, so when I say they have not contested the errors, it is the nature of the errors and the numbers that went into the wrong pots, there may still be an issue about the effect on the final sum of the errors.

Madam, you raised a certain number of questions, you have had second Barclay, I hope from the fact you have no questions for him that the issues you raised ----

THE CHAIRMAN: From what he said he does seem to have done an exercise which revisited all the turnover of Durkan Limited, and not just the turnover that had previously fallen into the markets on which the infringement was based, which was my concern, as I expressed it. His approach was capable of and did throw up points to Durkan's advantage and disadvantage, is perhaps one way of summarising it.

MR HOSKINS: The next point on which there is common ground is that the Tribunal does have full jurisdiction to correct the errors, it has the power to do so and the Office accepts that at para.33 of its skeleton.

So there is only actually one point which remains between us and that is the question of whether the Tribunal should exercise that power, should exercise that discretion to correct errors in a particular case.

The OFT has not gone very hard on this, it is said that the Tribunal should be reluctant to exercise its discretion, so it does not even go so far as to say that you should not, it simply says that you should be reluctant to exercise your discretion. In the interests of finality, legal certainty and a floodgates concern, so very general points.

Our response is this, if the errors are corrected on our calculation I accept this would be subject to the final fine tuning, but we think that the errors lead to a reduction in the fine of around £1 million, so the errors are material. We say it does offend against all notions of fairness that where a party has discovered inadvertent errors which have led to a penalty of around £1 million excess being imposed and – this is something that relates to the facts of the particular case – has raised those errors in an appeal that would have been brought in any event, so that in a sense deals with the floodgates' argument, it is not simply that this is the only part we have brought, but even if it were, so what? We say there is absolutely no reason why the Tribunal, if it accepts inadvertent errors, which are material, should not correct that error. There is simply again no point of principle as to why it should not be done.

THE CHAIRMAN: I suppose the only point of principle might be this, which is that in order to encourage parties to do a thorough job first time around one ought to make them stick with

that or, to put it the other way around, if it became known that the Tribunal would allow these sort of corrections companies might think "We can do a rough and ready guess at what the turnover is, because if it turns out that we get heavily fined we can always go back and then do a thorough job" to which I suppose the answer is: "Well it is up to the OFT to specify to the companies how they go about checking their turnover and getting it certified before it is provided in the first place."

MR. HOSKINS: Madam, I would make a different point. I understand that concern, but the way of dealing with it is saying that where a company does not exercise sufficient consideration to the original figures then it will not be allowed to correct by virtue of an appeal but that is not this case because you have seen Mr. Barclay's evidence, he took the task he was given first time around very, very seriously. It so happens that one only finds the main point that led him to actually revisit was this point about even if you are doing public sector housing it depends whether it is a private or a public client, and one only finds that in a footnote of the Decision.

So I fully accept that you might well say, and let us say in this judgment you were minded to allow this to happen, we have seen detailed evidence from Durkan, we have seen in the original process they were thorough, they were conscientious but nonetheless inadvertent errors came up. But we will make it clear that this is not licence for people not to be conscientious first time around, and they will not get the benefit of our discretion.

That is one element of Durkan, and in my submission it is a powerful point.

PROFESSOR PICKERING: Please forgive me if I have this wrong, but my recollection is that Mr. Barclay's first witness statement rather gave the impression that he had been working somewhat in the dark, he had not been fully briefed by his seniors in Durkan as to precisely what was required, and therefore that the error was inadvertent because he had not been adequately told what was needed. Is that a fair recollection? I am speaking without turning up the papers.

MR. HOSKINS: It is the Tribunal's gloss rather than counsel's gloss! (Laughter) He was not told by those instructing him about this particular point about even if you are doing public sector work it depends on the nature of the client. But the submission I would make in relation to that is it was not particularly clear, it does not look particularly clear to anyone what the position was, one only finds it finally in the Decision in a footnote and even if one now, going back to the Decision, tries to say "what is the test that is being applied?" it is not even obvious from the Decision. Remember, Mr. Barclay was doing this before the

Decision came out. So I accept that this was a point that was obvious, and there had been a system failure.

THE CHAIRMAN: What I do not think we have seen in relation to any of the cases is the part of the original request that went out with the Statement of Objections in April 2008, that actually the terms in which the companies were asked to provide the turnover and precisely what they were told to do because we have got in some of the appeals extracts from the Statement of Objections, but I have not managed to find in any of the information we have for any of the appeals that particular part of the Statement of Objections.

MR. HOSKINS: We have in our notice of application put in some of the extracts, whether it includes that I do not know, I have not checked that. If you would like to see it, that can obviously be produced.

MR. BEARD: Clearly we can obtain that if that would be of assistance, I am not sure I will be able to get it over the short adjournment, but I can certainly provide it to the Tribunal from the Office.

THE CHAIRMAN: I think for completeness it would be useful to know precisely, first of all what the OFT asked them to provide and also what, if any, specification or what, if any, guidance or stipulation, whatever the OFT gave as to how it should be certified. I know there was a point in relation to one of the other appeals about the taking of a sample and checking the sample, but whether that was chewed with the OFT and the OFT said, "Yes, that would be fine", or whatever, I am not quite clear. I do not want to create a whole lot of extra work.

MR. BEARD: I was going to say, I am slightly concerned that one should be careful what one wishes for, because I am not sure that what one finds is necessarily that there was a sort of identical process in relation to each person. In terms of the documents that were sent out, in particular to Durkan, identifying that would be relative straightforward and could be easily provided to the Tribunal. If one wants to go further and look at iterations of comments and questions that were raised in relation to this, one would obviously have to make rather wider enquiries and that would be something that we would require some time for because it would involve engaging members of the team in order to do it, and a question must arise as to whether or not the Tribunal really wants that sort of ----

THE CHAIRMAN: The OFT has taken the stance it has taken on these things, and we go along with that, but, as I say, just for completeness, it would be useful to see the initial terms in which the information was ----

MR. BEARD: Those behind me hear you, thank you, madam Chairman .

MR. HOSKINS: I am very grateful to Mr. Beard. I have got one issue left to deal with.

THE CHAIRMAN: Is that the compensation?

MR. BLAIR: Just before you leave this one, supposing that Mr. Barclay had discovered an error that would have doubled the penalty, was he under any obligation to tell the OFT?

MR. HOSKINS: Arguably he may have been. The figures you provide have to be accurate. If you subsequently provide a mistake, which is to your disadvantage then one would be taking a risk if one did not reveal those figures.

MR. BLAIR: That is not after the Decision is taken?

MR. HOSKINS: If the OFT were to discover, itself, for example, a mistake it might come after the company and you can have extra penalties imposed upon you for providing incorrect information. The question of whether that would apply where you to discover after the event is a difficult one. I do not want to sidestep the issue obviously.

THE CHAIRMAN: We will not hold you to that answer in case in some future year you find yourself in front of us with a completely different client arguing the opposite!

MR. HOSKINS: There is a delicate moral issue involved. Happily it does not arise in this case.

THE CHAIRMAN: Mr. Hoskins, if you want to say ----

MR. HOSKINS: Madam, if that was held against me I would never practise again. It is an occupational hazard.

THE CHAIRMAN: Thank you. We will reconvene at five past two for your last point.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Hoskins.

MR. HOSKINS: Good afternoon, madam. There is a degree of fever pitch in the room, I think, for those for whom this is the end of a long process and I will try and be as brief as possible. The compensation payments issue, and this is para.53 of the note on p.10. As we know, the Decision addresses two forms of collusive tendering or bid rigging. You have got cover pricing and you have got compensation payments. Our complaint is that in two different ways the OFT's treatment in relation to compensation payments has breached the principles of equality and proportionality but particularly equality.

The principle of equality is well established. I have set out it out at para.55 of the note. The principle of equality requires that different cases should not be treated the same without objective justification. I have given a case for that. It is such a well known principle that I do not think I need to take you through it to establish that point. Different cases should not be treated the same without objective justification.

As I say, there are two ways in which we say the Decision offends against that principle. The first one is that it treats compensation payment agreements without cover price, so just simple compensation payment agreements, as more serious than cover pricing without compensation payments. So that is the distinction, if you like, it is between a mere compensation payment case and a mere cover price case. It says that the mere cover price is less serious than the compensation payment.

Perhaps I could pick up the story. One sees it, first of all, in the Decision, para.VI.114, which simply states that point:

> "The OFT considers that bid rigging arrangements where the participants offer (or request) inducements to (or from) other cartel participants (for example, by making compensation payments) are more serious than those infringements where no such inducement is offered …"

So compensation payments are treated as more serious than cover pricing without a compensation payment.

As a result, the practical effect of that, as one sees in the Decision, is that one gets a starting point and anything with a compensation payment is 7 per cent of relevant turnover and for mere cover pricing it is 5 per cent. The effect of that in relation to my client is in relation to Infringement 135, which is compensation payment with cover pricing at 7 per cent. That figure is applied at the starting point. Our submission is that there is no principled basis for treating a mere compensation payment as more serious than a mere cover price.

Can I begin with the reasoning in the Decision as to why the OFT says that that difference in treatment is justified. I think we are going to need both volumes of the Decision, but I am going to flit between part VI and part III, so you might want to get both of them now if that is the easiest way to do it. I am going to start at para.VI.114, p.1653. I have already set out the facts. The OFT treats compensation payments as more serious than cover pricing. I just want to look at this because we see what the reasoning for that is, the justification that is given. It says, "(see paragraphs III.130 to III.131)", so that is our next port of call, please. That is p.370 of the Decision.

As I am going through this, I realise that my description of equality is actually incomplete, because there are two limbs to it. One part is as I have set out, that different cases should not be the treated the same without objective justification. Another aspect is that the same cases should not be treated differently without objective justification. I should clarify that before I move on. Again, that is not going to be in dispute.

Decision III.130 and 131 are the reasons which are given for the distinction. Can we look, first of all, at III.130, and can I ask you to read that, please. (After a pause) What that is doing is comparing a cover bidding arrangement with compensation payment to a cover bidding infringement without a compensation payment. That is irrelevant to the issue we are currently considering, which is comparing a mere compensation payment with a mere cover price. The point is simply that III.130 cannot be justification for a difference in treatment between mere compensation payment and mere cover price, because it simply does not deal with that point.

The second justification is III.131, and perhaps I could ask you to read that, please. (After a pause) The point that is made there is that parties who engaged in compensation payments were fully aware that they were not legitimate. So that is put forward as a reason as to why a compensation payment agreement is treated as more serious than a cover price agreement, awareness of illegitimacy.

This is dealt with in the penalty defence at para.268(c). Again, I have set out the extract from it in the note at para.63. What is said is:

> "… the parties which entered into agreements to make compensation payments (including Durkan) were fully aware that such arrangements were anti-competitive."

That is what is said in the defence.

Therefore, if one follows through the Decision to see what is the justification given for the difference in treatment between mere compensation payments and mere cover pricing, the only reason that is given which is relevant to Infringement 135 is awareness of illegitimacy. The problem with that is that the Decision also finds that the parties to mere cover pricing arrangements must also be held to be fully aware of illegitimacy. One sees that if one goes to p.1636, VI.40, and VI.44 in particular. It is in particular the second sentence of VI.44:

> "The OFT considers that, by the very nature of the agreements and/or concerted practices involving collusive tendering, each of the Parties must have been aware that the agreements and/or concerted practices in which they participated had the object of preventing, restricting or distorting competition and the infringements were therefore committed intentionally."

That is an important part of the Decision's reasoning in finding that mere cover pricing is an objective infringement.

So what one has on one side is the reason given as to why compensation payments are more serious than cover pricing is because the participants must have been aware of illegitimacy.

The problem with that, as an explanation, is the Decision finds that the participants in mere cover pricing must equally have been aware of illegitimacy – i.e. no principled distinction is given for the difference in treatment.

That is what is in the Decision. The defence comes at this in a different way. This is the top of p.13 of my note. In the penalty defence, and again I have set out the extract, it said,

> "An agreement to make a compensation payment distorts the tender process to an even greater extent [i.e. than a cover price] because the inevitable consequence is that a tenderer will inflate its bid by the amount of the compensation payment and/or choose to accept a lower profit margin, rather than adopting a normal commercial strategy of lowering its bid in order to be more competitive".

This suffers from the same defect because it only looks at one side of the equation. What that gives is a reason why compensation payments in themselves distort the competitive process. But, it does not have any comparison of the competitive effect of compensation payments as compared to cover pricing. So, it says that compensation payments distort the tender process more, but then does not explain by way of comparison why that is correct. It is simply an assertion based solely on a reflection that compensation payments do distort the tender process.

Of course - and this is the bulk of the Decision - the Decision finds that mere cover pricing, i.e. cover pricing without a compensation payment also restricts competition. Again, that is a very big part of the Decision. I do not think we need to look it up because I hope it is so obvious – Decision III.128 and 99. That is at p.370, for your note. So, we have a statement that compensation payments distort competition and cover pricing distorts competition.

But, the problem is that nowhere in the Decision or the Defence does one find justification and explanation of why compensation payments distort the process more than cover pricing. In our submission there is actually no principled reason why it cannot simply say, as a matter of basic principle that that must be correct. It is not. In truth it is actually more likely that the opposite is correct, i.e. that cover pricing has a greater effect on competition than a mere compensation payment because at least with a compensation payment both parties are still competing to win the tender.

So, the point we are making is that there is a difference in treatment. In order to have a difference in treatment one has to be able to justify it - objective justification. There is no objective justification given. One cannot find it in the Decision. Equally, the attempt to show it up in the Defence does not work because there just is not the material. This comparison has not been done. That is the first point. That is why we say that there is no

justification for treating a mere compensation payment as more serious than mere cover pricing. Therefore it was wrong to apply 7 per cent to Infringement 135 - a mere compensation payment - when only 5 per cent is applied to cover pricing. There is a lack of principle.

PROFESSOR PICKERING: So, are you happy to accept the possibility that the penalty for cover pricing might be raised to 7 per cent on the grounds of parity?

MR. HOSKINS: A common issue in discrimination claims. But what is well-established is that when one finds this sort of problem from the court levels down, and then for the future if a body wants to get rid of the discrimination by levelling up, it can. But, in the present case, I think your powers would probably be stretched to the limit if you were to put the 7 percent on everyone else. Certainly the standard approach in discrimination cases is that once it is established it is levelled down and it is left for the decision-maker to take account of it for the future.

There is a second argument on this. It is a separate argument. It is just based on the same principle of equality. That is why it is under this heading. It is a separate argument: a failure to distinguish between the fact that there are different types of compensation payment arrangements because one has compensation payment arrangements with cover pricing at the same time, and one has mere compensation payment arrangements without cover pricing. So, the comparison here is two types of compensation payment agreements. We say that the Office has also breached the principle of equality in relation to that because it has applied the same percentage - 7 per cent - to compensation payment agreements regardless of whether the particular infringement included cover pricing as well or not.

THE CHAIRMAN: What is the compensation for in either case? Presumably where you have your cover price and a compensation payment, the compensation payment is made in which direction then? By the person who is ----

PROFESSOR PICKERING: The winner pays the loser.

MR. HOSKINS: That is what one would expect.

THE CHAIRMAN: So, the person giving the cover pays the loser for compensating them for not getting the contract basically.

MR. HOSKINS: That is how that would work

THE CHAIRMAN: In your situation what was the compensation for? It was an agreement that -- --

MR. HOSKINS: It is a contribution to the costs of the tender to the losing party, i.e. it softens the blow if you lose the tender.

THE CHAIRMAN: So, Durkan lost that tender and was therefore compensated by Mr. Percevel.

MR. HOSKINS: That is right.

THE CHAIRMAN: If Durkan had won they would have had to have pay the £60,000 to Mansell.

MR. HOSKINS: That is right. That is the point. With a pure compensation payment agreement both parties still compete to win the tender. The blow for the one who loses is softened to a certain extent by the payment.

THE CHAIRMAN: Do you accept that there must be some kind of *quid pro quo*? We have got the one instance in which this happened, but there may or may not have been, actually or expected, a situation where another compensation payment went in the opposite direction. Or was this entirely a one-off?

MR. HOSKINS: I can only go by what is in the Decision. We raised this point about unfairness. I can then challenge the OFT's justification for it. Examples of compensation payments are at p.1653 of the Decision - VI.113. Some of them include cover pricing. Some of them do not include cover pricing.

MR. BLAIR: I may have missed the point entirely. I had thought that when you had the combination of a cover and a compensation payment it was, in a sense, a cover price given for value, and that there was therefore a contract, as it were, between, "I will give you a price as long as you pay me for it". That is wrong, is it not?

MR. HOSKINS: (After a pause): The reason I am hesitating is because I do not know the answer without going to the Decision. It is not something which springs to mind. The second reason I am hesitating is that I am not sure it makes a difference to my submissions. That may not be very helpful. First of all, I am doing a comparison between compensation payments alone and cover price alone. Now I am moving on to a comparison between compensation payments alone and compensation payment with cover pricing. There are both types covered by the Decision - both types of infringement. The OFT has treated both the same - 7 per cent. It will not surprise you to know that my argument is going to be that they should have been treated differently, because a compensation payment on its own is less serious than a compensation payment with cover pricing. Perhaps if I develop the point it may, or may not, tease out some of the issues?

The Decision expressly recognises that there are differences between these two scenarios. If we can look at p.371 of the Decision at III.137. In particular at the bottom of the page you will see reference to the term "compensation payment".

> "Wildgoose accepted this in principle, but objected specifically to the use of the term 'compensation payment' both in the context of cover bids, and as a stand

alone infringement. The OFT accepts that there are differences between compensation payments made in these two different situations and has, therefore, analysed them separately at paragraphs. III.127 to III.132 and III.138 to III.157."

So, Mr. Blair, the answer to your question may well be found in those paragraphs. The reason why, as I said, I am not leaping in and giving the answer is (a) I do not know it without going to those parts; and (b) I am not sure it makes any difference for the purposes of my submission.

We start from the point that the OFT accepts there was a difference between these two types of compensation payment arrangements and we say that logically an infringement involving only a compensation payment must be less serious than an infringement involving a compensation payment and cover pricing. We say that is reflected in the Decision itself, if one goes to p.370, III.130, it is one we looked at before but for a different purpose.

"Cover bidding infringements in which participants offer (or request) inducements (such as compensation payments) to (or from) other cartel participants are more serious than infringements where no such inducement is offered. Such an agreement further distorts the tender process: the supplier providing the cover and who will make the compensation payment is at least incentivised to recover the cost of that payment by further inflating his tender price in addition to any inflation due to reduced competition from the provision of a cover price."

So what you have in a compensation payment situation is the Decision itself recognises a step up between the two. We say that it must follow that if there is a difference between them, as indeed the Decision says, applying the principle, you must not treat different cases the same without objective justification, then there is a problem here unless the Office has put forward an objective justification.

Again, a number of points have been put forward, the first one is in penalty defence para. 270. The first point made is to refer to para. VI.115 of the Decision, it says:

"For the purpose of calculating penalties, the OFT is treating both types of compensation payments in the same way since the factors which make them more serious, referred to in para.VI.114 above, apply in all cases."

So that is from the Decision, p.1654. Then you will see the quote I have just read out, the final sentence at VI.1115. That refers back to VI.1114, the previous paragraph which we have seen before, which in turn cross-refers to III.130 to 131, which again we have looked at before, but let us go back to them, p.370.

These are the two reasons which are said to be objective justification for treating both types of compensation agreement the same. The first one we have seen is distortion of the tender process, and the second one is awareness of a legitimacy of the compensation payment. The illegitimacy point applies to both types of compensation payment clearly. But what about the point about the distortion of the tender process, because we say it is clear that the distortion of the tender process is different for each compensation payment agreement, because under a compensation payment arrangement without cover pricing both parties still compete to win the tender. Under a compensation payment agreement with cover pricing the parties do not compete to win the tender. We say it is clear from that that the latter form of compensation payment, i.e. compensation payment plus cover pricing is clearly more serious than the former because it has not only got the anti-competitive effects of a compensation payment agreement, it has the anti-competitive price of the cover price. That has not been expressly denied by the Office in any of the defence and skeleton argument up to date and we say nor could it be. Therefore, we say the Office has treated different cases the same, no objective justification.

The second point that is made in the penalty defence to try and justify the same treatment of different situations (para.79 of my notes) the OFT said it was entitled in the exercise of its discretion to take the view that the initial distortion is not sufficiently great so as to justify the application of a higher starting point. The Office here is saying "Let us assume that there is a greater distortion", it does not matter, we have a discretion to say "It does not really matter". With respect, as a matter of law the principle of non-discrimination is not a matter of mere discretion. If there is same treatment of different circumstances, the only way it can be justified is by an objective justification.

THE CHAIRMAN: Are they not saying there that the objective justification is that it is an immaterial additional distortion and therefore does not justify making a difference?

MR. HOSKINS: The problem is that there is no assessment of that point in the Decision, and let us say they did not use the words "In the exercise of our discretion", let us just say the difference is not so material, it is not required to treat it differently. That is fine if that is the way it is put, but it is not in the Decision, there is not that analysis in the Decision. So that is why they are left with the way they have put it in the Defence: "as a matter of our discretion" and without conducting any analysis we will assume it is not a problem".

Again, we say it seems pretty obvious, they have accepted there is a difference between them because a compensation payment on its own cannot be as bad as a compensation payment plus cover pricing, because in the former both parties still compete to win the

tender, they do not in the latter. That is what is said in the penalty defence, and there is another attempt at justification in the skeleton argument at para.38. What is said there (para.81 of my note):

> " . . . it was proportionate to treat all instances of compensation payments alike, regardless of whether they were combined with a cover price, in circumstances where there were only 6 instances of compensation payments in the entire Decision."

When one thinks of that it is quite an extraordinary argument. What it is saying is, "even if we have breached the principle of equality by treating different cases the same way it does not matter because we only did it to a few people", but this is just part of the theme which one sees coming through sometimes, which is clearly unacceptable. The way in which the OFT chose to run this investigation, i.e. lots of cases at the same time is not going to be objective justification for anything. Indeed, in any event, even as a matter of logic this argument assumes that compensation payments with cover pricing are more serious than those without, and that is the basis of this argument and says that there only six instances of it. If that is right, that strongly militates in favour of actually doing something about it, because you only have to look at six cases to make sure you make the difference. So it is not the case here, as the OFT suggested in another context, that it would be impractical for it to go to the six cases and treat them differently, it actually works against them. If there are only six cases it could and should have actually drawn the distinction.

We say again what one has is a breach of the principle of equality because different cases are treated the same, and no objective justification is given for that parity of treatment. We say that therefore means that the 7 per cent starting percentage for compensation payments without cover pricing, Infringement 135, must be less than the 7 per cent starting point for compensation payments with cover pricing i.e. "If they are 7 per cent we must be less."

Both these equality points, proportionality points also apply to the MDT because exactly the same approach has been taken there; higher MDT percentages applied to compensation payments than to infringement without compensation payments, 1.05 against 0.75,and no distinction was made between them for the different types of compensation payment.

THE CHAIRMAN: Did you have an MDT applied? I do not think you did.

MR. HOSKINS: Maybe I am tilting at windmills.

THE CHAIRMAN: The effect of the MDT only arises if the relevant turnover on which the fine is assessed is less than 15 per cent of the total turnover.

MR. HOSKINS: Madam, we did. If you go to p.1749. Infringement 240, MDT to apply 1.05 per cent.

THE CHAIRMAN: Yes, I know but the penalty after Step 2 takes ----

MR. HOSKINS: I understand, I am sorry, I had not picked that up. I had assumed that that was the figure.

THE CHAIRMAN: They always put that in.

MR. HOSKINS: That is what I had not picked up. I apologise. I am tilting at windmills on that small point. I appreciate those two points require a bit of "cold towels round the head". That is why I have set out in detail herewith all the references.

THE CHAIRMAN: Let me put this to you, Mr. Hoskins, that you are rather, sort of, not seeing the wood for the trees here, in that the reason why compensation payments are regarded as more serious is that, if I can put it colloquially, it is bad enough if the competitors are ringing each other up and speaking to each other. But if money is then changing hands in relation to these bidding arrangements, that then makes it more serious. Without the need to get into the, sort of, minutiae, that you have been getting into but just the fact that these competitors are now paying each other sums of money, raising false invoices, whatever, in relation to these arrangements makes it more worrying than simply them ringing each other up every now and then.

MR. HOSKINS: Madam, this is an infringement. This is a penalty relating to the Competition Act. What we are talking about is compensation payments without cover pricing; and in those instances both parties still compete for the tender. So, in terms of the harm on competition, in my submission there is -----

THE CHAIRMAN: That is not right, though, is it? Because, are you not getting cause and effect mixed up there? Because it is not the cover price that means that they do not compete with each other. The cover price arrangement comes into effect once a party has already decided it is not going to compete.

MR. HOSKINS: You have to be very careful, because that would completely undermine it, an object infringement analysis of cover pricing.

THE CHAIRMAN: No, no, well, I do not think it does. But,

MR. HOSKINS: Because it is based on an agreement between the parties that one of them will not compete. Otherwise you do not get an object infringement. So it is not – because if one looks at cover pricing as a unilateral act, of course, we are out of -----

THE CHAIRMAN: No, it is not looking at it as a unilateral act.

MR. HOSKINS: -- Chapter 1.

THE CHAIRMAN: It is trying to examine whether this difference that you point to as saying, "Well, with the compensation payment they are both competing. They just agree to share out, to sort of cushion the loss for the losing party, whereas with a cover price one of them is not then going to compete". I am just exploring a bit whether that really is a material difference between the two.

MR. HOSKINS: Well, the nature of the effect is different. And what the OFT would have to do for objective justification is point to where in the Decision it is analysed and justified saying that one is worse than the other. And I have taken you to those passages and I have said that they do not amount to objective justification.

PROFESSOR PICKERING: There is another way of looking at this. Suppose we have got four companies, A, B, C, D. And A determines a price of, let us say, 100, an index. B asks A for a cover price, and A therefore suggests, let us say, 110, okay?

MR. HOSKINS: Yes.

PROFESSOR PICKERING: Now, that is one market. And we can see that what is on offer to the client is a genuinely determined price in the case of A, and a casually determined price in the case of B. Now, with C and D, let us, you say they are both competing. Okay. Let us then say that their basic price is 100 in each case, right, because they are competing, they are very similar in costs and desire to win this work. But then they both agree that they will pay compensation to the other one if they win the contract. Now, that, it would seem, is at least arguable that that then introduces a new cost, and that because they are both party to this agreement they would both make provision for having to pay that cost, because in this case they do not know who is going to win the contract, on your argument, because they remain competitive. So, what happens there is that the client does not receive a cost or a price from either C or D which is related solely to the costs of doing the job, because there is another expenditure that is provided for which is the cost of making the compensation payment which, as we saw, was a not inconsequential sum of money. So, I do not know what that would be, but maybe that is, that pushes both up to 105, recognising that these are two separate markets. So in fact whereas in A and B the client has still got a genuinely competitively determined cost based price of doing the job of 100 from one of the tenderers, in the case of C and D, being a different market, neither C nor D are offering a price that is determined solely on the basis of the costs of doing the job, because both of them need to make a provision for a compensation payment. So, therefore, in that situation neither price is a true cost-determined price of doing the job. I offer that. I do not want to be arguing a

particular case, but that, when I sat and thought about this that was how it seemed to me, one would be taking a particular concern about the introduction of compensation payments.

MR. HOSKINS: I understand. (To the Chairman) Will you just give a moment, Madam, there is a particular point I wanted to check in the Decision. I will need to try and track it down. (After a pause) Yes, this is a needle in a haystack, I am afraid. It is p.1066 of the Decision. And, just to put it in context, this is the analysis of Infringement 135, do you see that? It begins at p.1059.

Then on 1066, if I could ask you to look at IV.3721. (After a pause) The point that is made is that – and I will come to the general as well, Professor, because you fairly made the point that there is a general aspect here – what this shows is that the Office was unable to conclude in the present case whether the compensation payment agreement figure was simply added to the respective bids. What that shows is that it does not necessarily follow that because there is a compensation payment agreement either the full of the agreement or indeed any amount, any part of the amount, will actually be added to the tenders which were submitted.

When one steps back it is obvious why that should be the case, because obviously has C competing against D, but in most of these cases C will be competing against not just D, but E, F, G, H, I and J. Given that both parties to the compensation payment agreement both want to win the tender, then obviously if they simply add on any part of the compensation payment agreement then it will make it less likely that it will be successful as against the parties. I think your example is a valid one as far as it goes but, with respect, it requires one to assume that a part of or all of the compensation payment is added to the price. 135 itself shows that that is not necessarily the case. Taking the general, it ignores the fact that the competition is not just between the two parties to the compensation payment agreement.

PROFESSOR PICKERING: The last point you have made, which of course is valid, also requires an assumption that the arrangement regarding a compensation payment is just a bilateral arrangement between two parties and does not involve other bidders. Where one is looking at a general issue of principle, one should not necessarily assume.

MR. HOSKINS: This is like a game of chess over the internet. I am certainly not aware, and I will be corrected if I am wrong, p.1653, that in the circumstances of this case any of the compensation payments were other than bilateral. The OFT will be better placed than I am to know if that is correct, but certainly that is my understanding.

PROFESSOR PICKERING: That is why I chose my words very carefully to say the “general” case rather than the “specific”.

MR. HOSKINS: When one is looking at the legality of what the OFT has done in this case, the legality of the OFT's decisions must surely be underpinned by the nature of the compensation payments which are before it, rather than any hypothetical possibility in relation to compensation payments. So, yes, one can take general points of principle, but they must be constrained, I submit, by the particular cases here. My argument depends upon a comparison of an actual case with another actual case. If I turned up to the Tribunal and I ran an argument which said, "You have treated my client in this way and it is unfair because if there had been a hypothetical case before the Office, which there was not, they would have treated the hypothetical case in this way", and you would have laughed me out of court. That is why I do say that I fully understand the argument as a matter of general principle but the Office's objective justification must be constrained by the facts of the cases that are heard before it.

PROFESSOR PICKERING: No doubt Mr. Beard might want to comment on that.

MR. HOSKINS: I am sure he will.

Madam, I will leave you, unless you have any further questions, with the cold towels which are flagged up in my note. I have put a section in at the end about the relief sought, but we have really, I think, traversed that already this morning when we were talking about the error of calculation and what the Tribunal could and should be expected to do. I have made the suggestion there about, making a judgment on the findings of principle, and then one option is to leave to go away and try and agree how it plugs into the figure. There is another more formal way which is remittal, but I imagine that sort of issue is one which is not common to the Durkan case. I imagine that is going to crop up in your other appeals as well, madam.

THE CHAIRMAN: Yes, thank you very much, Mr. Hoskins. Mr. Beard?

MR. BEARD: Madam Chairman, I will deal with the matters in the same order that Mr. Hoskins did – so relevant turnover, corrections and then I will come to the compensation payments issue at the end.

In relation to the relevant turnover point, essentially Mr. Hoskins has two points. The Guidance does not define the term "last business year" in para.2.7, and applying the year before decision as last business year is effectively fettering the OFT's discretion in the way that it is to be approached. Durkan's contention effectively is that the phrase "last business year", when used in para.2.7 of the Guidance, is, as a matter of the OFT's discretion, to be treated as "last business year preceding the date of infringement". That, I think, was how he principally put that first part of his argument. That, with respect, is simply wrong. The

meaning of the term "last business year" in the Guidance is clear and is not a matter of the OFT's discretion, as I indicated in the short summary I gave at the outset. Of course, as I also said, the Guidance is not a mathematical exercise, discretion is used along the way in applying the different steps. That is a very, very different suggestion from the idea that you can vary the meaning of the terms of the Guidance.

In passing, it is worth noting that precisely the opposite case was made by parties such as Renew and Woodhead and Apollo in their various appeals. They all stress that the Guidance must be followed unless there are exceptional reasons not to. They emphasise that the meaning of the term in the Guidance is not a matter for discretion at all. It is a matter of interpretation and a word, or set of words, must have a single meaning. On that point, they were right. They were wrong in their actual interpretation of those words, but they were right that a set of words and guidance can only have one meaning. So, in the circumstances, these discussions of fettering the discretion of the OFT are misplaced. The OFT does not have a discretion as to the meaning of the term "last business year".

In that context it perhaps worth just noting what the doctrine of no fetter on discretion really means. Where an authority has the power to act it can promulgate policies and guidance, but effectively it should never say never. In relation to the Guidance the OFT has promulgated, it accepts that the statutory obligation upon it is to have regard to that guidance under s.38 of the Competition Act. Nonetheless, the OFT should only diverge from that guidance for very good reason in particular cases. Mr. Hoskins referred to the *Venables* case, which is at Bundle 5A, Tab 9, and I asked the Tribunal to read on slightly further down. What one sees there is that there is an expression of the no fetter principle, but it is explicitly recognised that where you have got a policy that is properly laid out people will act on the basis of it, and it is only in exceptional circumstances that a public authority should be coming along and departing from it, otherwise the catalogue of complaint that you are violating people's legitimate expectations as to how matters are going to be dealt with will be loud and vigorous and no doubt litigious.

The second point to note in this context is that, as I say, the fact that you have a no fettering obligation does not have an impact on the interpretation of particular terms.

Just dealing with one or two of the authorities that Mr. Hoskins went to, the *Nicholds* case, the OFT are not saying that there is no discretion in relation to penalty setting, we are merely saying no discretion in relation to meaning. The absence of a discretion in that respect is not a breach of the no fetter principle, and that was what Mr. Parker QC (as he

then was) was saying, that there may be circumstances in which there is no breach of the no fetter principle.

As to the *HFEA* case, the *Taranissi* case, all that case points out, or the quote from Lord Justice Sedley that is being approved by the remainder of the Court of Appeal, is that it is wrong to say that you are fettering your discretion when you are applying a consistent approach. Whether it is the same decision being taken in relation to similar cases or a policy being applied over time that has been promulgated.

It is worth observing that Mr. Hoskins was seeking to set up consistency and fairness in opposition to one another as if they are public law attack dogs at each other's throats. Of course, that is quite wrong. Fairness is a broad concept, of which consistency is an important part. If a decision maker is inconsistent or discriminatory in the way that they approach things then they will be acting unfairly unless there are good reasons, objective justifications, for the differences in treatment. The OFT is not using consistency as if it is some sort of absolute trump card. What consistency is is an important principle that the OFT takes into account when deciding how it should deal with cases within a decision. Here, where cases have important similar features then it is going to be a function of the principle of fairness that you deal with those similar cases consistently.

Against that background, the idea that one can depart from the Guidance, guidance that has to be consulted upon and approved by the Secretary of State, is going to be a situation that should only arise in exceptional cases. Of course, although Mr. Hoskins tried to suggest that his account was particular to his client, in fact, what we have here is a situation where they were special, given the historic trend of economic growth, the idea that someone growing their turnover over time makes them special is quite obviously wrong. It is not a usual point of distinction, it is a point of similarity. So, in those circumstances, Mr. Hoskins saying we were fettering our discretion in the OFT in relation to his client just does not make any sense. What he is really saying is that he wants to take on the "last business year" terminology as used in the Guidance.

Could I briefly take the Tribunal to the Guidance. I realise it is the last of this series of appeals but nonetheless, it is Bundle 5B at Tab 33, if I may. This is the 2004 Guidance, so it is the Guidance that was applied in relation to all of these cases. It was the Guidance that was promulgated having regard to changes to the turnover order which set the maximum statutory cap for penalties. No doubt the Tribunal has read this guidance at some point, but it is worth bearing in mind that 1.4 policy objectives are set out, two particular objectives

that the OFT is pursuing in relation to its penalty assessment process. Those two objectives are:

> "to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
>
> to ensure that the threat of penalties will determine undertakings from engaging in anti-competitive practices."

In the submissions we have distinguished between specific deterrents determining the undertaking that is actually subject to the particular fine; but also deterrents, setting fines in a way and at a level which sends a signal to the market that this sort of conduct will suffer severe sanction. Of course, as we heard in the course of evidence, those signals being sent out to the market do appear slowly to be being heard. But, it is severe penalties that do get people concentrating. Then we have the statutory background laid out. Certain exceptions in reference to the cartel offence. Then one turns on to determining the level of penalty. Para. 2.1 sets out in summary the five step approach. But, if one looks at that five step approach, what it is is structuring the way that the OFT will approach its decision-making. It allows for the OFT to take into account a range of factors. There are then guidelines provided in the subsequent part of this section, setting out in broad terms how these matters are to be dealt with. For the moment we are focused on Step 1, the starting point. Of course, as we know, the starting point for determining the level of penalty which is to be imposed on an undertaking is calculated having regard to two factors: the relevant turnover and the seriousness of the infringement. That combination is brought together by applying a percentage, as you know, that indicates the broad level of seriousness of a particular type of infringement, and it is then applied to relevant turnover - not an arbitrary measure, but a measure ascertained using the well-accepted techniques of modelling albeit not with the strict requirements that might be required, for instance, in proof of dominance, but, nonetheless, using well-recognised techniques that identify what is the economically significant market. Then, if we move down we see at 2.7 the term 'relevant turnover' is referred to.

> "The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year".

The question posed is: What do those words mean? Well, if I were to ask you, as a company, to give me your turnover in your last business year, the natural answer you would give me is the figures for the most recently completed business year. Of course, the

Guidance relates to the OFT's decision-making. So, in the context of the Guidance that is being applied in relation to a decision being taken at a particular time, the natural meaning of those words 'last business year' is the most recent year at the time the decision is taken, because it is then that the Guidance is actually being applied.

So, the ordinary language interpretation of para.2.7 suggests we are talking about the most recently completed business period at the time of the Decision. That, in a way, is an end of the matter. But, secondly, there is an important second indication reinforcing this interpretation. That is the fact that 'last business year' is a phrase that is used twice in the Guidance and the second time it is used is at para.2.17. This is in connection with Step 5. Here we have the phrase being used in the first sentence and then in the second sentence,

> "The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it".

It refers to 'worldwide turnover' because that is the measure of turnover that is being used at Step 5. But, the term 'last business year' is specifically being linked to the year preceding the Decision. There is obviously a very basic principle of statutory interpretation - that where the same term is used in statutory material on more than one occasion it is not to be taken to have different meanings unless there are very compelling reasons why not to do so. Now, of course, we accept the guidance is not a statute and that strict rules of statutory interpretation do not apply. But, this is a more general and fundamental principle we are dealing with here. It is one which governs the use of language more generally. It certainly applies to the Guidance. There, we have it in para.2.17.

PROFESSOR PICKERING: Can I just ask you: What is a business year? How does it contrast with an accounting year?

MR. BEARD: In terms of an accounting year, I think in ordinary circumstances it will be the same as the accounting year. What is being distinguished is effectively from calendar year. So, it is not the last calendar year. It does mean that it enables companies to provide the details that they have completed for their last financial year. Of course, that has an advantage that when it comes to completing the Decision, considering turnover, and so on, what you will be able to have access to are audited materials - materials that have been reviewed by third parties. That certainly is the approach that the office has taken in relation to that terminology.

PROFESSOR PICKERING: We have no definition of 'business year'. It seems strange to me that we do not use 'financial' or 'accounting year' which I would have thought was the more straightforward.

MR. BEARD: I think collectively it has been used. In practice it has been applied in the same way as 'financial' or 'accounting year'. The key question, of course, that is being raised is not whether or not there is a difference between a business year and an accounting year, but whether or not it is the one next to the Decision or the one next to the infringement year.

PROFESSOR PICKERING: I understand.

MR. HOSKINS: But, I cannot assist, Professor Pickering, beyond that. In practice it has been the same thing.

THE CHAIRMAN: The difficulty that you now have created, Mr. Beard, is that I am very familiar with the arguments that you have put forward because they have been raised in many other appeals. In those appeals the appellants have put forward counter-arguments rebutting those points that you have made, of which I am aware because I have listened to them, but they are not points that Mr. Hoskins has made because he has not, as I understand it, specifically arguing that the wording that we have looked at means the year of infringement. So, I am not sure quite where we get to and it is not for me to put to you all the counter-arguments that have been raised in other cases, but I think you would have to accept, having put the case on the basis that it has been put in other cases, the Tribunal will have to take into account, in assessing your arguments, other textual analysis points that have arisen.

MR. BEARD: With respect, madam Chairman, I am not commenting on the way in which the Tribunal may consider these matters in due course. But, I am answering the argument that is put forward by Mr. Hoskins. Mr. Hoskins says, as a matter of discretion, that the Office should in this case be using infringement in the year prior to infringement as the basis on which it proceeds. The argument that I am setting out is that the Office has the Guidance. The Guidance is clear. It says that in relation to relevant turnover 'last business year' is the year before the Decision. In those circumstances you would need exceptional reasons to depart from that. In those circumstances, have those exceptional reasons been given? Plainly not. But, as a component part of that argument I have to establish that the term 'last business year' is clear within the terms of the Guidance. Therefore this Tribunal should not be departing from it at the instigation of Mr. Hoskins. So, I am directing the structure of my argument to Mr. Hoskins' point. In those circumstances, for the Office to set out some sort of different account would undoubtedly be surprising, but it is in fact the answer to Mr.

Hoskins' argument as well. If Mr. Hoskins does not have arguments that go to the textual analysis of the Guidance that he wished to deploy. Those are matters for him. It is not for the OFT to encourage Mr. Hoskins to use his creativity to come up with further reasons why he may well object to the way in the Office has dealt with these matters. The Office has to deal with the appeal as it is presented to it, and provide the answers as best it can.

MR. BLAIR: I have not been in any of the other cases, but the two points which strike me as a sometime draftsman are that there is room for the argument that 2.7 and 2.17 are looking in different directions. The first argument would be that the nexus in 2.7 is between the year and the infringement concerned. Both those words appear in the third line of 2.7. The second argument, for what it is worth, is that if the OFT define 'last business year' in relation to worldwide turnover and then add the gloss as to which year they mean, that is done in 2.17, much after the undefined provision in 2.7. Now, those are pure draftsman's points. But, maybe they have been addressed in other cases.

MR. BEARD: Taken as such, the latter of them - the fact that a definition appears later in the document - does not in any way overcome the two arguments already put forward as to the ordinary language interpretation; nor, indeed, the consistency of interpretation. In relation to the fact that in 2.7 there is a nexus between the infringement and last business year, of course, the term 'last business year' is being applied in the context of the geographic market affected by the infringement. Indeed, that is well understood. But, as I will come on to say, there are some good reasons why it is that even in relation to any reference to the infringement, and of course the relevant turnover is being calculated by reference to the market in which the infringement occurs, so it is natural that there would be a reference to infringement in this context, and that is not sufficient, the OFT says, to change the meaning of 'last business year'. There are good reasons why, even in relation to Step 1, you would sensibly be using 'last business year of turnover' prior to the Decision. Quite apart from the fact that you would end up in a situation where you would be using two systems of turnover which would be strange - to say the least - and also bearing in mind that, of course, what one is doing is ensuring that you carry out a penalty assessment process that does not go over the statutory maximum - and the statutory maximum is specifically defined in terms of last business year of worldwide turnover being the turnover in the year prior to Decision. So, there is a sense in which when you are calculating the Step 1 assessment you will want to ensure that any calculation carried out at Step 1 cannot effectively cross the relevant threshold in relation to the statutory cap. Again, another reason why you would want to be using the same measures of turnover.

However, it is also worth remembering that what is being done at Step 1 is using turnover as a measure of seriousness. In that respect, seriousness is not simply a matter of impact. It is a matter of attribution of a degree of opprobrium to the particular infringement. That degree of opprobrium is actually best calibrated against the current state of the undertaking - not some past state of the undertaking. Indeed, Professor Pickering earlier, when you were asking Mr. Hoskins about the use of some kind of discount rate to be applied to an old ----

PROFESSOR PICKERING: To up-rate.

MR. BEARD: Yes, to up-rate. Effectively, I interpolate that what the suggestion would be doing is trying to calibrate somehow the real value of a penalty which was attached to an earlier turnover. Effectively, by using last business year prior to the Decision, you step round all of those difficulties because you are calibrating to the scale of the turnover of the undertaking now

PROFESSOR PICKERING: But the point is that a company with rapid growth could well argue that they are being penalised for their success over the intervening years. As I said this morning, I am not saying whether I buy that argument or not, but a discount rate to adjust upwards would, in some cases, especially in the case of companies that have above average, or below average growth experience, it would result in a quite different outcome, that must be accepted.

MR. BEARD: I think issue might be taken with the idea that someone will be being penalised for their success, if the question is ensuring that the seriousness of an infringement is marked against the current scale of the company, it is not accepted then there is inherently an unfairness. But also I think it is important to bear in mind that what we have here is the focus on Step 1 and I will come to Mr. Blair's comments about Step 5 in a moment, but what we have is a focus on Step 1. Now, as is recognised, and as actually occurred in this case, focusing on Step 1 and ascertaining a figure that identifies seriousness by reference to relevant turnover ensures that you generate figures that can then be subject to further adjustments in the remainder of the penalty process. It may well be that those initial steps actually generate figures that are sufficient to operate as the specific and, indeed, general deterrent that the Office is looking for under the terms of the policies that I have already referred to in the Guidance. In other words, no uplift would be required at Step 3 in order to secure sufficient deterrence, so what you would have is that the Step 1 calculation would be operating to provide the sufficient deterrent effect that is being looked for in relation to the policies being pursued by the Office. In that regard, of course, focusing on deterrence you do want to attribute the penalty to the scale of the company, the undertaking that you are

dealing with now, because deterrence is a forward looking matter. So insofar as Step 1 is undoubtedly focused on seriousness it can also generate figures that are sufficient for deterrence purposes, and of course deterrence is a forward looking matter and it simply goes to reinforce why it is that you want that consistency of approach in relation to turnover. I am sorry that is a slightly long way of dealing with the points made in drafting terms but those purposive arguments as well as the linguistic ones are important in understanding this Guidance.

THE CHAIRMAN: Do you then say that the business year chosen for the way that you do the MDT, which is not relevant in this case, and is not spelled out in the Guidance, that that year should always be the decision year, or if at Step 1 you are using the infringement year then it makes sense to use the infringement year at Step 3 as well?

MR. BEARD: I am not going anywhere close to "always" because always is a bold word to use in relation to penalty structures that must be subject to the possibility of revision. There is of course a process by which penalty systems can be amended in time, they have to be consulted on of course under the statutory scheme, but the idea that one could say "always". What the Office's case is that in the context of applying a deterrent uplift in cases where it is considered that there is inadequate deterrence it is plainly rational to do it, it is reasonable and sensible to be doing it in relation to the turnover in the most recent business year because that is effectively the closest to a forward looking measure that one can obtain at the time one is reaching the Decision. So I would never say always, but certainly there is a compelling reason why that is an appropriate means of setting a deterrence threshold mechanism by reference to turnover.

There are one or two other points that were raised in the course of Mr. Hoskins' submissions about these matters. One of them was the length of time that the OFT had taken to reach its decision and that this somehow had a distorted effect on the way that penalties are set. First, the OFT is not suggesting that the length of time it takes to reach a decision should be a determining factor, but it is right that this Tribunal is alive to the practicalities of an investigation, and that it is important in practice to ensure that it is able to obtain relevant turnover figures. Of course, one of the collateral benefits of using last business year as the year just prior to decision means that you will be able to ensure that you are able to get comparatively accurate figures for thee purposes.

It is also worth noting that there is an illogicality to some extent in those submissions that say "Actually the year before infringement is really the one that one should look at", because it may be temporally proximate to the infringement if the OFT takes more than a

year to reach a decision, and I am not pretending that the OFT usually reaches decisions in less than a year, but nonetheless what we have is a situation where by its nature that turnover in that market would not have been turnover that would ever have been affected by the infringement time running forward effectively. You cannot have an infringement having any suggested impact on the market previously. So there is indeed a difficulty with the notion of using year prior to infringement as necessarily a useful ----

THE CHAIRMAN: I thought it was actually the year prior to the end of the infringement.

MR. BEARD: Yes, but then it depends on the nature of the infringement, and here where you have infringements that are discrete in time, you can end up with a situation where, because of the use of financial and accounting years it will be a substantial period of time prior to the infringement itself that would be being used as the relevant turnover. That is not a good advert for that as a necessary form of turnover to be used here, but I add that as a coda to the analysis, because the other arguments that I have articulated in relation to the wording and purpose of the similarity and approach between Step 1 and Step 5 are very much the basis of the Office's case.

There is one other interpretive point that I think is worth just briefly dealing with and that is the reference that Mr. Hoskins made to the EC Commission material in this regard, and he said, quite rightly, that the way in which the European Commission goes about imposing penalties in relation to Article 101 and Article 102 infringements is that it has a mechanism that is bit like the Guidance that we have in the UK, it is not precisely the same, but broadly speaking in its equivalent of Step 1 it does use a measure of turnover around the time of the infringement, and then later on in terms of setting the maximum, the equivalent of our Step 5 it uses worldwide turnover in the year prior to decision. We do not demur, but we do note, and the Guidance is found at Tab 35 of Bundle 5B, and I will just briefly take the Tribunal to it. One sees here that this is actually Guidance that was promulgated in 2006, so it is Guidance that actually supersedes the date when the Guidance that we are dealing with came into force. Prior to that the Commission has operated Guidance that was vastly different, that was brought into play in 1998 which involved a wholly different structure entirely. So ironically, at the time when we put our Guidance in place there was a very different structure being operated in Europe, but now the European structure is rather more like that which is operated in our Guidance.

On the first page it says: "Method for the setting of fines", and then the sub-heading: "Basic amount of the fine" which is rather akin to our Step 2 approach. Then if you turn over, para. 13: "Calculation of the value of sales".

"…the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area . . . It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement."

So there it is using the specific language of year prior to infringement, and then if one goes on across the page one sees at para. 32, just above that: "Legal maximum". Here we have effectively the equivalent of our statutory cap and considerations for Step 5, and here you have specific wording saying last year prior to decision.

Taking it merely as a draftsman's point here we have a situation where different language is being used in order to express different concepts to be used within a process, in other words making absolutely clear beyond peradventure that when you are using concepts of turnover you need to clearly express that if you are going to be using different terms at different times.

MR. BLAIR: One final question – sorry to hold you up. How does the Guidance have to be interpreted where the undertaking in question has been merged into a much larger undertaking between the end of the infringement and the date of the penalty. You have to reconstruct what the group might have been had it remained unreconstructed?

MR. BEARD: I am slightly cautious about dealing with the different hypotheticals as to how one actually applies this. I know that in relation to other appeals and other cases there are circumstances where it has been argued that the level both of relevant and total turnover of an undertaking has increased not by growth as was being raised by Professor Pickering, but by acquisition. It was not necessarily a merger in the way that you were referring to. In those cases my recollection is that the difference was not considered an acceptable difference, because what one was looking at was the nature of the undertaking and the impact one wanted to have now in relation to that undertaking. That has been an issue that has been canvassed in other appeals particularly, and I would not want to give a final answer in relation to your hypothetical. I can, of course, get instructions if that is of assistance.

THE CHAIRMAN: Have we got what the European Commission's Guidance on fines was at the time that the 2004 OFT Guidance came out?

MR. BEARD: We do not in these bundles, we do in the grand consolidated bundles that were put together for the other appeals, the 1998 Guidance is in those.

THE CHAIRMAN: Is there nothing between the 1998 Guidance and 2006 Guidance?

MR. BEARD: No, there were inquiries made because at one point someone made submissions that in fact there was Guidance prior to 1998 and that is not actually true, all there was prior to 1998 was provision in what was Regulation 17, and I will not get the Article right, I think it was Article 15, but I am not sure. Mr. Singla helpfully tells me that the old Guidelines are actually in the current version of the Purple Book. I am slightly surprised, I had thought that they had been excised. I am sorry, I think it is just the title. Unfortunately I cannot offer them, but obviously I can provide them. The structure of them was that essentially the Commission allocated cases according to three brackets as to whether or not they were mild, spicy or very spicy, and they attributed a starting point by reference to specific figures that set brackets for the level of starting points notionally, so it was a very different structure. You effectively had to decide which particular pot you were putting a particular type of infringement into, and there were actually numbers attached to the parameters of the initial starting point of the Guidance itself, and then you went on and carried out some further considerations. We can certainly make them available ----

THE CHAIRMAN: No, we would have them here somewhere in the building, I am sure.

MR. BEARD: I am sorry, madam Chairman, if there were particular questions in to them, I will do my best to deal with those. But, if there are particular issues, it may be sensible to deal with them subsequently. But, I am confident that the structure was no guidance prior to 1998, save for judicial authority which went in various directions; and there was a somewhat infamous article published by, I think Mr. Van Bael in the mid-90s that criticised the Commission's penalty policy for coming up effectively with magic numbers. And it was against the background of that criticism that the Guidance in 1998 was promulgated and there are some debates as to how the judicial authority fitted with the Guidance in 1998 and then the Guidance in 1998 was subject itself to criticism as the Commission developed its application over time, and eventually there was a change in the way that matters were dealt with subsequent to modernisation. But that potted history of Commission fining procedure does not actually go to the substance of how it was all operating. Does that deal with the questions?

THE CHAIRMAN: That is fine.

MR. BEARD: Just one final point in relation to guidance. At one point, madam Chairman , you referred to the fact that the Tribunal is not bound by the Guidance. And, of course, as a matter of strict law you are not bound by the Guidance in the same way that the Office of Fair Trading is. But, the fact that you may not be bound by it does not mean that the Tribunal should effectively set it to one side. Of course, the Tribunal should be very slow

to depart from the Guidance or depart from the OFT's conclusions in operating the Guidance if the OFT has properly and conscientiously applied it – and there is the Achilles case in which those matters were canvassed – because otherwise you would end up with the very odd situation where, under public law terms you would have a situation where the Office was effectively being required to follow the Guidance save in exceptional circumstances, it appears before the Tribunal, this is an appeal, it is a criticism of its Decision, it would be effectively being said, "Well, you didn't do anything wrong but nonetheless the out-turn is wrong". It is not an impossible position, but it is one that should only be reached by this Tribunal extremely slowly.

So, as I have said, so far, the focus was on the criticism of the Step 1 analysis. But, as Mr. Blair put it in his question to Mr. Hoskins – to some extent the real essence of what Mr. Hoskins is talking about is not really Step 1, but the process as a whole, or Step 5 as Mr. Blair put it. And he linked that to comments that had been made by the President in a different constitution of this Tribunal in the *GMI* case. It is important to emphasise that the policies that are pursued in the Penalty Guidance are policies that are sensible, rightly and lawfully pursued in the Penalty Guidance, and they operate to ensure – the steps in the process operate to ensure that those policies are properly pursued. Steps 1 and 2 provide that measure of penalty by reference to seriousness. Adjustments may be needed at Step 3, that was not the case here, no MDT uplift, but pursuing these legitimate and lawful policies through a structured penalty assessment process, means that the criteria being applied along the way are not arbitrary, they are not unfair, and they are not discriminatory.

If you are assessing whether a penalty is arbitrary or unfair, you have got to look at matters in the round, looking at the process as a whole. And making comparisons in relation just to Step 1 is not of assistance if other considerations such as the deterrence, uplift, the capping mechanism, the financial hardship mechanisms, that altered the way in which the out-turn penalties were arrived at, create substantial changes. Now, you have briefly looked at the table at p.1749, but if I may, I will take the Tribunal briefly to it. This is obviously the Penalty Table for this case.

Madam Chairman, I recognise of course that this is a table, or tables of this sort are ones you are very familiar with, but it nonetheless repays brief consideration of the different parts of it.

What you have at the top are the identified infringements going along, and then the different steps are articulated down the left hand side, obviously with key pieces of information along the way, the Infringement date, then the Product Market, the out-turn of the analysis of

relevant market definition, an extensive exercise carried out by the Office. And here it is delineated between Office for Infringement 135, and Public Housing for Infringements 220 and 240.

It is worth noting that actually, in the Statement of Objections, Infringements 220 and 240 were referred to as "Private Housing Markets" in error, and a Supplementary Statement of Objections was sent out correcting that fact, a matter I will refer to a little later.

"Geographic market, London", this was done by government office regions. And then the total turnover to the relevant year end, and there Professor Pickering, one sees the relevant year end being specified and therefore the financial accounting year being specified. "Total worldwide turnover" for the undertaking. "Relevant turnover" for the year end. Again, specifying the relevant period. "Relevant turnover", so that part of the total turnover that falls within the product and geographic market.

Then the Step 1 starting point, and here we have the percentage. So, 7 per cent for Infringement 135 because that is the compensation payment infringement; 5 per cent for 220 and 240. So, we get a figure generated by the combination of relevant turnover and Step 1 which is then the "**Penalty after step 1**", which is in bold.

"Duration multiplier", which is effectively Step 2, well, in none of these cases was there any uplift for duration, each being discrete infringements. "**Penalty after step 2**", therefore, the same. "Penalty as % of total t/o", so this is taking the penalty after Step 2 and checking it against the total turnover figure that is set out above, and the percentage for that is set out for each of the "**Penalty after step 2**" figures. And the reason that is material, and I will come back to it, is because it is to that that the 4,5 per cent cap applies. It is to those figures where the infringements were in the same markets. So, "**Penalty after step 3**", I am sorry, the next line is "MDT to apply", and this is the bit that Mr. Hoskins corrected himself on. Here what we have is an MDT of 1.05 per cent. That is because one of the infringements is a compensation payment infringement, but it is applied to the highest penalty amongst the infringements at that stage. And the reason for that is effectively the OFT was not wanting arbitrarily to be lifting up a particular infringement by reference to the MDT, it took the highest penalty and used that in all cases in seeking deterrence. But here, of course, what one sees is that 1.5 per cent of total turnover is far lower than the 3.14 per cent seen above; or indeed the cumulative percentage of total turnover. So, it has no impact on the next point, in other words, the Penalty after Step 3. So, MDT has no impact here. But then after Step 3 there is an adjustment, and that is in relation to Infringements 220 and 240 because those are infringements that occur in the same markets, Public Housing in London and

generate a total, and in relation to those particular infringements, those in conjunction with the total turnover attributable to Infringement 135 mean that the total penalty after Step 2 would amount to 6.82 per cent of the total turnover of the undertaking. And there we have a situation where -----

THE CHAIRMAN: Do you not add in the 0.57 per cent as well?

MR. BEARD: Yes. I am sorry. I do add in the 0.75 per cent, you are quite right. My arithmetic is flawed. It would be seven point -----

THE CHAIRMAN: So, you add up 0.57, 3.68 and 3.14.

MR. BEARD: Yes, it would be 7.39, I think. So, you have 7.39 per cent. I apologise. My arithmetic was flawed, 7.39 per cent, obviously greater than 4.5 per cent, so a reduction was made in relation to that. But it was not a reduction that simply took it just below 4.5 per cent. There was a 50 per cent reduction applied to the two penalties in relation to the markets where the markets were the same, and I will come back when I deal with the corrections point to the impact of that. I am just describing how it works here.

So, you get a revised penalty after Step 3, obviously, with the latter two penalties reduced. Then you have Step 4, "Aggravating/Mitigating Factors", which are matters set out in the Guidance. And here we have Directors' involvement, an uplift of 5 per cent in relation to Infringement 135 as we heard in the course of evidence. That was the involvement of Mr. Simmons and Mr. Fraher in their trip to the Swallow Hotel and all that was associated with it.

Then "**Penalty after step 4**" then accommodates that. Then there is an assessment of the percentage of total turnover overall now, because that is considering in particular whether or not there is proximity to the statutory cap, but also because one of the infringements related to a period prior to the implementation of the 2004 Turnover Order and the 2004 Guidance and prior to 2004 a different method of calculation of relevant turnover and maximum cap was used. The statutory cap related to the period prior to the infringement, not prior to the Decision. A check is carried out to see whether or not there is any risk of exceeding the previous statutory cap. So, the out-turn cannot have exceeded what was the maximum that could have been opposed at the time when the infringement occurred.

And then you get the out-turn "**Penalty after step 5**" when those adjustments have been undertaken. And then, after that, any reduction for leniency if the party had come in for leniency, and in this case reduction for accepting the fast track offer and admitting Infringements 135 and 240. So, a 25 per cent discount was given for accepting the fast

track offer. And then you get a "**Final Gross penalty**" and a "**Final penalty after leniency/fast track**" offer.

So, that is how the penalty was imposed here, applying the structure of assessment that had been developed by the Office in the context of this Decision so as to ensure that you had a fair reasonable penalty assessment system that was being applied in relation to all of these cases, but taking account of the particular circumstances of the cases, looking at the particular circumstances, the particular turnovers, the particular figures, the particular steps that had been taken along the way and the mitigating and aggravating factors; and although it does not arise in relation to this case, there were considerations of financial hardship.

Now, it is just, I think, worth illustrating to the Tribunal how this broad process worked, in particular the modifications by reference to the 4.5 per cent price cap. And if you have the core bundle in this appeal, at Tab 3 is the consolidated defence, and at the back of Tab 3 there are some pull-out tables, Annexe A, B and C. If one goes to Annex B, what you should have a table with green and red bars all the way across it. What you have is a list of names, unfortunately only for every other set of bars down along the bottom axis. On the side axis you have percentage figures, and the top of the table is 10 per cent. You can see the figures on the right hand side of the vertical axis. At the top of the page reading sideways, one can see that the green bar is the penalty at Step 3 after adjustments, and the red bar is penalty at Step 3 before the capping mechanism. The capping mechanism is the 4.5 per cent capping mechanism. The only reason I wanted to just direct the Tribunal's attention to this document is because what one can see here is that in relation to the cases that were being dealt with by the Office, there were clearly a number of very spiky outliers – in other words, companies where the red bar was comparatively a lot taller than the red bars of all the other companies. Those red bars are percentage of total turnover because that is what the vertical axis is.

You then look to the green bars and what you see is that the capping mechanism effectively fells the tallest trees. In relation to Durkan, unfortunately Durkan is not specifically mentioned here, but if you go to the right of the table, the tallest spike on the right of the table – I am sorry, apparently you do have names at the bottom of your table. On mine I have a gap, but I know that the gap between Dukeries and E Manton is the Durkan spike.

THE CHAIRMAN: We only have alternate names.

MR. BEARD: That is the Durkan spike. What one can see is a tall red bar, and then the shorter green bar. That is the operation of the 4.5 per cent price cap in practice, and just for completeness, if one turns on to Annex C, what one there sees is bars for every infringing

undertaking, and these are the pre-leniency FTO penalties as a percentage of total turnover. So what you are seeing here is the broad swathe of penalties after the adjustments have been made but before any leniency or FTO discount operates. Then you have at Annex E a chart which then compares against 10 per cent, the final penalty as a percentage of total turnover. So Annex E then takes you through and the yellow bars are the actual outturn penalties, subject I think only to financial hardship issues. So some of these would have been practically reduced.

PROFESSOR PICKERING: Could I just ask you, Mr. Beard, going back to the schedule on p.1749 of the Decision, you told us about the summation of the penalty percentages as a proportion of total turnover which came to 7.39 per cent. The total turnover was different in the three cases, or in one case as compared with the other two.

MR. BEARD: That is correct, in relation to Infringement 220.

PROFESSOR PICKERING: What are we actually assuming it is a proportion of, because if you were to go up one line and take the penalty after Step 2, if this becomes a significant figure, which, as I understood what you were saying, it does because the proportion is above 4.5 – is that right?

MR. BEARD: Yes.

PROFESSOR PICKERING: Then, in fact, you need to move up one line and sum the total penalties and relate them to a single turnover figure surely, rather than add different percentages.

MR. BEARD: I understand the point that you are making, Professor. I think I will need to take instructions in relation to specifically the operation of that here. What actually happened is set out on the table, that the Infringements 220 and 240 were reduced by 50 per cent by the operation of the price capping mechanism. That is the practical impact of the application of the price cap mechanism, which is accurately reflected here. The point you make about why it is that one should be combining turnover as a total and then assessing a percentage of total where the different infringements involve different total turnovers, I understand the question and I do not have an immediate answer for you.

PROFESSOR PICKERING: If you take the total worldwide turnover as £210 million odd, then the summed penalties as a proportion of that total turnover is somewhat below 7 per cent. So, if anything, the capping has been too favourable, has it not, to Durkan? I make the observation and leave you ----

MR. BEARD: I am conscious of time and I do not want to be in any way mysterious about it, the way in which the capping mechanism worked was to ensure actually that a penalty would

not be over 4 per cent. What was done was a practical reduction that looked at the percentages of total turnover and moved it down to below 4 per cent. It did not just move it down below 4.5 per cent. The way that it was effectively done was that the Office took the level of the penalties and looked at them as a percentage of the total turnover, and then attributed a discount to the nearest 5 per cent in relation to the penalties that were in the same markets to ensure that the total was less than 4 per cent. If you had a higher level than 4.5 per cent, and there are some of them where the total was up at 12 per cent, you would actually get a radically higher discount in relation to those particular penalties. You get 70 per cent to ensure that your total penalty was just below 4 per cent. If you were at the level of just over 5 per cent, you might only get 20 or 25 per cent discount, again to bring you just below 4 per cent, and you can already perhaps anticipate why this has an impact both in relation to Infringement 220, if there were to be any success for the appellants in relation to that, and also in relation to corrections, because it is not right to assume that the level of discount that was applied here would be applied if the percentage of total turnover that was being identified at Step 3 was, in fact, lower, i.e. closer to 4.5 per cent, which I think, madam Chairman, you anticipated.

THE CHAIRMAN: In the table Mr. Barclay has carried forward that 50 per cent, and you say that is not ----

MR. BEARD: That is not the way the Office did it.

THE CHAIRMAN: Whether we would do it that way is something ----

MR. BEARD: That is, of course, a further ----

THE CHAIRMAN: I was alive to that point, yes.

MR. BEARD: In any event, I am sorry that it has been slightly a tortuous trawl, but I think it was important to show the Tribunal just the mechanisms that were being undertaken and the sorts of considerations that were being taken into account, the steps being used to pursue those legitimate policies, because Durkan's argument is essentially a vague and general complaint about arbitrariness. There are no real parameters on how you are supposed to assess arbitrariness on Mr. Hoskins' case apart from turnover increased over time. It is a sort of, "It feels too high, it smells wrong" type submission that is being made, but these are not satisfactory bases for challenging this penalty where legitimate and appropriate principles have been developed through a system of penalty setting that has been approved in the Guidance by the Secretary of State and promulgated, and then assessments are made along the way in the context of these cases which take into account the circumstances of particular undertakings, but apply fair and consistent measures to the assessment of penalty.

There is simply no basis to look at the end and say, "Actually the outturn penalty is arbitrary or wrong".

This is not the Office turning round and running some sort of Martin Luther defence, "Here I am, I can do no other". That is not the position at all. It is saying that where the considerations were applied, they were fairly applied, and they were the practical application of just policies. It is not enough just to turn round and say, "It is not right". For example, when we are talking about seriousness, of course every infringement is slightly different. The Office identified what it considered were key characteristics of infringements that made them relevantly similar for the imposition of the seriousness percentage for Step 1. So cover pricing had a 5 per cent percentage applied to it. In fact, it turns out that 5 per cent is the lowest percentage that has ever been applied by the OFT in any case where a percentage mechanism has been used. It has been used in other cases, but no lower percentage than that has ever been used. I think it is important just to keep that in context. Characteristics were identified, the specific facts of the case were looked at. Did the case fall within that particular category or not? If it did, then it was 5 per cent. If it did not and it involved a compensation payment instead then 7 per cent, and I will deal with the challenge to that in a moment. That is the way that it was approached. That is not arbitrary. That is applying sensible principles practically in line with the Guidance. On that basis there just is not a good way of saying the outturn is wrong, unfair or arbitrary. It is not a matter that the OFT did not check. It checked all along the way that the way that it was approaching this was sensible and right, and indeed it did apply specific checks like the 4.5 per cent cap, like financial hardship assessment. So Mr. Hoskins is wrong both in law and in fact as to way that the OFT approached these matters.

Unless the Tribunal has any further questions in relation to the penalty issues pertaining to relevant turnover and those matters, I was going to move briefly to corrections. We accept this is a difficult question. This is an appeal against the OFT Decision, and it is clear that in respect of the figures submitted to the OFT in respect of turnover, the OFT did not make any mistakes that had been identified in putting them through the penalty assessment mechanism and applying its judgment to those figures. There are, as the Tribunal has already articulated, very good reasons why there was no error by the OFT, and the Tribunal should not reopen an issue on appeal. There is an important consideration that if a party thought it could correct errors then that will incentivise people to think they have got two goes at this. It may be that they do one scrupulous go and think, "We could do it another way" and try again later, but the greater risk is, of course, that there is a degree of

casualness in the way in which matters are approached the first time round. Mr. Hoskins said, this was an appeal, the floodgates would not open here because he had legitimate other appeals and therefore this was an adjunct to those. That may well be right, but that does not prevent other people turning up in due course with just a corrections appeal. In the circumstances, the floodgates unfortunately could well be opened by this.

Furthermore, there is a general principle that should be borne in mind, which is that it is important that there is a degree of legal certainty about decisions. Decisions are taken by decision makers, public authorities, on the basis of the information they have before them. There is a good reason why you should not *ad hoc* be reopening them. After all, that is the way that courts work more generally. There are special acute exceptions, like the barrel jurisdiction that exists in the High Court. Generally, you do not go back, you have got to appeal if you want a change, and if you appeal then of course these matters can be considered.

The OFT does not say there are no circumstances where corrections should be submitted, but they should surely only be in exceptional circumstances. If you could reasonably have got the figures right the first time then there should not be any reopening. If you submitted figures that you thought were sound on the basis of the information you had then this Tribunal should be extremely slow to start saying, "Actually, you should be able to reconfigure them".

Mr. Barclay has submitted two witness statements, and there are, it would seem, two issues for the Tribunal: Are the reasons given by Mr. Barclay for making the corrections such as to justify any consideration? If so, are the proposed corrections acceptable in the sense that they have been prepared in a sufficiently thorough, balanced, fair and audited manner? Now, the second of those questions the OFT does not make any particular observations on. It leaves those matters to the Tribunal. In relation to the first, the reason given by Mr. Barclay for the re-assessment is effectively set out in his first witness statement at para.15. I will just take the Tribunal to that. It is attached to the back of the skeleton argument, his first witness statement at Annex 1. He says at para.8 that he did not have access to the statement of objections or attend meetings with the lawyers, and so on. Then, at para. 14,

> "Infringement 240, South Molton Street, concerned Concentra Ltd. [which was what Durkan Pudelek had become by that time] and is based on relevant turnover of £132,172,984 within a product market of public housing".

Initially I thought this was a mistake by either OFT or Concentra, for the simple reason that my understanding was that Concentra did not operate in the public housing market sector. As we heard, their focus was private. At para.15,

> "I arranged to see the then Director of Finance, Peter Hall, on 15 October, 2009 to discuss this matter. We had a brief meeting whereby he showed me hard copies of extracts from the 'SO' that concerned the definition of the market sectors. Later that day he sent me these by e-mail in pdf format".

Then Mr. Barclay goes on to explain what he did thereafter.

So, what it appears is that it was the contents of the SO, when they were specifically drawn to his attention, and he thought, "Hang on a second! This could be done differently". Then he went back through and he carried out the exercise and at para.20 we see the various contracts that he has referred to. It is just worth noting in passing in relation to these contracts that 45 - 51 Whitehall is nothing to do with public housing/private housing. This was a straight error about whether or not this was an office. So, this was not an error detected by reason of the categorisation to which Mr. Barclay had been alerted, it was collaterally a matter he picked up along the way. We are not saying it was not an error. We are not taking any issue with it. But, it is worth noting that this was just a mistake. Then Sudbury Arms, Greenwich Wharf do appear to be cases where they had been categorised as one form of housing and in the light of his consideration that you should allocate them by reference to the client, they were to be re-allocated by reference to turnover. But, then, when we get to Whytleafe, Kingston Road, and Highgrove House - again, the errors are nothing to do with the concern to which Mr. Barclay was alerted. Those are all to do with geographical allocation errors.

So, in practice, what happened was, from Mr. Barclay's witness statement, that alerted to the terms of the SO by Mr. Hall and the way that Concentra had interpreted it - that one could allocate turnover by reference to the client - Mr. Barclay then went away and did a wholesale analysis, in the course of that he picked up all sorts of different errors - not just errors related to the particular matter to which he had been alerted by his conversation with Mr. Hall.

This matter is relevant to the consideration of whether or not the reason given is sufficient to justify reconsideration here in relation to all of these matters. What you have is evidence that it was from the SO that another company had identified this as a mechanism for allocating turnover from the SO - not from the Decision, but from the SO. He had then gone away and done an exercise and it was picking up all sorts of things. Now, there is a

difficult question for the Tribunal as to whether or not it should be, "If you were minded to allow corrections, you should only allow corrections that flowed from the particular identified difficulty, or whether any correction should then come into matters".

It is obviously right that if Durkan, or any part of Durkan, had had doubts about how to categorise matters by way of turnover, they obviously could have raised them. They could have asked whether or not there was any objection to these matters. Obviously Concentra had taken a different view on these matters and no objection was taken by the Office to the approach adopted by Concentra. As I have already touched upon, it is worth noting that in relation to Infringements 220 and 240 - so, the ones that were to do with public housing - in fact they had been wrongly categorised by the OFT as private housing in the SO, and a Supplementary Statement of Objections was actually sent out saying, "We wrongly categorised these matters".

I accept that that is not talking about how you then calculate the turnover for the other projects. But, what was being highlighted was concerns about allocation of projects between private and public housing at that stage. Just for your notes, theSupplementary Statement of Objections is referred to - the key contents of it are effectively summarised in - the Decision at II.332 at p.1750. I will not take you to it. I think the change in allocation is obviously common ground.

So, to be clear, when calculating turnover on infringements, infringements in the housing sector were categorised according to the client procuring the work. That is how the Office went about it. But, that does not mean that parties all necessarily used that methodology. The OFT does not assert that that was the case. The parties came to the OFT with their turnover figures and the OFT does not assert that all of them dealt with it in a systematic way of allocating particular turnover by reference to the client procuring the work.

So, two points just on those matters. You have a situation where some reasons are given, but they are not just in relation to the Decision. They are prior to the Decision which means that being alive to those matters, as Concentra was, it was able to operate prior to the Decision. It is unclear why Mr. Barclay and Durkan more generally could not have dealt with it in that way. Secondly, you do begin to see some of the difficulties that flow from enabling corrections in this way because whenever you are going through any sort of detailed analysis such as this, there is a scope for errors. Doing it the second time you do create some of these difficulties and incentives in relation to the floodgates.

There is, however, in relation to those matters one further important issue here, which I have already anticipated. It flows from the point, madam Chairman, that you raised right at

the outset of this hearing: “Entirely without prejudice to the principles involved in making the correction, if anyone were to do so in relation to this we would need some re-calculation of the penalty taking into account the various steps”.

As we have seen, Mr. Barclay has tried to do this. I anticipate that perhaps what the Tribunal actually had in mind was that the OFT would have to think about these matters in due course. But, either which way, it is helpful that Mr. Barclay has set out his thinking in relation to these matters. But, there is a crucial assumption made in this re-calculation by Mr. Barclay that the operation of the 4.5 per cent cap would remain the same even if there was a reduction in the level of turnover subject to the assessment.

THE CHAIRMAN: Though I gather that we are not being asked to come up with figures at the end of the judgment that we produce, and you agree that it would be appropriate for there to be a further sort of discussion after we hand down judgment of the actual calculation. Maybe in view of the time it is sufficient that you have put down your marker on that point. It may be something that subsequently we have to address.

MR. BEARD: We are concerned to do that for two reasons: there is the possibility that the mechanism that was applied by using the round percentages and if you move the penalties down in the way that is sought on this appeal there is a real risk that, although not significant, the outturn penalty could actually be higher in this case - just at the margins. I think it is important that the appellant is alive to that, and the Office would not want it, in the circumstances, to have been suggested that it had not mentioned these points.

Turning then to compensation issues, I hope I can deal with this relatively swiftly. In essence there are two points, the first encapsulated essentially by you, madam Chairman. The submissions of Durkan in this regard are simply missing the wood for the trees. We heard some rather interesting and colourful evidence about how a compensation payment mechanism worked in this particular case, and the arrangements that had to be made for bringing in Mr. Woolf and Mr. Fraher to act as the enforcer in relation to these matters and that the meeting at the Swallow Hotel where the normally loquacious Mr. Fraher apparently, according to his evidence, managed to remain silent on the car journey there and ask no questions about why it was that he was being brought along.

The essence of the issue therefore is that this is a serious matter because it involves payments of money under cover of false invoices - illicit payments of money between competitors - and is therefore serious. Then, the second point, in essence, is this: the seriousness of the infringement is made in relation to the aspect of the collusion which is most serious. The reason that that point is important is because Mr. Hoskins’ second strand

of analysis is to say, "Well, look, there were cases where there was cover pricing and compensation payments. Those only got 7 per cent. Surely that means that we should get less than 7 per cent". Professor Pickering's points about, "Why does the ratchet always move only in one direction?" is a point well made. It is not accepted by the Office that the judicial approach must be always to move matters downwards. That is not correct. But, nonetheless, the key issue here is that it is the most serious aspect of the infringement in question relating to the particular tender event that effectively is used as the benchmark for the setting of the initial percentage.

I apologise for this, but briefly I am going to take you back to one or two paragraphs in the Decision to which Mr. Hoskins has already adverted. The first of those is at Decision VI.113 - 115 at p.1653. The table at 113 is important. It sets out the six instances of compensation payment agreements or concerted practices particularised in this Decision. I am not going to take the Tribunal to each of them, given the time. However, it is worth noting that the first three of those were infringements where there was a compensation payment arrangement and a cover price. So, in the first there was a payment to back off and a cover price provided. In the second and third there were cover prices and compensation payments, but no finding that the compensation payment was paid to the recipient of the cover price to back off. There was no specific finding in that regard. Those are the first three.

Then things become slightly different. Infringement 104 was an instance of a compensation payment. There was no cover price involved, but there was an exchange of information about pricing between the parties. Then we have Infringement 135 with which the Tribunal are familiar. Then we have Infringement 146. Infringement 146 was, like Infringement 135, only a compensation payment. So, amongst the six you have three where there was an additional factor of a cover price and three where there was no cover price - there was only a compensation payment albeit in one of them there was an additional exchange of information. Therefore, the picture that was painted that, in fact, all the others were cover price and compensation payments is not right. As I say, it fits with the overall analysis carried out by the OFT that says that you focus on the most serious aspect in setting the 7 per cent.

You have been taken to paras.114 and 115. Paragraph 115 is important because there we have the explicit exposition of the OFT's position in the final sentence: ". . . the OFT is treating both types of compensation payments …" i.e. those with or without cover pricing,

"… in the same way since the factors which make them more serious, referred to in VI.114 above, apply in all cases."

The factors there are the factors that have been referred to in the legal background at III.130 to 131, but also in 115 you have sections III.127 to 135 and 136 to 157 and it is to those that I would ask the Tribunal briefly to turn now, they are at p.370 of the Decision.

127 is part of heading G in this section and it is a subheading. The main heading is found at 360 and it is "Cover bidding". So III.127 is:

> "Cover bidding involving compensation payments.
>
> III.127 As noted above, some cover bidding arrangements include the payment by the party giving cover to the party receiving cover of an agreed amount of money (a compensation payment). A compensation payment is often expressed by the parties concerned as a payment to compensate for lost tender costs, although, in some instances, it is also referred to as a payment to 'back off' or 'stand down'."

Then:

> "III.129 It is wholly irrelevant that a compensation payment made in conjunction with a cover bid may be expressed as being to cover the recipient party's tender costs . . ."
>
> "III.130 Cover bidding infringements in which participants offer (or request) inducements (such as compensation payments) to (or from) other cartel participants are more serious than infringements where no such inducement is offered. Such an agreement further distorts the tender process . . ."

- "further distorts" in the context of a situation where you are dealing with the cover bidding existing. The fact that the OFT says that in principle there is a further distortion where there are two elements to the unlawful behaviour does not suggest that it is inappropriate to look at the most serious element for the purposes of the Step 1 process. What we see on the opposite page at H is "Compensation payment arrangements" and here we have a lengthy exposition which is dealing with the concerns about compensation payments generally, whether or not they involve cover pricing. I would invite the Tribunal to read that section, not now but in due course when time permits after this hearing. In particular I would refer to para. III.139, where the OFT is distinctly looking at the wood as well as looking at the trees,

III.140 and then III.143, again expressing explicitly the anti-competitive object of compensation payments without cover pricing, again the wood, not the trees.

The analysis carries on, agreement to add the amount to the bid prices. There is consideration and discussion of this, and then the next subheading above III.149: "No express agreement to add the amount of compensation to bid prices." This goes to the point that I think Professor Pickering was raising, and I would direct the Tribunal in particular to para. III.150 where there is an analysis of almost precisely the sort of hypothetical example that Professor Pickering was specifically referring to. It does not do it in (a), (b), (c), (d) terms but what it is talking about is the impact of these sorts of arrangements, and they have arrangements not only on multilateral situations to which, Professor, you referred and also on bilateral arrangements. It is worth remembering that this was a bilateral arrangement here, because we had reached a point in the tender process, according to the evidence, where there are only two involved.

There is one other section I need to take you to, and that is III.155 in particular, the summation of the OFT's position:

> "Bid rigging infringements in which participants offer (or request) inducements . . . from other cartel participants are more serious than infringements where no such inducement is offered. Whether or not there is an express agreement to inflate the tender bids . . . a supplier who may be obliged to make the compensation payment is at least incentivised to recover the cost . . . Moreover, the OFT considers that it is clear that the Parties were fully aware that an agreement to make a compensation was not legitimate . . ."

Mr. Hoskins says they knew that cover pricing was not legitimate either, so that is not a differentiating factor. What is being said here is that the OFT considers this was more serious. In fact, many of the other parties that have brought appeals have said compensation payments were much more serious in relation to their appeals saying cover pricing should be treated as a less than a 5 per cent case. Nonetheless, what you see there is the OFT looking very squarely at the wood, and not only that but focusing on how you set the penalty by reference to the most serious element. Because Step 1 is part of a penalty assessment system where the measure at Step 1 is a level of penalty assessed by reference to the seriousness of activity we are obviously focusing on the particular tender event where the unlawfulness occurs. In those circumstances identifying the most serious component and attaching that 7 per cent mark to it is both fair and rational, it is also sensibly balanced as compared with the lower threshold for cover pricing. It is recognising the seriousness of

illicit payments carried out under false invoices about which we have heard some good deal in relation to this particular case. It is worth bearing in mind that if one were to start trying to tinker with these matters and say: "Actually compensation payments, when you had cover pricing, should be treated in a slightly different way from others", how does one deal with some of the other cases that have been identified like information exchange and so on. How do you calibrate the situation where a price is given rather than received. Does it matter in these circumstances which way things flow? How does one begin to actually carry out those sorts of fine grained exercises which would flow from the approach that is being proposed here. The truth is that 7 per cent was a sensible, reasonable non-discriminatory assessment of the seriousness to be applied at Step 1 in relation to compensation payment infringements.

Unless the Tribunal has any questions, those are the submissions of the Office.

THE CHAIRMAN: No. Thank you very much, Mr. Beard.

MR. BEARD: I am sorry for the time I have taken.

THE CHAIRMAN: Mr. Hoskins, anything in reply?

MR. HOSKINS: With all the pressure weighing on my shoulders I will be as brief as I can be.

The turnover issue, I apologise that I had not picked up what the OFT's position was in the meaning of the Guidance, it certainly was not clear to me from the submissions they put in, but let us put that to one side. What the Tribunal will have to do in this case and other cases is decide what the meaning of para. 2.7 of the Guidance is. Having decided what the meaning is it will have to apply it in all the cases. So in fact I have not made submissions, Mr. Beard had another bite of the cherry, that is fine, the Tribunal will make its decision, but as I pointed out it does not make any difference to my case whichever way it goes, because if the Tribunal finds in favour of the OFT on the submission it is still a guidance, and therefore, as I showed in the case law, there is still the obligation on the Office to make sure that it stands back and decides whether the result is fair in the particular case – tilting at windmills really.

I referred you to GMI, but I referred you to the passage I had set out in my closing submissions. Can I just highlight a section in the transcript again – you have seen part of it in my note – p.34 GMI – this is the link with the precise point. I set out p.34 lines 10 to 19 where the President is pointing out: "You did not step back, did you?" Miss Bacon says: "We did, we looked at the MDT and we had a cap", but the President makes the point at p.35: It is all very well that you did this as a matter of a template, but he says:

> "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?"

That is absolutely an encapsulation of our case, and it is very telling that Mr. Beard in his submissions did not say the Office stood back and looked at the results in each particular case. He said: "It must be fair because we applied the template", but I showed you the log that says that that is not a sufficient approach, one cannot simply assume that the policy will result in a fair result in all cases, and that could not be clearer from the case law. The logic of the OFT's approach on this is that – I will pretend to be the Office here – "If we, the Office apply our Guidance then it does not matter if it leads to an unfair result in a particular case because we have applied our Guidance." Once one recognises that that is what is actually being said by the Office in this case, and one looks at the case law you can see immediately where the fundamental flaw is.

Step 5 does not help them because that is just a statutory cap, it is an absolute maximum, so it means you cannot be terribly unfair, but there is still scope between the statutory cap and what is below to still be unfair, there are degrees of unfairness, so the Step 5 statutory cap is not an answer to this.

Deterrence is a similar sort of point. Mr. Beard pointed out that part of the Guidance is supposed to be about deterrence. That is absolutely right, but the deterrence cannot be arbitrary. The final sum you impose, part of the object of which is deterrence, must still be fair and not arbitrary. You cannot say: "We happened to apply something that was three times larger than it might have been", but that is fine, it was three times larger because that really deters you. Again, logically, that cannot be an answer to the legal requirement to step back in each particular case.

Another way he put the deterrence point is the result of Step 1 might be sufficient for deterrence purposes, you might not need to make an extra uplift, and he also said "What we are trying to do is looking to deter the company now, and that is why you should look at the time of the Decision."

The problem with that is that if you start at Step 1 with an arbitrary figure in the way I have described and no real connection with the infringement, then of course you may not need an uplift for deterrence because the arbitrary figure leads to such an excessive and unfair result. It is the same point, the fact that you reach a big figure and that will deter does not mean that the figure you have reached is actually fair.

Mr. Beard said my case was that you, the Tribunal, must apply the year prior to infringement test. I did not say that. I said what the Office has failed to do is to stand back and decide whether the approach slotting in the template was arbitrary or unfair, and what I said is you, the Tribunal must do that. I said that if you agree with my submissions that you have to do the standing back, then one of the solutions, and it seems to me it was the obvious solution in this case, is the year before infringement because at least then you have some sort of connection with the infringement albeit perhaps with an indexing as the Professor suggested.

Mr. Beard made the point that applying the year before infringement can lead to a disjunct because you can have the turnover being looked at in the year which was actually prior to the infringement. That is precisely the point in *Umbro*, but at least the *Umbro* position is less arbitrary and therefore recommends itself. The fact that there is still an element of arbitrariness and that approach does not mean that you live with the clearly large disjunct between the time of decision and the date of the infringement.

I have made the point, he took you in great detail through the steps but applying the process itself does not necessarily lead you to a fair result because if you plug in at Step 1 something that is arbitrary, the thing is skewed throughout. With respect, as I said, it cannot really be caught up by tinkering with deterrence or whatever, because if in fact, as I have said, the differences between an order of £6.7 million and two point something, then to get there with deterrence, the percentage would have to be enormous beyond any reasonable figure that has ever been applied, so that does not help.

The final point on turnover, Mr. Beard said that I gave no parameters. You and I, madam, addressed that point and I took you to what the President said about it in GMI, he referred to some parameters. The trouble with that is if you look at it the other way it is for the Office to justify its approach and here what I have shown is that there really is no obvious reason why the date of decision should apply to my clients.

With respect, Mr. Beard's submissions really miss the point entirely because he did not address the fact that they had not stepped back and looked to see if this was fair. With respect, I will turn that point back on him. He has accepted effectively that his client has not stood back to see if it is fair, and that is clearly a flaw. I addressed what I said should happen, a way of approaching fairness. He simply did not deal with it. There is a gap. So the Office's position is, "As long we apply the general template it is fine, even if it leads to an unfair result in a particular case". That is an extraordinary submission, but that is their submission.

On the question of corrections, I appreciate that money is tight for everyone at the moment. I do have to say it was rather opportunistic, having remained silent about the nature of the errors throughout this process, for the Office suddenly at the eleventh hour to start taking points about the nature of the errors. The short point is this: it is quite clear that the errors committed were not in bad faith, and I would say it is also quite clear that it was not wilful casualness, it was a complicated exercise done in good faith. Mr. Beard said, "It is just a mistake". Exactly, it is just a mistake in good faith.

Mr. Beard also said, "Is the reason given in Mr. Barclays' statement sufficient to justify a correction?" Let us flip it again the other way: is the OFT really saying that it would be fair to require Durkan to pay a substantial sum – they gave the example of £1 million, but there will have to be the corrections, but we are talking about substantial sums, certainly hundreds of thousands of pounds, which has no justification in the circumstances. That is again what the Office is saying, "We are terribly sorry that we have accepted all this extra money from you, tough". It cannot be fair, and again it is a pretty extraordinary submission.

Compensation issues: we come back to counsel's gloss, because what Mr. Beard said is that I fail to see the wood from the trees, but the truth is, what the Office has done is it has done a gloss, it says one size fits all. Yes, go and read those paragraphs that he pointed out to you, because I have pored over them. I have had the cold towels round my head. When you read them, what you will find is that they do not make the relevant comparisons, by which I mean they do not compare cover pricing alone with compensation payments alone, and they do not compare different types of compensation payments. Yes, there is lots of discussion, but none of it is relevant.

That is all I have to say, thank you very much.

THE CHAIRMAN: Thank you very much, Mr. Hoskins, and indeed thank you very much to all counsel and those assisting them. It has been a very interesting five days and we will now go away and consider what we are going to do and let you know in the usual way. Very well done to all counsel, if I may say so. We did press you individually very hard on certain points, and you certainly gave extremely comprehensive and helpful responses. So thank you very much indeed.

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