IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1136/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) JH HALLAM (R&J) LIMITED
(2) JH HALLAM (CONTRACTS) LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Watson Burton LLP) appeared on behalf of the Appellants

Mr. Daniel Beard and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Mr. Robertson, this series of hearings is going to be déjà vu defined!

MR. ROBERTSON: Sir, members of the Tribunal, I act for the appellants, which I will refer to collectively as J H Hallam, and my learned friends Mr. Beard and Mr. Woolfe appear for the respondent, OFT. Perhaps I can deal first of all with housekeeping. The tribunal should have one bundle comprising J H Hallam's Notice of Appeal?

THE CHAIRMAN: Yes, carry on.

MR. ROBERTSON: You will already have from this morning's hearing the OFT's statement of defence. You should have our skeleton argument together with a second witness statement from Mr. Hefford?

THE CHAIRMAN: Yes.

MR. ROBERTSON: There is an OFT skeleton and then finally a third witness statement from Mr. Hefford referring to one aspect of the OFT's statement of defence.

THE CHAIRMAN: We have got all those I think.

MR. ROBERTSON: As my instructing solicitor explained in the last Tribunal last week, I will need, in this hearing, to refer to confidential information under paragraph 1(2)(b) of Schedule 4 Enterprise Act, confidential information the disclosure of which would or might, in the Tribunal's opinion, significantly harm the legitimate business interests of the undertaking to which it relates. I checked with my learned friend. Whilst he has no objection to us going into a hearing in private at the appropriate point (which would be in about a minute's time) we will try to keep it as short as possible before we resume in open hearing.

In my submissions we are following the order of our Notice of Appeal; the impact of penalty, the Tribunal's jurisdiction, the seriousness of the infringement, flaws in the OFT's penalty calculation, mitigating factors.

Dealing first with the impact of the penalty, the penalty on J H Hallam is £359,796. This is equivalent to some four years of J H Hallam's average pre-tax annual profits, as Mr. Hefford explains in his first witness statement at paragraph 13.

THE CHAIRMAN: Could you say that again?

MR. ROBERTSON: Four years of average pre-tax annual profits. That is Hefford first witness statement paragraph 13 which is at tab 3 of the Notice of Appeal page 3. We draw the comparison that I drew this morning with the *Sainsbury* and *Imperial Tobacco* cases where the parties in those cases were 5 per cent of pre-tax annual profits for what are apparently more serious infringements, and, in common with this morning's hearing, the OFT has not engaged in a substantive discussion of those cases and why the penalties should be

apparently much easier for undertakings to bear than for us. You will hear this on a number of occasions, not just from me. The construction industry has been hard hit by the recession. J H Hallam is no exception. The current financial position is explained in Mr. Hefford's second witness statement which was served together with our skeleton argument. That updates the position from the first witness statement. The OFT has made a response at paragraph 69 of its skeleton, to which the third witness statement of Mr. Hefford responds. As Mr. Hefford's statements contain confidential information as defined, I would now ask the Tribunal to go into a private hearing for the next 10-15 minutes so I can make reference in open court already to that information.

THE CHAIRMAN: That will require anybody who is not a party or authorised representative of a party, please, to leave the room until further notice. Thank you very much, sir.

(For Private hearing see separate transcript)

THE CHAIRMAN: Thank you very much.

MR. ROBERTSON: Throughout this process, Hallams provided the OFT with complete cooperation and was granted leniency. It had no option to appeal because the OFT's penalty calculation has ended up with a disproportionate and unfair outcome. We have sought, in our Notice of Appeal and skeleton argument, to explain the reasons why the penalty has come up as so disproportionately high. We have put the matters we rely upon by way of mitigation. I am not going to repeat those matters; I only want to deal with the additional matters highlighted by the OFT skeleton argument, and of course, if I do not comment on all the OFT arguments that is not to be taken as an acceptance of them.

Many of the matters that I now wish to address we have already discussed in this morning's hearing. I am not going to repeat submissions. I will just try to deal with additional points which were left over from this morning's hearing. I will just indicate headings, because that will show the areas where there is common ground with this morning's hearing.

Our second main topic is the Tribunal's jurisdiction. We have covered that this morning. At the end of the day, the OFT does have a guidance methodology, but this Tribunal's jurisdiction extends, if it sees fit, to substituting a fair and just penalty for that imposed by the OFT. That is not in dispute.

Turning to the third of my headings, the seriousness of the infringement, again the OFT seem to want to argue that this is one of the most serious infringements of competition law, as indicated by paragraph 15 of their skeleton. The comparison with the roofers case which led to the *Apex* appeal to the tribunal was raised this morning by my learned friend. As I indicated this morning I was not involved in that appeal; I was only involved during the

administrative procedure which led to the decision. I acted for a client which was granted leniency by the OFT. To the best of my recollection, certainly the case my client ran did not submit that cover pricing was the endemic practice in roofing or anywhere else. There does not seem to be any read across that I can see between the facts of that case and the facts of the current appeals.

In any event, as I said this morning, the OFT recognised that the appropriate level of seriousness merited a 5 per cent starting point. As I say, that is not in dispute. It is how far on the scale of seriousness.

I think I have said all I wanted to say this morning about comparisons with criminal cases. That is an objective point of comparison. I have drawn the Tribunal's attention to the material put before the Tribunal about Sentencing Advisory Panel, Sentencing Guidelines Panel, and the observations by the Sentencing Advisory Panel, about the relationship between having a turnover based fine, but one which takes into account profitability in industries where they are endemic in their margins such as construction.

THE CHAIRMAN: Of course, here we are talking about practices which took place historically, so we are able to look at published audited accounts?

MR. ROBERTSON: Yes.

THE CHAIRMAN: Over a series of years?

MR. ROBERTSON: That is correct.

THE CHAIRMAN: There is no suggestion of the accounts being – I mean, all companies can be creative in their accountancy, obviously, from year to year, according to their perfectly legitimate objectives from year to year. If one takes a run of years for these kinds of companies one gets a reasonable snapshot.

MR. ROBERTSON: I think that must be correct. Certainly my clients are typically family owned, family operated firms, maybe with or without outside shareholders. There does not seem to be much point in creative accounting.

THE CHAIRMAN: I do not mean creative in any critical sense. Companies will adjust their profit margins from year to year according to their anticipated performance for the next year. It is a perfectly proper thing to do. But when one takes a run of years one can have a decent snapshot of a performance of a company, whereas in a criminal court one is often faced by accounts which are as criminal as the conduct complained of, and over a much shorter time.

MR. ROBERTSON: Yes, there is no suggestion, I think, that there has been any incentive, certainly for any of my clients, to have been consistently (would the correct term be)

massaging their accounts. I think they can be accepted at face value. I do not think it has been suggested by the OFT that the picture of the construction industry was painted, certainly in response to statement of objections. I have acted for a large number of the companies under investigation and I have been consistently told that margins are, in good times, about 1-3 per cent.

On the OFT's justification they were talking about economic harm here. Many criminal offences are aimed at preventing economic harm, like insider dealing offences. It does seem to justify a totally different approach when looking at the justice of an overall fine.

The fourth heading is the flaws in the OFT's penalty calculation. This is addressed in our skeleton for this hearing at paragraphs 140-175. Just to run through the headings: tendered and non tendered work, we have been over that this morning. High turnover and low margins, again we spent quite some time on that this morning, and the comparison with the tobacco case, of *Sainsbury* and *Imperial Tobacco*. Just to reiterate, we are not inviting a departure from a turnover based approach to penalty calculation; we are simply saying that in applying a turnover based approach one has to have regard to the circumstances of the industry that you are dealing with. That is a point that is made by the Sentencing Advisory Panel. It reflects also the views of Sir Jeremy Lever in his article "*Just Desserts*".

Lack of effect on price, the OFT maintains the view that the lack of effect on price of cover pricing is not a relevant factor to penalty calculation. We are not disputing that cover pricing is an infringement by object. We are not disputing the logic of the *Apex* case, making that point. We have not ever disputed that. What we do dispute is that you then disregard any effect when it comes to calculating what is an appropriate penalty.

My learned friend referred to *Archer Daniels Midland*, but he has not referred to the more recent *T Mobile* case, which was a judgment of the Court of Justice of the General Court where – to repeat again the passage from paragraph 31 of the judgment – the Court of Justice said that it was relevant in determining the amount of any fine to have regard to whether anti-competitive effects result from an infringement by object. In our submission, that is just common sense. That is one of the factors you take into account in sentencing.

As to multiple penalties and the arbitrary choice of infringement, in the current case one of the penalties imposed upon J H Hallam before leniency was £31,232. The other two penalties were over ten times higher at £311,282. It seems to us that scale of variation between the penalties, there is nothing to suggest that one of the cases was worse than the other, that just indicates how the happenstance of the product market in the infringement taken by the OFT determines the overall level of the fine essentially.

If you are looking at this case, some of the penalties are arbitrarily low, some are arbitrarily high. We seem to have two arbitrarily high penalties here.

We were a leniency applicant, and we provided the OFT with evidence of six infringements for which we have been fined three times. My learned friend's argument is that we cannot compare with the leniency applicants and other addresses of the decision because leniency applicants will provide evidence of whatever infringements they have got evidence of. In our case it was six, and in the *Irwins* example that I referred to this morning it was 130. The OFT say for other addressees of the decision who we did not enter into a leniency process with, or refused to enter into a leniency process with, we will not have the relevant hearing of information so we will not have the volunteering of a list of infringements.

There are two points to make in response to that, which is correct on its face. Firstly, you may well, as a consequence of carrying out investigations, requests for information, be provided with evidence of however many infringements it might be for another company. It is really the OFT's decision how they take that investigation forward. They may continue to pursue it, or they may, because of inadequacy of resources, conclude that they are not going to carry on investigating. The OFT may well have evidence of large scale infringement by a company, but take the view that because they are not a leniency applicant we are just going to stop at a certain number.

The point we are getting at is the OFT has not been able, for whatever reason, to work out the relative scale of infringement by the various addressees of the decision. All we know is that our level of infringement was six and in the scheme of things that seems on the low level. Other companies plainly have much more extensive evidence of infringement to give to the OFT, but we are being treated just as harshly as they are.

THE CHAIRMAN: It is not an easy issue for the OFT, is it Mr. Robertson? Supposing that you were here in relation to one infringement and another company had 35 infringements, you would be making exactly the same point, would you not, pro rata? But at the end of the day the OFT are there to bring an end to anti-competitive practices of this kind. Are they not entitled to take a policy view that they investigate it so far and no further, consistent with achieving their objective?

MR. ROBERTSON: They obviously have to make the investigation manageable, particularly here because the practice appears to be endemic. But what they have done is treated companies who are not in the same position all alike by saying: three penalties when there is evidence that some were engaging in it occasionally and others were dealing with it absolutely systematically, a regular, almost everyday occurrence. They are treating them

the same, when the OFT has sufficient evidence to know that they are not in the same position.

The addressees of the decision – I have not counted up exactly – there are some that have two infringements, some of that have only one, and therefore only receive a single penalty or a double penalty. It just seems to us to be somewhat arbitrary to say that three is the maximum when you know indisputably the scale is not one to three; it is one to 130 for one; one to 11 for another; one to six for us. There is sufficient evidence before the OFT to know that the scale of infringement was different from company to company, and yet they have refused to take that factor into account, and treated everyone who has received three penalties as a maximum infringer.

The multiple penalties points, the OFT did not need to do this; they just needed to set a single penalty per company, and then adjust it to take into account what they knew about that company. So introducing this multiple, it would never make the fine more rational; it could only operate as making it more irrational.

THE CHAIRMAN: I am sorry, it may be that I am being dense about this, but why does having a single penalty per company make it fairer? You can have one penalty per company or three penalties per company, as long as the penalties are fair and proportionate, does it matter?

MR. ROBERTSON: Yes, it does, because some only got one penalty, some got two penalties, some got three penalties, but it did not reflect different levels, it just reflected where the OFT's investigation had come to an end, where they brought the bar down and chose to end it.

The second point we have got about the arbitrary choice of infringements, again as a leniency party they have done to us what they have done to other leniency parties: they have taken the most recent infringements. As has happened, two of the three most recent infringements were in the education sector. One took place in 2002, the other took place in 2004. The fine was imposed by reference to turnover in 2008 and education turnover for J H Hallam peaked in 2008. So they happened to alight upon the single worst year for us.

Discrimination against small and medium sized firms, the point to emphasise on that for J H Hallam is the same point as in this morning's hearing. The figures are a bit different. The education turnover was 28 per cent of all turnover. Five per cent of 28 per cent is 1.4 per cent, two penalties, so the fine is 2.8 per cent of total turnover. Contrast the national firm where the MDT would only have been 0.75 per cent of total turnover. So it is four times higher than the figure you would come up with, just applying the MDT.

The OFT say they have been conservative in dividing England into nine administrative areas and working on the basis of that turnover. But it does have this effect; that it captures all the turnover of a small and medium sized regionally based firm. We are East Midlands based. That is where we generate pretty much all of our turnover, whereas a national firm is national based.

Discrimination by comparison with undertakings involved in compensation payments, there is really nothing to add to what I said this morning and what is in our Notice of Appeal. We have received proportionately a higher fine than those who engaged in what the OFT took the view was a more serious infringement. The OFT emphasised on methodology. We say; look at the outcome. It is the outcome that matters, because at the end of the day it is the outcome that we have got to pay.

Director involvement – again, nothing to add to what I said this morning.

Last business year turnover, there is an additional point here to that which we took this morning. Because they have used the last year of turnover they have picked the peak year of turnover. For infringements that took place before the OFT changed its fining guidance we would not have been fined at anything like that level. If you apply the penalty guidance, we would have received, if we had received the maximum in accordance with penalty guidance, a much lower fine. We set out in our Notice of Appeal why we think that is retroactive increase of what is to be treated for these purposes as a criminal penalty.

Finally, the appropriate level of the penalty. We set out in our skeleton argument from paragraphs 176-215 the factors we would invite the Tribunal to take into account if it is prepared to revisit the penalty imposed by the OFT upon us. Responding to the OFT's invitation in paragraph 13 of their skeleton where they say that we have failed to set out what an appropriate level of penalty should be, I have already referred the tribunal to the figure that we think is the maximum that would be appropriate in current circumstances.

I do not think there is anything I want to add to any of the other matters set out in our skeleton and in our Notice of Appeal. Just to deal with one point on the Europe Economics report, my learned friend suggests that now the report has been published at the beginning of this month that our submissions that we had made originally confidentially on the first draft of that report somehow fall away. They do not and they still remain good. What the report showed is that essentially before the OFT's investigation became a matter of knowledge in the construction industry as a consequence of the publicity given to the issuing of the statement of objections in April 2008, the large proportion of the construction industry was blissfully unaware of the illegality of cover pricing. Was that because the

construction industry deliberately ignores legislation? No, it does not; it is a highly regulated sector where compliance with health and safety is well understood by responsible firms.

What it shows is that prior to the publicity given to this investigation and the issue of the statement of objections, the message had not been communicated to the industry that cover pricing was a breach of applicable competition law. One possible explanation for this, in my view, one probable explanation for this, is that in not a single one of the earlier cases (the OFT had had five earlier cases) did the OFT use the term "cover pricing" or "cover bids" in the publicity given to those cases. We set this out in our Notice of Appeal. We have referred to the titles of all the Press Releases. The OFT always referred to it as collusion, or collusive pricing, or bid rigging. I have heard this from any number of 20 clients, time and time again people have told me they just were not aware. Of course they know that bid rigging is illegal, they know that cartels are illegal. They just did not think cover pricing was wrong; they were taught it in night school! It had been carried on from time immemorial. They just did not link the two. That is the basic problem.

The OFT has got its message across now. Everyone is well aware of this in the industry. That is what the Europe Economics report now shows. The way in which the OFT secured its aim of stamping out cover pricing was publicity. That is why we say that if the Tribunal is prepared to revisit penalty, then a deterrent element is not necessary when it comes to cover pricing. The work has been done essentially. Anyone engaged in cover pricing now would probably deserve to have the book thrown at them. But the book would not be one of the main textbooks that taught it in the old days!

Sir, unless I can assist you further, I think I have done the best in the time limit.

THE CHAIRMAN: Thank you, Mr. Robertson. Just bear with me for a moment. (Pause) Yes, Mr. Beard. Sorry, I was formulating a question about cover pricing, but was not succeeding in the formulation, so I will hand over to you.

MR. BEARD: Sir, with the permission of the Tribunal, I will deal with the material not related to financial hardship first, and then come on to that at the end.

As with the situation in relation to this morning's hearing, we have prepared a navigation table just to assist the Tribunal in following through the various parts of the pleadings. (Handed) I am conscious that various of the themes were elaborated this morning and I will not reiterate those points about how one goes about assessing the application of the guidance, and how those matters are to be dealt with. The residual submissions in the end of the skeleton argument from Hallam that set out, I suppose, a rubric as to how one goes

about fining the scheme do nothing of the sort, and do not give any good reason why there should be a proper departure from the guidance.

The points in relation to the seriousness of cover bidding again were rehearsed this morning. Unless the Tribunal wishes to hear further in relation to those matters, I will not return to them. The point being made in relation to, in particular, *Apex* is not that this is the most serious form of infringement, but it is a serious matter and that that seriousness should be reflected both in the step 1 penalty and any consideration of deterrence that arises.

Similarly, I will not go into issues concerned with comparisons with criminal schemes. The points made by Mr. Robertson do not add to the submissions made earlier. In relation to traditional and non traditional turnover as being the relevant consideration to which a 5 per cent starting point should be applied, again, Mr. Robertson has not dealt with why it is that a relevant market definition is the important and salient consideration of turnover that must be brought to bear here.

In relation to the high turnover and low margin, again, Mr. Robertson has not added to the submissions he has made previously. He reiterates the attempts to use cases such as *Sainsburys* and Tobacco, the two he happens to select, the ones that are to his advantage supposedly, cases where there was an early resolution agreement that changed the way in which the penalties were going to be assessed, and why that is a sensible comparator.

Really, what Mr. Robertson is doing is alluringly inviting the Tribunal to say: yes, turnover, that is a relevant consideration but it is not the only one. One should be considering profits here as well. That submission, in the OFT's view, is flawed, substantially flawed, and one that this Tribunal should be cautious about following.

The basis for using turnover is well explained, both in the guidance and accepted in both domestic and European case law. The reason why there are two components to the assessment of turnover: the relevant market turnover and the total turnover, again very well explained.

Mr. Robertson then says; yes, but there should be some sort of adjustment for the profitability. Here, this morning and today, he has referred to specific profitability of specific entities. But it cannot be that the profitability of a specific entity can be the determining factor for any adjustment. That would plainly be a perverse consideration because you would end up benefiting inefficient market participants, those that did not generate significant turnover. It recognised also that it is relatively easy to manipulate profitability. That is not to say that it is a technique of evasion, but if one takes family companies, how they disperse their profits – whether by dividends or remuneration for

directors which will then appear as costs rather than as part of the profit that was being dispersed – may be a matter of all sorts of taxation considerations. Therefore, the way in which one begins to assess what is high and low profitability for a single entity, and whether or not it is low profitability notwithstanding the efficiency of the company (which would have to be the way in which one would sensibly begin to use this as a rational consideration) are matters that the OFT simply could not use sensibly as a matrix for adapting the overall penalty structure that it would be applying. Instead, Mr. Robertson moves to the suggestion that this is a high turnover/low profit margin industry and therefore as an industry it is different from other industries. Of course, we do not actually have that comparative information. Mr. Robertson picks on Milk and Tobacco without us having details of how those are relevantly comparable industries that one should be referring to. In the context of Milk, it is not clear whether it is the Milk industry or supermarkets industry, and whether or not relevant comparisons should be drawn.

But in those circumstances, the idea that one should be then trying to carry out this sort of assessment and work out what constitutes high and low profitability in different industries and how there should be an attenuation or increase in the level of penalty, is difficult. Earlier this morning, sir, you, Mr. Chairman, asked about the comparison with, for instance, the advertising industry. I do not have any figures that suggest one way or another how profitable advertising industry may or may not be. Some players in the industry may be very profitable; some may not be. It would be wrong for us to make an assessment in that regard and then try to draw comparisons. The matrix becomes ever more complicated. We are not in a position to sit here and say: there should be some sort of aiming off. One does have to, in the end as well, have in mind the practicalities of these matters. Needless to say, when the OFT is faced with representations in relation to any penalties, strangely enough the people that come along are never extolling the profitability of their industries, never extolling the prospects for growth, development and success in an industry. Indeed, that is in no way surprising.

But for the OFT that poses a very significant difficulty: working out what a rational comparator would be in these circumstances is extraordinarily hard. Therefore, to try to carry out this analysis in relation to profit, which is a matrix which, as I have said, is not one that is as easy to gauge as it is in relation to --

THE CHAIRMAN: Just looking at the five steps that followed, is it not right that up to step 3 the OFT is really looking to broadly objective matters, but once one passes step 3 are they not

looking at what are broadly subjective factors, and then it becomes an evidential process which takes into account the material presented by the company concerned?

MR. BEARD: I am not sure that properly captures what is going on. In relation to step 1 it is true that the guidance sets out criteria for assessing relevant turnover. Of course, we have the techniques that were used for defining relevant markets. So to that extent one can see that it is subjective. Equally, in relation to the starting point percentage, one can see that it is generalised, although that is not necessarily the case. It is in this decision because there are two types of infringements. There is the straight cover pricing and compensation related activity. So two different percentage points were reached. But it is not impossible that you can get a range of percentage points being applied at the outset. So to say that is an objective stage rather than a subjective stage, depending on the undertaking and the infringement in question, I think, might be taking it a step too far.

Equally, when one moves beyond steps 1 and 2, so starting from duration and moves on to factors for adjustment, it is not right to say that they adjust open to a completely liberal discretion; there are a range of factors that are for instance specified as aggravating or mitigating circumstances. Those are adumbrated in the guidance. In particular, those factors one would say were objectively defined by the guidance. So you have both subjective evidence being considered and objective consideration by reference to principles in all of the steps of the penalty system. So I do not think that it would be right to draw a stark distinction as, sir, you have identified in that taxonomy.

It is right that in this case you do, of course, have a situation that at step 3 you had a minimum deterrence threshold applied. One can say; is that subjective; is that objective? I am not sure that that semantic analysis will necessarily advance one terribly far. Clearly, the manner in which the MDT was arrived at was by reference to the approach in previous cases, the roofing cases, the appeals that had come before this Tribunal, how it had been analysed. In those circumstances, it was an objective standard. We are not saying you cannot put any other deterrent consideration or adjustment in at step 3, but it was an objective standard that was applied across all of the infringements of similar type.

Similarly, in relation to the price capping mechanism, one could say that is just subjective. It involves a degree of judgement, that is true. It is true also that there must be a degree of different reasonable outcomes that could be reached in relation to a price capping mechanism. One cannot demur in relation to that. But it was an objective standard set, and it was one that ensure that all of the penalties, the outturn penalties that were arrived at, fell within a band of penalties as a percentage of overall global turnover that the OFT thought

was broadly reasonable given the nature of the infringements in question. I am sorry that is a rather long way of answering your question, but that deals with the particular aspect.

THE CHAIRMAN: I asked for it!

MR. BEARD: Just picking up a couple of additional points, Sir Jeremy Lever – obviously when his articles are cited they must be noted with due deference. Mr. Robertson says that his article suggests that a profitability consideration should be used to adjust the manner in which turnover is dealt with. I do not think that is quite fair to Sir Jeremy. Sir Jeremy goes much further and tries to detonate an intellectual nuclear device under the use of turnover entirely. He says, without any discourtesy to anybody, he thinks that it is a wholly irrational measure.

Sir Jeremy obviously sets out some very interesting and no doubt compelling reasons why that detonation should occur. As yet, no authority has followed him.

THE CHAIRMAN: It is not the law!

MR. BEARD: The fact that it was an opinion prepared for a German business organisation that generated that commentary is something that one has to entirely set aside, given the intellectual purity of the author. Nonetheless, it is not the law.

Just briefly dealing with *T Mobile*. I am very sorry I did not go to *T Mobile* before the short adjournment. There was a time issue that arose. Since my learned friend returns to it, it seems appropriate to give its appropriate scrutiny. Volume 8 tab 115. As with all Competition authorities concerned with mobile telephony, I approach this with a degree of trepidation! I think in relation to the particular citation that Mr. Robertson relies upon, we can dispose of it relatively shortly and with a degree of ease, without troubling ourselves about roaming rates or back hall charges or any of the nasty matters that come before this Tribunal!

If one turns to paragraph 23 on the fifth page, this is a reference to the preliminary ruling. It is what was than an Article 2.3.4 reference to the ECJ. The first question that is referred:

"As a preliminary point, the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature – I am sorry, I should have referred to the first question. I am not sure it particularly matters. It is at paragraph 22:

> "When applying Article 81(1) EC, which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?"

THE CHAIRMAN: That is such an opaque question that you might as well turn to the answer!

MR. BEARD: 23, the preliminary point about the overlapping notions of 'agreement', 'decisions', 'concerted practices', then a comment from the Advocate General about how one considers the assessment of concerted practices. A number of criteria have been set out. At paragraph 26 that is citing some hoary cases on concerted practices that are well familiar to those who have had to grapple with that issue. Then:

> "(27) With regard to the assessment as to whether a concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context … Moreover, while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, threshold is nothing to prevent the Commission of the European Communities or the competent [authority] from taking it into account. (28) As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects [so it is recognising that under 81 you have two sorts of infringements: objective infringements and effect infringements] it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions … It has, since the judgment in LTM, been settled case law that the alternative nature of that requirement, indicated by the conjunction 'or' means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is pursued. Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restrict or distorted to an appreciable extent. [So again, just drawing out the object/effect distinction.] (29) Moreover, in deciding whether a concerted practice is prohibition by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition [and, some well tested case law is cited]. The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition [i.e. object cases]. (30) Accordingly, contrary to what the referring court claims, threshold is no need to

consider the effects of a concerted practice where its anti-competitive object is established. [Then it goes on, and this is the paragraph relied upon.]

(31) With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti-competitive object, it should be noted, first, as pointed out by the Advocate General … that in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. [So that is the end of the matter. You do not have to consider impact. Then it goes on.] Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages."

THE CHAIRMAN: Is that not what Mr. Robertson is saying?

MR. BEARD: I am sorry, it is the "can". What you have got a situation here is saying you have got two categories of concerted practice: you have got objects and effects. If you are dealing with objects, do not worry about impact, you do not have to think about it. If a regulator wants to consider effect in assessing penalties, it can do so, "can" not "must". Mr. Robertson's proposition is "must".

THE CHAIRMAN: But what is the difference between "can" and "may". It means can do so lawfully, does it not?

MR. BEARD: Yes, it can do so lawfully and proportionately. The point is that it does not have to, because where you have identified an anti-competitive object, when you go on and carry out the penalty exercise you do not have to consider any of the impact of it. You can do; you do not have to.

THE CHAIRMAN: But supposing that the regulator does not do so, and justly (to use a very broad term) it should have done so, what happens then?

MR. BEARD: If "justly" means that it was wrong not to do so within the confines of the law within which it operate, then of course it must do so.

THE CHAIRMAN: Forgive me for interrupting, Mr. Beard, and the problem I am sure is mine. "Can" means it has a discretion to do so, right?

MR. BEARD: Yes.

THE CHAIRMAN: In deciding whether to exercise a discretion or not, then the decision making tribunal or organisation has to do so applying the proper principles of justice. So if it fails to do so and should have done so, then that is unlawful?

MR. BEARD: Yes, but what that judgment of the court is saying is not that one must – in other words that where one has got a concerted practice that is object related, you do not have to consider it for the purposes of infringement, but you must consider the impact when you come to do the fining process because otherwise you are not justly establishing the fine. That is not what that judgment says; it says nothing of the sort. That judgment says: if you want to you may. So in the context of a submission that is saying: you must look at whether or not there is an effect on price, in other words, there was a concrete impact, which is what Mr. Robertson says is an adjustment that should be made here, that authority does not help him in any way. To the contrary, the fact that the European Court is there saying, when faced with a specific reference question about the role of impacts analysis in concerted practice cases where there is an object of anti-competitive effect, it merely says you can take it into account, not that you must. It militates strongly against Mr. Robertson's submission.

THE CHAIRMAN: I understand your submission.

MR. BEARD: Mr. Woolfe points out that actually if one goes on to paragraph 39 what one sees is that what was being argued was that a no effect on price argument was irrelevant for the central infringement, but I do not think that takes us any further in terms of the analysis of the relevant paragraph that Mr. Robertson relies upon.

I should reiterate, of course, that one has already seen the *Archer Daniels Midland* case that was referred to in the earlier hearing, which for reference to notes is volume 7/92 and in particular paragraphs 62-72. That equally made clear that there was no need to be considering effect when assessing penalties.

When one comes on to the multiple penalties accusation, that somehow this was an arbitrary approach, the earlier submissions about the manner in which this investigation was carried out, and the focus, I reiterated the fact that choosing the three was entirely rational; it was a perfectly sensible and fair way of proceeding, and indeed the fact that multiple penalties were imposed did not mean that the OFT ignored the cumulative effects reference to the MDT and the capping mechanism. Those submissions also cover the points related to the arbitrary choice of infringement. But it is, just in passing, impossible to resist referring to the submissions made by Mr. Robertson about how Hallam is a company that only came

forward with six infringements and then three were chosen for penalty, and therefore it is vastly different from other companies.

If one takes up the appeal bundle and looks at page 9 of tab 2.

THE CHAIRMAN: Manuscript page 9.

MR. BEARD: It is an exhibit to the statement of Mr. Meears-White. It is the leniency application, as can be seen from page 7 external numbering.

THE CHAIRMAN: This is the reference to 77?

MR. BEARD: 77 covers given, 50 received, so 127, if I am doing my maths correctly.

THE CHAIRMAN: Receiving a cover means a contract?

MR. BEARD: Receiving a cover does not guarantee the contract.

THE CHAIRMAN: It means you are more likely to get the contract.

MR. BEARD: Sorry, receiving is when you rule yourself out. If you have got one you know that ----

THE CHAIRMAN: Right. This is quite a roll of honour of the building industry, is it not?

MR. BEARD: That is an apt term with the relevant qualification. The only point I make is this: that the Tribunal has already recognised the fact that a process has to be adopted by the OFT in dealing with these sorts of matters. Trying to say we only came forward for six on leniency, or we were only considered in relation to six at a later stage in the investigation is just not relevant. We cannot, in these circumstances, start trying to render comparators in relation to either leniency applicants, or indeed non leniency applicants. The whole process that was adopted in relation to the largest investigation that has ever been undertaken is described in some detail, and the rational steps that were taken to focus it have been set out.

The discrimination against SME's point has already been dealt with. Again, it is predicated on this notion that the relevant market analysis is the sensible, rational and economically appropriate means for dealing with the assessment of step 1 starting point penalty.

Then the discrimination vis-à-vis compensation payments, I think little is made of that. In relation to directors' involvement, again the fact that a family business has its directing mines closer to the coalface (to mix industrial metaphors) is not a reason why there should be no concern given to such a factor by the OFT. It is whether or not the directing minds of an entity are involved in it that is important. *Ready Mixed Concrete* is simply irrelevant in assessing that matter.

I will then turn to the last business year considerations that have been highlighted. The way in which the last business year is seen has been the subject of some consideration in a number of appeals. The exposition of why it is that the last business year is to be seen as

the last year before the decision is described in particular in paragraphs 58-70 of the defence. I will not take the Tribunal to it, but it needs to be recognised that the statutory scheme relates to imposition of a cap on turnover relating to the year prior to decision. There is a virtue in the consistency of turnover analysis across the picture in relation to penalty setting, relating to the same period of turnover. That is particularly important in relation to considerations of the policy of deterrence, where if you are looking at specific and general deterrents you want to be looking at the circumstances as close as possible to the decision. In that regard it is perhaps just worth referring the Tribunal for its notes to the *Degussa AG v. Commission* [2006] ECR II-897 case which is at volume 8 tab 99. I will provide the reference to that. It is in particular at paragraph 278.

This is European approach. There is different guidance at the European level, but nonetheless, in terms of the overall manner in which consideration of deterrents is a policy in relevant turnover to be considered (when I say relevant turnover I do not limit that to the turnover considered at step 1 but turnover considered for the purposes of the penalty assessment) it makes clear that the court, the general court in this case, considers that the objective of deterrents can properly be achieved only if regard is had to the situation of the undertaking at the time when the fine is imposed.

THE CHAIRMAN: Would the court be saying the same in 2010? This is a 2006 case at a time near the end of the period of sustained, unprecedented growth in turnover and profitability among companies throughout the European Union.

MR. BEARD: Probably.

THE CHAIRMAN: Would they be saying the same today?

MR. BEARD: As far as we can tell, Sir, there is no good reason for them to depart, because it is a question of deterring people going forward.

THE CHAIRMAN: Yes, but the scale of penalties in the current environment, which has developed between 2007 and 2010, is significantly proportionately greater than would have been the situation in 2006, is it not, because of the change in economic circumstances throughout the Union?

MR. BEARD: There are two points. I think (1) this Tribunal should be rather cautious about taking any form of judicial notice of the effects of the financial crisis on any particular industry. (2) If what is being suggested is that in 2006 you would have a higher turnover than you would in 2010, and therefore when it comes to imposing penalties in 2010 the Commission would be going back to 2006 and using that turnover, because then you would

have a situation where the final turnover to be applied would be substantially greater, I am not sure I see any --

THE CHAIRMAN: Perhaps I have not made myself clear. This sentence – and it is one sentence only ----

MR. BEARD: I am sorry, there are further paragraphs.

THE CHAIRMAN: Yes, but this sentence, which summarises further paragraphs, refers to the achievement of the objective. I am merely postulating the argument that at the time when this decision was reached it may well be right that the objective could be properly achieved only if one looked at the turnover of the undertaking at the time when the fine was imposed. But in an entirely different economic situation, the way in which the objective is achieved might be quite different. I am not sure how binding this is in law.

MR. BEARD: I am not going as far as to say this binds this Tribunal at all. The question is a different one: is there a sense as to why last business year of turnover that is applied by the OFT through its guidance, and has been applied in this case, is a rational, reasonable, sensible, appropriate mechanism? The point is; it is not just that we are plucking this out of the air; there are a whole range of reasons, including in particular the statutory framework, the fact that you have got guidance that refers to this, the fact that the guidance has been the subject of approval by the Secretary of State, and then in addition one is saying; look, the General Court is also accepting that when you are talking about these sorts of policy considerations that is the measure of turnover that is relevant.

It needs to be made clear that at no point in the OFT submission is it being said that there is no possibility that guidance could change, that the policies could be executed in a different manner. That is not what is being said by the OFT. What the OFT is saying is: it has promulgated the guidance, it considers the guidance is rational, fair and reasonable, no challenge to lawfulness is made, it makes the assessments under the guidance which are matters of judgment. It says to this Tribunal: you should afford us a degree of discretion in how we apply those principles. If we do that reasonably and well, you should not consider that what we are doing is wrong. In particular, if we are not getting it wrong through that process, which takes into account these various policies, you should not be concluding that the outturn is wrong or unfair or unjust, and you should not be having reference to arbitrary comparators which are not fleshed out adequately but would create significant difficulties for the Office in considering how fairly to do this.

I note in passing, of course, that if, in consideration of deterrents matters the European Commission or any other regulatory body were to hark back to higher turnover periods for

setting penalties, one could only imagine what the level of indignation and consternation about the impact on viability is going to be. So when one is attributing an impact to a company, doing it to the company now in a way that is proportionate to its current total turnover is a rational, reasonable, sensible and fair mechanism. That was merely introductory, sir.

THE CHAIRMAN: I am so sorry, I interrupted you more often.

MR. BEARD: I also wish to deal with the point that is raised in relation to *Uttley*. Mr. Robertson sticks by his written submissions, although in his oral submissions I might have detected a lack of profound enthusiasm for this point. Volume 3 tab 43 is the case of *Uttley* if I might just briefly take the Tribunal to it. The *Uttley* decision has to be considered in the light of what is being submitted here. What is being said is that under the previous guidance when you considered the starting point turnover at steps 1 and 2, you considered the turnover in the year preceding the end of the infringement, and then you went through steps 1-5. They were slightly different, but not significantly. That was the salient difference. When you reached the end of step 5 and you considered the maximum statutory cap, that statutory cap related to turnover in the year prior to the end of the infringement. Now the approach adopted by the OFT, the approach applied in the roofing decisions, and so on, is that last business year turnover is the year prior to the decision.

Mr. Robertson says, "Ah, yes, but if you had applied the mechanism of the old guidance through the old guidance system using year of turnover prior to infringement you would come out with a lower penalty, since you use year of turnover prior to decision you end up with a higher penalty".

Article 7 of the European Convention on Human Rights, he says, precludes that conclusion because it says you are not allowed to retroactively impose a heavier penalty than was permissible under the preceding law that applied at the time of the infringement, so he says this is all unlawful, it is all retroactive.

It is worth just reading the headnote to the case of *Uttley*, which concerned specific criminal provisions in relation to serious sexual offences.

> "Allowing the appeal, in the context of Article 7.1 of the ECHR the penalty that was applicable was the maximum penalty which the legislature prescribed for a criminal offence at the time it was committed. In considering whether the applicant's rights under 7.1 had been infringed the proper comparison was between the sentence which the court imposed for offences in 1995 and the penalty which could have been imposed for those offences in 1983."

That proposition is effectively made good in paras.20 to 21 of the decision where consideration of relevant case law of the European Court of Human Rights is undertaken. That is p.2284, and I would just invite the Tribunal to read that.

The other point to note in this context is that the OFT specifically went back and considered whether in fact any of the penalties being imposed would exceed the maximum statutory cap that was applied at the time of the infringement, and there is no issue, as I understand it, but that that statutory cap would not be exceeded. In the circumstances, there is no merit in the argument being put forward, it is a plain misreading of *Uttley*.

Just to reinforce that conclusion because of course the European Convention on Human Rights, although the Community is not a signatory of it, the rights embodied in that Convention are, of course, considered to be fundamental rights of the Community Legal Order and therefore are issues that can be heard by the Community Courts.

If one goes to tab 92 in bundle 7, which is the *Archer Daniels Midland* case, a full copy of which I handed up earlier, because there was only an extract in there previously ----

THE CHAIRMAN: Page?

MR. BEARD: It is para.38, p.3281. Paragraph 38 is simply saying what I have just said, that Article 7 of the ECHR is a fundamental right within the general principles of Community law. What they were dealing with here was a suggestion that you had a position where the infringements in question were committed at a time when there was no guidance operating at Community level, but when it came to apply the penalty, guidance was applied. So there had been a shift in the way that the Commission applied penalties from its policy pre-published guidance to the position under the guidance. One can see the obvious parallel here. It was from general policy to guidance in this case, and here Mr. Robertson's case is one guidance to another guidance. What was being said was, "Look, you cannot do this because under your old policy you would have imposed a lower fine, and so when it comes to the guidance you cannot operate that guidance, it would be retroactive because you would be imposing a higher fine".

What the court does is it reviews some of the case law that was referred to by the domestic court in *Uttley* and, having referred to that, goes on at paras.43, 44 and through to 47 and 48, to say, "This does not stack up as an argument, regulators can change the way in which they operate. As long as the penalty that is being imposed under the new regime is not greater than the maximum that could have been imposed under the old regime, there is no problem with Article 7 here".

One final issue before I finish off with financial hardship is the point that is made about the endemic nature of cover pricing, the suggested endemic nature. It is noted, of course, that the European Economics Report suggests that actually it is the run-off parties that do not understand the essence or the nature of an infringement which involves a deception effectively on the party seeking the tenders. One needs to bear in mind what the essence of this submission really is. The fact that a lot of people do something wrong does not render that thing any less wrong. Effectively, what Mr. Robertson is saying is, "The industry thought this was okay because it was endemic, because it was accepted practice", and he links that to the, "Well, as soon as we were doing something bad and the OFT was on to us we stopped".

Actually, the industry knew pretty well what was going on. Mr. Robertson's anecdotal evidence from his particular clients does not take him any further in this regard. Furthermore, as a pretty fundamental principle ignorance of the law is no proper defence in these circumstances.

If one takes up the defence of the Office of Fair Trading – I do not know if you have it to hand – although it is not dealt with in the defence under the term "endemic practice", if one turns to p.65 of the defence and para.180 onwards, there is a sub-heading "Genuine uncertainty as to the law", and this is really the essence of Mr. Robertson's contention, "People were doing it and therefore we were genuinely uncertain as to whether or not we were doing anything wrong, so there should really be an adjustment in this regard". That submission, when it is crystallised in that way, is patently unsustainable. There was and is no genuine uncertainty as to the lawfulness of cover pricing. The secret exchange of pricing material between competitors in a tendering process is plainly unlawful. The fact that large parts of the construction industry ignored this does not render that lawfulness any more uncertain. No properly advised undertaking could ever have reasonably thought that some such conduct was lawful, or arguably lawful. The law was and is clear.

Then at 182 effectively the defence lays out the clear concerns that were articulated by this Tribunal in *Apex* echoed in *Makers*. In each cover pricing infringement one party provided another with prices which it could use to ensure that it did not win the contracts, and which, although false, would appear to the client to be genuine. It is a deception. How you can turn up before the Tribunal and say, "I was engaging in a deception, I had no idea it was wrong", is a submission that is bold and plainly and unsustainable.

If one turns over the page, what one sees is that way back – way back – in 1973 it was being made absolutely clear in European authority that this sort of manipulation of tendering was

not permissible, it was a breach of competition law. The fact that there were books in the 1930s saying that this was quite an entertaining scheme is neither here nor there. It is to be recalled that back in the 1930s grand cartels were seen as in the public interest.

THE CHAIRMAN: What are we to do about such evidence as there is before us that in the 1990s cover pricing was frequent, if not endemic practice in the building industry, and indeed if we look back at that list which you showed us earlier provided by Hallams it is a cast list of most of the major businesses in the construction industry, some of them very much bigger than Hallam?

MR. BEARD: This is true. Indeed, the scale of the investigation that had been carried out by the OFT recognises that there was a lot of it going on. That does not mean that it was recognised as being ----

THE CHAIRMAN: What account are we to pay to that evidence, because it is apparently uncontroverted evidence?

MR. BEARD: Uncontroverted in the sense that there were textbooks saying the wrong thing.

THE CHAIRMAN: And that it happened.

MR. BEARD: And that it happened, none. It is worth recognising that, in fact, that although it is talked about as if this was accepted as currency in the construction industry, the European Economics Report indicates that even in 2008, 82 per cent of those surveyed thought that cover pricing was illegal, and that has gone up further in the final outturn survey. So there is no doubt that vast swathes of the industry thought it was illegal. The fact that they engage in illegal practices does not justify it one iota. So the answer remains, none.

There was one final issue in relation to endemic pricing that the Tribunal raised earlier. I was slightly coy in answering you. It was to do with roofing and *Apex*. The question was whether or not there had been any reference in those roofing decisions and in the proceedings before the Tribunal as to whether cover pricing had been widespread in the roofing industry. The reason I was slightly coy was because I acted for Apex in relation to the appeal and I was slightly concerned that I did not remember accurately what had actually been referred to and said both in the decision and in the judgment. In the *Apex* decision – in other words, the OFT decision – and I will provide the references, volume 9, tab 123, and the relevant pages are 103 to 104, parties have made representations that cover pricing in the sense used in this decision is a widely encountered phenomenon in the roofing industry.

> "The parties' infringements gave purchasers of flat-roofing services the impression there was more competition in the tender process relating to a specific contract

there was actually was. However, the OFT notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that such infringements are not the most serious examples of collusive tendering."

So a similar approach to an assessment of seriousness.

The point there is that in para.390 there is clear representation that the situation was widely encountered. I am loath to use the word "endemic", because I am not sure that it elaborates very much.

In relation to the judgment of the Tribunal in the appeal, para.390 is specifically quoted at para.273, and the reference for that is volume 3, tab 46, p.102 to 103. So there you had the submissions being made in relation to roofing.

That, I think, answers the question that the Tribunal asked earlier, which is, was there any cognisance of this idea previously, and the answer is yes. I am not suggesting that it was played out in the same way. I can say with some confidence that it was not run in quite the same way in relation to the appeal. In relation to the question raised by the Tribunal the answer is yes.

Unless I can assist the Tribunal in any other matters save for financial hardship, which I can start in open and then go into a closed haring if that would be of assistance ----

THE CHAIRMAN: Yes.

MR. BEARD: Just dealing briefly with matters concerning financial hardship, the Office has set out in its skeleton argument the way in which the guidance and jurisprudence underline the highly exceptional circumstances in which a reduction in fine on the grounds of financial hardship might be appropriate. I think the particular key case in this regard is *Sepia Logistics*, found at volume 4, tab 58. Could the Tribunal turn to para.94, it may actually foreshorten my submissions if I could just ask the Tribunal to read from para.94 down to the end of para.101.

THE CHAIRMAN: (After a pause) Yes.

MR. BEARD: Just to take a series of quick points in relation to this, just working slightly backwards, it is clear from para.100 that the onus is very much on the party to set out fully all the material evidence that would justify any reduction in financial penalty:

"… it seems to us the onus must be on the applicant to provide the regulator with all the information and/or documentation it wishes to have taken into account."

It is notable at 101:

"Given that in this case the OFT did not have at the time it took its Decision sufficient information to assess the financial position of the undertaking as a whole, we think it was reasonable for the OFT to conclude that a reduction in the level of penalty on the grounds of financial hardship was not justified."

We will leave for another day the fight as to whether any post decision evidence is admissible. The OFT reserves its position specifically in that regard, but is willing to deal with the material that has been put forward by Hallam in any event, but it notes para.101. The second point to note is that the assessment of both the European court in *Tokai Carbon*, which is at bundle 7, tab 91, for your reference, and in *Achilles*, which is the decision of the Tribunal, volume 4, tab 53, makes very clear that even insolvency or liquidation of an undertaking does not necessarily suffice to warrant a reduction in fine. It is an extremely high threshold. The statement that is made, the fact that a measure taken by a Community authority – this is *Tokai* – leads the insolvency or liquidation of a given undertaking is not prohibited as such by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the person or tangible or intangible elements represented by the undertaking would also lose their value. In other words, if you do bad things, you may go out of business, people may have to be re-employed elsewhere, the assets may have to be sold off. That, in and of itself, is not a factor that means the penalty must be reduced. In *Achilles* that proposition from *Tokai* was specifically considered and approved by the Tribunal. The references that have been made by Hallam to *Tokai* do not assist it in relation to these matters.

THE CHAIRMAN: How does this square with the press release issued last week by the Commission in the *Bathrooms* case?

MR. BEARD: Undoubtedly a regulator can take the view that it will take into account factors of financial hardship. The point I am emphasising is that, as a matter of law, there is no requirement.

Hallam have cited the opinion of Advocate General Gilhoed in *Showa Denko* for the proposition that while the Commission is not required to take into account reduced ability to pay, the same does not hold true of actual ability to pay based on the size and economic power of the undertaking. This is a spurious distinction, and it is one that was debunked in *Sepia* itself. So to maintain the position in the face of a clear authority at para.96 of *Sepia* is an unsustainable proposition.

Fourthly, the appellant refers to and relies upon the *FNCBD v. Commission* case and the *NILWA* case, both of which concern particular exceptional circumstances relating in the first case to mad cow disease alone, and the second in relation to mad cow disease and foot and mouth, that in circumstances where agricultural livestock producers were operating in a way that might otherwise be thought of as potentially seriously anti-competitive, those very exceptional circumstances effectively causing the collapse in trade to a greater extent in relation to the relevant products were such as to justify exceptional measures to be taken to reduce financial hardship.

I go back to the point made earlier, it is not a matter on which this Tribunal should take judicial notice that somehow one can compare the financial crisis in general and vague terms that is referred to and the circumstances that obtained in relation to the agriculture sector and say that one can read them across.

Those cases do not assist Hallam, and in circumstances where there is a high threshold to be met, as is recognised as permissible by the jurisprudence of this court and the European courts, the approach adopted by the OFT to say, "Yes, we will consider financial hardship but we will only consider it by reference to two thresholds, one, whether or not the penalty in question, the outturn penalty, exceeds 50 per cent net assets, or exceeds 150 per cent of your profit after tax", but those were used as broad indicators. It was not that you had to cross each. If you could put in submissions that showed why you have financial hardship in relation to net assets or profits, then the OFT would consider your case more fully.

Here it is important to note, and it is a matter that was studiously not referred to by Mr. Robertson, you would not have detected it from his submissions. Hallam received a 50 per cent reduction in its penalty. In other words, you have a situation where the OFT came along, notwithstanding the very high thresholds set in the case law and said, "Okay, given what you have told us, we will reduce your penalty, we will halve it". So what Mr. Robertson is coming along to this Tribunal and saying, "50 per cent, that is not enough".

I do now want briefly to turn to one or two specific matters, and I am obviously concerned, I do not think I will refer to anything confidential, but I do not want to run any risk of doing so.

THE CHAIRMAN: If those who are not parties or representatives or parties would leave now, we would be grateful. Thank you very much.

(The hearing continued in private, see separate transcript)

THE CHAIRMAN: Shall we open the doors again, please? Carry on, Mr. Robertson.

MR. ROBERTSON: The final point is on financial hardship my learned friend took you to *T Mobile* and we established that this Tribunal has a discretion to take financial hardship into account. That is also plain from the terms of the judgment of this Tribunal in *Sepia* (see paragraphs 81 and 109 in relation to the nature of the jurisdiction of this Tribunal).

The position about the *Northern Irish Bloodstock Auctioneers Association* case and the assertion by my learned friend that there is only general and vague noises coming from me about the downturn affecting the construction industry, there will be specific evidence I think it is before this Tribunal tomorrow morning in the form of an Experian report annexed to a witness statement. So there is written evidence.

As to the impact of BSE and the Foot and Mouth Disease in Northern Ireland Livestock, the Tribunal has not yet received, but will be receiving, evidence on that in the GMI case. Again, references to official reports which attempt to put some sort of scale on it. So a Tribunal, not this constituted Tribunal, will see that evidence. The position is the construction industry is facing at least as big a downturn as the auctioneers industry had been by the time of the OFT's decision in 2003.

May I turn to margins in this industry. My learned friend says you cannot make any comparison between this decision and margins in the construction industry and other cases. I would love to be able to take the Tribunal to the decision in *Tobacco* and *Milk and Cheese*. One they have not adopted yet, the other one they have not published. I took those are being comparable cases. Another comparable is the *Construction Recruitment Forum* case. There are three appeals coming to this Tribunal from that decision. I acted for one of the parties that is not appealing that decision. That case was all about margins. The margins were considerably higher. From memory it is about 30 per cent margins in the recruitment agency business. That is something I will take up with your Lordship's kind invitation to submit further submissions in writing, just so that the Tribunal can see that.

This industry, it is suggested somehow that this may be inefficiency. There are over 186,000 construction firms in the UK. That is the figure cited in the OFT's decision. You have seen how many construction firms there are. It has all the appearances of a highly competitive industry. That is one of the reasons why margins are so low and are going lower as the Tribunal has heard. That is not indicative of inefficiency.

A further point on *T Mobile*. I think your Lordship's questioning of my learned friend established that there is a discretion – can, not must – when it comes to taking the effect of an object infringement into account when fixing an appropriate penalty. What my learned friend's skeleton, and indeed his responses to your questions, appeared to disclose are that

the OFT has been operating under an error of law. It has failed to appreciate that it has got a discretion, and has therefore not considered exercising it. This Tribunal's jurisdiction means that it can approach the matter afresh, and we submit that it should do.

The next point is J H Hallam's leniency application and the number of infringements to which it referred. This is relevant to the multiple penalties argument where I submitted that the number of penalties does not have a relation to the degree of infringement. My learned friend said look at the evidence here: J H Hallam took cover, it says on 50 occasions during a period in which it submitted approximately 1500-1600 tenders. That is taking a cover on one in 30 tenders.

The evidence in Irwins scale of infringement which is before the Tribunal hearing the GMI appeal, shows that Irwins took covers on 130 occasions during a period in which it submitted 450 tenders. So it was taking a cover for every third or fourth tender. That is ten times as frequent. Obviously they are different scales of operations, but the decision treats them just the same.

The Article 7 issue, my learned friend detected a lack of profound enthusiasm for my submissions. I would add what that distinct lack of enthusiasm for was getting advance notice of his point in an email at 9.36pm last night!

THE CHAIRMAN: As early as that!

MR. ROBERTSON: That is late for me; I was already tucked up in bed! I was waiting to see how he put his case. Now that I see it, the simple point is this: the maximum cap on penalties is not the maximum penalty. The European Commission's fining discretion is different to that under the Act. This is a point I will, if I may, also address further written submissions on because I need to go back to the relevant Community legislation Regulation 17 of 62, which was the one at issue in the *Archer Daniels Midland* case. But, it is simply this: in the UK we have a statutory scheme for imposing penalties set out in s.38 of the 1998 Act which requires the OFT to publish and adopt guidance, and, at 38(8),

> "When setting the amount of a penalty under this power the OFT must have regard to the guidance for the time being in force under this section".

That is why we said in our written submissions that the OFT has to go through applying the guidance. That establishes the maximum penalty. It is a variable maximum penalty, but they have got to follow the guidance and the guidance required them to take the last business year before the year of infringement at the relevant time. The OFT cannot just rush straight to the cap. It is only a cap. It is not the maximum penalty. Section 38 tells you what the maximum penalty is, and undoubtedly the maximum penalty changed in 2004

because the guidance changed. That is how we distinguish the Community case law. It is a different statutory scheme. However, I will confirm that in short written observations on that point in due course.

Uncertainty as to the law. My learned friend asserted that vast swathes of the industry thought cover pricing was illegal. I think he bases that on the Europe Economics Report. That is just not correct. The scale of involvement in cover pricing and the JH Hallam leniency application is a very good illustration of just how pervasive the practice was. It is covered at para. 4.10 of the Decision, and subsequent paragraphs. Paragraphs 4.10 to 4.29 (pp.397 to 401 of the Decision). There is lots of evidence in front of the Tribunal in various appeals that as soon as people in the industry were alerted to it, they put a stop to it. You will hear evidence about that. The OFT just simply ... lectures, evening classes, textbooks and the OFT just dismisses the authors of textbooks as being authors of grossly ill-informed publications. Of course, in our skeleton we could not resist pointing out that one of those authors was also one of the experts engaged by the OFT as part of the European Economics exercise. If learned authors of textbooks can get it wrong, you can excuse people who operate construction firms for not appreciating that what they were doing was against the law.

Sir, unless I can assist you further, those are our submissions in reply.

THE CHAIRMAN: Thank you very much, Mr. Robertson. Thank you both for dealing with today's hearings with such despatch. If there is anything which has not been covered or is not clearly included in the written submissions, then please feel free to provide us with brief additional material.

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