IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1140/1/1/09
1141/1/1/09
1142/1/109

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 July 2010

Before:

THE HONOURABLE MR. JUSTICE ROTH
(Chairman)
MICHAEL DAVEY
DR.VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) HAYS PLC
(2) HAYS SPECIALIST RECRUITMENT LIMITED
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED
(2) CDICORP.

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

(DAY ONE)

APPEARANCES

Lord Pannick Q.C., Mr. Mark Brealey Q.C. and Mr. Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

Mr. Paul Harris (instructed by Addleshaw Goddard LLP) and Mr. Mark Clough Q.C. (of Addleshaw Goddard LLP) appeared on behalf of Eden Brown Ltd.

Ms Ronit Kreisberger (instructed by Blake Lapthorn) appeared on behalf of CDI AndersElite and CDI Corp.

Mr. David Unterhalter S.C. , Ms Maya Lester, Mr. Alan Bates and Mr. Gerard Rothschild (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Before we start, Mr. Brealey, may I raise a few introductory matters? We understand from the timetable which has been provided to us that each appellant wants to make a short opening statement - about half an hour each. We suggested that it would be helpful also to have a short opening statement from the OFT. We understand that invitation has been accepted. So, on that basis, there will be about two hours of short openings. We propose then to break at that point for lunch. So, it might be slightly earlier than one o'clock. We can then have a clean start with the witnesses in the afternoon.

Secondly, as regards confidentiality, there are, as is usual in these cases, a number of matters on which various appellants have claimed confidentiality. A lot of them are figures or percentages. We do not think that presents any problem. It is, however, important in particular when cross-examining a factual witness. It is much easier for counsel to be alert to the confidentiality of particular points than a witness, however experienced he or she may be in the witness box. So, please, draw the attention of the witness you are cross-examining to any issues of confidentiality. As I think you all know, one can refer to, as it were, 'the figure in paragraph such-and-such', or 'the figure that one sees in line such-and-such' without actually mentioning the figure in open court.

However we have seen that Hays, Mr. Brealey, has claimed confidentiality for other matters - in particular the management structure of Hays as at late 2004/2005 and the reporting lines of Robert Smith is said to be confidential. We find it very hard to understand why that should be confidential. Secondly, Hays standard terms of contract, both with their clients and, indeed, with temporary workers of which there must be a huge number in circulation. I do not think the other appellant that has referred to its standard contracts has regarded them as confidential. Again, we find it very hard to understand how those can possibly be confidential. It will cause some practical difficulties for the cross-examination of at least one of the Hays witnesses and of the experts. So, we are not going to rule on that now, but, Mr. Brealey, if you and your team can consider that over lunch and let us know after lunch whether that is maintained. If it is, we will have to rule on it. We will leave it there.

MR. BREALEY: I will take instructions.

THE CHAIRMAN: Can I then move on to timetable. We have had this morning, very helpfully, a joint statement the experts which we have received and briefly looked at, and we are grateful to Mr. Hall and Mr. Allen for producing that. That, no doubt, as indicated in the covering letter, should assist with regards to time needed for cross-examination of experts. I will come back to that.

As regards closing submissions, these appeals do raise quite a number of points of principle and points of law on which there are a number of authorities that are referred to. We do think that one day would be too short and that one and a half days is appropriate for closing submissions – that is to say that the closing submissions should therefore start at two o'clock on Wednesday at the latest.

Working back from that, as it were, this afternoon we expect that both the Hays' witnesses should be completed. We think that two and a half hours, Mr. Unterhalter, should be quite sufficient for those two witnesses. It may be slightly more than two and a half hours if we come back at a quarter to two.

Tomorrow we propose to start at ten o'clock, and that should enable the other witnesses of fact to be completed in the morning. We note that Mr. Ballou has to come first. That will mean that after lunch tomorrow Mr. Hall can be called. We think half a day with Mr. Hall, particularly in the light of the agreed statement, and then on Wednesday, at most half a day for Mr. Allen will be sufficient. If the appellants complete their cross-examination of Mr. Allen a little earlier than one o'clock they will have a little more time for closing, but it must be completed by one o'clock.

Not only do we now have the helpful agreed statement by the expert but our view on the issues that the experts address in this case, the gross net issue, is that where there are questions of what generally accepted accounting principles, expert evidence is both admissible and helpful. When one gets beyond that expert evidence is, it seems to us, of doubtful relevance in this case. It may be that we will have to consider, under the paragraph in the Schedule to the 2000 Order, what is meant on the facts of this case, by amounts derived from the provision of services. Unless that is an expression that is given meaning in generally accepted accounting principles, and from what we have seen of the reports it is not, then that is a matter of interpretation and a question of law for the Tribunal. No doubt distinguished accountants have opinions, and a lot of people will have opinions on it, but that is not something where expert opinion evidence is going to assist us or indeed be relevant. In just the say, by analogy, it has long been an issue in tax law under what was Schedule E, whether monies or benefits in kind received by an employee are to be treated as derived from their employment. Whatever views accountants may have on that, that is not something on which expert accountancy evidence is called. It is a matter of interpretation for the court. So it is, yes, of relevance in this case, but it is of limited relevance to one particular area, and that expression of view may assist in constraining the cross-examination to half a day.

That, I hope, deals with general timetable. We note there is a particular issue that has been raised for us on the gross net fee issues as to in which order the appellants will speak and who goes first. I have to say that in all my years at the Bar and my brief experience now on the Bench it does not make the slightest difference to the outcome of the case who speaks first. What is important is that everybody should have a fair chance to speak and we note that CDI wants to have a fair opportunity and must have a fair opportunity to put its point on the *Endesa* application and the point of law, and we think CDI should be allowed 30 minutes for that point because it is an important point, indeed it is to the benefit of all appellants. Having said that if you cannot agree on who speaks first we think Hays should go first having put in the expert evidence, but, as I say, we do not really think it makes any difference, we think the important thing is CDI should have sufficient time and you should include 30 minutes for that point.

That, as it were, is the list of items that we have identified that need to be addressed at the outset unless somebody else wishes to raise any other point.

MR. BREALEY: Thank you, Sir. I suppose formally I should introduce the cast.

THE CHAIRMAN: Well we have a very helpful list, Mr. Brealey and as it is a large and star-studded cast I do not think you need run through all the names.

MR. BREALEY: What I shall do is try to finish around about 10 past, quarter past 11; I am going to speak for about 20 minutes and then Lord Pannick is going to speak for 10 minutes on the MDT. Given the time we have just made some points of emphasis in writing and I wonder if I can hand those up, please. (Same handed) It will speed things up, I promise! We are trying to distil the main points and what we regard as the key points within the main points.

THE CHAIRMAN: Yes, we have of course read your very, very full skeleton.

MR. BREALEY: Of course, so I shall be brief, but I think it is worth just emphasising some of these points.

The Tribunal will know from para. 1 how the fine is imposed on Hays. Step 1, the fine of £12.1 million, that is 9 per cent of relevant turnover of £134.8 million and is going to be a key issue in the case. Step 2 it was increased, the duration, Step 3, the fine of £15.1 million was considered small by reference to the worldwide turnover of £2.5 billion and was increased to £41.3 million, and then at Step 4 the fine was increased even more by 10 per cent as the OFT considered that Mr. Simon Cheshire was senior manager. It was then reduced by 5 per cent for compliance, reduced by 30 per cent for leniency and we had the resulting fine of £30.3 million.

At the outset it is necessary for me to put that fine into perspective, and the Tribunal have seen this from para. 1.16 of the notice of appeal, but the proportions are quite staggering. Hays UK Construction property business post-tax profits for 2008/9 was £12.4 million.

THE CHAIRMAN: Yes, you can take those as read. We have seen that, you have emphasised it in the notice of appeal. We notice the point you make.

MR. BREALEY: If I could emphasise it one more time just in a different way. If the Tribunal would take NCB 4 vol. 1, and it is a graph that is set out in Hays' accounts, and it is at p.118 of this bundle, just to show the impact that this fine has had. "Areas of specialism" we employ 6,933 staff operating from 345 offices in 28 countries across 17 specialisms. So this is Hays' worldwide network. If you mark the "Construction & Property", which is the second column down, alongside the UK and Ireland -- So, there is that one dot there -- that one square, the infringement occurred in a part of that dot. It did not include all temporary workers in construction. It did not extend to Ireland. The person responsible for the infringement was responsible for the south-east of England, as the Tribunal will have seen. So, it is a part of that dot. However, for the current year the fine wipes out all of the profit made in all of those dots. For all of those specialisms in all of those countries the fine wipes out all of those dots. That is the extent of the fine on Hays and why our overall submission is that this fine has been exaggerated and is disproportionate. It gives you some idea. Wiping out legal services in Australia, for example. All the profit in all those dots have been wiped out for the time being.

Turning back to this note, as the Tribunal know, Hays has five main grounds of appeal. The first wrongly included - and this is an important figure - the £1.7 billion worth of temporary workers' wages when assessing the fine at Step 1 and Step 2. So, that is essentially the net fees issue. Secondly, the OFT wrongly concluded that the infringement should be classified as 9 per cent. Thirdly, the increase for deterrence was disproportionate. Fourthly, it was wrong to increase the fine by a further 10 per cent for senior management. Fifthly, we have a compliance programme and we say that 5 per cent is not sufficient. Those are the five grounds of appeal which we have.

If I could summarise the submissions on the net fees which I tried to do from para. 5 onwards. The OFT considered the Hays' relevant turnover for the purposes of Step 1 was £134.8 million. That comprises the fees paid by the clients for Hays placing permanent workers, the fees paid by the clients for placing temporary workers, and then the temporary workers' wages (as we know by virtue of Regulation 12) Hays is obliged to pay the temporary worker. The effect of this is at para. 6. If it was just (a) and (b) - so, if the fees

were just considered, the relevant turnover would be just over £33 million whereas, as I have just said, it is £134 million. So, in broad terms it makes £100 million worth of difference and 9 per cent of that is £9 million. So, at Step 1 Hays is being fined £9 million for passing through the workers' wages. We say at para. 7 that that is wrong for three reasons. The first reason we submit is that it is contrary to the fining policy objective (Step 1). Secondly, it is disproportionate. Thirdly - something which the Tribunal has flagged up - are these amounts derived in any event? That is a question of law.

Taking the first reason first - contrary to the objective of Step 1 - I take this in three stages. First of all, identifying the object of identifying relevant turnover. Essentially it is common ground that the objective at Step 1 is to identify the relevant activities. So, how has the infringement impacted on the relevant activities? That is the Court of Appeal in *Argos* and the OFT in the Decision refer to it. You look at the particular trait which has been affected. Now, here, what are the activities which have been affected? What services are included? The OFT sets this out at para. 5.25 of the Decision. They define the activities as the supply by recruitment agencies of candidates with professional, managerial, trade and labour skills required by the construction industry in the UK. It is helpfully set out at Annex A - the various types of candidate which are included, for example, engineering, architectural. At para. 5.44 the OFT says what activities have not been impacted by the infringement - so, clerical, secretarial. Paragraphs 12 and 13 are important because we submit it is quite clear that Hays does not actually provide to the client for service that is provided by the temporary worker. It assigns the worker to the client. It supplies the worker to the client, but it does not actually provide that service. It is not providing architectural services. It is not providing engineering services. So, the example we give at para. 13: if Hays assigns paralegal professionals Hays is not undertaking to provide that legal service. It is the temporary worker who is self-employed providing that service as a matter of form and substance. Hays is simply not liable if that paralegal is negligent. That is a big distinction between this set-up and sub-contracting, for example, in the construction industry. At para. 14 we set out how we believe the OFT has back-tracked a little bit. It says it was misunderstood. It says that Hays is managing a workforce. We set out para. 37 of their skeleton. Essentially, the say that managing a workforce is in the limited sense of engaging and paying for the services of temporary workers. So, those are the services that are being provided. They are essentially placing these temporary workers with candidates.

Now we come to the crucial part: what is the appropriate financial metric that measures these activities. This goes to the scale and magnitude. We say - and obviously the

evidence will have to be adduced - that the evidence shows that net fees is the true measurement of the scale and magnitude of Hays' business of supplying both permanent and temporary workers. It is net fees. Over at p.6 we set out - and I will not go to it in the time available, but evidence will be adduced - broadly the evidence which establishes that net fees measures the scale of the business of Hays in this area.

The OFT, as the Tribunal knows, takes turnover. It accepts that turnover, as a concept, is vague and imperfect. Yet, it refuses to adopt a financial metric which properly measures the scale and magnitude of Hays' activities. So, the question is: why? What is the reason given in the Decision for refusing to take net fees as opposed to turnover which is in the accounts. It says, at para. 5.126 of the Decision, that it is required to follow the 2000 Order at Step 1. It is required to follow the 2000 Order at Step 1. On that basis, it continues, "net fees are not material to the consideration of turnover at Step 1". At para. 5.126 ----

THE CHAIRMAN: I think it is better that we do not turn up the arguments because that will slow us down. You have given us the reference.

MR. BREALEY: The other reference, Sir, is 5.135. That is the second quote, 5.135. Required to follow the 2000 Orders, that is Step 1, and net fees are therefore not material, not relevant. We say that is a legal error. That is the OFT misdirecting itself. It is plain that the 2000 Order imposes a statutory cap at Step 5. The Order does not require the OFT to adopt an accounting for turnover at Step 1 or Step 3. The guidelines are merely guidelines, and certainly do not bind this Tribunal. If this Tribunal considered that net fees was the appropriate financial metric it could take it. Illegal error is saying, "I am bound to take turnover because that is in the 2000 Order". It has, simply on that basis in the Decision, said, "I am going to look at net fees".

That is the first reason why we say the OFT has erred.

Secondly, disproportionate and arbitrary: again, there have been suggestions in the skeletons advanced by the OFT disputing that these sums are not passed on, and yet in the OFT's own words para.5.72 of the statement of objections and para.5.123 of the Decision, the OFT itself recognises that the revenues relating to temporary work as wage costs are passed through to the temporary worker. And that is where we get the words "passed through". It is in the Decision itself.

We say taking revenues that are simply "passed through", to use the OFT's own words, it is disproportionate, when we are looking at the magnitude of the sums that are simply passed through as an instance of the application of Conduct of Employment Agencies and Employment Business Regulations 2003. Here the accountancy evidence is, to a certain

extent, relevant because, as the Tribunal knows, we say that the accounts could have been drawn up using net fees as opposed to the turnover figure, including the wages.

The last issue on this net fees ground of appeal is amounts derived, and the Tribunal is alive to that issue, as I know, and we will develop that in closing. Suffice it to say, we submit that the wages of the temporary workers are not derived by the services that Hays provides.

The second ground of appeal, it is here. It concerns seriousness. We say this was not a *BA* type price fixing cartel. We have set out the factors why we say it is slightly short of 9 per cent, and at the back of the skeleton argument we have also set out a comparison of previous cases. *Imperial Tobacco* did not get 9 per cent. The Tribunal will be alive to these issues and I will not repeat them at the moment.

Compliance, I think, speaks for itself. I will skip over MDT because Lord Pannick is going to deal with that.

Paragraph 36 on ground four, senior management: can I flag the two points here. As I have said, the fine is increased – this is the fine based on worldwide turnover, so this is the fine which is based on this £1.7 billion in workers' wages – by 10 per cent because Mr. Simon Cheshire was allegedly a senior manager. We say that is wrong for two reasons: first, on any sensible view, he was not a senior manager. He did not have responsibilities as a senior manager. He was responsible for the South-East of England, and if he was a senior manager in Hays, there are about 70 senior managers, which we say is ridiculous.

Secondly, even if he was a senior manager, he was only a senior manager, according to the OFT, of the construction and property division, not even of a limited company, but of the construction and property division. We say it is quite perverse then saying he is a senior manager of that lower division to then increase it by 10 per cent based on worldwide turnover. He was simply not a senior manager at the highest level of Hays Plc . If he was the chairman of Plc, he would be a senior manager of Plc and you could take an increase based on the worldwide turnover. There is a complete disconnect between saying he was a senior manager at this lower level and then taking a whole chunk of worldwide turnover.

THE CHAIRMAN: Can I just ask: when you say Hays had about 70 senior managers, which of the Hays' entities are you referring to, Hays Plc?

MR. BREALEY: The Plc. I will pass over to Lord Pannick to deal with deterrence.

THE CHAIRMAN: Thank you very much.

LORD PANNICK: Thank you very much, members of the Tribunal, my submissions on behalf of Hays are directed at the MDT via Step 3 of the analysis. As the Tribunal knows, in the case of Hays, the application of the MDT under Step 3 has had a very substantial impact on

the penalty. Prior to Step 3 the penalty was £15.1 million, and Step 3 increases it to £41.3 million. So there can be no dispute about the care with which the MDT needs to be considered and assessed in the imposition of this penalty.

We have three main points about the application of the MDT, which I will develop later in the week, and they echo points which various constitutions of this Tribunal have heard in the past few weeks in the construction cartel cases. The points are set out in the note which Mr. Brealey handed up, starting at para.31. Can I just identify them at this stage. The point is that we do recognise of course that the penalty may include an element for deterrence. That is specific deterrence for this company, and general deterrence for companies like it of course. Our complaint is about the means which the OFT are using to achieve this deterrent effect. Our complaint is that having identified, as they do, a figure based on culpability under Steps 1 and 2, and that figure is then replaced by a Step 3 figure, which is designed to secure the deterrent effect, and the Step 3 figure has no links to the culpability figure. Steps 1 and 2, assessment of culpability, are not the foundation stone of the penalty, they are simply replaced by another method of assessment designed to secure deterrence.

We accept that it may, depending on the facts of the individual case, be appropriate to increase the Step 2 figure, the culpability figure; and it may be appropriate to increase it in some cases by 50 per cent or 100 per cent, or in some rare exceptional cases by more than 100 per cent.

What we will submit is impermissible, and what is disproportionate, is to use the MDT methodology so that the penalty at Step 3 is fundamentally dissociated from the original assessment of culpability under Steps 1 and 2, and what you have under Step 3 is simply an attempt to identify a penalty which is going to have the desired deterrent effect. We say, as the OFT themselves say in their Guidance, one has to have twin objectives here, one has to link culpability and deterrence. That is the first point which I will develop.

The second point that we make is that the OFT have failed to ask themselves, as they must, whether the figure they arrive at under Steps 1 and 2 is sufficient for deterrence in the circumstances of this particular company, and others like it. We have here a Step 2 figure which results in a fine of £15 million at Step 2. The OFT do not ask themselves "Is that sufficient for deterrence in the circumstances of this company and others like it?" The only analysis is to assess and conclude that the figure is small compared with a figure derived from world turnover. They do not look at the circumstances of this company and others like it and ask whether the Step 2 figure is, in fact, sufficient to secure deterrence in the circumstances of this company and others like it.

The third point, which is closely linked to the second is that having applied Step 3, based on worldwide turnover, they do not then step back and look at the proportionality of the result derived from Step 3 in the light of this company and others like it and ask themselves do we really need a fine of £41 million, nearly three times the Step 2 figure in order sufficiently to deter.

We have three particular factors which we want to draw attention to under both the second and third points that I am making, which we say the OFT have not looked at, at all, or sufficiently, and we draw attention to these three factors because MDT is focusing on deterrence and that requires an assessment of the practical reality of this company and others like it. The economic situation of this company, and others like it, an assessment not carried out by the OFT. First, the profits of the company, which Mr. Brealey has already referred to, we say this is a highly relevant factor in assessing the sum needed to serve as a deterrent. We are not suggesting that profit is determinative. We are not suggesting that turnover is irrelevant, we are saying that profit must be relevant to an assessment of the true economic situation of the company and so relevant to what is needed for deterrence.

The second factor of the three which we say must be taken into account is that the Step 2 figure is already the product of the gross turnover figure – a point Mr. Brealey made. If he is right in his criticism under Step 1 this point plainly does not have the same force. But if the Tribunal were to reject his point then it is striking indeed that Step 2 and Step 1 already proceed on the basis of a wholly unrealistic assessment of the economic situation of Hays, and we say this is highly material to whether you really need to increase under Step 3.

The third relevant matter, ignored by the OFT under Step 3 is the compliance programme adopted by this company for the future. There is no dispute here, the OFT accept under Step 4 that this is a company which introduced effective compliance measures to ensure that wrongdoing does not recur. We say that it necessarily follows that there must be a lesser need for deterrence of this company and others like it under Step 3. All three of these points under our second and third arguments, and our first argument, all go to the proportionality of the penalty which the OFT has imposed in this case, and I look forward after cross-examination to developing these points for the Tribunal.

THE CHAIRMAN: Thank you. Yes, Mr. Harris?

MR. HARRIS: Sir, Members of the Tribunal. On behalf of Eden Brown I would like to address you briefly in opening – I may not take the full 30 minutes, which I hope will be of benefit later on in the hearing. I have three sets of brief introductory remarks, and then I will touch very briefly upon the individual grounds of appeal that Eden Brown takes.

My first introductory remark relates to disproportionality and excessiveness. Indeed, our principal point in this appeal is that the OFT has used the highest conceivable metric for turnover, that is to say, gross turnover. That metric is of very questionable proportionality for two reasons.

The first is that on any sensible view of the economic substance and reality of the recruitment agencies in this case, they are only acting as conduits for the wages of the temporary workers. Indeed, if one takes a step back and asks why it is they are called "wages" the answer is obvious. They are called "workers' wages" because they are provided to the worker in consideration for the work that is done by the worker. We simply pass them through our accounts.

Secondly, it is of very questionable proportionality because those wages that are passed through our accounts are such a huge proportion of the metric that the OFT has chosen. That is my learned friend Mr. Brealey's point about effectively the £100 million pass through leading to £9 million for Hays with the corresponding effect on Eden Brown.

THE CHAIRMAN: Yes.

MR. HARRIS: So principal point first limb, very questionable proportionality to use this highest conceivable metric but then, and this is where our complaint really lies, it is then that same metric that is used by the OFT at the deterrent stage (known, as we know, as Step 3). The OFT asks itself the question; what proportion of that gross turnover is required for deterrence? We say that disproportionality is an inherent feature of using gross turnover at the starting point, and then that disproportionality is very substantially aggravated by asking oneself what proportion of it should be used at Step 3 for deterrence. In other words, to echo a point my learned friend, Lord Pannick, made a moment ago, there is, if you like, two levels of disproportionality – a double disproportionality – that is where we say the OFT has gone so very badly wrong. They have never taken a step back and asked themselves the question does this company, on the facts of its infringement, require a double disproportionality, the highest conceivable metric at Step 1, and then a proportion of that at Stage 3.

We say that where the OFT have gone wrong is that they have become wedded to their formula and lost sight of the need to tailor it to the specific circumstances of the infringing undertaking, so again I adopt Lord Pannick's point that it has become dissociated from an assessment of the culpability on the individual facts of the particular case. We know from, amongst others, the case of *Lindsay* in the Court of Appeal, cited both in my skeleton argument and that of Hays, and if you want the reference to it, it is tab 53 of the authorities

bundle, volume 4. We know from the Court of Appeal that it is not lawful to have regard only to the wider policy objectives and, in so doing, lose sight of the individual circumstances of, in that case, the smuggler, in this case the competition law infringer. That is my first introductory remark, it is double disproportionality leading to excessiveness.

My second set of introductory remarks very briefly relate to jurisdiction. We are disappointed that the OFT is not taking heed of the representations that we made at the various stages about disproportionality, but we are heartened in the knowledge that this Tribunal has full jurisdiction to review the penalty on its merits, and to correct what we regard as this very significant major flaw in the OFT's approach. Indeed, we go so far as to say that the Tribunal has a duty to give full and effective independent judicial scrutiny by reference to the particular circumstances of Eden Brown.

Notably in this regard, the OFT invites the Tribunal repeatedly and at a number of different Steps, effectively to defer in large measure to what they call variously "discretion" or "margin of appreciation". I accept, of course, that in writing they accept that the *Argos* jurisdiction is open to this Tribunal and they can review it but in a number of different places, particularly at Step 3, their basic case is, "We have a margin of appreciation. We have acted well within it. With respect, you should not interfere".

We see this rather differently. We say that one of the principal flaws, as a matter of law in this Decision, is the OFT's use of its margin of appreciation or discretion. In a nutshell it is far, far too broad. A discretionary practice or rule, which is applied inconsistently, resulting in unforeseeable and arbitrary outcomes -- That approach deprives a litigant of effective protection for its rights and is inconsistent with the requirement of lawfulness. My authority for that proposition - there are a number, but the one I rely on is in the skeleton - is the case of *Carbonara* , the human rights court case, at Authorities Bundle Volume 3, Tab 33, in particular, at paras. 62 to 69. In light of the time available I do not invite the Tribunal to turn that up now, but that was a case in which there expropriations of property by the Italian government, and they were done in an arbitrary and unforeseeable manner. The Human Rights court in Strasbourg said that was unlawful and therefore amounted to a breach of Article 1 Protocol 1. The paragraphs that I have referred you to set out the need, in order to comply with the requirement of lawfulness, to have foreseeable and non-arbitrary outcomes. However, where our complaint lies, in particular as regards Step 3, is that it has not been possible for these appellants (obviously including Eden Brown) to foresee what the OFT was going to do as regards deterrence, and the outcome has been arbitrary. One way in which this could be put, for example, is that in the case of Eden

Brown the percentage of its relevant turnover which is represented by its fine at Step 3 is 19.2 per cent. Hitherto that was regarded as confidential, but for today's purposes and hereafter it is not. But, one could replace that figure of 19.2 per cent with, frankly, any other figure - be it 15 (which is the case of Hays) or 25 or 35, or, frankly, any other figure - and not change any other word in the entire Decision. What that goes to prove is that the OFT has, to put not too fine a head on it, plucked that figure out of the air. It is not grounded by reference to the individual circumstances or facts of Hays, or by reference, for example, to particular evidential considerations. It is an arbitrary figure. We say, with great respect, that this Tribunal is going to have a difficult job subjecting that to what it is required to have - namely, full and effective judicial scrutiny for that very reason that I have just given. It could have been any other figure.

THE CHAIRMAN: Just to be clear, you are referring to the 15 per cent - not your client's 19.2 per cent.

MR. HARRIS: No. I am referring to the 19.2 per cent. The exact same submission can be made about the 15 per cent. Indeed, the complaint of arbitrariness is made by Hays. But, it applies to the 19.2 per cent as well.

THE CHAIRMAN: Yes. That was not applied as an a priori percentage, the 19.2 per cent. You were not subject to the MDT.

MR. HARRIS: Not subject to MDT. That is correct. But, the same point about arbitrariness applies to the 15 as it does to the 19.2 per cent.

Thirdly, by way of introductory remarks, I echo the point made by Mr. Brealey that these infringements need to be seen in their context. Our major point under this heading is that the Construction Recruitment Forum was not simply one degree less than the most serious conceivable cartel offence. Yet, that is how it has been treated by the OFT - at a 9 per cent starting point. Frankly, we are baffled by how the OFT could have come to the view that it is only one degree less than the most heinous of cartel offences. We say that they have reached that view because they failed to take into account relevant considerations. It is clear that they have failed to take them into account from the way in which they express their view of seriousness in the defence. It was manifest from that document that the points we say are relevant considerations, which are similar in many respects to those that are advanced by Hays, simply have not been taken into account by the OFT.

I adopt the points so far as they relate to Eden Brown in Mr. Brealey's document, but in respect of Eden Brown I would just like to make two other additional points to put these infringements in context. The first is that Eden Brown is not one of the big players in the

market. On the contrary, we are a small player in the market. One just has to compare the relative levels of net fees of the respective appellants in order to see our relatively small size.

Secondly, the point is taken by a number of appellants that this was a relatively small market share percentage. That is the 13.6 per cent that you will have seen in the various notices of appeal. But, another figure - and the reference for this figure is non-core bundle 1, Tab 3, page 383, para. 18 - is that at about the time of these infringements there were over 10,000 recruitment businesses active in the UK, of whom seven are implicated in the CRF.

So, by reference to those three sets of introductory remarks, our basic point is that in context this fine on Eden Brown has lost touch with proportionality and ended up being excessive for infringement of this nature by a company of this size. We put our particular points under three further headings. If I can, I will just address those briefly. Sir, do you wish the reference again.

THE CHAIRMAN: No, I have that.

MR. HARRIS: The first ground of appeal is obviously common to the three appellants. I will not duplicate anything Mr. Brealey said in opening. It is the gross / net. But, very, very briefly, we say in opening four things about gross / net. First of all, there are two fundamental flaws in our submission: Flaw A is that the OFT has simply not understood the true factual nature of the activities in this sector; Flaw B is that the OFT has focused far too much on form as opposed to substance. My second point is that the fine on Eden Brown would be less than one-quarter of the fine that we ended up with had the OFT not made the two flaws that I have just identified. So, it is of very considerable importance to the effective judicial protection that we come to this Tribunal in order to seek to secure. The figures for the quarter, if you want to note them down, are in our Notice of Appeal at core bundle 2, tab 4, page 11, para. 5.5. Thirdly, we say: Can it sensibly be said that Eden Brown are worthy of over four times as much punishment and deterrence than we would otherwise receive simply because we pass through the wages of temporary workers? Obviously I ask the question rhetorically, but we say the answer is self-evident. Then, fourthly, if I could just draw your attention, and I would like to turn this case up briefly, to the Decision of the French Competition Commission in the case of *Manpower* (authorities bundle 7, tab 84). I am only going to take you to two paragraphs. This was a case in which three of the largest recruitment consultants in the world engaged in extremely serious anti-competitive behaviour, largely in the French market. They were then fined for that infringement by the

French competition authorities. One of the issues in that case was the gross / net issue which confronts this Tribunal today. Can I take the Tribunal, please, to the section on sanctions at the back of this rather lengthy translated Decision. You have to bear with it, if you delve into the detail, that it is a translation. It is rather hard to follow in French. In places it is extremely difficult to follow in translation. But, be that as it may, the gross / net issue is identified precisely at authorities bundle 7, tab 84, page 63, para. 164, Section 5 on sanctions. It is about six or so pages in from the end.

THE CHAIRMAN: I think it is p.63.

MR. HARRIS: Thank you. I am grateful.

> "The companies blamed all put forward that the base of possible sanctions should not be the sales turnover mentioned in the tax bundles of the companies or groups concerned, because this includes the wages and direct and indirect charges related to the use of temporary staff, amounts which go directly to the workers and social or public organisations. Only the 'gross margin' of the TEAs [temporary employment agencies], i.e. in substance the price of the services invoiced to the UC [that is the final client there - I cannot remember exactly what the 'UC' stands for (it is identified at the beginning at page 3, para 3)], reduced by these wages and charges, which would correspond to the actual activity of the TEA, should be used".

There they are making the same argument that we all make. What happens over the page, at para. 168, is that they prevail on this gross net issue.

> "The arguments put forward by companies will thus be taken into account by the Council in the calculation of the sanction ----"

This next clause is rather opaque, and I confess I cannot follow it.

> "-- not legally by dividing their 'the base' mathematically as interested third parties wrongly claim, but in fact [and this is the key passage] to ensure that the sanction is in proportion to their ability to pay, with this being a better reflection of the circumstances and taking into account their very specific activity, with their gross margin being factored in rather than their sales turnover".

So, what has happened on this specific issue is that the French Competition Commission has been persuaded that it is (a) proportionate to use net fees rather than gross turnover, and why is that? It is because that takes into account their actual circumstances, and their very specific activity. It also says it takes into account their ability to pay.

I do not put this authority on any higher pedestal than it merits. I am not suggesting that it is anything other than persuasive. It is certainly not binding, and there are differences in the manner in which fines are calculated under the French system than there are under the domestic system. But, nevertheless, what I do say is that it is highly illustrative that on this critical question that goes so very much to the heart of proportionality, in the context of fining as well - because we see some of the points that the OFT rely on at various stages relate, for example, to merger control -- But, when it actually comes to fining, what the Conseil has said in the French case is that it is proportionate to base your fine on net fees. Although I should perhaps have shown it to you - and I do not invite you to turn it back up - the numbers are set out on the final page of the Decision. I will come back to them in closing because it is illustrative, again, to see how the percentages work out when one looks at the actual fines in that case.

Moving on then from net fees, our next ground of appeal is at Step 3, the deterrence step. Very briefly in outline, our central point is as follows: It is common ground between Eden Brown and the OFT that the figure reached for Eden Brown after Steps 1 and 2 was excessive. That is exactly what it says in the Decision at Core Bundle 1, page 286, para. 5.254. The OFT's case is that that Step 1/Step 2 resultant figure was greater than necessary in order to achieve deterrence. Well, so far, we completely agree. Something significant needs to be done to that figure because it was far, far too high. It was excessive. It was far greater than was needed in order to achieve deterrence. Our appeal on this ground is really very simple. We say that although the OFT did reduce the fine at Step 3, because it was too high, it did not reduce it sufficiently. In particular, the problem with where the fine ended up on our case after Step 3 is that it remains disproportionate, it is discriminatory vis-à-vis the other parties to the cartel and, as you heard me say a moment ago, it is arbitrary. Very briefly on disproportionality and discriminatory nature, this can be assessed by reference to three figures. They are all effectively mathematical expressions of the same point. I will tell you what they are. If you would like to turn it up – it is perhaps not essential, but in the Decision at para.5.283 – I will invite you to turn that up, the Decision at Core Bundle 1, page 291, para.5.283, there are two confidential boxes in this Decision, and there is a cross-reference.

THE CHAIRMAN: Can you just explain, the ground of appeal that you are addressing at the moment, you say that it was not reduced sufficiently for Eden Brown?

MR. HARRIS: Yes.

THE CHAIRMAN: I understood from your notice of appeal that what you say on ground three is really contingent on the minimum deterrence threshold being set aside generally. You say, if it is warranted then it should be reduced. If the 15 per cent should stand as a minimum deterrence threshold then Eden Brown's fine should be reduced?

MR. HARRIS: No, Sir, we complain that what has happened to us at Step 3 is disproportionate irrespective of what view you take of the MDT. We say it is disproportionate and discriminatory. What we do say, however, is that if the Tribunal takes the view that the MDT is unlawful and a different approach should have been taken, and in particular that that would result in a much lower set of proportionality adjustments for the other parties – take Hays, for example – then we would pray that in aid. The point that I am just about to make is that we have been disproportionately and unfairly treated by reference to other parties. This is the case if they get fined at 15 per cent, but if they get fined, for example, at stage 3 at, say, 5 per cent, then we have been even more unfairly and disproportionately treated. There is no justification for treating Eden Brown as requiring a deterrence level at step 3 that is higher than that of any of the other parties given that it has been involved in the exact same infringement in the same way. Therefore, if their deterrence levels come down, including because you are persuaded, for example, by Lord Pannick's submissions on MDT, then their fine will be lower at Step 3 and ours should likewise be lower at Step 3.

We put it two ways: a free-standing complaint and, if you like, a piggy-back complaint. As to the free-standing, there are, as I say, three mathematical expressions of effectively the same point. The first arises from Core Bundle 1, page 291, para. 5.283. As I say, there are two red boxes in 5.283, and the details are set out in footnote 894. The figure for Eden Brown is no longer confidential, and that is, you can see this in the footnote, 10.9 per cent of Eden Brown's net fees. So the penalty expressed as a proportion of Eden Brown's net fees is 10.9 per cent. I do not know whether the other figures remain confidential, but it does not matter, you can see them. You can see that Eden Brown's figure is the highest of all of them. That is my point. That is mathematical expression number one.

Effectively the same point can be put into two other different ways, which is that as a proportion of total worldwide turnover, Eden Brown's fine at this stage has ended up being 2.3 per cent. If you want the reference to that it is Decision Core Bundle 1, page 312, para. 5.392. When you compare that proportion with everybody else's, again Eden Brown is significantly higher.

Then the third way of putting it is the point that you, Sir, just put to me, which is effectively in the case of Hays and the other appellant, CDI, the proportion of relevant turnover

expressed as a percentage of worldwide turnover is 15 per cent for them, but for us it is a lot higher, it is 19.2 per cent. In effect, what we say is that there is no justification for us being treated more harshly by way of deterrence at Step 3 than these other parties.

So, Sir, that just takes me in the couple of minutes remaining to the last two discrete grounds of appeal, which are extremely brief. There is, as you know, a dispute about the year of relevant turnover, it is a discrete dispute, it applies only to Eden Brown. The issue is whether or not the phrase "last business year" for the purposes of Step 1 should be interpreted either as meaning the last business year preceding the end of the infringement, which is my case; or the last business year preceding the Decision, which is what the OFT now says. This is an issue of interpretation. I will deal with it in closing. What is interesting, just in opening, about this case is, of course, that one thing certainly is clear: the interpretation that I advance is certainly capable of being the correct interpretation, because it is the very interpretation that the OFT used to use. Sir, that is all I have to say about that issue.

Then very briefly and finally, the mitigation: in our case it is extremely brief and straightforward. We did receive a 5 per cent discount for compliance but the OFT has singularly failed to address the fact that we had more mitigating factors than simply compliance. We say that they ought to have been given a modest level of credit and they have not been.

Sir, unless I can assist those are my submissions.

THE CHAIRMAN: Thank you very much. Yes, Miss Kreisberger.

MISS KREISBERGER: Last but not least, Sir, and I think that may well be throughout this hearing, I appear for CDI. CDI received a fine of £10.861 million, and for convenience the penalty calculation is set out at the back of our skeleton argument. That is at core bundle 2, tab 9, and it is at the last page. The CDI has five grounds of appeal which are listed at para.4 of the CDI's skeleton. That is at p.289 of the same bundle, tab 9. Sir, with the exception of ground 4, which is the ground that raises a very specific point on the way in which the OFT sought information from CDI. The other four grounds for each aspect of CDI's core challenge, which is that a final penalty, pre-leniency discount of almost £11 million is manifestly unfair and out of all proportion with the nature of CDI's role in the infringement. It results from serious errors in the OFT's approach.

In particular, Sir, there are two key aspects of the methodology which we say by their combined effect are flawed. The first is the inclusion of temporary wage costs, which we have heard much about already today. In CDI's case relevant turnover, as you will see from

the summary of the calculation, was just under £92 million for Anderselite. Anderselite is the UK subsidiary of CDI, the infringing subsidiary. Of that sum, temporary wage costs account for £73 million. So we say it is the inclusion of temporary wage costs in relevant turnover, along with a fine which is predicated upon 9 per cent of that figure which we say is inflated.

A third failing is manifest, and here I am echoing the words of Mr. Harris. At no point did the OFT stand back and ask itself whether a sum amounting to almost 9 per cent, of almost £92 million, represented a fair overall turnover to penalise CDI for its subsidiary's role in the infringement.

So just turning to ground one of CDI's appeal relating to the temporary wage costs, 80 per cent of that figure of almost £92 million represents temporary wage costs. So the inclusion of those costs has produced a fine almost five times greater at Step 1 than it would otherwise be. That is £8.3 million rather than £1.8, if one stripped out those costs. So it has a dramatic impact on the level of the fine. The Tribunal will appreciate that this is the mainstay of CDI's appeal.

I am going to do my best not to duplicate the arguments we have already heard this morning, and I am going to just touch on five aspects, they are really the five headings on which we make submissions under this ground. The first is the purpose for which relevant turnover is assessed. The second is why a proper understanding of the purpose of the assessment means that temporary wage costs should be excluded and that relates to the nature of the services supplied by Anderselite in the market. The third is the relevance of the intermediary principle. Then the OFT's mistaken belief that CDI's accounts viewed in isolation provide the answer. Finally, the fifth heading is the relevance of obligations under employment law on Anderselite.

Turning to the first heading, purpose, we say, and here I am echoing the words of Mr. Brealey, that the OFT lost sight of the purpose for which it was defining relevant turnover. Purpose is, in this context, critical. The purpose of defining affected turnover, turnover in the affected services, is to give an indication of the scale of the infringement. Sir, we get this from an authority *Musique Diffusion Française*. I will not turn that up now, but the reference is authorities bundle 4, tab 57, p.1909, para.121. Those are the words of the Court of Justice. That is why one looks at affected turnover.

The requirement that there be a correlation between scale of the infringement and the fine imposed is at the very heart of the penalties machine. It is the requirement, one of the twin objectives, that the penalty reflects the seriousness of the infraction. It is really a very

simple precept. The greater the scale of the infringement, the more serious the infringement, the higher the fine. I would just refer the Tribunal there to the OFT's own penalty Guidance at para.2.9, which says that the starting point is assessed for each undertaking in a multi-undertaking infringement to take account of the real impact of the infringing activity of each undertaking on competition. This is why the OFT go about this exercise.

Just to be clear, there is very good authority from the Court of Justice that in fixing the amount of the fine purpose is critical. I will be developing this submission in closing, so I will just give the Tribunal the reference for now. The case is *Britannia Alloys*, and that is authorities 2, tab 32, p.4456, and I refer here to paras.21 to 25 and, in particular, para. 25, where the court held that:

> "… the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No. 17 . . ."

with which they were concerned:

> ". . . the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed."

- purpose is everything. So when one talks about defining turnover at Step 1 of the calculation, the concept of turnover, relevant turnover, must be understood through the prism of penalty assessment, which means that turnover, as assessed, must reflect the scale of the infringement.

Whilst we accept that in the ordinary course the OFT is entitled to rely on turnover as reported in the undertaking's accounts for these purposes we say there are exceptions to this rule. In circumstances where reported turnover does not reflect the scale of the undertaking's infringement, which is the purpose of the exercise, which we say is the case here.

The problem here is that over £70 million of temporary wage costs, which are included in reported turnover and so counted as relevant by the OFT do not correlate CDI's activities as a recruitment agent, and here I am not going to repeat the submissions that you have already heard today, simply to reiterate the temporary wage costs are, of course, remuneration for employees, paid in consideration for labour services, which are supplied by those employees to the construction company not by AndersElite. So AndersElite we say is effectively a middleman, it supplies recruitment services both for temporary and permanent

workers, notwithstanding what we say are differences of detail in the arrangements as regards temporary and permanent workers – the two categories. We say the true measure of turnover corresponds to the Commission element of CDI's turnover. This is where the intermediary principle is helpful to the analysis. I will not go through the authorities now but we will rely in closing on paras. 157 to 160 of the Commission's jurisdictional notice, that is at authorities vol.1, tab.19, p.35.

THE CHAIRMAN: That is in "Mergers"?

MISS KREISBERGER: In Mergers. The interpretation of that notice in the *Endesa* case, and that is the judgment of the CFI as it then was, that is authorities vol.3, tab 38.

We say that those authorities confirm that even in the merger context exceptions apply to the general rule, that a competition authority can simply rely on a figure of reported turnover without making deductions to reflect economic reality.

So really the keystone of CDI's case is that it was incumbent on the OFT to consider the economic reality of AndersElite function in the market and we will rely on the evidence of Mr. Ballou, the President and CFO of CDI Core on the substance of the service provided, which is recruitment, temporary or permanent. We say which of these two boxes any particular vacancy falls into is essentially arbitrary and it makes little practical difference, aside from the question of on whose payroll the worker is placed.

The OFT refused to give any serious consideration to the economic reality, the reality on the ground because of its insistence that it was sufficient to rely on the fact that CDI includes temporary wage costs in reported turnover in its accounts. The OFT say that was all that was required. We say that is an improper approach by a competition authority with extensive power to impose fines. If the purpose of the assessment is to reflect the gravity, the scale of the infringement, it was incumbent on the OFT to do that by reference to basic market facts, indeed the facts set out in its own Decision. I should be clear here, I am not suggesting that the OFT was required to perform some sophisticated economic assessment of recruitment services. On the contrary, the facts are all there in the Decision. This is not an onerous burden which we are suggesting. All we say is to shut its mind to the nature of AndersElite offering whilst imposing a fine of £11 million we say was a basic abdication of responsibility, not considering whether the Commission was the appropriate measure. I would draw the Tribunal's attention to para. 160 of the notice which I will be referring to in detailed submissions which says that the underlying legal and economic relations have to be carefully analysed, the accounts are not sufficient.

There is a single paragraph in the Decision which refers to what it claims to be differences in the placement of temporary and permanent workers, and that is a matter that I will be addressing in detail after we have heard the evidence, but in short at this stage I would just draw attention to the fact that the cited differences, paragraph V.140 of the Decision, are differences which arise out of the obligations under employment law on AndersElite, such as the risk of non-payment, for instance.

We say at a level of basic principle, it is unfair to penalise CDI so much more heavily, five times more heavily for matters which, as Mr. Ballou explains in his witness statement, are effectively matters of detail imposed by legal obligation, but they do not alter the nature of the basic recruitment services supplied by AndersElite. That is all I propose to say on temporary wage costs.

I will now turn to our submissions on the minimum deterrence threshold. Here I can be brief, because no minimum deterrence uplift was in fact applied to CDI's penalty. There is consequently no discussion of any increase at Step 3 to CDI's penalty in the Decision at all. In fact, the only reason why this was included as a ground of appeal by CDI is because of the somewhat Delphic comment at para. 5.113 of the Decision, I will just read that to you, Sir. It says:

> "Were it [OFT] to exclude Ad Hoc Supply from an assessment of relevant turnover . . ."

- that is an issue which does not arise now –

> ". . . it would be necessary to increase certain of the penalties at Step 3 in order to arrive at a sum that represents, for each Party, a sufficient deterrent, having regard to the seriousness of the infringement and the Party's total turnover."

This concerns CDI. We say that if the Tribunal is with us on temporary wage costs, in our respectful submission the penalty should be adjusted downwards so as to be in line with the penalty predicated on relevant turnover excluding temporary wage costs. We say that the additional £6.5 million at Step 1, which flows from temporary wage costs, should not be reintroduced by virtue of a specific MDT methodology, which would be calculated by reference to CDI's worldwide turnover (group turnover) a methodology as regards CDI, which is not set out in the Decision, nor are we even give why such an approach should be applied in the circumstances of CDI's case. We say it is improper for a competition authority to seek to uphold a fine imposed, if the Tribunal is with us, in error of £11 million inflated by reference to temporary wage costs, to uphold that fine by reasons not found in the Decision as regards CDI.

I make this point because the OFT's written submissions on this are somewhat conflicting as to whether they do seek to impose the MDT on CDI were we to succeed on ground 1, or not, after the event where they seek to justify the £11 million by reference to the MDT. First, the OFT attempts to get around this in the skeleton by saying it does not seek to apply the MDT methodology to CDI, this is at para. 27 of the OFT's skeleton. It only seeks to uphold, it says, the ultimate level of the fine by reference to the reasons set out in the Decision.

Then we see, only a few paragraphs later, at para. 32, the OFT appears to contradict itself arguing that if temporary wage costs are in fact excluded it would be appropriate to the Tribunal to then reapply the MDT analysis based upon what the Tribunal would have found to be the correct way of calculating CDI's turnover to see if any Step 3 uplift is required. It seems to us the OFT is undecided as to what the position on the MDT is, but we wish to be clear as to our stance. Of course, CDI does not contend that the Tribunal must close its mind to deterrence in assessing the fairness of the overall level of the fine, but we say a fine reduced to strip out temporary wage costs would be sufficient in the circumstances, but we also say that the notion that this very specific MDT tool which we are now told is based on 15 per cent of the undertaking's worldwide turnover maybe applied to CDI's fine so that it is kept at its original level, £11 million, notwithstanding a finding by this Tribunal, if that were the case, of deficiencies in the OFT's methodology. In our respectful submission this will not do.

THE CHAIRMAN: Are they just saying Miss Kreisberger, that we are not, as it were, operating like a Court of Cassation if we have complete jurisdiction as to the fine, if we find in your favour and the other appellants' favour on the gross/net issue, but against those appellants who have raised the MDT issue, so that we were persuaded that the 15 per cent is appropriate, then in looking at the fine on your client we must be consistent and therefore apply that methodology with which we have, on this hypothesis found to be fair and appropriate. That is how I understood the OFT's position.

MISS KREISBERGER: We make two submissions in response to that. We say first that the fine cannot be based on what you find in the Decision, there would have to be a dramatic recalculation because worldwide turnover – there is a table in the Decision – which sets the percentage of relevant turnover as 15 per cent of CDI's worldwide turnover. If we are right on ground 1 it would be appropriate to strip out temporary wage costs from that calculation, so we simply do not have the figures in front of us to do that at the moment, that is the first point.

The second point is we say that what the OFT is then saying is it is appropriate to apply a one size fits all approach. It takes a blanket uniform approach, 15 per cent, and applies it across the board. We say that is improper because penalties is always about fairness on the facts.

THE CHAIRMAN: That is the point that Lord Pannick has addressed us on, and which you adopt.

MISS KREISBERGER: I adopt that point.

THE CHAIRMAN: So you say it would not be appropriate.

MISS KREISBERGER: We take that point a step further, and we say not only is this another example of the mechanistic approach on which Lord Pannick has already addressed you, but we say they take it a step further because they have not given reasons to justify that approach in the Decision as against CDI, so it is the apotheosis of the mechanistic approach, on what basis do we take 15 per cent here.

We make one other substantive point on this. If the OFT took the view that a penalty based on 15 per cent of CDI's overall turnover however calculated is appropriate, 9 per cent of the 15 per cent, it should have set that out in the Decision. The OFT has done that in other cases. The OFT has set out alternative methodologies, clearly reliance on temporary wage costs is highly controversial and those submissions were made in response to the statement of objections. So if that is what they wanted to do in the alternative they should have said so. I would propose then to move on to our last three grounds, that is all I propose to say on the MDT. I can be very brief on the remainder.

Ground 4, which is the error in calculation point which we make, this ground, specific to CDI, relates to a mistake made by the OFT by which it overstated AndersElite's relevant turnover by £3.74 million, 9 per cent of which, rounded up, is £337,000. The OFT does not dispute that the error was made - only that the fine should not be subject to a downwards adjustment, even though the figures on which it was based in this respect were flawed. In essence, the OFT says the mistake is on CDI's head. We say as a matter of law that is wrong. We have cited in our skeleton at para. 61 *Roquette Frères*, where the court held that even if the mistake is attributable to the undertaking it does not justify taking the wrong turnover into account when determining the starting amount of the fine. If there is time I will take the Tribunal to that in closing.

However, here we say the mistake is not fairly attributable to CDI, but to confusing and inconsistent statements on the part of the OFT. In exercising its extensive fining powers, we say it is incumbent on the OFT, before arriving at the final amount of the penalty, to set

out clearly and unambiguously by formal notice the elements of turnover (which here were supplied by reference to individual candidate roles) which CDI was required to supply. We say inconsistency in a s.26 notice, which I will take the Tribunal to later cannot be cured by subsequent informal correspondence. The short point is that CDI's solicitors provided figures in response to the s.26 notice - the information request - which were composite figures. They related to three categories of candidate. The first category is candidates which were placed with non-construction companies - other types of client to do construction work; the second was candidates required for the maintenance of existing civil engineering structures; the third was candidates required for rail safety critical roles. The short point is that CDI provided composite figures for those three groups of candidates. Ultimately, at the stage of the s.26 notice in issue here the OFT was undecided as to whether those three categories were going to be in or going to be out. In the end it decided that Category 1 - non-construction companies - were in and the other two were out. It therefore needed to go back to CDI and ask for those composite figures to be broken down. That was clear to the OFT in the correspondence. It did not do that. So, the calculation could never be correctly performed. Mr. John Mitchell of Blake Lapthorn, CDI's instructing solicitors, gives evidence on this point.

Moving on, I would like to just touch on what are our Grounds 3 and 5. I will take them together because they are overlapping in their subject matter. These grounds relate to the level of the starting point on which you have heard Mr. Harris, and the overall level of the fine, which we say is unfairly high and out of all proportion to the infringement committed. The point here - and the reason why I take them together - is, as I have already said, that it is the combination of a starting point of 9 per cent at the very upper end of the scale - applied to a measure of turnover which includes temporary wage costs which we say has led to an unfairly and dramatically inflated fine. You have been addressed similarly by Mr. Harris this morning. We say that the 9 per cent starting point and the resultant £11 million fine are out of all proportion to CDI's role in what was an ineffectual, short-lived cartel. The infringing conduct lasted just over one year. It failed to achieve its goal of excluding Parc and collapsed of its own accord. Crucially for CDI, the only external manifestation of the infringing activity in terms of CDI and of the linked conduct, I should say, was termination of contractual arrangements with one single customer, Taylor Woodrow. We are looking here at very limited effects on the market. We say a fine of almost £11 million is out of all proportion to the effect on the market.

The OFT's mistake, in our submission, is that it has failed to have regard to what is known as the totality principle in criminal law and the proportionality principle in Community law. Even if - which is vigorously denied - a starting point of 9 per cent could be justified, or, as is also vigorously denied, the inclusion of temporary wage costs could be justified. The cumulation of those approaches is a manifest infringement of the proportionality principle. At no stage did the OFT attempt to cure the dramatically over-stated fine to which its methodology led by taking a step back and asking itself whether, in the light of all the circumstances pertaining to CDI, £11 million was a fair penalty, one which was capable of justification. Given the nature of CDI's role in the infringement, we say it patently was not. Those are my opening submissions.

THE CHAIRMAN: Just on that last point, so that we are clear how you put it, I take your point about the totality principle. You referred to CDI's role. You criticise the 9 per cent, as everybody does from the appellants' side. Are you suggesting that a different percentage should apply for CDI as from the other two appellants?

MISS KREISBERGER: We say that the OFT should not take the view that it must apply the same starting percentage to each of the undertakings. We say that each one has to be approached on the facts. We say that either 9 per cent is too high -- I do not make the submission in a comparative basis.

THE CHAIRMAN: That means we have to look in detail ----

MISS KREISBERGER: No, we do not make it on that basis. All we say is that on the basis of the findings of fact in relation to CDI, the cumulative effect is disproportionate.

THE CHAIRMAN: Thank you very much.

MR. UNTERHALTER: In opening we would want to address three main issues. The first concerns the typology of errors which we say the various challenges fall into. The second is a somewhat broader reflection upon the different calls that are made to you, partly to intuitive judgments that are asked of you by the appellants; partly to a theory of consistency which I shall seek to briefly outline in these opening remarks. The third is to simply reflect upon the typology which we will set out in the first section in relation to some of the major substantive themes that have already been developed before you in the openings of our learned friends.

If I might then begin with the typology? This is an appeal. Whilst it is common ground between the parties that the Tribunal has a jurisdiction to make a determination on the merits of the appeals that are now brought before you, it is central, in our submission, to understand what is the kind of error that is being identified for your consideration.

The first kind of error which does not arise in these proceedings is that there is no challenge by any of the appellants to the Guidance as being in any way unlawful. Therefore, a good deal of what you are being asked to consider is how the Guidance was applied rather than whether there is anything problematic about the Guidance itself.

The second category of error is an error about the interpretation of the Guidance. What, indeed, is the concept of relevant turnover? What does it mean to speak about something being derived in the requisite sense that the turnover order refers to that language. That is a question of the proper interpretation of the Guidance. It is a question of law. It is one in respect of which there is a right or a wrong answer. It will be for the Tribunal to determine what that answer is and whether there has been any error by the OFT.

The third category - and it is probably the largest category of error that is relied upon - really deals with various kinds of application errors which are alleged. It is said in a variety of contexts, but most obviously perhaps in respect of the determination of seriousness, that in determining a 9 per cent starting point the OFT has wrongly applied the Guidance which is set out in Steps 1 and 2.

The last category of error is one which would say that the OFT was required to depart from the Guidance and failed to do so, or the converse of that which is that the OFT did depart from the Guidance and should not have done so. There is some flavour of at least that last kind of error when it is said that even if a strict application of the meaning of relevant turnover would lead one to apply what is to be found in the statutory accounts of the appellants. Nevertheless, there is warrant to depart from that view because it would lead to disproportionate results and the like.

We would submit it is important then to categorise these errors and understand what they stand for. It is so for a particular reason which has little burden to the appellants, but, in our submission, is an important consideration for the Tribunal. That is that at least in respect of issues of application it is now well-established that the question of application is one in respect of which there is a margin of appreciation that is due to the OFT. One of the questions which is seldom answered with any clarity by the appellants is, "Well, why is it in respect of, say, a determination of seriousness, that some other figure - 8, 8.5 - is somehow the right figure?" What we have heard little of from the appellants is either what those benchmarks are or what better supports adherence to those benchmarks. Thus, we do submit that on some fundamental questions around applying the Guidance and applying judgment to the Guidance there is a margin. Very often the calls that are made in respect of re-adjustments are either simply calls to intuitive judgment or simply unreasoned by the

appellants simply to say, as they frequently do, that it is disproportionate in some general way, but without an apparent set of reasons which show how the discretion has been exceeded in a manifest fashion. We submit, therefore, that that is an important question in trying to determine the species of error and the consequence of that error for the ultimate merits-based determination that the Tribunal is required to make.

THE CHAIRMAN: On that particular kind of error that you refer to you, what is relied on, of course, is consistency with other Decisions, which is a form of benchmark.

MR. UNTERHALTER: Yes. Undoubtedly it is one way of getting one's bearings in relation to where seriousness lies. We do not suggest otherwise. But, it really comes to the second theme that I wanted to address in opening, which is that there is an almost constant tension in the arguments that have been addressed to you already, and will no doubt be developed in due course, that, on the one hand, there is a call to a highly individuated form of justice which is sought. It is said that there is some fine-grained metric which one can determine simply by looking at the facts of a particular case. It is that judgment which is called in aid. It is a highly intuitive judgment which is asked of you.

The second is a call, as we heard our learned friend Mr. Harris make, to the requirements of consistency and non-arbitrariness – in other words, a call that there should be clear and well developed principles which are consistently applied. So for various reasons, the attack is sometimes upon what is said to be a mechanistic approach that is adopted by the OFT, part of the criticism that is offered of the MDT is said to be simply its mechanistic application. At other points, the call is quite different, which is to say, as my learned friend Mr. Harris pointed out, "We are not being brought into line for the purposes of deterrence, too much is being done to us for the purposes of doing deterrence, we must suffer a burden no greater than any other party for that purpose". In our submission, what the Guidance is it seeks to set out a number of principles in respect of which there is no dispute between the parties, but it does so for an important reason, which is that it seeks to create a framework within which the OFT can then apply reasoning and judgment for the purposes of arriving at a proper penalty. In respect of the MDT where deterrence is at the heart of that particular enquiry, it is again a principled effort to come to terms with what deterrence requires. Here, as Lord Pannick has indicated, there is a root and branch challenge, at least as we understand the challenge made, to MDT. It is not just a question of application, but it is said that in adopting the MDT as a policy, that strays entirely from the permissible bounds of what deterrence allows for under step 3 Guidance. So at least as to that challenge it

appears to be a challenge as a matter of law; and then there are some questions of application as well.

We will submit on that score, and I shall come to it in a little detail in due course, that, in fact, MDT is cast upon a particular principle, and it is properly applied. That principle is that deterrence requires one to have proper regard to the size of the undertaking and its ability to cause harm in relevant markets for competition law purposes. What the MDT does is it properly accounts for how size is relevant to what must be done by way of the work of deterrence. Either principle is right or it is wrong, but we submit that it is a perfectly justifiable principle, and indeed it is a rational basis upon which deterrence can be thought about and considered. We submit that that is a far preferable view around how to structure thinking concerning the issues of deterrence, rather than, as we have heard in various permutations, this call to, "Some number of millions is enough to do deterrence, the work of deterrent is adequately by a fine numbering £2, £3, £4, £10 million, but not more". What is that a call to? It is simply a call to some intuitive set of judgments that seem to have no foundation in any justificatory reasoning. We submit that that invitation is an invitation that the Tribunal, upon reflection, should decline.

Can I then proceed from that second consideration as to how intuition and principled considerations of penalties might work in the thinking ultimately of the Tribunal to the third topic, which concerns the different major subject matters that will now be determined by you in this appeal.

Can I begin, firstly, with the question of seriousness, because here there is a very significant difference between the approach the OFT and the approach that is taken by our learned friends for the appellants. It has been said that whilst recognising that the infringements here are of some consequence they simply do not warrant a figure of 9 per cent because that is wholly disproportionate in ascertaining a proper sense of this infringement. In particular, what is said about this is that the OFT has simply failed to have proper regard to what Hays in its skeleton refers to as six factors, the six factors being that this did not concern mass consumer goods, there was a fragmented market, the market share of the appellants is 13.6 per cent, there were low barriers to entry, and there was no evidence of damage. It is said that had proper regard been had to those factors – I do not ask the Tribunal to turn this up, it is at para.26 of Hays' skeleton – then a very different account or result would have come about.

We want to make two broad submissions which we will develop ultimately on this score. The first is that this is not a proper account of what the Decision has to say about those very

factors. These were the very matters that the parties raised before the OFT in response to the statement of objection, and they were fully dealt with by the OFT in the Decision. One can see that from para.5.203 of the Decision and thereafter. It is simply not the case that these factors upon which Hays and, to some degree, the other appellants place such reliance, were considered at all. On the contrary.

The second proposition is what were the factors that were relevant to the determination of seriousness. Here might I just sketch in the round why the infringements here are of such a high order of seriousness. We are in this case concerned, as the Decision makes plain, and the Decision, when it comes to the question of seriousness refers to the entire content of part 4 of the Decision. So it refers back to all the evidence that was assembled carefully for the purposes of deciding upon the infringements, but here are some crucial features of what happened here. Parc was a particular kind of intermediary, a neutral vendor, which was of relatively recent origin, which came into the market in the construction industry in around 2003. It was perceived by the appellants as threatening to their business model and the margins that they sought to procure from the work that they did. Why was that so? Because, as the Decision makes plain, entities such as Parc stood as an intermediary to manage the way in which recruitment companies dealt with their clients, the construction companies; and in particular were concerned to ensure that the rates at which workers were offered were indeed proper and competitive rates.

Shortly after the intervention of Parc, and its agreements with Taylor Woodrow on the one hand and Vinci on the other, there was the constitution of the CRF precisely and deliberately to deal with the threat that was posed by Parc. This was not, as it were, some rather loose and ineffectual effort to meet a competitor threat in the market, it was a very direct co-ordinated effort by the parties to the CRF to get together and seek to formulate a strategy to meet a threat to their margins in the market. Instead of, therefore, either yielding to the potential competitive introduction of rate reduction through the scrutiny that intermediaries such as Parc would offer, and deal with it or not as the case may be individually, they decided to get together to do two things. The first was the collective boycott of Park so as to seek to disintermediate that company and reach over it directly to the clients that had previously dealt with the recruitment companies. That disintermediation was intended for one purpose and one purpose only, which was to ensure that the kinds of rates that Parc was seeking to put upon the recruitment agencies, and you will see those figures – there is a particular figure, I am not sure if it is confidential, that was being offered by Parc, but it was precisely to avoid having to be pegged at that figure that they sought to

disintermediate Parc and secure higher margins and indeed they did so. That was the first thing.

They did so precisely through the collective boycott action that was taken so as to ensure that they made it plain to the construction companies that they would not deal with Parc. The construction companies said that they must, but nevertheless the collective boycott was put in place.

That comes to another aspect of the matter, which is that it is said that this is a highly fragmented market in which the barriers to entry are extraordinarily low and so this must necessarily have been an ineffectual effort to meet the competitive pressures that Parc and other intermediaries of that kind might offer. On the contrary, the constitution of CRF was deliberately built around the biggest players, as it referred to. They worked out where they would be most likely to have an impact. We know that there is a stratification in this industry because there are preferred suppliers and, generally speaking, those are the parties, as is explained in the Decision, that are given the first opportunity to tender to construction companies. So as we see both from the dealings that Vinci had with the construction companies and also in the constitution of the CRF, there was a targeting of those that were biggest and best placed to supply skilled workers to the construction company. That needs to be seen against a background in which there was skills shortage in the construction sector. Further, in circumstances where the construction industry is a major – or certainly was at the time and no doubt remains so – part, a major industry, within the economy of this country constituting something of the order of 6 per cent of the GNP of the country.

These are, therefore, very significant interventions that are sought to be utilised for the purposes of frustrating competition in significant ways where there was much constraint from the prospective of the construction companies as to how to source the skilled workers in what was a construction boom that was taking place.

The collective boycott was one feature of the conduct that was undertaken. The second feature of it was that there was a targeting of margins, a blatant form of price fixing, and these two interventions were intended to work in concert, one with the other, so as to ensure that margins could be maintained. It was done not simply by virtue of one meeting, but by a number of highly formalised meetings that took place over a period of about a year and a half, and it was supplemented by extensive bilateral discussions that took place outside of the formal meetings that took place within the forum itself.

We submit, and I will come back to some of the aspects of this, that this is extremely serious behaviour. It is blatant price fixing. It is aimed to secure margins in a major sector

of the economy with very serious implications for the competitiveness with which construction companies could secure skilled workers under conditions of shortage. That is, in our submission, an extraordinarily serious set of circumstances, and whether one compares it to mass consumer goods industries, or whether one simply says this is a vitally important sector of the economy it has highly serious implications.

One last feature on this before I move to some general reflections on MDT, and that is that it is said very often in these circumstances that where there is an infringement by object, somehow there is a discount of seriousness because specific effects are not proven. They do not need to be proven, although Part 4 of the Decision is replete with the effects that were felt by this co-ordination that took place, but it is actually an inversion of the proper order within which these matters should be considered. It is precisely because this kind of conduct is so self-evidently wrongful and potentially problematic that no effects need be determined, they are in this sense the *per se* infringements, the seriousness of which speak for themselves. There is simply no discount to be had for the seriousness that flows from object infringements of this kind. We submit, and we will expand further on this, that the seriousness that was found was wholly warranted in these circumstances.

If I may come to the second major question in which there will be a plethora of evidence before you. It nevertheless comes down to a number of very basic points. The first is, as I have indicated, simply a question of law, which is what does relevant turnover mean? And, within the scheme of the turnover order, what does it mean when one says "amounts derived by the undertaking from the sale of products and the provision of services?" In our submission there will be very little dispute as to what the legal meaning of the provision of services is, the only question here is whether these appellants do provide services of a kind that allows for the wages that are ultimately paid over to workers to be accounted for as part of the turnover of the companies.

In our submission a proper inquiry begins with what services do these appellants provide? We will endeavour to show you that it is perfectly plain that the appellants provide services by way of providing the workers to the construction company, they contract to do so, and when they then receive consideration for the provision of those services that consideration then includes what is reflected in the turnover figure, and it includes an amount which is partly the fee, commission, and it includes an amount in respect of the cost to the appellant of providing the service, and that cost is what they have to procure themselves by way of contracting with the workers, so that they can themselves provide the service. All of that will be dealt with in great detail on the facts that are yet to come.

We will submit that on a proper assessment of those facts taken both from the financial statements which you will see, and also from what is to be derived from what is actually provided by way of the contracts that it is quite clear what is being done by providing services.

The only consideration it is then said that even if you can utilise the turnovers reflected in the financial statements, and that definition of turnover is more or less consistent with the meaning of "relevant turnover" for the purposes of the legal definition of the turnover order, nevertheless there is some warrant not to apply gross turnover, but net fees because that has some relevant implication for the scale of the undertaking in the relevant market. We will submit in due course that that is simply a different way of invoking the notion that one should apply some species of profitability standard at the level of relevant turnover, and we would submit that that is not the correct approach to these matters. What one is concerned about when one is concerned with the impact of the infringement is that one is concerned with market based transactions that have taken place, because it is there that the infringement occurs, in the market in respect of the transactions that these undertakings engage. Those infringements, and those transactions are exactly the transactions in respect of the provision of services, and there is simply no warrant to take some portion of that because it is a better measure of performance as to profitability and the like. We submit for the purposes of Steps1 and 2 there is simply no warrant to apply that notion of net fees as a better reflection of impact which is transaction based, as we have submitted.

If I might then briefly come to the question of the MDT. Our learned friends, and particularly Lord Pannick for Hays, say on this score that the first objection, and this appears to be the legal challenge is that the MDT is a methodology. It is a means by which one seeks to do the work of deterrence, but it is a means which is simply not legally permissible under the Guidance, and it is not so – it is said – because it has lost its moorings and its moorings must be grounded in culpability, that is the central proposition that is advanced and seemingly it is a proposition of law that is advanced on that score. We will submit that that is not a proper way of conceptualising what MDT is because it does not lose its moorings in the way suggested. What happens in the way that MDT has developed is that it looks firstly to see what has happened at Steps 1 and 2. That is concerned, of course, with seriousness and the impact of the infringing behaviour within the relevant market. But for many purposes that will suffice. In other words, nothing more needs be done by way of deterrence and, indeed, the position of Eden Brown is a good example of that. There is nothing more that needs be done. The question of MDT is an intervention of

a different kind and for a very specific purpose. It is when what is achieved by way of Steps 1 and 2 arises in circumstances where the amount of market activity and the relevant market is small in relation to the size of the undertaking as a whole, and it is only in those circumstances that MDT comes to be of application.

It is not a methodology that simply floats unconnected to what happens at Steps 1 and 2, it is a methodology that is applied in specific circumstances, and that is where the rationale for MDT becomes important. Why is size of consequence to deterrence? It is of consequence to specific deterrence, because one is concerned to determine what is the scope for this kind of an undertaking to do harm of this or other kinds in the future? If a fine is so trivial relative to the size of the undertaking, that it could be discounted then there is every reason to take account of how big the undertaking is because it is its economic power and its potential for power in the future that must be deterred. That is the point of MDT. It is comprehending the size of the entity, the seriousness of what it has done in the past and the future or forward looking consideration of how it should be deterred, given its size, and what it has done, for the future. We submit that is a perfectly defensible proposition and one which is reasonably of application to Hays as was the case here.

We do submit that those are the large issues over which the matter will be joined. There are, of course, a large number of subsidiary matters, but I shall not deal with them at this stage. That gives you, I hope, some sense of the overall terrain of the dispute.

THE CHAIRMAN: Yes, thank you very much, that is very helpful. Can I raise two matters, Mr. Unterhalter? We have had this morning, appended to the Hays' speaking note that we received, a table of I think six previous Decisions under Chapter I giving the percentages. I think it is helpful for us to have a simple schedule. If there are any other previous cases on Chapter I that the OFT think we should have, I think to have a complete schedule would be quite useful or, indeed, when you have had a chance – I imagine you have only just received that this morning – to have a look at it for any comments on what is said there, I would have thought that this purports to be just a summary of previous Decisions that a neutral version could be agreed. I have not had a chance to read through it yet, but I think that would be helpful.

MR. UNTERHALTER: We can do that, certainly, Sir.

THE CHAIRMAN: If that can be produced perhaps by Wednesday. Secondly, we have had reference, and no doubt will have more, to the Decision of the French authority, which is relied on by at least some of the appellants. I think you say in the Decision and repeat in the relevant skeletons that the penalty regime in France is materially different in various ways

from that which the OFT has to apply. I think in the Decision there is just one illustration of the difference that is set out. I think we would find it helpful to have a slightly fuller explanation of what the difference is if that is being relied on and, maybe again by Wednesday it would be possible to produce I think no more than two pages at most, just a summary of how the French fining regime operates. Thank you very much.

As we indicated, we shall take our lunch break now and come back at a quarter to two, and Mr. Brealey, if you and your team could look into the confidentiality matters and let everybody else know. If, as we hope, some of what is claimed to be confidential is no longer claimed as confidential then you will need to arrange for the other appellants other than the OFT, to have copies in due course, with those redactions removed.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: Sir, the answer is, "Yes" - we do not assume confidentiality for those two categories of document that you requested. We will endeavour to get you pages which are unredacted.

THE CHAIRMAN: Yes. Thank you very much. I am sure that is very sensible.

MR. BREALEY: That takes us into the evidence now. The first witness who is being called on behalf of Hays is a Mr. Robert Lawson.

Mr. ROBERT ARTHUR LAWSON, Sworn

Examined by Mr. BREALEY

Q Mr. Lawson, there should be a bundle CB3 in front of you?

A Indeed, there is.

Q Could you go to Tab 2. You see there a statement. If you just flick through it, is that your statement?

A Yes, it is.

Q Go p.46 of the bundle. Is that your signature?

A Yes, it is.

Q Can you confirm to the Tribunal that the facts and matters set out in this statement are true to the best of your knowledge and belief?

A Yes, I can.

Q Mr. Unterhalter will have some questions for you. I am told at the back that sometimes they cannot hear. Can you keep your raised up a little bit, please?

A Will do.

Cross-examined by Mr. UNTERHALTER

Q Mr. Lawson, I wonder whether you would go to your witness statement, to para. 13. You are referring there to what is said to be the introduction of a comprehensive new competition law compliance programme. Do you see that?

A Yes.

Q That indicates, or certainly implies, and elsewhere in the statement I think this is clear, that prior to the new competition law compliance programme you had some sort of programme that pre-existed it; is that correct?

A That is correct. The previous programme was essentially around induction of new people into the company and when people were promoted.

Q Yes. That presumably is why at para. 8 you say, speaking of Mr. Waxman in the second sentence, "Mr. Waxman considered that any disclosure to competitors of confidential information relating to Hays, its pricing, or its customer relationships was simply unacceptable and he felt that all Hays employees should have known this".

A That's correct. That's why -- that's exactly why

Q Yes. We have to accept then that the first programme was a failure.

A Clearly the fact that it didn't work effectively, yes, and that's why we had to upgrade it. We had no reason to upgrade it until these events occurred. We had no evidence to suggest that we should.

Q What it does show you is that compliance programmes, no matter how well intentioned, fail?

A No, I don't think. I think that the previous programme was probably inadequate, in that it didn't have sufficient repetition and reinforcement to it, which is perhaps the big learning for us out of this incident.

Q I want to suggest to you that although compliance programmes are helpful and reinforce messages with relevant employees, they are simply educative in nature. What they do not go to are the incentives that sometimes employees have to breach competition law?

A I think it's deeper than that. I think education is part of the activity, but much more importantly is the culture of the company and its ability to reflect that culture throughout its organisation. That's infinitely more important than anything else.

Q Yes, but culture or not, the fact is, as we have seen in this case, there were incentives that Mr. Cheshire had in his business dealings over a period of more than a year to engage in cartel behaviour, and that you accept, do you not?

A Mr. Cheshire had the same incentives as every other manager of his level in the company. Mr. Cheshire obviously chose to disregard the instructions that he had received in terms of the Competition Act.

Q Who gave him those instructions?

A They would have been given to him as part of his normal induction and when he was promoted to area manager for the South-East.

Q "Would have" – you do not know that?

A I don't know that, no, but that was the normal practice.

Q So notwithstanding all of that, he found that there were incentives that overrode the programme that he had been exposed to by way of the initial compliance programme – correct?

A No, I don't think so. I think he had the standard form of incentives that all our people had. Mr. Cheshire was an exception in that he then transgressed the law in trying to enhance his own revenue level.

Q He was really trying to enhance Hays' revenue level, and in particular – you are not suggesting this was self-enrichment – he was trying to increase the revenue level of his division, the C&P division?

A Correct, on which he was incentivised.

Q Yes, but those incentives still exist in your business?

A Of course.

Q So the incentives are there to push the margins in the division for which he was responsible and he saw opportunities to do so by way of infringements of the competition legislation?

A The incentives did not in any way suggest that someone should transgress the law. The law is over-arching above everything you do. There is no incentive that in any way should suggest to an individual within the company that they should go and break the law. That is not the purpose of incentives.

Q I think perhaps we are at cross-purposes. The point I am making to you is that Mr. Cheshire is an example of someone who was incentivised to maximise margins – you accepted that?

A Correct.

Q He found that one way of doing so was to breach the law. I am suggesting to you that that is a constant temptation that must exist?

A Again, I think – it is a temptation, of course it is, but if the culture of the company is sufficiently strong then the temptation is irrelevant. People do not break the law merely to achieve their sales objectives.

Q I am not certain what you mean by "the culture of the company". What is the culture of the company?

A The culture of the company was to be ethical, law abiding and operate to the highest principles in business.

Q But apart from that culture there is also the need to make margins, make profits and sometimes cut corners, and that is a constant temptation. Are we at one on that?

A We are at one on it being a temptation but that is how you manage a business, to avoid those temptations becoming the way that business is conducted, and hence Denis Waxman's reaction on hearing of these events, and mine.

Q You see, I want to put to you a simple proposition, Mr. Lawson, which is this: that whilst education may be a good thing to inculcate in people in the company at various levels, the inducement not to give in to unlawful schemes of the kind Mr. Cheshire engaged in is for the company to know that the value of its business is at stake, and the risk to the value of the business is very great if it should commit the infringement and be found out. Its value destruction that motivates businessmen - correct?

A Yes.

Q Again, here I think we will be in agreement, the line of authority – I think this is common ground, but just so we can be clear about this – effectively Mr. Cheshire was responsible for the South East region of the C&P business of Hays, is that correct?

A Correct.

Q And he reported to Mr. Smith?

A Correct.

Q Mr. Smith was indeed a director of the company, is that correct?

A Of the specialist block, yes.

Q And Mr. Smith, at least at the time, then reported to Mr. Waxman?

A Correct.

Q So in fact Mr. Cheshire was, as it were, reporting directly to a director and that director, Mr. Smith, in turn to the managing director of the company?

A Robert Smith was a director of a subsidiary of the company, not of the listed company.

Q But you have described in your witness statement that this was a relatively flat structure?

A Correct.

Q And indeed, so much so that Mr. Waxman, as you understand it, used to attend the – and I use this word simply to refer to the board of the C&P division, let us not argue for the moment what that means – the C&P board was one that Mr. Waxman used to come to?

A As he did to all others, yes .
Q Yes.
A That was his style to manage, which was to attend these meetings, which occurred throughout the country in each of the specialisms.
Q So we can take it then that Mr. Cheshire, who was on that Board which effectively governed the C&P division was putting forward his ideas, together with other members of the board, and interacting with the managing director, Mr. Waxman, on that basis, is that correct?
A Normally the attendance of Mr. Waxman was to hear the financial results which would be presented by the finance director. He generally did not stay on for the operational issues, he delegated those to Ron Smith.
Q Yes, so Mr. Smith, you certainly accept is senior management?
A Correct.
Q You would also accept, I assume, that this board of the C&P division were concerning themselves with the strategic questions necessary for that division to go forward. Is that also correct?
A They would be concerning themselves with the operational issues of optimising and delivery of the annual budget, their prime concern would be that the strategic issues would generally be dealt with at the head office.
Q I suppose it depends what you would mean by "strategic issues. But, for example, it is that board that would consider questions as to national accounts?
A Correct.
Q And who would be dealt with ----
A Sorry, that may or may not be the case. If the national account stretched across other specialisms it would not be considered by that board if it was considered by the Executive Committee, i.e. at a higher level, which Mr. Smith was a member.
Q Yes, but there were some aspects of the national accounts that were considered by that board?
A Yes, they were specific to the C&P, some elements of that could be considered, yes.
Q And so, for example, questions as to who you might want to deal with, and not deal with, would have been matters located in the board of the C&P business, correct?
A If such matters were raised to that board it would consider them, yes.
Q There is a Decision which has been rendered in this matter by the OFT, could that be placed before you? It is CB1. Do you have it?
A Yes.

Q If you would turn to p.123 of the Decision? You will see there is a discussion there about what were the exclusions that were taking place pursuant to the cartel behaviour that was the subject matter of the Decision. If you look at 4.86 you will see that in the second sentence it begins,

> "In a letter dated 31st January, 2005, Hays informed Taylor Woodrow that it refused to supply labour candidates to Taylor Woodrow through Parc in the north-west region".

If you look at the footnote you will see that that was a letter from Duncan Collins of Hays to Mr. Warrington of Taylor Woodrow. I can place that letter before you if you would like, but do you accept that such a letter was sent?

A I have no knowledge of it.

Q You have no knowledge of it.

A But I accept the point. I have no knowledge of it at all.

Q We do have a witness statement in these proceedings from Mr. Collins who explains that at the time - in 2005 - he was reporting to Mr. Cheshire. Is that consistent with what you know?

A I don't know Mr. Collins. But it could be. He had a couple of regional directors underneath him. He may be one of them.

Q Mr. Collins says (witness statement bundle, CB3, tab 3, para. 9) that in the period up until June 2005 he reported to Mr. Cheshire. "During this period I was meant to have regular meetings." He says that in point of fact he did not have as many meetings as he would have perhaps wanted because Mr. Cheshire did not seem to be as interested as he would have liked. However, it certainly appears from Mr. Collins' statement that he was reporting directly to Mr. Cheshire.

A That's perfectly possible, yes.

Q What we have here is a situation, if one locates what is occurring in January 2005, where Mr. Cheshire has been involved in various collusive agreements in respect of cutting out Taylor Woodrow, and certainly not dealing with Parc in these matters, and then the letter is written by Mr. Collins. Does that come as a surprise to you?

A Yes.

Q What investigation, in point of fact, has Hays done as to who knew about this cartel behaviour?

A We went through the entire organisation, including C&P to establish if there were any cartel activities. You will recall that we were also asked by the OFT to look into the IT

recruitment business at the same time. We probably data-mined every e-mail that was on our servers through this process.

Q You see, what this letter would indicate is that the execution of the cartel strategy, at least as to this aspect of it, was done by Mr. Collins.

MR. BREALEY: I hesitate to interrupt here, but there is a witness statement from Mr. Collins. The OFT have not challenged the statement of Mr. Collins. They are not cross-examining him. What is happening here is that Mr. Lawson is being asked questions which should properly be put to Mr. Collins.

MR. UNTERHALTER: With respect, that challenge is not properly made. Mr. Collins' evidence is accepted that he reported to Mr. Cheshire. We are exploring the relationships between what Mr. Cheshire was doing and how his policy was executed.

THE CHAIRMAN: Mr. Collins does not deny that he wrote the letter, does he, in his statement?

MR. BREALEY: Not as far as I am aware, no. He does not deny that he wrote the letter. Really the questions should be put to him as to what he meant or what conversations he had, or whatever -- whether he knew about the cartel. It is not for Mr. Lawson to give evidence on behalf of Mr. Collins.

THE CHAIRMAN: As I understand it, all that Mr. Lawson is being asked is about the investigations that Hays conducted when this matter came to light. That seems to me a proper line of questioning. Mr. Lawson obviously cannot give evidence of what Mr. Collins thought.

A I do not actually know Mr. Collins, sir.

Q I understood that from your earlier answer, yes.

MR. UNTERHALTER: Just to put the point again to you, Mr. Lawson, the fact is that that letter is an execution of a Decision taken at the cartel meeting which was no longer to deal with Parc and to indicate that to Taylor Woodrow. It is Mr. Collins who writes the letter.

A Yes - and Mr. Collins is a subordinate of Mr. Cheshire.

Q Yes - and therefore it would certainly seem that what has happened here is that at least one other employee appears to have been implicated at least in the execution of this cartel. Did you know that?

A No.

Q No. Nothing was ever brought to your attention about that?

A No.

Q I want you, if you would, to turn to the Decision and look at p.298, para. 5.315. This was a submission that was made by Hays where it was said, "Hays submitted that Mr. Cheshire

had no individual authority to make any Decisions that affected the Construction and Property division's business on a national level. Hays submitted that, 'At most, Mr. Cheshire could be described as a mid-level divisional manager with responsibilities in a small part of the Hays Specialist Recruitment business'". That theme is borne out at 5.318 where it is said:

> "In terms of the extent of his authority, Mr. Cheshire stated that he had the authority to make Decisions about matters that related to individual offices, but matters affecting C&P on a nationwide basis were determined by the C&P board upon which he sat).
>
> **Mr. Cheshire stated that collectively, he, Mr. Smith and Tim Cook, determined C&P's sales strategy including the preparation of annual strategic plans, targeting of clients, which neutral vendors to deal with and national sales incentives".**

Do you see that?

A Yes.

Q Is that in fact correct?

A Yes. It is correct. I mean, we could debate whether annual strategic plans and annual budgets are the same thing, but in essence that would be my understanding.

Q Yes. In respect of matters concerning national accounts of which Taylor Woodrow would be one example -- Is that correct?

A In essence that would be my understanding.

Q Yes. So, in respect of matters concerning national accounts of which Taylor Woodrow would be one example; is that correct?

A I would think so, yes.

Q And Vinci another?

A Yes. I think so.

Q Yes. -- as to whether to deal with a neutral vendor such as Parc, those are matters that fell within the authority of the C&P board.

A If they were advised of that matter, yes.

Q Yes. Here is the interesting question for you, Mr. Lawson: If Mr. Cheshire says - and you seem to accept that those were matters that could only be decided at the board level, and that is in fact confirmed by what Mr. Smith has to say on these matters, if authority was being followed, what appears to be the case is that these were matters raised with the board because that is the area in the company where the authority is located for these matters.

A I have seen no evidence, and I am not aware of any evidence, that said that the issues that Mr. Cheshire was discussing at the CRF were ever brought to the C&P board.

Q But, Mr. Lawson, what inquiries have been made to properly determine that issue?

A As said, we have looked at every email that we could mine, recover. We have asked our team. We have asked Robert Smith, etc. That is it. It appears to be, on all the evidence that we have before us, Mr. Cheshire operating on a solus basis.

Q But that is not what Mr. Cheshire says. Mr. Cheshire, in respect of whom there is no witness statement before the Tribunal -- What Mr. Cheshire says is, "These were matters I took to the board". So, either Mr. Cheshire is lying or the board was approving these policies.

A I have seen no evidence that– none whatsoever – that the issues of the CRF went to the board.

Q But you do not know, you are just saying so?

A I can only answer questions on the material that I know.

THE CHAIRMAN: Mr. Unterhalter, I do not think the OFT has made any finding that the board approved these matters. It hasn't made that finding.

MR. UNTERHALTER: This line of questioning goes to something slightly different. I will not pursue it longer than necessary, but what I want to put to you, effectively, Mr. Lawson, is this: what this tends to indicate is that the *locus* for these kinds of Decisions is at board level. It would seem, certainly if Mr. Cheshire's account of things is followed, that that is where he received his authority. Is that a matter of concern to you?

A No, it is not a matter of concern that Mr. Cheshire would receive his authority from the board. Mr. Cheshire, who in my opinion was operating outside the remit that was he given, did not discuss the issues that he was discussing at the CRF with his colleagues and operated on a *solus* basis.

Q I am asking you what basis you have for making that claim?

A The basis I have for it is that I have seen no evidence of the CRF and its implications ever being discussed at the board of the C&P, or anywhere else for that matter.

Q That you have done simply by looking at emails?

A Emails and minutes, yes.

Q I think you will agree, Mr. Lawson, that Decisions of this kind concerning whether to deal with intermediaries such as Parc are matters of some importance. Would you agree with that?

A Yes.

Q They have a direct bearing on how you will maintain a commercial relationship with major clients in the C&P business?

A Correct, yes.

Q And if Mr. Cheshire is correct, and you seem at least to this extent to agree, that these are matters located at the board level of C&P, then Mr. Cheshire was at least involved – let us put aside the question of whether he brought any of his cartel behaviour to the notice of the board – just generally speaking, then Mr. Cheshire was directly involved in rather important Decisions going to important clients and the strategies to be pursued in dealing with those clients – correct?

A Mr. Cheshire would operate his dealings with the major clients within the parameters set by Robert Smith and Denis Waxman. He had no flexibility beyond that. He was a sales manager and his job was to sell the company's activities to our clients.

Q What I am putting to you, Mr. Lawson, is that at this board level, this is not Mr. Smith instructing Mr. Cheshire, that is a board that is constituted, as Mr. Cheshire has stated at 5.319 of the OFT Decision, where matters were debated concerning, amongst other things, sales strategies and strategic plans concerning national accounts and issues concerning the C&P business.

A Yes.

Q Do you agree?

A Yes, and Mr. Smith would set the parameters for those.

Q I think the point I am putting to you is that you do not need a board if it is just a matter of instruction. You constitute a board, no matter what appellation one gives it, for the purpose of taking Decisions among the members of that board, otherwise why have a board?

A I don't think it was a board, and it isn't a board. It was an effective means of ensuring that there was the same communication to all members of the activity. So you have the two people there, the South-East chap and the northern provinces fellow, and they both received the same instructions at the same time.

Q That is not what your witness statement says. You do not say that the board was constituted as a convenient means of conveying instructions?

A No, but I do describe the parameters under which that board operated.

Q Those parameters, I want to put to you relative to what Mr. Cheshire has to say on the subject, are rather constrained, and deliberately so, because Mr. Cheshire, who presumably participated on that board, has an account where he indicates, as I have pointed out to you, the kinds of matters that were debated there?

A Those issues would be – yes, they would be discussed, but the Decisions would be made by Mr. Smith.

Q I am putting to you and I should not have thought that you would want to be disputatious on this point, is Mr. Cheshire is of sufficient seniority within the organisation that he is participating in debates to influence the outcome of strategically important matters concerning the C&P business. That is what I am putting to you.

Q My answer is that he would input with regard to the sales activities in the South-East of England. That was his role, to run those offices in the South-East of England.

Q Mr. Lawson, I understand what his role was when he left the board, but what I am putting to you is that when he was at a board meeting and they were discussing matters at the board meeting, he was free to, and did, engage in the discussion to influence and achieve outcomes concerning the strategic questions relevant to the C&P business. It seems obvious.

A No, he would be inputting with regard to the activities of the South-East of England.

Q Mr. Lawson, are you seriously suggesting that all that this board did was receive sales reports from persons such as Mr. Cheshire and that these runners then received their instructions from Mr. Smith, and that is what the board was. Have you seen the minutes?

A Yes.

Q And?

A That's a reasonable analysis. There would be comment as to variations as to operations within the parameters set; but in essence it was about sales activities in that division.

Q Then you and Mr. Cheshire clearly do not agree on the subject.

A I think there are a number of areas where Mr. Cheshire and I do not agree.

Q Yes, indeed. I want to put it to you that you do not constitute a board – in other words, a permanent standing body of this kind – simply for the purposes of exchanging information and receiving instructions. That Mr. Smith could do by picking up the phone or receiving a report?

A That is the normal way that multi-division sales operations are run. That is a perfectly standard way of doing it, and it is what I've seen in other companies as well.

Q How often did this board meet?

A I think about every month. We had 13 periods a year.

Q So they got together monthly just for this exchange of information?

A Absolutely, and they would then look at the overall performance of the business, etc.

Q And nobody mentioned the possibility of, "This strategy or that strategy might be working well, we perhaps want to" ----

A You would share practice. Of course that happens. That's a perfectly standard thing that goes on at these things.

Q Of course, and consequently Mr. Cheshire is on a standing body where these matters are discussed, presumably for the purpose of reaching well informed Decisions for the company and particularly this division?

A Certainly unified Decisions, yes.

Q That is what I am putting to you, that Mr. Cheshire is of sufficient seniority in the organisation to be at least participating in those discussions, potentially influencing them, even if he could not finally take any Decisions in respect of them?

A Yes, that's accepted.

Q Would you also then confirm that the size of the C&P division – this cannot be a confidential matter because it is in your accounts – was sizeable? In other words, of the divisions that were represented in the company this was a sizeable division. In fact, I think it was the second largest – is that correct?

A Yes, in the UK.

Q In respect of the UK business, yes. In 2009 what was its approximate turnover?

A In 2009, £47 million, I think.

Q Just roughly?

A I think £47 million, but you're asking me from memory.

Q I have got the 2008 figure. Perhaps you would like to look – there is a non-core bundle ----

A I thought you asked me for 2009.

Q I did ask you for 2009. I can show you a figure for 2008 which you will find in the non-core bundle 4, the exhibits to the experts' report, vol.1, look at p.230, do you have it?

A Yes.

Q You will see in respect of the UK and Ireland there is a breakdown by way of net fees of the various divisions, and you have "Accountancy & Finance first, and then you have construction.?

A Yes.

Q And it is £118 million?

A Yes.

Q And that is a pretty consistent position as number two by order of net fees, would that be about right?

A Yes, absolutely right.

Q So it accounts for something less than a quarter of the net fees of the UK and Ireland business?
A Correct.
Q I want to put to you, we do not have the figures in the accounts, but the South East business was at least 50 per cent of that and probably a considerable amount more, would that be correct?
A I don't know.
Q You do not know, but you know enough about the business I would have thought to know it the rough proportion?
A Yes, it would be significant, yes.
Q It would be more than the norm?
A No, I don't know that is true, I don't know.
Q You just do not know?
A No, it would be significant.
Q It would be significant?
A Yes.
Q Probably at least 50 per cent.?
A I don't k now. It would be between 40 and 60 I would imagine, but I don't know.
Q 40 and 60 per cent, I understand, all right. That means that Mr. Cheshire is in charge of a very considerable amount of net fee business, let alone the turnover for which he would have been responsible?
A Yes.
Q And if we compare it just by relative orders of magnitude, to a company like Eden Brown, for example, in 2007 – and these are again on the published figures – its fees were of the order of just a shade under £16 million in total?
A Yes.
Q So you are talking about a man, Mr. Cheshire, who is responsible for a very significant amount of business with key clients that are of great value to your company, would you accept that?
A Yes. He helped operate a significant amount of turnover and, of course, being the size we were, we had a very well developed methodology for managing such things.
Q Therefore, in respect of the South East division he is responsible for the profit and loss of a very vital part of your C&P business?

A He is responsible for the sales and operates the manning levels within certain parameters, and the fee levels were defined.
Q But if he does not do his job properly, given the responsibility that he has then, your figures could be significantly compromised in a key part of your business?
A Yes, as they would be for any other sales manager.
Q Yes, and it is really for that reason that the OFT has said that it is not a question of how many other people in this very large organisation were above him or at his level – I think the number is said to be about 70, is that more or less right?
A Yes, and still today I think, roughly between 70 and 80 at his level.
Q But that is across your worldwide operations. In the UK and Ireland we have seen there is a very compressed reporting structure. He is (or at least, was then) the third tier down. You have the managing director, Mr. Waxman, you have Mr. Smith, and then you have Mr. Cheshire?
A But that was the manner in which the then CEO, Denis Waxman, chose to manage it, and it was a style that had been there for 30-plus years and had now run its course.
Q Run its course or not, that is how it was structured, and that meant because of the few tierings that there were that Mr. Cheshire was in the UK and Ireland business very high up the chain?
A No, because the power was concentrated among the level above Mr. Cheshire, and always has been in that business at that time.
Q You see the other thing about his seniority, Mr. Lawson, is this, that whether he mentioned these matters to the board or not, the fact is that he was able to effect the cartel behaviour across key parts of the C&P business, that is what he was able to do as a matter of his practical authority, irrespective of his legal authority?
A There is no evidence that he achieved that. He operated under cover. He probably gave undertakings to competitors that he could not deliver and, as we have seen throughout the CRF just ceased to exist even before the dawn raid occurred.
Q You are suggesting that he just gave undertakings but in fact I have just pointed out to you a letter that was written which flowed directly from agreements that had been struck in the CRF?
A But that letter was never enacted as far as I am aware. He wrote the letter ----
Q No, no, no, are you suggesting that there was in fact a supply that was taking place? The only exclusion in respect of Taylor Woodrow was in respect of one category of workers

which were technical workers, everyone else you would not deal with Parc. Were you revising the admissions that you made?

A But then the evidence I have seen, the revenue with Parc continued through this process, the revenues that Parc enjoyed with the company.

Q How did it do so? Through what mechanism?

A I have no idea.

Q Well perhaps you should, because the way it occurred was to take Parc out of the picture and, at least in respect of Vinci enter into an arrangement which disintermediated Parc, that is how it was done, and seemingly Mr. Cheshire was doing all of these things?

A But the actual company revenue with Parc was constant through this period, or reasonably constant.

Q I do not need to take you through the many parts of the Decision, but Mr. Cheshire, I think you will accept, is deeply involved in the CRF - correct?

A Correct, yes.

Q And the admission that has been made by your company was to say that there was, through the target fee initiative, and the collective boycott, a situation that arose where in fact the ability to negotiate with the confidence that your competitors in CRF were going to adhere to similar rates, was a factor that had a consequence for your commercial negotiations with parties such as Vinci, that is the admission that you have made?

A Agreed.

Q So what I am putting to you is that Mr. Cheshire was so positioned in your company that he was able to strike a deal within CRF and then ensure that you were given a wholly undue advantage in your negotiations with a customer?

A But he could not deliver it, he did not deliver that.

Q What do you mean? What do you mean he did not deliver it?

A He did not deliver the agreements that he endeavoured to enter into in the CRF.

Q I am afraid that that is simply not correct. There was a clear indication to Taylor Woodrow that they would not be dealt with, save in respect of technical workers. Are you suggesting that they were dealt with beyond that?

A Yes.

Q What is your evidence for it?

A Revenues with Taylor Woodrow.

MR. BREALEY: I really do want to interrupt the cross-examination infuriating though it is, but if the issue is going to be put as to the effect of this concerted practice, then I think Mr.

Lawson has to be shown the passages in the Decision where it is proved that there was an effect, and then Mr. Lawson can give evidence on that. But what Mr. Unterhalter cannot do is just willy-nilly say: "These were the effects, please give us your opinion on them". He just cannot continue to do that. He has to show the witness passages in the Decision where the effect is clearly shown.

THE CHAIRMAN: I think, Mr. Unterhalter, you can either do it by reference to the Decision or presumably to obtain leniency Hays made admissions.

MR. UNTERHALTER: They did indeed.

THE CHAIRMAN: You can do it by reference to the admissions that Hays made, but I think it is right that you should not just put it to Mr. Lawson in the abstract.

MR. UNTERHALTER: Oh indeed. (To the witness): If you would have regard to 4.98 of the Decision.?

A Which bundle is that in.

THE CHAIRMAN: That is in bundle 1 which I think you have.

A Yes.

MR. UNTERHALTER: If you look in the Decision at 4.98 you will see that it says,

> "With the exception of AWA and of Hays with respect to 'Technical' staff, each of the parties subsequently acted on this agreement by collectively refusing to supply candidates via Parc to Taylor Woodrow until at least January 2006".

That comes, if you turn back to p.122 - and this is where we found that letter - you will see that Mr. Cheshire, if you look at p.120 of the minutes of the CRF, at 4.75,

> "Simon Cheshire confirmed that if the Labour Hire business was put through Parc as well Hays would exit the agreement on both the Labour and Technical business".

Now, the only business that was not exited was the technical business. Do you see that?

A Yes.

Q There is a very full admission which follows from an account that Eden Brown gives. That is then confirmed as an admission that is given by Hays. If you would look at p.168, para. 4.230,

> "For example, CDI AndersElite told the OFT that: 'because each CRF member then knew the rates at which Vinci were prepared to deal for this type of arrangement. In consequence ---"

It then sets out a number of consequences.

"It enabled each CRF member to know that in tendering at that rate they would not be missing out on a commercial opportunity to deal at a higher rate.

It meant that the CRF members knew that if they wished to be added to the PSL, they need not offer a rate lower than that apparently achieved by Hill McGlynn in its negotiations.

It meant that [sic] knew that it would be commercially worthwhile making the effort to deal direct with Vinci.

It potentially affected Vinci/Parc negotiating power.

4.231 During the course of its investigation the OFT asked certain of the parties to comment on this statement from CDI AndersElite, and Hays responded as follows:

'Hays accepts that the information described in the OFT's letter dated 1 June, 2007 could have encouraged a CRF member not to accept an offer at a lower rate and/or hold out for a higher rate.

Hays therefore broadly agrees with the analysis provided by CDI AndersElite'".

What I want to put to you, Mr. Lawson, is that Mr. Cheshire was in a position not only to strike these agreements but to have these effects by way of improving the bargaining position of Hays vis-à-vis key clients, such as Vinci and Taylor Woodrow. You have admitted it.

A Yes. But, clearly he could within the south-east and co-operating on a service basis.

THE CHAIRMAN: Can I just ask about that? You refer to the south-east. You have national accounts. I think you mentioned that earlier.

A Yes, we do, yes.

Q Would they be some of the most important?

A National accounts would be some of the highest revenue accounts of the company, yes.

Q Taylor Woodrow ----

A Taylor Woodrow would probably be one of them, yes.

Q You said you do not know Mr. Collins personally. But, your company has put in a witness statement, as you saw, from Mr. Collins. You have that in the same bundle where your witness statement is Mr. Lawson, at Tab 3. Mr. Collins was appointed, he says in para. 2, at the bottom of the page, National Accounts Director. In paras. 6 and 7 - and it was said to be confidential; I do not know if it still is - he talks about his role in looking after all of the C&P business national account. You see that?

A Yes.

Q That was the job he was given.. Then he says in para. 9 that in the period up until June he reported to Mr. Cheshire. He was meant to have regular meetings to discuss national accounts. They should have been generally monthly, but not absolutely every month, and so on. Is it not right that Mr. Cheshire was therefore responsible for national accounts?

A (After a pause): That would appear so, yes.

Q You said earlier with regard to this quasi-board that he would input re. sales activities in south-east England when he was regional director. But, he was also the member of the board with responsibility for national accounts, was he not?

A Clearly according to this, yes.

Q On that, when you say in your statement at Tab 2, p.44, para. 57, where you talk about Mr. Cheshire's role, you say at (f) that he had no responsibilities beyond the south-east of England. But, in fact, he did, did he not, because he also had responsibility for national accounts?

A On the basis of that, yes.

Q Thank you.

MR. UNTERHALTER: Thank you. It was, of course, because he was so positioned that he was in a position to participate in CRF and have an influence over what was occurring in respect of national accounts.

A That must be clearly true, yes.

Q There is a note that I have of an interview that was held by the OFT with Mr. Robert Smith. It is not on the record. But, I would ask for an opportunity to put this matter to the witness. It is a very short recording of the minutes of that interview.

THE CHAIRMAN: Mr. Lawson will not have seen that then.

MR. UNTERHALTER: No, he will not.

THE CHAIRMAN: Has that been disclosed?

MR. UNTERHALTER: No, it has not. Indeed, we only came upon it this morning, it is a Freshfields minute which has been reproduced. They clearly have it. It is just that we only came upon it this morning.

THE CHAIRMAN: How did you come across it?

MR. UNTERHALTER: It was produced by Freshfields in the leniency process. When I say 'we came upon it' it was as a result of inquiries that we made to ----

THE CHAIRMAN: It was a note that was put to you by Hays in the course of the leniency process.

MR. UNTERHALTER: Indeed. It is that note that we would want to put to Mr. Lawson.

THE CHAIRMAN: (After a pause): It is difficult to anyone to comment on it without knowing what it says. If you would give a copy to Mr. Brealey ----

MR. UNTERHALTER: I will give a copy to my learned friend and he can look at it. (Same handed)

MR. BREALEY: I do not know if the Tribunal has been handed this at all?

THE CHAIRMAN: No, we have not. We would like to know what you say about it first.

MR. BREALEY: All I know is that it starts at p.12 and the first thing I would like to do is to see whether they have just taken something -- I have not even read it yet. I would like to see whether they have taken it out of context. I am told that there is a lot more to it than this. There are a lot more interviews. We just do not know the purpose for which this is being brought to the witness.

THE CHAIRMAN: Mr. Unterhalter, if you are going to do this in cross-examination, first of all it is highly desirable that you inform counsel for the party that is calling the witness beforehand so that they can look through the document. Obviously, apart from anything else, they can re-examine on it. We do not normally, as it were, take people by surprise in this way. They can also make reasoned submissions if they say it is not fair in it being put in.

MR. UNTERHALTER: We do not mean to do any unfairness to my learned friend. However, if he wishes to resist the questions being asked ----

THE CHAIRMAN: At the moment nobody knows what the question is.

MR. UNTERHALTER: Perhaps I could just indicate. It is a very short point. We do not need to unduly delay over it. It is simply that portion of an interview with Mr. Smith which goes to questions put concerning what was known to him concerning the contracts with Vinci and Parc, and Taylor Woodrow. It goes to his state of knowledge around the matters that I have already raised with Mr. Lawson.

THE CHAIRMAN: Although the Decision is based on Mr. Cheshire - not on Mr. Smith.

MR. UNTERHALTER: No Indeed. Indeed. The issue though is that this was simply circulated as part of what was going on, located within that board that we have had some -----

THE CHAIRMAN: I do not think that is the basis, is it, of the Decision?

MR. UNTERHALTER: We accept entirely that it is about Mr. Cheshire's competence as a senior manager. The only question is: Within what year, as it were, did he exercise those functions? All of this simply goes to what were the things that were discussed at the board level. Nothing more, nothing less.

THE CHAIRMAN: You have made your finding in the paragraph you referred to as to what was discussed.

MR. UNTERHALTER: We do not need to take it any further. We are happy to leave it on that basis. We have no further questions.

MR. BREALEY: I have no further questions.

THE CHAIRMAN: Mr. Lawson, in your witness statement you describe - and, indeed, you were asked about - the new compliance programme that Hays has introduced - a very comprehensive compliance programme. You describe it in your statement. The individual who, as it were, particularly let down Hays and the events which have led to the Decision of you being here as Mr. Cheshire. In your statement can you turn, please, to tab 2, the stamped numbering it is p.33 of the bundle, it is p.5 within your statement. At para.16 onwards you describe in detail the new compliance programme and the various aspects of it. Do you see that?

A Yes.

Q The first step, as you explain, in para.16 is that the legal director or general counsel, Alison Yapp, is personally making presentations, and you say at p.34 at the top of the next page that altogether at least, and then there is a figure, and again I do not know if that is confidential, it is marked confidential, attended these tailored presentations. That was one level of the compliance programme. Then you explain other ones. There is email, there is on-line training, and so on. Would Mr. Cheshire, or someone in his position, as it were, be one of the people who would have the personal presentation, the tailored presentation, from Alison Yapp?

A Yes.

Q Thank you very much.

A And in addition, he would do the on-line.

Q And in addition the on-line.

MR. DAVEY: Mr. Lawson, in para.60 of your statement you say that at the time of the infringement there were a number of individuals at Mr. Cheshire's level of seniority – is that in the UK or is that worldwide?

A Global – worldwide, sorry. Senior managers, there would be 15 globally. I think there was a point that came up in the presentations to you. At Mr. Cheshire's level globally there would be circa 70.

THE CHAIRMAN: Any questions arising out of those?

MR. BREALEY: Just arising out of one question that you asked, Sir. Mr. Lawson, you were taken to para.16, p.33, and whether Mr. Cheshire would have been essentially a key manager. Why would he have been a key manager?

A He was a key manager because he had control of a number of offices, and that would constitute being a key manager.

Q Would being a key manager necessarily mean that he was a senior manager?

A No, it does not. He was not known to me. The difference in my mind between a senior manager and a key manager is that a senior manager has profit responsibility, a key manager may have other responsibilities. All the senior managers had profit responsibility. Cheshire did not have profit responsibility.

MR. BREALEY: Thank you.

THE CHAIRMAN: Thank you very much, Mr. Lawson. You are released as a witness which means you can go.

A Thank you very much indeed.

(The witness withdrew)

MR. BREALEY: The next witness is Mr. Paul Venables.

Mr. PAUL VENABLES, Sworn

Examined by Mr. BREALEY

Q Mr. Venables, could you locate bundle CB3, the witness statement bundle, and go first to tab 1. Do you see there a statement that says it is your first statement?

A Yes.

Q Do you have any corrections to this statement?

A Yes, I do, I am afraid. If you go to para.28 I am afraid there are some slight numerical errors in here. At 28(a), the 335 per cent should be 333 per cent. Later on in that where we talk about the pre-leniency, that should be 122 per cent.

THE CHAIRMAN: These are now not confidential?

A No. They are published data anyway.

Q I did wonder.

A The next number, instead of 94 per cent it should be 93 per cent.

MR. BREALEY: If you go to p.24 of the bundle, is that your signature?

A Yes.

Q If you then go to tab 5 and do the same thing, there is your second witness statement, can you identify the signature at p.89?

A Yes, that's mine.

Q Can you confirm to the Tribunal that the facts and matters in both of these statements are true to the best of your knowledge and belief?

A They are.

MR. BREALEY: If you stay there Mr. Unterhalter will have some questions for you.

Cross-examined by Mr. UNTERHALTER

Q Mr. Venables, would you go to NCB4, which is the non-core bundle 4. It is the exhibits to the expert report, volume 1. In that bundle you will find your accounts, and I want to you look in the first place at p.178.

A Yes.

Q Can we get a few things clear that I am sure will be common ground. There are accounting policies that are determined by Hays and you are one of the key people involved in making those policies?

A Yes, I'm the Group Finance Director. Clearly I've got people under me, but I determine the principles and make sure that our policies are in line with that.

Q Those matters are put no doubt to the board for their approval?

A Yes.

Q And they are no doubt then also put past your external auditors who will also approve them – is that correct?

A They don't approve them. Our auditors clearly audit the financial statements and make sure they're consistent with the policies.

Q Yes, but if there was any deviation from proper accounting norms they would inform you of that – would that be correct?

A Yes.

Q So they ensure consistent, as it were, treatment with applicable accounting norms – would that be correct?

A Yes.

Q So we have a definition then on turnover in your accounts, which you will see at p.178, and it is in the second column under the heading "Turnover", and that is the definition that stands for turnover in the treatment of this matter by Hays – is that correct?

A Yes.

Q Could we just go through that definition step by step. It says:

"Turnover is measured at the fair value of the consideration received or receivable …"

That presumably is received or receivable by Hays – correct?

A Yes.

Q "… and represents amounts receivable for goods and services provided …"

Is that correct?

A Yes.

Q "… in the normal course of business, net of discounts VAT and other sales-related taxes."

So if you are wanting to determine turnover for the purposes of your company, one begins by asking, "What are the goods and services provided?" Is that correct?

A You look at the accounting standards which help define what should go into turnover, and then you interpret those.

Q You have looked at those accounting standards, some of which are detailed in the first column on p.178 and you have derived this definition – is that correct?

A We have, yes, each of the five paragraphs there.

Q Yes, absolutely. The principal definition is to be found in the first paragraph, and it begins by looking at the notion of what consideration is receivable for the goods and services provided by Hays – is that correct?

A And in this context we have to look at two accounting standards that give great detail on what we should include.

Q We will come to that. What you then go on to explain, if we look further on, we see that in the next paragraph there is:

"Turnover arising from the placement of permanent candidates is recognised at the time the candidate commences full-time employment."

That is your position as far as permanent candidates are concerned. Then:

"Provision is made for the expected cost of meeting obligations where employees do not work for the specified contractual period."

Then you move over to temporary placements?

A Yes.

Q "Turnover arising from temporary placements is recognised over the period that temporary staff are provided."

A Yes.

Q So would you accept that in the very consideration of these two categories, which is turnover arising from permanent candidates and turnover arising from temporary candidates, there is a different temporal dimension?

A There's a different time period because the nature of the service is slightly different.

Q If we look at the definitions what we see in respect of the placement of permanent candidates is that there is a point of time at which it arises which is when the candidate commences full-time employment?

A Yes.

Q That is because, in effect, you find the candidate. You present the candidate to the employer – in this case the construction company?

A Yes.

Q And if the construction company wishes to it can enter into a contract of service with that individual?

A Yes.

Q And it is at that point of time that your commission is earned?

A Yes.

Q And that represents turnover for the purposes of turnover for permanent employs?

A Yes.

Q The placement of permanent employees – correct?

A Yes, correct.

Q If we look at the situation with temporary placements, there there is a different situation because, as your own definition indicates, there is a period of time over which those services are provided?

A Yes.

Q What happens, as I understand it, and you will correct me if I am wrong, is that you are responsible for accumulating the time sheets?

A Yes.

Q There is an hourly rate that has been determined, and amounts become payable over the period as you submit invoices in respect of the time sheets that you have accumulated - correct?

A Yes.

Q So as this service is provided by Hays so you can tender your invoices?

A No, our service is provided at the start of the process in both cases. It is the temp who clearly receiving – the temp will work over a period of time, and because of employment

legislation, which I am sure we will come on to, we receive amounts for their pay as well as the commission that we make.

Q At the moment I just want you to focus on what you are saying to the world in your accounts, and what you are saying is that you provide a service, is recognised over the period that the temporary staff are provided – are provided by whom?

A The temporary staff are providing their labour/service direct to our client.

Q I want to put to you, Mr. Venables, that it is perfectly clear on any reading of this that temporary staff are provided by Hays, that is your contractual obligation by the company?

A No.

Q Are you suggesting that your contracts do not provide that Hays will provide the services of temporary staff to the construction company?

A Our service is that we will find the appropriate person for our client, and then the temp starts work at our client.

Q Yes, Mr. Venables, your contracts stipulate that Hays will provide these services to the construction company, am I correct?

A It sets out the services that we are asked to provide, yes.

Q So you will find the workers, and then it is your obligation to provide them to the construction company?

A And the construction company says they want to use them and, yes, as you know we have to go under a contract for service, and we provide them to the client, yes.

Q That is the critical point, you provide them, i.e. Hays provides them under the contracts?

A They are not our workers, but yes, we facilitate them starting to work for our clients.

Q Let us be clear, you are, that is Hays is under the obligation to provide. It is the construction company that looks to Hays to provide those workers?

A To find the people on their behalf, yes.

Q And to provide them?

A I am not sure of the definition of "provide". Our job is to find the appropriate people and then transfer them to our client.

Q But you do so because it is your obligation to provide, and the construction company looks to you to provide them. Are you happy with that?

A We have a service we provide, which is our recruitment services, and then there is a separate labour service which the temp provides, yes.

Q But, Mr. Venables, let us not fence around this issue.

A I am not trying to fence.

Q The fact of the matter is that the worker does not enter into a contract with the construction company, Hays does?

A Correct. We have a contract with our clients, and then when the client wants us to find them a temp and they are happy with that temp we have a contract with the temp, we provide the temp to them.

Q Yes, you provide the temp to them, exactly. Then you put up an invoice and that is charged on the invoice that you put to the construction company?

A We have an invoice, yes, which clearly involves two elements I am sure comes in.

Q Yes, just to be clear, the invoice actually refers to an hourly rate, and that is made up of two components, one is your commission fee, and the other is the cost to you of providing the worker?

A And sometimes both can be clearly broken out, and sometimes it is just one item.

Q In fact, quite a good deal of the documentary evidence we have seen suggests that there is simply a single rate that is reflected on the invoice?

A Yes.

Q If we carry on reading – I am still on p.178 -

> "Turnover arising from temporary placement is recognised over the period that temporary staff are provided. Where the Group is acting as a principal, turnover represents the amounts billed for the services of the temporary staff . . ."

A Yes.

Q So in other words, including the salary costs of that staff, that salary cost is obviously the cost to you?

A No, it is the cost to our client. There are two elements to this, there are two distinct parts. There is the commission that we receive for the service we are having, and there is the salary costs that are passed through and go through to our ----

Q We will deal with your pass through allegation, let us just deal with what the language is saying in your report. You are referring to the fact that where the group is acting as a principal, which is in the standard case where you are entering into a contract with the construction company, correct?

A Yes.

Q You were acting as a principal, you determined that to be the case?

A In the two accounting standards it is quite clear what are the principles that determine whether it is principal or agency, and we follow those, yes.

Q In the standard case for most purposes you are acting as a principle?

A Not in all cases.
Q Not in all, but let us just deal with the generality ----
A The majority, yes.
Q In the majority of cases ----
A Under the accounting standards we are acting as the principal, yes.
Q That means that you are undertaking the obligation to provide the service, and you are earning a consideration ----
A We are providing a recruitment service, yes. We do not provide a labour service.
Q I do not want to go back, we have covered that ground. Let us just deal with this, you are acting as a principal, and then it says: "The amounts billed for the service of the temporary staff"?
A Yes.
Q That is the services you are providing because this is acting as a principal?
A It is acting as a principal, yes.
Q In acting as a principal you are providing the service, that is why you are a principal?
A There is no real difference whether we are a principal or agent in the service we are providing.
Q I am just reading the language. You are speaking about the fact that you are acting as a principal, turnover represents the amounts billed for the services. If you are acting as a principal the services you are rendering ----?
A You have to be rendering the staff.
Q You have to be rendering the service, otherwise you are not a principal?
A It goes on to the services of the temporary staff.
Q What you are doing is you are rendering the service of supplying the temporary staff?
A Yes.
Q Yes. And in respect of that you then say that it includes the salary costs, and I am putting to you that can only mean the salary costs to Hays of those staff because you are acting as principal?
A Again, the accounting standards are very clear what is principal or agent, we follow that. If we are principal we have to include the remuneration of the temporary staff in our turnover, yes.
Q But I am raising a slightly different point. We have established you are acting as a principal?
A Yes.

Q You are supplying the service as a principal?
A We are providing a recruitment service, yes.
Q I think we have had that discussion, which is that you are providing the temporary workers as a principal to the construction company, correct?
A Yes.
Q And those constitute costs to you in providing that service, and that is precisely what you are saying at the foot of p.178?
A The cost is only incurred clearly where the construction company is using the temp, yes.
Q That may be. It may be that it is only when the construction company asks you to provide the worker that you incur the cost, but it is your cost, that is Hays' cost. Is that correct?
A Again, under the accounting standards we have to take the principal fee which includes the cost of temporary labour, yes.
Q Yes. So you reflect that then as a cost to Hays in respect of the provision of the temporary workers?
A Under the accounting standards we have to, yes.
Q Yes, all right. You have indicated that under the accounting standards you have to make a determination as to whether or not you are acting as a principal?
A Yes.
Q And there are a variety of factors that you can look to for that purpose, what were the factors that persuaded you that you were acting as a principal?
A The main one is, if we stand back we are in 28 countries, we have more than 30,000 clients, and we need to ensure that our accounting policies were consistently applied; we have to have consistent accounts. So we followed FRS 5 and IAS 18 which are the relevant accounting standards. They list certain factors for principal or agency. Specifically under FRS 5 it says that unless you have disclosed to the relevant parties you are an agent you are a principal. So our policy, again to ensure consistency across, is unless we have had a specific arrangement with our clients, where we have been operating a payroll agency on their behalf, and that has been disclosed to them, and we disclose it to the temp, then we account on a principal basis, yes.
Q So you are saying it is the fact that you have not disclosed to your client the construction company, that you are acting as an agent that leads you to the presumption that you must be acting as principal?

A Well actually, we go a little bit further than that, we have 30,000 customers and unless we have a specific agency agreement we assume that we are principal, and that is effective in the stated policy you are asked to follow under FRS 5.

Q But there are a number of other factors, it is not a uni-factor consideration, is it?

A There are about five or six factors depending on which standard you are looking at.

Q Including risk?

A Yes.

Q And was that surely not one of the things that you considered?

A It is one of the factors, but as we were going through, I am sure the other parts were accounting policy, we looked at "had we disclosed" – we had an agency arrangement. You are right, there is then "Do we have a credit risk". There is then: "Are we responsible for providing the service?" We do not provide the labour service, we provide the consulting service, so that would not have been a factor, so there is a number of factors we take into account, but the consistent one that drove our policy is have we explicitly disclosed an agency arrangement, "Yes" or "No"? That is a rebuttable presumption under FRS 5.

Q You say that that was the factor, but you I assume would take all of the factors into consideration and come to a conclusion, that would be the way you would go about it?

A No, if you have 30,000 – if you only had one business with one client, then clearly you can look at the merits on that one client. If you have 30,000 customers, we are in 28 countries, I do not want every single country trying to exercise their judgment as to what they think the standards mean. To make sure that we have consistency, and also if you recollect it is only in these accounts we clearly show turnover, outside of these accounts turnover is not a relevant matrix in our industry, there is no focus on it by shareholders, no focus on it by analysts. In my four years here I have never been asked a question about turnover, so our policies in great detail focus on our net fees, we have to have accounting policy for turnover, we set it out here, and the rebuttable presumption in FRS 5 was unless you have said you are an agent you are a principal, and that is been the driver. But you are right, we look at all of the principles, but that is the one we look at more than the other factors.

Q As I understand it, you do not use FRS is that correct?

A There is FRS 5 and then there is IAS the International Accounting Standard.

Q I thought that was the one that you used?

A In the International Accounting Standard it does not have a point which says; "Have you disclosed whether or not you are agency?" But actually at the time the Accounting Standards Board issued a press release which said that the principles in FRS 5 are the same

as IAS 18 and they were not expecting any firms to change their accounting just because of what came out in IAS 18.

Q In other words, you accept IAS 18 does not refer to this disclosed agency agreement?

A But FRS 5 does. The UK Accounting Standards Board issued a press release when IAS 18 came out, which clearly set out, it is pretty clear and stark, it is a short press release, I am sure you have it there, it sets out that they were not expecting any changes, and specifically the two are consistent.

Q But, in point of fact had you ----

A Sorry, and by the way that has been consistent across all of these years and our auditors, Deloitte, one of the big firm of accountants who have audited are happy with the treatment that we have taken.

Q So you in effect apply IAS 18, even though it does not make reference to the disclosed agency point, correct?

A Yes.

Q And you do so simply for historical legacy reasons?

A No, the Accounting Standards Board announcement came out after IAS 18, so it gave guidance at that time. It was not some guidance that came out two or three years previous, it came out at that time, and it said that FRS 5 is consistent with IAS 18. In other further parts to it they were not expecting companies to change their accounting standards, sorry, their accounting treatment, just on the fact that IAS 18 had been issued.

Q So what we can then accept is that throughout the years you have adopted the position that you are acting as a principal here?

A Yes, we have adopted it consistently unless we disclose that we are an agent, yes.

Q Not only do you do so, but indeed it is very much the position with most of your peers and competitors in the industry as far as we can see.

A Yes.

Q So, it appears to be an industry norm.

A Clearly, as I'm sure will come, there have been some exceptions which have kind of come out of this process, but, yes, it's an industry norm.

Q Yes. As a result of this case and the consideration that Mr. Hall has given to this matter nothing has changed, notwithstanding, as I understand it, the fact that you think that Mr. Hall is persuasive in his opinions as to the fact that you could be considered an agent. In point of fact you have not changed your accounting policy. Correct?

A No. We have not. And we don't need to. I mean, our accounting policy is -- Everything we disclose in our accounting policy. It's not just one line under an individual note. As I'm sure you're aware, the true and fair view is on all thirty-three pages. So we're clear, on the face of our -- In fact, my first year as Group Finance Director of Hays was 2006. So, we had to implement IFRS. In fact, it's the only time in my four years, other than this case, that I've ever thought about turnover. As you'll see on p.175, which is just previous, in addition to disclosing turnover we specifically disclose net fees on the face of the income statement. That's an additional information we're allowed to disclose under GAP. Also, in the note that you went to ----

THE CHAIRMAN: Allowed to disclose under ----?

A Under generally accepted accounting principles we're allowed to give additional disclosures if it helps the reader. So, we disclose net fees on the face, as well as turnover. We also, as I am sure we will come on to, then disclose in the next two paragraphs in there, where Hays acts as principal in arrangements, invoicing on behalf of other recruitment agencies -- turnover represented -- invoice collection on behalf of the other recruitment agencies, including arrangements where no commission is directly receivable from the group. So, we want to make sure that the readers of our financial statements understand that there are items included in turnover for which very, very clear -- It is not only that we get no value out of the work of the temporary worker - we actually get no value ourselves for our services. One final point: We also, in note 6 to the accounts, which is another thing I added at the time -- At p.182, at the bottom of p.6, I specifically included a reconciliation between turnover and net fees because, as a new finance director coming into Hays in 2006, collectively now you've got all of the items you need to know. You've got turnover. You can see included in there is the remuneration of temporary workers. You get to net fees with the commissions that we earn on the services we provide. Included in the turnover note we have got all those constituent parts to it, including where we act as agent, which the service will be exactly the same, but where we act as agent we only include the net fee in turnover and net fees, and we don't include the remuneration of temporary workers. So, collectively, all of that together means that in my mind, as a finance director, and I'm tasked with this, you know, "Is this kind of true and fair? Have we given adequate disclosure?" That gives adequate disclosure to all the issues in the round. So, the reader of the financial statements can clearly see that 75 percent of what goes into turnover is the remuneration of the temporary worker.

Q But let us just get back to the question, if you do not mind, Mr. Venables. I was putting to you that you have made a determination; that you act as a principal; that you have done so consistently and you mean not at all to change that treatment for the future; is that correct?

A Yeah. I mean, I think you asked me originally about Mr. Hall's statement. There are some clear merits in some of the points that he has raised. I am happy, as Group Finance Director at Hays, with my accounting policy. It may well be that I give some additional disclosure to enhance this, but I haven't felt any need to change it because I am happy with the policy we have.

Q Yes. So there is going to be no re-statement of your accounts.

A No.

Q Yes. Indeed, if you were to move over to an agency definition you would have to re-state your accounts because these are very material sums that are involved. Correct?

A Yes. Yes. So, if, for example, all of our activities that have been under Stage 5 -- There's no difference. There's no substantive difference where we're acting as an agent -- acting as a principal in this matter, which I'm sure will come up in services. From a substantive service standpoint of what we're doing, if everything was under the agent, then actually our net fees would be the same as turnover. It's just that we have certain arrangements where we specifically break out the payrolling service directly under a separate legal agreement.

Q Mr. Venables, I wonder if you could just try and answer the question - because otherwise we are going to be here a very long time. The question I just put to you was: You are not planning to re-state your account ----

A No, we don't need to.

Q These are material amounts. Correct?

A As a whole, this shows a true and fair view and I am happy with our policy. If we only, for example, had turnover on the face of the P&L and none of this explanation, then I wouldn't be because it wouldn't show a true and fair view. We're having turnover on the face of the income statement. We're having net fees. We are clearly demonstrating in Note 6 to our accounts the remuneration of temporary workers. Yes, I am happy that that meets the accounting standards.

Q Yes. You are happy therefore to maintain the fact that you are acting as principal. Correct?

A Unless we have specifically disclosed to all parties that we are acting as agency, yes.

Q Yes. That is because this Decision is ultimately your Decision and those on the board with whom you consult before making accounting policies. Correct?

A We have to read the accounting standards. We have to look at our business. We have to form appropriate policies with a need to make sure that there is adequate disclosure, which we have done here. Clearly, as you have said earlier, our auditors will review our accounts and determine whether they are happy with it, yes.

Q In other words, it is not Mr. Hall's judgment on this matter that counts. It is your judgment and those with whom you consult within the company for the purposes of making this determination.

A And my judgment is that we have covered all of those items. We are back to, if I was only showing one line as turnover, that in my view would be misleading and I would not have signed the accounts. Because we show all of this as a package of disclosure, it meets the true and fair view.

Q What was my question, Mr. Venables?

A Am I happy with the -- I apologise.

Q My question to you was: It is your Decision - not Mr. Hall's - as to whether you act as principal or not.

A Yes.

Q The answer is?

A That unless we've disclosed as an agent, we act as principal, yes.

Q And it is your Decision to make.

A The board's Decision, yes.

Q Yes. Very good. Now, can we go to p.137 of this volume? Here you speak about a financial review. Do you see that?

A Yes.

Q You speak in the first paragraph about the performance of the group. Do you see that?

A Yes.

Q It says,

> "The performance of the group has been impacted by deteriorating conditions in all our markets, particularly in the second half of the year. Group turnover decreased by 4 percent, net fees by 15 per cent".

A Yes.

Q I think you would accept that any reasonable reader of that statement would infer that you consider turnover to be something relevant to the performance, or lack of it, of the group.

A Yeah. I think you've got to take all of these -- the whole of this annual report -- I'm going to say, and I know it's in my witness statement, so I apologise -- I mention turnover about

three times in all of this in our annual report, and I mention net fees -- I can't remember whether it was ninety or sixty times - 'cos there's two separate disclosures. I think it was ninety times. This is in fact the -- I may well be corrected. I am sure you will. We're starting off here, and in line 3 in that part I mention turnover. I don't think I mention it in any other part of this 'cos it then goes on to net fees. As I'm sure you know, earlier on in this statement where we've got an operating review on every single one of our businesses -- As an example, pp.130 and 131, here, under the UK and Ireland, if you look on the right-hand side, you can clearly see that we're talking about the operational performance of our UK and Ireland business. I don't think turnover is mentioned anywhere on this page. It starts with net fees in the individual parts of the UK business and then shows operating profit. So, you're right. On that one page I mention it. I don't think I mention it anywhere else.

Q Mr. Venables, I am just putting a very simple point to you - that is, that when the reader is asked to consider the performance of the group at the passage in the financial report you mention turnover as one indication of performance. That is correct, is it not?

A They've already read twenty-nine pages until then and turnover's not mentioned once.

Q Right. Well, let us read on, shall we ----

THE CHAIRMAN: Can I just ask: Why do you mention it there?

A Well, because we have to show somewhere -- If we talk about the face of the account, we show turnover. We show in the summary income statement there -- In fact, this is again the only time we show turnover. So, we mention it once because some readers are interested in it. The bulk of our readers of financial statements - certainly all of the analysts and shareholders focus ----

Q Sorry, Mr. Venables. I am not looking at the summary on the bottom half of the page. I am looking at your personal review and your comment on the performance of the group. Why do you mention turnover as relevant?

A It would be strange in a financial statement to the annual report, in a total of ninety-nine pages, to not mention it at all. I think that's the only time I actually mention it. It may not be under my name, but I also write all of the operational review on behalf of my board colleagues as well, like I talked to you earlier on. There we are discussing ----

Q I am only asking about this. I am not asking about the other bit.

A I think it's probably for completeness, Sir.

MR. UNTERHALTER: Yes. It gives a complete sense of the performance of the group.

A If it was an important matrix of our performance of our group it would have been mentioned earlier on. It would've been mentioned earlier on. It would've been mentioned in other parts of this statement. This is, you know, almost a hundred page document, and it's mentioned once.

Q Mr. Venables, these are your words. They are not ours.

A They are.

Q That is what you have said. Any reader reading this would understand what you are saying - that is, that turnover is one matter of relevance to performance.

A I think somewhere in here we talk about the key performance indicators of our business, and turnover is not mentioned at all.

Q Yes. Would you accept that every single year there is reference, as far as we can see, to turnover as an indicator of performance?

A Every single year turnover is mentioned once in our annual report. Net fees is mentioned between sixty to ninety times. Again, it's in my witness statement how many times.

Q Mr. Venables, the point I am putting to you is not about how many times - but that it is an indicator of performance, in your own words, year after year.

A But if I mention net fees ninety-nine times and I mention turnover once in something I've written and taken my time to write in trying to explain our performance, then I think what it does give an indication to is that net fees is ninety-nine times more important than gross turnover.

THE CHAIRMAN: I think, Mr. Unterhalter, you can move on.

MR. UNTERHALTER: Yes, Sir. (To the witness): On that same page, at p.137, let us read on. The last paragraph says,

> "The temporary placement business representing 56 per cent of Group net fees, was more resilient with net fees decreasing by 7 per cent. This represented a volume decrease of 6 per cent and a 10 basis points decrease in the underlying temporary margin to 16.8 per cent. The temporary placement business achieved growth in the first half of the year, but volumes fell in the second half as demand weakened".

How do you determine a margin?

A A margin is net fees divided by turnover.

Q Yes. Therefore, turnover here, when you are concerned with margins, is a relevant metric. Correct?

A Yes.

Q Yes. When you refer to volume, that is, in effect, the value of the services that you are providing. Again, it is relevant for the purposes of working out your margins.

A Volume will be the number of temps.

Q Yes. The number of temps. So, the number of temps multiplied by the rate will give you your turnover.

A Yes, and the number of temps multiplied by a margin will give us our net fees.

Q Yes. So, the point that I am putting to you here is that, again, volume and turnover are relevant for the purposes of margin determination.

A Volume is important for margin determination because clearly margin is our net fees, and clearly the more temps that we have out at our clients, the more fees that we will earn. I'm not sure that the turnover has a greater relevance than that.

Q Well, the point is - and I do not think we need to debate further on this - that volume is a component of turnover and turnover is relevant to margin. What you are marking out here is that it is a volume decline that is putting pressure on your margins.

A No. I'm actually breaking up the two separate points. I'm breaking it at: (1) what has actually happened to the amount of temps; and (2) what is the margin we achieve? Clearly, in a recession, as we've just been through, we come under pressure from our clients and our margins. They are two separate points.

Q Yes. But your volumes are also falling.

A Yes.

Q That is one of the things that is also putting pressure on your margins.

A Not necessarily. But, clearly, if margins have gone down -- if volume has gone down, then it's possible, yes.

Q Exactly. Now, whilst we are on the subject of margins, would you look at p.321? You do here examine the margins of the temporary business. It seems that the margins on permanent and temporary workers do differ because there is commentary in the reports on these matters. Is that correct?

A Yes.

Q If we look at p.321 in the first column, you will see that it says in the first paragraph:

> "While our temporary business margin was broadly stable in the second half of the year, there are two legislative changes in the United Kingdom that may put modest pressure on the temporary margin business."

Then you explain the legislation. It says:

"Firstly, legislation was introduced in April 2007 impacting the tax status of temporary workers. This particularly affects he Construction & Property and Information Technology sectors. Secondly, legislation has been introduced requiring that temporary workers are paid additional holiday entitlements."

Do see that?

A Yes.

Q That legislative change requires that Hays provides a holiday entitlement as part of what it makes available to the temporary worker – correct?

A Yes.

Q And that entitlement has increased?

A Yes, so that our clients will pay for that holiday entitlement, yes.

Q The point is that you have not recouped it from your clients because it is putting pressure on your margins?

A As it turned out, we recouped 99 per cent of it, but you are right, there was legislation which came out in two stages which increased the amount of holidays that temps get, originally from 24 to 26 days, and then from 26 to 28. This is some time ago, so I apologise. Clearly at that time, we would have been getting ready to go through discussions with our clients. Clearly the cost of temps was potentially increasing because they were going to get more paid holidays. We would have flagged that there was some potential risk to our margin.

Q In other words, what this demonstrates, I want to put it to you, Mr. Venables, is that a legislative change can increase your liabilities to the temporary workers, and you may not recoup because you are risk in respect of these matters, and you may not recoup it from the client under your contract, and that is exactly why the margin is under pressure?

A I think you're working the wrong way round. Our problem is that the costs that our clients are going to pay has now been increased. The question is, will the clients be happy to pay all of that or will they be happy to pay the vast majority of it. In this case we were able to recover about 99 per cent of that cost.

Q Let us look at the warning that you are sending out here. You may have actually managed to recoup the great majority but the warning you are sending to the world in your statement is that you may not recoup, and that is because Hays has to pay the temporary worker in accordance with the requirements irrespective of what it receives from the construction company?

A Yes, that's a completely separate point, isn't it? That's the credit risk standpoint, which I'm sure we'll come on to. This issue is the cost of the temp for our clients was increasing, and

would we be able to recover it? As it turned out we recovered 99 per cent of it, but you're right, when I wrote this, and I apologise, it's got to be July/August – this is the 2007 annual report, is it?

THE CHAIRMAN: I think that is right, yes.

A I apologise, Sir, we are going back some time. There will have been a change in legislation. As you can see, in fact, it is October 2007 and April 2007, so I was writing this in August 2007, and I will be flagging that there could be some risk. As it is, 99 per cent of it was offlaid, yes.

MR. UNTERHALTER: Mr. Venables, there are two sides to this. One is that the risk that the construction companies, the clients, may not pay all of this increased holiday allowance, but the second is that Hays is obliged to pay it. It is a cost to you, this holiday allowance?

A No, we would have agreed – again, we will have agreed with our client what is the – a temporary worker as a rate, we have a margin, often that is very explicit. The risk, therefore, was the cost of a temporary worker to our client was increasing and therefore the question was, would we able to recover all of it or could a small part of that lead to a reduction in our temporary margin, which is why I disclosed it here. As I've just covered, we were able to recover 99 per cent of it.

Q Mr. Venables, I do not want to go round in circles, but the fact is that in respect of this holiday allowance that is an amount that you have to provide to the temporary worker that you are contracting with – correct?

A No, this is an amount that a temporary worker – a temporary worker will receive it because there will be certain days where the client is paying for them and they will be on holiday, yes.

THE CHAIRMAN: When you said, Mr. Venables, that, in fact, as things turned out you recouped 99 per cent of it, when you wrote this, and you think it was about August, did you know you would recoup that?

A Of course not.

Q If you had not recouped 99 per cent you would still have had to pay that entitlement to the -- --

A We'd have had less margin, yes, and the real question with (a) is that the difficulty is when you've got a large number of clients is clearly you've got to have a lot of discussion with each of those clients, and when I was writing these financial statements – I apologised earlier, I wasn't sure if it was 2007 or 2008 – you can clearly see that there were two uplifts,

as it was, because it was a statutory increase. Our clients understood that and the rates were amended accordingly.

Q Let me give you one other reference to the way in which you style your accounts that may be relevant. Could you look at p.238 in this volume ----

THE CHAIRMAN: And this is which year?

MR. UNTERHALTER: This is 2008.

THE CHAIRMAN: So the accounts start at 211, yes, and you are taking Mr. Venables within these accounts to p.238?

MR. UNTERHALTER: Yes. We see that under the heading "An excellent financial result" we see group turnover increased by 20 per cent, the same kind of statement that we saw in 2009 – do you accept that? This is a feature of how you style your accounts?

A It's a standard table in the accounts. This the only section in the whole of our annual report that we mention turnover. We show turnover in the table above. I cover it right at the start, as I have here, then in all of the other parts of the directors' report and the business review we talk about net fees, because net fees is what is reviewed by our shareholders and by all analysts in this industry.

Q That is one metric of performance, net fees, but it is not the only one.

A But it is the one that all of our shareholders focus on, and that was clearly set out in the expert witness report of John Woolland, who is an analyst, one of the key analysts in our sector. He said that he, as an analyst – in fact, I complain that in my four years at Hays I will have done more than 1,000 meetings with our shareholders. Their focus is on how we are growing our net fees, how we are growing operating profit, and what's happening to our head count.

Q All that I am putting to you is that, although that may be the way in which one performance metric is assessed by persons from various perspectives, another can be turnover?

A Turnover is a statutory item that we have to disclose in here. In all other aspects of this annual report, in all parts of the business review, in all of the meetings we have had with our shareholders, turnover is never mentioned because it's irrelevant. It's an irrelevant item in our industry. That's why, when we started this discussion, I said that in the notes to the accounts I clearly set out that 75 per cent of turnover is the remuneration of temporary workers.

Q Could we have a look at some of your contracts. Would you look at bundle, NCB4, volume 2. Just to orientate you, these are your standard terms of business, and it commences at 1731, but the actual terms appear from 1733.

A Which page am I going to?

Q I would ask you to turn in the first place to 1735. I want to take you to various parts of this agreement, but you do confirm that this is the standard basis upon which you contract with your clients – is that right?

A I'm just trying to figure out whether this is a standard contract or whether it is a specific customer contract.

THE CHAIRMAN: I think it is introduced on p.1731, Mr. Venables, by your expert, Mr. Hall, as standard terms of business. If you go back to p.1731 it is says, "Standard Terms of Business – current", and then over the page it is permanent staff, and that is 1733 and 1734. Then one gets to 1735, I think running through to 1737, and that seems to be temporary staff.

MR. UNTERHALTER: If I could take you to the second paragraph on 1735 it says:

> "The parties hereby agree to the introduction and supply by the Employment Business …"

May we pause there for a moment. "Employment Business" is something of a term of art because it has legislative consequences – correct?

A I'm not a lawyer, I'm not an expert in this area, but, yes, I'm sure it is a form of art.

Q In broad terms you know that if you are acting as an employment business rather than an employment agency under the relevant legislation, you cannot act as an agent and you are obliged to pay the temporary worker whether you are paid or not? Was that a matter about which you are aware?

A No, you're right. What we do is exactly the same under all of these terms, but clearly where we're providing temps there is specific employment legislation, and you're right, that then leads to a legal form.

Q Yes, but "Employment Business" has a specific meaning, and I think you understand that it means, in effect, that you cannot act as an agent? Do you not know that?

A I don't know that. I can explain my understanding. The main point of difference is that under the employment legislation, clearly in the event of a temp we are responsible for the payment of the temp. So substantively what is the difference between the two? We have a liability to pay the temp.

Q Perhaps we need not be delayed and I will come back to it, there is also a provision that you may not act as an agent in those circumstances?

A I'm Group Finance Director, not a lawyer.

Q But it is the case that you need to be acting as an Employment Business within the scheme of the legislation as so understood. It is a reference to the employment legislation?

A I'm afraid that's not ----

Q Again, you do not know, very well. Let us carry on:

> "… supply by the Employment Business to the Client of the temporary worker named in the Engagement Letter …"

Can there be anything more clear than that what you are contracting for here is that Hays, as the Employment Business, is going to supply to the client the temporary workers? It is an obligation you are undertaking?

A If our client decides to take a temporary worker, then part, as you know, of our recruitment service is that we clearly try to secure that on behalf of our client.

Q It may well be that your client has particular needs and you will try and meet those needs, but let us just look at what you are undertaking to the client. Your own contracts refer to the fact that what you are doing is, you are supplying, not the worker is supplying, you are supplying the service?

A We are finding – we are finding the temporary worker. The temporary worker is performing the labour service and we are doing a recruitment service to find them.

Q This is your own contract, Mr. Venables?

A No, this is the recruitment industry.

Q No, no, Mr. Venables, you would accept, would you not, that one of the ways in which you determine how to treat these matters for the purposes of turnover is to look at the contracts – correct? It is part of what you have to do as an accountant?

A Yes, and when I said earlier on, in determining how we do our accounting, if we have an agency arrangement we treat it one way, if we don't we treat it another way.

Q And one of the reasons why you treat these relationships as principal relationships is because contractually that is what you are providing?

A Contractually, we have to pay the temp.

Q Put aside the payment of the temp, just look at the ----

A There is no substantive ----

Q Let me finish my question and I promise I will give you all the time you need to answer. The contract that you and your company have concluded in its standard terms makes it plain that Hays is providing the service.

THE CHAIRMAN: Mr. Unterhalter, (i) if it is a submission on the contract I am not sure it is necessarily helpful to do it by way of cross-examination of a witness, that is a submission

you can make to the Tribunal. (ii) what this clause actually says, I think, is "supply of the worker to provide the services." So on one reading it is the worker that provides the services, but you can make submissions on the contrary to us.

MR. UNTERHALTER: We will do so. The only reason I am raising this with Mr. Venables is one of the considerations that is relevant to making principal determinations is: what do your contracts actually provide, that is the purpose, it is not whether he has an exhaustive view as to its ----

THE CHAIRMAN: I think Mr. Venables agreed that as a general statement earlier, but one of the relevant matters is what the contracts provide without going through the actual clauses in the contract.

MR. UNTERHALTER: Well I do not, again, want to duly extend this consideration, but I do want to draw your attention, Mr. Venables, to some provisions in this agreement which his that in clause 3 on p.1735, which is that it is the employment businesses responsible for the payment of the temporary workers, you accept that?

A Yes.

Q And there is a consequence which flows from that by way of the risks that are attached because ----

A There is a credit risk.

Q Yes, and you accept that?

A Yes, and as we discussed earlier, that is one of the things that we have to look at, it states in the Accounting Standards, yes.

Q And then it says under 5, if you turn the page:

> "The Client agrees to provide the Employment Business sufficient information to enable the Employment Business to confirm the suitability of the Temporary Worker . . ."

So they must provide the information as far as that?

A Clearly the most important thing is what is the service the client wants the temp to do so that we can try to make sure we find the right person with the right skills, yes.

Q Then we see on questions of replacement under 7(b):

> "The Employment Business shall have the right to replace a Temporary Worker with another individual to provide the Services. Any replacement Temporary Worker supplied pursuant to this clause shall be deemed to be supplied under the same terms as governed the original Temporary Worker under this agreement."

Do you see that?

A I do.

Q Now, what I want to put to you about that provision is that this is entirely consistent with the way in which you have indicated temporary workers are supplied in your financial accounts, which is that you are providing workers, and you can take one out and put one back over the period of the contract; you are, as it were, providing a work force under specifications to the client. That is why ----

A We don't ----

Q If I may just complete the question: That is why, unlike in the situation with permanent workers you can take out a worker and simply replace that worker over the lifetime of the contract?

A That never happens. So we are clear, 95 per cent of what we do, whether it is permanent or temporary recruitment, is exactly the same. The client gives the requirement, we find the appropriate worker, we try to match the skills, we get the client's agreement and then we place them there. The only difference between permanent and temporary is in the case of permanent the client has made the Decision they want to employ, so they will contract direct with them. In the case of a temp absolutely the client does not want to employ, does not want an employment risk, and under the legislation as you covered earlier, we have a requirement to ensure that the temp worker is paid.

So we do not have a body of workers, we do not manage a body of workers, we do not have temps, so I am not sure where this is going because there is no substantive difference between what we do in permanent recruitment to what we do in temporary recruitment.

Q You say it makes no difference, but why do you provide in an agreement that you can in fact take workers out and simply replace them if, in fact, it is exactly the same service as you would provide in respect of permanent workers? I want to put to you that you can only provide for that in an agreement because in effect you are supplying a complement of workers over the period agreed with the construction company, and if you find other work for that person that you will be better remunerated you can substitute, and you do?

A In my four years in the company that has never happened. There is not a party substitution. Clearly at some point the temporary worker might go sick, and may not have performed a particularly good job there, so we may be asked to replace, but this is not a group of people that we have. Temporary workers tend to register with lots of agencies, because what they want to do is secure employment so they can pay their own bills, etc. What we do is when we have the requirement from our client we find the right person and we send them through to the client. The client then manages all aspects of what the worker does for them. The

worker has some skills and the client manages it under their supervision and direction and control.

THE CHAIRMAN: You say this has never happened in your four years, you are the Group Finance Director, would you know ----

A Yes, I would because ----

Q Just a moment. If on one contract in Hartlepool for temporary workers the regional manager were to replace one with another, would he come to you as Group Finance Director?

A No, I would not know that, but I am one of two executive directors at Hays and we are involved in all aspects of the business, we run the company. My understanding is that that does not happen. Equally, before I joined Hays I worked for a company that had more than 150,000 employees. I personally recruited more than 500 people and have had more than a couple of thousand temps, I was the managing director in that business as well. That just does not happen, that is not the role of recruitment companies.

Q For some reason it has been thought right and necessary to have that clause in your standard terms. Do you know why?

A I can make an educated guess if I may. Again, if somebody has been off sick for a period of time, clearly we do not get paid, when a worker is off sick the worker does not get paid and we do not get paid, it is a contract for service, they only get paid when they work. Clearly if somebody has gone off sick for a period of time, generally the client will call us and say: "Joe Bloggs has gone off sick, can you find somebody else?" I guess all this to us is: "Please come to us first and ask us to replace them".

MR. UNTERHALTER: I am putting to you that the reason you have this in your standard clause, whether it is for reasons of sickness, or whether for other reasons, you have that ability, you have that right?

A No, we do not have that ability. Our temps are working for our client on their premises, they are part of our teams of our clients when they call up something. It is just not credible to suggest that we could call up a client at any point and say: "We'd like to have that temp out and we'll find you another one", that just does not happen.

Q Well it is odd because, and I will find the provision in one of your other agreements, but there is one of your agreements where in fact you undertake not to take a worker away for other employment, I will find that in a moment. Are you aware of that?

A I have read the contracts, there will be some clauses, and it may well be that that has been driven off by a customer seeing this, but I have been involved in the recruitment industry

for 20 years, and that is just not something that happens. So we need to look at the substance of the business. I realise that there is a clause in here which may be interpreted. I have not had a chance to look at all of the other clauses in this part as we have been going through, but that is not something that happens in recruitment. We are not providing an employment service, we are not an IT service company, we are not Balfour Beatty. If Balfour Beatty, who are a construction company, were doing a project as a subcontractor clearly they have taken responsibility for something that they have said a building will be built. We do not do that, our business is you, the client, determine what you want to do and we will find you the people that can help you do it.

Q Well we will come to that provision, I will find it and you will see that obviously your clients believe that you have this ability and so sometimes specifically provide that you should not be able to do so?

A Again, there may be individual clauses which are here for form or whatever, I am not the company lawyer, but in my knowledge, having been involved in recruitment for more than 20 years, I have never heard that has happened.

Q All right, let us look at the charges which you will see under clause 2.1:

> "The client agrees to pay the hourly charge plus VAT in respect of each hour worked . . ."

Do you see that?

A Yes.

Q ". . . each hour worked by the temporary worker." You have already accepted that often that is simply an all in hourly fee?

A Sometimes it is. There is also a large number of contracts where there is a specific margin that we are receiving and in fact, as I am sure you are aware, unfortunately most of the contracts that fell part of the CRF were stated fixed margin contracts.

Q Well let us read on in 2.1, if you look at the last sentence:

> "For the avoidance of doubt the Employment Business reserves the right to increase the hourly charge subject to statutory requirements."

So it is yet a further indication I want to put to you, Mr. Venables, that what is happening is that you are providing these workers over a period of the agreement and you are reserving the right to increase the hourly charge over the period of the contract?

A That is just not credible, that does not happen.

Q Well that is what it says, I hope it is credible, it is what it says.

A It might do, and where that is very useful, and I give you an example of that is when I was asked about the holiday pay some 10 or 15 minutes ago, a legislative change came out, it led to a temporary worker having four additional holiday days, which clearly increases the amount of holiday work. We would have agreed a rate for that temporary worker. Clearly now there are going to be some hours where that temporary worker does not work but they are going to get paid, so the hourly rate for when they are working needed to be increased, and you are right in those circumstances this is a very good clause to go to the clients and say: "There has now been a legislative change", or it might have been a tax change or whatever it is, "the rate will increase" it is just not credible to suggest we could call up a client – let us take [Confidential], or any of the ones in here, [Confidential] – and say "We have just decided, we have got out of bed this morning and we have decided we want to increase our hourly rate." We have been doing recruitment for more than 40 years.

We have long standing customer relationships and you do not build an ongoing customer relationship if you are at any point in time just increasing your prices. Clearly, a clause like this is very useful because there could be two things happening. We might well have something which says: "The going rate for a lawyer when we sign a contract is £x per hour" and overtime that going rate will change, and all this enables us to do is to say "The rate has changed." But, quite frankly, when the client calls us up with a job they will say: "I want a construction worker to perform X job," the company in case in this part well knew what the going rate was for a architect, for example, they will tell us what they were prepared to pay, but sometimes clearly if you had a much smaller company they wouldn't know and we'd be able to pass on to them "This is the rate". So there may be a clause in here but that is not the substance of any recruitment business I know.

Q Well you keep referring to "the substance" but the fact is that you are placed in a position where these kinds of clauses are written into your agreements ----

A Into our standard terms.

Q And they are the kinds of rights that are wholly consistent with the fact that you are providing the service over a period of time, and you are adjusting the rates by right over the period that you supply these workers ----

A No, and again, what happens here is a client will call up and they will say that they want a temp for six weeks. They might seek our advice, what is the appropriate rate for an architect, or they may well know, and that will be the rate that is fixed for that period of time. Clearly, we might have another assignment further down when again we will state the rate, so this is not how recruitment – it is just not credible to suggest that recruitment

companies go and say "You know what, we'd like to increase our rates this morning", that doesn't happen.

Q I just read your contracts, Mr. Venables. Let us look at clause 6.1 under "Liability":

> "The Employment Business undertakes to make all reasonable efforts to ensure reasonable standards of skill and experience from the Temporary Worker."

Then there are some exclusions for liability in respect of what the worker will do. It says:

> ". . .but no liability is accepted by the Employment Business for any claim arising from failure to provide a Temporary Worker for all or part of an Assignment."

Again, what it is saying is: "You will provide a worker, and you will take steps to ensure there are reasonable standards"?

A We are a recruitment business and our job is when the client says this is the skill I want you to find for me, clearly we will try to find somebody who has appropriate skills. What this says is " We will make all reasonable efforts". If you said you want an architect, you want that architect to work on this type of project? We'd like them to have relevant skills", then clearly as part of our recruitment services we will interview that person, we will ask them those questions. "Have you got skills working in X, Y, and Z in a fairly top level generic way?" and then we will hand the temp across to our client. But, you then need to go to Clause 9.2 which says that the client "agrees to be responsible for all acts, errors and omissions of the temporary worker, whether wilful negligence or otherwise". So, it is pretty clear, you know. Our job is to use appropriate skill to find somebody with the right skills to be able to do the job the client wants, but when they go to the client's premises they are under the supervision, direction and control of our client. It is the client that manages the whole of the project. We do not visit any of our locations. So, we do not visit the client and find out, you know, 'Has the temp appropriately done a certain building?' because we don't have skills to do that.

Q All that I am pointing out to you is that from a variety of perspectives all of this contract points to the fact that it is Hays that is undertaking these obligations in respect of the workforce that it is delivering to the client. These are all just indications of the same theme.

A I disagree. I don't think that's accurate at all. 9.2 clearly sets out - and if I had a bit more time there's probably another one in here - that, you know, we're not responsible for the acts of the temps. When the temp goes to our client, they work for our client. They work under the direction of our client and the supervision. It's the client's responsibility to ensure that the work is to a certain standard. We do not give any warranty on the level of work that takes place. Our job as a recruitment company -- That is why we're called a

recruitment company and not - I don't know - a construction company or an IT service company. Our job is to make sure that we use appropriate skills. Clearly part of that is to make sure that the person does have a qualification. Depending on our agreement with our client, if they have said that they have worked on certain projects, that they actually have worked on those projects.

Q Just so that we can try and avoid unnecessary differences, we are not suggesting that you are required to supervise these workers once they are with the client. We are making the point that from these agreements it seems plain that you have got to provide these workers and that they have got to be at the requisite level of skill for the purposes of the client. That is what I will suggest.

A No. That's not true. In the construction space we're not a construction company. We don't have intimate knowledge about what typical skills are needed to do a certain project. We will ask the client what they want. They will tell us, "We want you to find us an architect. We want them to work for X period of time. We would like that they have these sorts of skills and relevant experience". Our job is to try to make sure from their resume, from having a discussion with our client, and with the candidate, that it looks like they've got those skills. We won't know whether they have those skills. We won't know whether they're particularly good or not. We can see what work they've done in the past. It's when they start at our clients and they're under the supervision and control of our client -- Our client is the only person that will know, "Have they got the right skills?" All we've got due care to do is just to -- What we can't do is just throw somebody to our client. You know? This is all about, you know, "You're a recruitment company. Exercise your judgment in trying to make sure you've found somebody that's got the skills to do the job". Nothing more than that.

Q The point is that if, having supplied them, they are not to the requisite standard, it is your obligation to ensure that they are. That is what you have to do, and you have to do it over the period of supply.

A No, it's not.

THE CHAIRMAN: I think we have exhausted this topic. We see what Clause 8 says. I think perhaps one can move on.

A Yes.

MR. UNTERHALTER: I have mentioned that there was an agreement where you do make some interesting provisions as to what can and cannot be done. It is in the exhibits to the witness

statements, which is NCB3, Volume 1, Tab 3 of the [Confidential] Agreement. It commences at p.339. Look, please, at p.342. We see under 'The Services' at 3.1,

"The Supplier in its own right and make best endeavours to ensure that the Temporary Worker where applicable warrants and represent to the Buyer that: ----
"

MR. BREALEY: Sir, I understand this is confidential. It is live.

THE CHAIRMAN: I thought that the standard clauses are not confidential.

MR. BREALEY: Apparently this is not a standard contract.

MR. UNTERHALTER: Perhaps I could make this very simple. (To the witness): Would you just have regard to 3.10? I have indicated that there was an agreement which had certain features of a specific sort. You need to answer in response to 3.10 ----

THE CHAIRMAN: Can we just read 3.10? It needs a bit of concentration to read this very small print. (Pause whilst read):

MR. BREALEY: I am informed, Sir, that we can waive confidentiality over this clause. It can be read out.

MR. UNTERHALTER: Have you had an opportunity to look at it?

A It's a non-poaching clause, is it not?

Q It says, "-- this Agreement will not solicit or entice away or endeavour to entice away from the Buyer any employee of the Buyer or any temporary worker currently assigned under the assignment with the Buyer without, in any such case, the prior written approval".
So, there is no enticement provision. You are required to make that worker available and they cannot be enticed away.

A The way I read that one -- I apologise. I have only just had chance to look at this. The way I read that is that clearly as part of a recruitment process we will have had a discussion with our client. Let's say we've met a senior person at the client. What we're not able to do is to try to poach, first of all, somebody who works for our client.

THE CHAIRMAN: I think that is exactly right.

MR. UNTERHALTER: In other words, you have provided the workers to the client and you cannot, as it were, withdraw them because you would like perhaps to put them on another assignment for a higher fee.

A Again, that's never happened. So, in my four years as Group Finance Director and my twenty years in recruitment, that just doesn't happen in this industry. You're not going to deal with a client such as [Confidential] -- You're not gonna make a Decision one day,

"You know what? We're gonna take all of your temps away from you", or something like that. That doesn't happen. This is one clause in this agreement.

Q Yet another indication as to what we say is the case, which is that you provide the workforce.

A I mean, clearly, when you end up -- I mean, when we've got on to these contracts, these are not standard contracts. Clearly in our discussions with our clients sometime we insert clauses in here that our client wants. If some of these clauses are completely irrelevant to Hays, then, quite frankly, we're not interested in them. You know, the standard recruitment process is for 99 per cent of all the workers you put, they attend the assignment, they complete the work, everybody gets paid, there are no issues. So, if there are any issues it is on the one in one hundred where anything happens. So, you know, there's a lot of clauses in here that -- nearly all of them -- I mean, the beauty about recruitment in my time as Group Finance Director is that there's no litigation in the area; there's no customer claims in the area; we've never had to go against insurance. All of those sorts of things. But, clearly, our clients will have a lot of clauses in her which might give them protection in a theoretical event.

Q Again, I am not certain whether confidentiality is being claimed over this contract, or not. I just want, in broad terms, to refer you to Clause 3.2 of this agreement where, again, one sees that there are provisions about how the services will be provided. It is entirely consistent with what we have seen in your standard clause agreements.

A If I have got this right, this says that -- I apologise. In my own witness statements, there was an appendix I put to it which -- For example, this is probably one of the clauses that was raised by the OFT at the time where I also covered the other key clauses. Rather than me trying to read through each clause in here and say -- I'm not sure where it is in my bundle. This is one of the contracts, I think, that was raised, was it not? It was one of the ones that were given. You raised, or your expert witness raised, one clause. We then raised a number of ones back.

Q It is one of them. All that I am pointing out to you about these agreements is that ----

A Am I able to go ----

THE CHAIRMAN: We are slightly wondering whether we need to spend more time on this?

MR. UNTERHALTER: No. I have regard to time. I do not need to spend ----

THE CHAIRMAN: We do want Mr. Venables' evidence to complete today.

A Am I able to make one final point?

THE CHAIRMAN: Yes.

A If I can just make one point because I think it gets to the heart of it? Our clients asks us to do a recruitment service. Let's say it's an architect and they're on £50,000. Let's say our commission for the purpose of this is 15 per cent. At the end of that route, 95 per cent of what we do is exactly the same in a recruitment process. The last 5 per cent is the bit that is different. We spent all of our time on the last 5 per cent. But, in that case, Sir, if they're permanent, you know, they're going to get a salary of £50,000 and we're going to get a commission of £7,500. £7,500 is what goes into our turnover £7,500 is what goes into net fees. If we have to go through - because of employment regulations, if the client's decided to go down the temp route, and let's say for the purpose of this it's a one-year contract, so it's a comparable period -- In that case, the temporary worker will be paid and we will receive £57,500. The temporary worker will be paid £50,000. Our accounts will show turnover of £57,500. In Note 6 - remuneration of temporary workers - £50,000 and net fees of £7,500. So, if turnover is to be the determinant part, you can have the same worker because often it can be the same person who might go down a permanent route and might go down a temporary route. Now, it is not credible to suggest that Hays, or any other recruitment agency, is providing seven times the service under a temp contract where suddenly that turnover will be £57,500.

THE CHAIRMAN: I do not think that question has been put to you.

A Well, it's the substance though underpinning all of these different points.

Q Mr. Venables, you are not here to make a speech or submission. You have got extremely able counsel - quite a number of them - who will be making submissions in due course. If you would just answer the questions.

A I apologise.

MR. UNTERHALTER: Let me try, if I may, to speed up this process somewhat because perhaps we can reach some measure of agreement as to what the arrangements are. You would, I think, accept - and I hope I do not have to take you to the agreement - that you enter into a separate agreement with the temporary worker. Correct?

A Yes, sir, as you said earlier on, under the employment legislation. If the client determines not to take the temp direct into them - because sometimes that happens - then clearly what the legislation is trying to ensure is that the temp gets paid. So, as part of that, when the client has said, "Yes, I want that temp" we will have a contract for service with the temp.

Q Yes. The point there - and it is just the language of the clause - is that the temporary work on acceptance of any assignment will supply his or her services to the employment

business. In other words, what is clear from your contractual arrangements is that the temporary worker supplies services to Hays.

A No, that's just not credible in this industry. They don't provide their labour service to us. They provide it to our client. It just happens to be because of employment law that these items go through our books.

Q Contractually they contract with you.

A They have a contract for services with us, yes.

Q They do not have a contract with your client.

A No.

Q I think all that is being said is that therefore, because perhaps of legislative reasons, that is the structure. It is in the contract with you that the temporary recruit agrees to provide services.

A To our client, yes. That is the legal form.

Q It is a contractual obligation that the temporary recruit undertakes to you - because he is in a contract with you.

A If they want it, yes. Clearly, assuming the temp wants the work, then of course ----

Q That is how it is structured. Let me then move on to another subject, since that seems clear enough from your contract. That concerns the issue of risk. You have indicated, in your witness statement at any rate, that whilst you take it that credit risk is one of the features of the agreement that you did pay attention to, you say that the materialisation of this risk is very low?

A The net risk is very low, yes.

Q The net risk is very low. I want to put it to you, and it seems that Deloitte, your auditors agree, that the indicator of whether you have a principal relationship or not is not whether the risk materialises, but whether there is risk exposure that exists – the existence of the risk under the accounting standard, not whether you can mitigate that risk in one form or another?

A That's not what drives our accounting.

Q Is it not the case that the standard under which judges risk for the purposes of making a principal or agency determination is not whether the risk materialises, but whether the risk exists?

A That's one of the factors. There's one part of our turnover note that you didn't take me to, the last paragraph, which clearly shows that where we have a disclosed agency arrangement, we do not include the remuneration of temporary workers in our turnover. We

still have in those circumstances the same credit risk. Just because our policy has been to follow – if we have a disclosed agency, that's how we treat it. That's been determining factor. So the gross credit risk is there throughout, but that's not what drives how we do our accounting now.

Q As I understand it, that is a factor that you take into account for the purposes of making this determination on the principal agency point – am I right?

A It is, but as I've just described, where we've got two transactions which could be with the same client, if one was going through a disclosed agency arrangement we did not include the remuneration of temporary workers in turnover; in the other one, if there wasn't disclosed agency we did, we would have had the same credit risk in both with different accounting for each one, which was our policy and which was signed up by our auditors, yes.

Q All right. Is it also the case that the way in which you deal with this question in your annual report, and again perhaps I can try and cut through this as best I can, is that what you indicate is that this risk is spread widely because you do not have only one big customer?

A Yes.

Q Is that correct?

A Yes.

Q So it spread over a large number of customers, and consequently you identify the risk and then say, "But we are not overly exposed to one big customer and therefore we are able to spread the risk properly" – do you accept that?

A And that clearly talks to the gross risk that we have in each of those transactions. As I said earlier, we've got 30,000 customers, so it's clearly diversified.

Q Can we go to the actual way in which you go about procuring these temporary workers, and to that end could I ask you to look at NCB3, volume 1. Can you tell the Tribunal, you have a ----

A Where are we?

Q I am sorry, it is NCB 3, volume 1, I want to refer you to a large number of entries of this kind, but perhaps could you look at p.293.

THE CHAIRMAN: What is this document?

MR. UNTERHALTER: Perhaps I can just indicate, and my learned friend can tell me if this is problematic from any point of view.

THE CHAIRMAN: It is marked "Confidential", what actually is it?

MR. UNTERHALTER: As far as we understand, it is something called a [accounting system] Information Capture System, but perhaps Mr. Venables would identify it for us?

A I'm the Group Finance Director, so I'm afraid that it may well be that I haven't ----

Q Are you unable to identify this for us? It was provided by Freshfields pursuant to certain enquiries that were made?

A Again, I'm not the UK finance director, or even the finance director of this business, it looks like it's a list of individuals, but I can't – and I can hardly read it either.

Q Perhaps this is not confidential, which is that you have a database ---- Let me ask you, do you have a database of temporary workers?

A Clearly, yes, we have a record of all of the transactions that happened in the past. We'll clearly also receive CVs of people who have registered with us, yes.

Q In fact, you capture – certainly, if this is an example of it ----

A This isn't our database, I don't think.

Q Whether it is the entire database or not, I am simply concerned with ----

A It's not our database. [accounting system] is not our database. [accounting system] is our accounting system.

Q All I am asking you to identify for us, Mr. Venables, is that you have a database in which you keep details of temporary workers in their thousands, and next to them there is an identification of their competence and the appropriate rate at which you will hire them out?

A No, that's not ----

Q I would be surprised if a company of your size did not have such a database, but perhaps you would tell us otherwise?

A This looks like – I haven't seen ---- I apologise, if I've seen this document before, it's years ago. This looks like just an extract of actual transactions. It's not a list of what rates people would work for. It looks like it's a historical list of actual temps, but again, without having a chance to look at it in more detail ----

Q Let me ask you in more general terms, you are seeking to source temporary workers?

A Yes.

Q You clearly have people on file in your database. As to who you have, their competences and the rates at which they work?

A No, not the rates. The rates will be determined at that point. We may have some historical – that's our business – we may have some historical record, and I think this is actual transactions, where it will say what their rate was. What we won't know until we have a conversation with a temp – we've had a conversation with a client, the client will tell us

what they're prepared to pay – what we won't know until we've had a conversation with the temp is about what the temp wants.

THE CHAIRMAN: I think, Mr. Unterhalter, this is – you will have had more time to look at it than I, but it explains on p.278, this being part of the [accounting system] ----

A The [accounting system] is our UK, or was our UK accounting system.

Q Financial information for candidate placements.

A Shall I read the page, Sir.

Q It is said to be confidential, but on that basis it appears to be a historic record used for generating invoices?

A Yes, [accounting system] is our accounting system. Clearly to be able to raise an invoice to our clients, we will need to know what is the temp being paid and what is our margin.

MR. UNTERHALTER: All right, so you have, you say, historical information but ----

A Sorry, this is historical. This is ----

Q Let me ask you the question, it is not difficult. You are in the business of supplying temporary workers?

A Yes.

Q Sometimes these are on large projects which are going to run over a number of months – correct?

A Yes.

Q A construction company approaches you and says, "I want a variety of competences to service a particular project" – correct?

A Yes.

Q You will go into your database and you will seek to source the relevant workers that the construction company wants – yes?

A Yes, correct.

Q You will then make a proposal based on the work complement that this construction company wants and the rates at which you will supply those workers. That is what you do?

A Again, two elements. First of all, certainly, as you can imagine, in a recession, as is the case at the moment, our client will tell us what they are prepared to pay. It's clearly a buyers' market at the moment.

Q It was not always.

A I was going to come to that actually. Clearly, at other points where labour is short then the temp will come in and they'll say, "I got £25 per hour on my last assignment, I want £30 now". That is part of a discussion. Our client will say, "These are the services we want to

get", we'll then say, "In the market at the moment this is what you'll have to pay for that". The client clearly then takes a view, do they want to pay that or do they not want to pay it? That's recruitment.

Q Yes, but what I am putting to you is, irrespective of whether you have to adjust your rates one way or the other, let us look at the circumstances that were applicable at the time that the infringement took place, at times of labour where there was a shortage of skills – correct?

A Yes.

Q Particularly in the construction sector, perhaps in others – correct?

A Yes.

Q A client has got a big project and it wants competent people to be supplied on a temporary basis?

A Yes.

Q You will put up a proposal based upon all the competences that are required across a range of disciplines and you will put in a rate which will cover that supply of workers?

A First of all, it doesn't happen like that. A client is not going to come to us and say, "We've got a construction project, can you get everybody for us". Most construction companies have their own internal recruitment businesses, they actually do more than 50 per cent – someone like Balfour Beatty do 80 per cent of their own recruitment. What they'll say is, "We need two architects", or, "We need someone with this skill", and then, you're right, we will clearly find out from that temp what is the rate they want. We'll then let our client know. The construction market is a good example. In the construction market our clients very well know what the going rate is in the market. As you'll know, in a lot of these agreements, our margin was very express, what we were able to charge on top. The client will say, "Okay, so the temp is going to get this per hour, your margin is Y, this is the total cost if we decide to use it".

Q In point of fact, one of the reasons that Parc was controversial, certainly to Mr. Cheshire, was precisely because it seems that construction companies had difficulties in assessing whether they were getting value for money at all?

A Clearly construction companies, like every other company, want to get great service at the lowest possible price, yes.

Q Yes, but the more general point that I want to make to you is that you are making an offering, and very often it is an offering simply in respect of rates, in respect of the positions that need to be filled by temporary workers with a client, and it is an all-in rate?

A No, most of these agreements that wasn't the case. Most of these agreements, there was a stated margin that we would get on top of the rate. So they would say, "The going rate for an architect is £45 an hour, can you get me somebody with the right skill at that". That for us is either a yes or no, can we get? We'll attempt to do the job for that job. In a lot of these agreements we had a fixed margin, which might have been 13 per cent, 15 per cent, or in the case of where Parc were trying to get to, 10 per cent. What we're not doing is saying to – we will clearly advise our temps about what the going rate is and what they should expect to get. What we can't do is tell a temp, "This is the rate", what we can say is, "This is the most that the company is prepared to pay, the construction company is prepared to pay, do you want this assignment or not?" That's normal.

Q Which contracts do you particularly have in mind? Which ones?

A We could take – if you go to any of the ones in there, there's two, [Confidential] – I've got a summary of the main contracts in my ----

Q Why do we not go to the contracts you have been relying upon. Perhaps I could refer you to expert reports, core bundle 4, and Mr. Hall's report, p.43.

A Sorry, where am I going to?

Q Core bundle 4, pp.42 and 43, but confidentiality has been sought in respect of these contracts. (After a pause) It simply identifies particular contracts?

A Yes.

THE CHAIRMAN: Mr. Unterhalter, how much, given the time, have you got?

MR. UNTERHALTER: I need to deal with this subject and then there are just a few other matters, but I might ask just to review overnight.

THE CHAIRMAN: Well how much longer?

MR. UNTERHALTER: Probably about 15, 20 minutes, I would have thought.

(The Tribunal conferred)

THE CHAIRMAN: Mr. Unterhalter, there is also of course re-examination, so that does look like 30 minutes at least, possibly 40 at the outside I would hope, but more like 30. In that case I think it sensible to stop now, Mr. Venables has been in the witness box for a while. We are starting at 10 tomorrow. If you can liaise with Mr. Brealey and sort out exactly what is confidential, it may be that the names of the clients are confidential but the clause you want to refer to is not, I do not know, but that is one possibility, but you can sort that out rather than slowing things down if we go on now, and we are just not going to finish. I would suggest that is the route we take. Mr. Brealey?

MR. BREALEY: At the moment I do not have any re-examination, it is just the names of the clients which are confidential, so I do not know whether you want to continue and get it out of the way.

THE CHAIRMAN: At the moment you do not have any re-examination, but you do not know what is coming in the next 20 minutes. Unless there are great problems for Mr. Venables tomorrow morning I think we will break now and we are starting at 10 really to factor in this situation.

LORD PANNICK: Can I mention a very minor matter, which is with the consent of the Tribunal, I need to be elsewhere tomorrow afternoon, I hope that is acceptable.

THE CHAIRMAN: Yes, I do not think you are dealing with that part of it ----

LORD PANNICK: I can deal with the Terrorist Asset Freezing Bill, that is what I shall be dealing with tomorrow afternoon. I am very grateful.

THE CHAIRMAN: 10 o'clock tomorrow.

(Adjourned until 10.00 a.m on Tuesday, 27th July 2010)