IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1115/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 July 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

CREST NICHOLSON PLC — Appellant

- and -

OFFICE OF FAIR TRADING — Respondent

- and –

ISG PEARCE LIMITED — Intervener

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

_____

HEARING

APPEARANCES

Miss Marie Demetriou and Mr. Nigel Parr (instructed by Ashurst LLP) appeared on behalf of the Appellant.

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

Mr. Paul Lasok QC and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Intervener.

_____

THE CHAIRMAN: Good morning. Are we going to start with you, Miss Demetriou?

MISS DEMETRIOU: We are, sir, if that is okay.

THE CHAIRMAN: And Mr. Lasok, what are you intending to do this morning?

MR. LASOK: Observe.

THE CHAIRMAN: Observe, I thought so.

MR. LASOK: And appear intelligent!

THE CHAIRMAN: Oh, you always appear intelligent! (Laughter)

MR. LASOK: And smile pleasantly.

THE CHAIRMAN: Sounds like a good Friday! (Laughter) Right, we are now ready. Miss Demetriou.

MISS DEMETRIOU: Thank you, sir. I appear for Crest Nicholson, the appellant in this case. Mr. Beard and Mr. Singla appear for the OFT, and, as you will see, Mr. Lasok and Mr. Holmes appear for ISG Pearce, but are not proposing to play any part this morning.

This is Crest Nicholson's appeal against the penalty of £4,369,555, which is a reduced sum reflecting the 15 per cent discount granted to Crest, but to Crest alone, on the original penalty of £5,188,856 imposed upon it by the OFT in its decision. The Tribunal will have seen that Crest raises four grounds of appeal. I take it that you have read the skeleton arguments?

THE CHAIRMAN: We have.

MISS DEMETRIOU: Have you also received the bundles which are paginated?

THE CHAIRMAN: Yes, somewhere, volume 2. Yes, we have received the bundles that are paginated, volume 2.

MISS DEMETRIOU: So the first ground of appeal raised by Crest alleges breach of the principles of equal treatment and fairness. This is a ground which is specific to the facts of Crest's case. It arises from the successful judicial review which it brought against the OFT in relation to the OFT's fast track offer.

The second ground of appeal relates to the application of the minimum deterrence threshold by the OFT. Although other appellants in these appeals have advanced arguments on the MDT, as the Tribunal will be aware, we say that its application to Crest raises particular concerns. It has resulted in the multiplication of Crest's penalty by a factor of 2,450 compared with an average of seven in relation to other undertakings.

Thirdly, Crest submits that the OFT selected the wrong year of turnover for the purposes of determining the penalty at step 1. This is a pure point of law, and it is a ground which other

appellants have also raised. It is not a ground which is dependent on the particular facts of Crest's case.

Crest's fourth ground is that the penalty imposed on it is disproportionate.

Before turning to each of these grounds in turn, what I would propose to do is place them in context briefly and highlight a number of factual points that are important in this appeal. I can do that very briefly.

The first is that the fine in this case is the eleventh highest imposed by the OFT in this investigation out of a total of 103 penalties. The second is that the fine was imposed in relation to a single infringement of cover pricing which took place in September 2001, before the OFT's other decisions on bid rigging. So this is not a case where Crest was aware of the OFT's stance in other cases and flouted it deliberately. The successful tenderer for the project in question was Balfour Beatty, whose bid was lower than two genuine bids, and so the Pearce group of companies and Crest did not benefit at all financially from this particular infringement. Thirdly, the value of the contract was just over £1 million so that is one fifth of the fine imposed by the OFT. Fourthly, the infringement was not committed by Crest itself, but by Pearce Construction Midlands Limited, which I will call Pearce Midlands for the remainder of my submissions. Fifthly, Crest is the historic, indirect parent company of Pearce Midlands, so more specifically Pearce Midlands has, at all material times, been a wholly owned subsidiary of ISG Pearce Group Limited, which I will call Pearce Group. Crest acquired the Pearce group of companies in 1985, but in January 2003 – before the OFT commenced its investigation – the Pearce group of companies was subject to a management buy out; it was acquired by its existing management.

THE CHAIRMAN: What was that date again?

MISS DEMETRIOU: January 2003. Sixthly, since the sale, so since January 2003, Crest has not been active in the construction sector at all. Finally, when the OFT was carrying out its investigation, because of the factors I just referred to (because of the buy out) Crest had no means of ascertaining whether the allegations made against Pearce Midlands were well founded because, as a result of the buy out, it retained no staff and no documents. So it was not therefore in a position proper to assess the fast track offer extended by the OFT to the addressees of the eventual decision.

Sir, with those factual points in mind by way of background, I would like to turn now to the four grounds of appeal, and I will start with the first which is breach of the principle of equal treatment. In a nutshell ----

THE CHAIRMAN: Just before you turn to that, I am going to ask you a question which arises from some of the other cases which, as you know, we have been hearing and have been heard in another room, and that relates to the starting point of 5 per cent. After due consideration, are you proposing to take any issue on the starting point of 5 per cent?

MISS DEMETRIOU: No, we are not taking any issue on that, no, we are not. Our issue in relation to the calculation of the penalty relates to step 3. We say that the starting point was all very well, there is no problem with the starting point in this case. The problem was that it was abandoned when the MDT was applied at step 3.

THE CHAIRMAN: I merely mention it because if anybody, on due reflection, at any stage wished to take a point they have not taken on the starting point they are perfectly free to do so in writing, and of course the OFT to respond.

MISS DEMETRIOU: Thank you, sir, we will consider that.

THE CHAIRMAN: Thank you.

MISS DEMETRIOU: Turning to ground one, our argument is very simple, and I will explain what it is in a nutshell first: the OFT made a fast-track offer pre-statement of objections of a 25 per cent discount for undertakings willing to admit liability in respect of a number, and in our case it was 18, of unparticularised allegations made against them. Unlike most other recipients of this offer Crest was not in a position, acting in good faith, to admit liability as it was not able to make any assessment at all as to whether these 18 allegations were well founded.

The OFT should, in our submission, have taken this difference in position into account, but it failed to do so. Instead what it did was it gave Crest a 15 per cent discount for the admission it made post statement of objections, but this was precisely the same discount it had offered to other undertakings which made admissions post SO. So it did not, in fact, grant any additional discount to Crest because of the different position it found itself in relation to the fast track offer. We say this constitutes a breach of the principle of equal treatment because it failed to recognise that Crest lost the opportunity at an earlier stage of obtaining a 25 per cent discount on its penalty.

Much of the analysis underpinning this argument has already been carried out by the Administrative Court in the context of the judicial review brought by Crest in relation to this point. What I propose to do is structure my submissions on this ground in the following way: first, I will take the Tribunal to the pertinent passages in the Administrative Court's judgment; secondly, I would like to explain very briefly what happened after the judgment; thirdly, I will summarise what our submissions are – maybe at that point I do not need to do

so because they will already have been made clear; and fourthly, I would like to address the points made against us by the OFT in its skeleton argument.

Could I ask the Tribunal to turn to the Administrative Court judgment, which is in the paginated bundle at tab 2, pp.207 and following. Paragraph 2 of the judgment summarises Crest's position, and I have already made many of the points in that paragraph. What the court is emphasising there is that there is really no connection between Crest and Pearce Midlands.

Turning on to para.10, I do not propose to read this out, but for the Tribunal's note that summarises the rationale for the fast track offer.

Skipping forward to para.23, this explains how the fast track offer was extended to Crest and the Tribunal will see that annex 1 to the letter sets out the details of 18 suspect tenders. In relation to each was the name of the claimant's subsidiary involved, Pearce Midlands, the name of the suspect tender, the approximate date of the tender, and the client. In relation to each of them the claimant was asked to indicate yes, if it admitted to having participated in bid rigging activities in the suspected tender and accepted the OFT's offer. So you will see that there was very minimal information provided in relation to each allegation. What was asked for by the OFT was a simple admission.

Paragraph 25 – again this is by way of factual background – says that neither the claimant (Crest) nor Pearce Midlands accepted the fast track offer. Crest advised the OFT in a letter of 18th December 2007 that it was unable to verify the OFT's allegation for itself, therefore it did not feel able to admit liability, and it sets out thereunder the reasons why it was unable to make any assessment itself of whether its historic subsidiary, Pearce Midlands, had in fact engaged in any of these alleged infringements.

THE CHAIRMAN: They said they had made enquiries of Pearce?

MISS DEMETRIOU: That is right, sir, they made enquiries of the solicitors of Pearce Group and got nowhere with those enquiries. What the judge found in relation to that is that there was in fact a conflict of interest between Crest and Pearce Group, which the Tribunal will be aware of in view of the fact that there is an appeal on liability brought by Pearce Group in which it claims that Crest alone should be made liable for these infringements.

So much of the judgment is background factual material and summaries of the arguments, but if you could skip forward to paras.63-64 this is where we start to get the nub of the court's reasoning.

What the court held here is that it should have been evident to the OFT, as a result of Crest's November response to the fast track offer (which was the paragraph I just showed you), that

> " …prima facie the claimant was objectively in a different position from most, if not all, of the other recipients of the offer. The fact was that the claimant was an historic indirect parent which, on making inquiry, explained that it was unable to obtain information about the 18 tenders listed in the Annex to the November letter. It had sold the part of the business which had engaged directly in the alleged infringements and no personnel from that time, common to both businesses, remained. Solicitors acting for the Pearce side of the business had told it that it had not uncovered any evidence to support the OFT's allegations. As already mentioned [and this is the conflicts point] Pearce's assistance should be seen against the background where the interests of the claimant and Pearce might well conflict if liability was ultimately to be found. [We have seen that that has in fact transpired.] (64) In my judgment this prima facie objective difference in the claimant's position meant that the OFT needed to address the principles of equality and fairness. An objectively different position might mean different treatment was justified; to put it another way, not to take it into account might be procedurally unfair. It was not enough that the claimant received a similar offer as others. In my view the OFT had to confront the difference of the claimant as an historic indirect parent unable, on its account, to access information through documents or personnel about possible bid riggings."

Then I would invite you to read the rest of the paragraph, which I will not read out.

The point here was that in this judicial review Crest was asking the OFT to reopen the fast track offer post statement of objections, when it did have the material whereby it could assess the strength of the allegations. The court held that Crest was in an objectively different position, and that had not been taken into account, as it should have been, by the OFT.

We see at 68-69, this section of the judgment considers counter arguments made by the OFT which were rejected by the Tribunal. I just ask you to note paras.68 and 69, because that concerns an argument raised by the OFT that which it still persists in now in its defence and skeleton where it says: other people were not in a position to consider the strength of the allegations, so you could have just taken a commercial decision to accept liability. The

court rejected that argument at para.69 and emphasised the fact that these infringement proceedings were of a quasi criminal nature, so the last two sentences of para.69:

> "In my judgment fairness does not countenance a situation where someone who reasonably believes that they are not liable for wrongdoing can be pressured into admitting to liability in this way. As a matter of procedural fairness enforcement authorities must not be able to compel admissions by parties so they blindly admit guilt on the basis of a commercial decision."

So that argument was rejected by the court.

Paragraphs 82 and 83 are important paragraphs because these set out what, in the court's view, the OFT needed to do. The judge says:

> "In my judgment what the OFT needed to do, when confronted with the claimant's contention that, in effect, it was in a different position from other recipients of the Fast Track Offer was firstly, to engage with that claim and secondly, to undertake to bear that in mind as a relevant consideration when it came ultimately to fixing any penalty in relation to any breach of competition law on the part of the claimant. At the point of imposing a penalty the OFT will need to be satisfied that the claimant was, in fact, in an objectively different position. In other words, the claimant will need to establish that as a result of its being an indirect historic parent company, and having made reasonable inquiries, it was not in a position, as were other recipient of the Fast Track Offer, fairly to admit liability. [That has been established by Crest, and I do not think there is any dispute in relation to that.] (83) Then the OFT will need to decide what discount on penalty, if any, should be accorded the claimant because it was not able fairly to admit liability in response to the November Fast Track Offer. It is for the OFT to decide how to do this. It might take into account matters associated with the Fast Track Offer letter itself, for example, the invitation that if a recipient had queries it could ask further about them. It might take into account wider considerations. It is not for me to force the OFT to exercise its discretion in the application of its penalty policy in any particular way. At the end of the day it is for the OFT to decide, in the light of all relevant considerations, what reduction in ultimate penalty, if any, is necessary. What it might not do is to set its face, as it has until now, against acknowledging that if the claimant was in an objectively different position when it received the

November Fast Track Offer, that was not a relevant consideration in the application of its penalty policy."

Sir, the OFT rely on the words "if any". They say that here the judge is saying that it does not necessarily have to give a reduction in penalty and there is a wide discretion, etc. Of course, we accept that the OFT has a discretion when setting its penalty, but that discretion is certainly not unfettered. What the judge was saying here, very clearly saying, was that up until now the OFT has failed to take this objective difference into account, and it has to take it into account at the stage of setting the penalty. We say that it has not done that. That is the nub of our point on the first ground.

Finally, moving forward to the end of the judgment, again we see at para.90 summarised what the OFT needed to have done. It is really a summary of what I have said so far.

THE CHAIRMAN: Can I just ask you if the term "very wide discretion" has any real meaning as compared simply with discretion?

MISS DEMETRIOU: We say not, sir. We say that what Cranston J. was anxious not to do here was to pre-judge the final decision, because this was all taking place before the OFT reached its final decision on liability, let alone on penalty. So the judge was anxious not to pre-judge the situation, but he was saying; these are principles that you have to take into account. We do not think there is any difference between "very wide discretion" and "discretion". It is well established that the OFT has discretion when setting its penalty.

THE CHAIRMAN: And it has to exercise it lawfully, whatever that amounts to.

MISS DEMETRIOU: It has to exercise it lawfully, and there are restraints on that discretion. What the court has done in this case is set out very clearly what one of those constraints is, which is the principle of equal treatment and how that principle applies on the facts of Crest's case.

THE CHAIRMAN: Yes.

MISS DEMETRIOU: Sir, turning forward one tab to tab 3 you will see there the declaration that the judge made following this judgment. That is a declaration stating that the OFT must consider – so again we come back to this clear constraint on its discretion – whether the claimant was in an objectively different position, and if it is satisfied that it was it must take that into account when determining what penalty, if any, it imposes.

To complete the picture about what happened after the judgment, the OFT in the event proceeded with only one of the 18 allegations it had laid against Pearce Midlands, and Crest was informed of this. At the SO stage that had been whittled down to the three. At the supplementary statement of objections stage, Crest was informed that the OFT was only

proceeding with one of the 18 allegations. Just for your note, that is at tab 27, p.502 of this bundle.

Again, for your note, at tab 28 of this bundle you will see the letter from the OFT ----

THE CHAIRMAN: Tab 27, page?

MISS DEMETRIOU: Page 502, sir. That is the one infringement, so that is alleged infringement 75. That is one infringement that is being pursued at this stage. Then at the next tab, tab 28, you will see the OFT's letter to Crest following the judgment, inviting it to make representations on this point about equal treatment.

Then at tab 29 is Crest's response. In that response, Crest, having seen the gist of the evidence in the supplementary statement of objections, admitted liability in respect of infringement 75. In the same letter it asked the OFT to apply a discount of 25 per cent to any penalty imposed on the ground that it had not been able to avail itself of the fast track offer since this was the only way to put it on an equal footing with those parties who had been fairly able to assess the fast track offer and accept it. Again, it set out in full the reasons why it was in an objectively different position, and explained why this should be taken into account.

This is all evidence that the OFT had had before, because there were witness statements served with the claim for judicial review setting all of this out. So this is not really new information.

In its decision the OFT took no account of this difference in position because, as I said at the outset, what it did was to apply a 15 per cent discount to Crest in respect of the admission of liability it made post SO, but that was precisely the same discount it applied to all undertakings that had made an admission post SO. So that discount in itself did not take account of the additional disadvantage suffered by Crest in not being able to avail itself of the fast track offer. That is our complaint in ground one. That is the nub of our complaint.

Really what we are saying is that Crest lost the chance of obtaining a 25 per cent discount, and that simply was not reflected in the penalty set by the OFT and that is a breach of the principle of equal treatment.

It is important to note, in our submission, that the OFT does not dispute that Crest was in an objectively different position to most other recipients of the fast track offer. Could you turn to the OFT's skeleton argument – I do not know where you have it, it is in this bundle but you may have it in a more convenient place – para.30. What the OFT says there is that in its decision it explained that

> "… Crest's objectively different status …"

So it is acknowledging that there was an objectively different status –

> "… did not justify a greater discount than 15% because (i) the OFT noted that many other parties also had limited access to information when they received the FTO (albeit for different reasons), and (ii) the OFT did not accept Crest's arguments as to the alleged lack of assistance which it received from Pearce."

That is a slightly confused paragraph because it is saying on the one hand that it accepts that it is in a objectively different position, but then it quibbles slightly with an alleged lack of assistance it received from Pearce. The OFT's reasoning in its decision on this point is, we say, completely unsatisfactory and opaque and that is reflected in the skeleton. What does seem to be at least tolerably clear from the first sentence is that the OFT is accepting that Crest was in an objectively different position.

I think perhaps the best thing to do would be to its reasoning in the decision itself, which is at tab 1.1 of this paginated bundle, and it begins at p.154. Its reasoning on this point is to be found at paras.349, which starts on p.154 of our pagination, through to para.353. It is just more than a page of reasoning.

THE CHAIRMAN: Would you like us to read that?

MISS DEMETRIOU: Sir, I am very happy for you to read it, or I can take you through it.

THE CHAIRMAN: I cannot see any reason for you to read it out in full, but you take it your own way.

MISS DEMETRIOU: I am happy to summarise what it says, or if you would like to read it first, then ----

THE CHAIRMAN: I think we have all read it.

MISS DEMETRIOU: I will go ahead and just summarise it. The first argument that the OFT uses, and this is at para.349, is that granting a 25 per cent discount would be tantamount to reopening the fast track offer, which is something which they say that the judge in the judicial review specifically said was not required. The OFT said this would unfair on other FTO recipients.

The main error here, and we have got various arguments on that point in our skeleton, is that the OFT has focused solely on a discount at 25 per cent. What it has not done at all is considered whether some kind of discount falling short of 25 per cent would be appropriate. How about a discount of 23 per cent? That would not be tantamount to reopening the FTO, yet that would recognise that Crest missed out on an important opportunity not to achieve the result of the FTO. The major flaw in all of this reasoning is that the OFT has simply not addressed its mind to this point. It said 25 per cent not appropriate, so we will give 15 per

cent, which is what we have given to everyone else, but it has not at all considered whether something falling short of 25 per cent, but more than 15 per cent, would be warranted. We say that there it fell into the trap of doing exactly what Cranston J warned against, which is setting its face against the objective difference which Crest has established.

The second argument relied on by the OFT is at para.350, and that is that, in summary, undertakings which had accepted the FTO assisted the OFT in its investigation, whereas Crest had not because it made it made its admission post SO. Again, this does not stand up to scrutiny. First, there are clearly some undertakings which accepted the fast track offer which did nothing at all to advance the OFT's investigation. The OFT acknowledges this at para.223 of its defence. As it itself says, it granted a discount to undertakings which blindly admitted liability and therefore were not in a position to assist the OFT's factual understanding of the investigation. The OFT also claims that companies accepting the fast track offer assisted in streamlining the investigation, but had Crest accepted the fast track offer it would not have been able to assist in streamlining the investigation because it knew nothing. So it would have had to have blindly admitted 18 allegations which would have had no impact on streamlining the investigation at all.

Again, this point could, at most, only provide a reason for not providing Crest with the same discount at the FTO companies, so 25 per cent, but it does not explain why a discount falling short of that was not appropriate. That is another problem with that point.

THE CHAIRMAN: Paragraph 352 seems to suggest that they did consider something between 15 per cent and 25 per cent, does it not? It does not say: we consider 18, 21 and 23, but it does refer to between 15 and 25 per cent.

MISS DEMETRIOU: Sir, are you referring to where it says "a materially higher discount than 15 per cent"?

THE CHAIRMAN: Yes.

MISS DEMETRIOU: Sir, yes, on its face that is what it says, but there is no analysis anywhere of why that would not be appropriate, so all of these arguments which it uses are basically arguments to say: Crest is not in the same position as the other FTO companies, mainly because it did not assist the investigation in the same way and it would be unfair to those companies to grant it the same discount. But that argument only bites in relation to 25 per cent. So it may have asserted here that it considered other figures, but it has not in substance considered those other figures, because all of its arguments only make sense in relation to the 25 per cent point. That is really our submission.

The third argument, which is in 352, is that the OFT says that Crest's position is not unique. It says that there are seven other historic parent companies which have been subject of decisions. In our submission, this argument fundamentally misunderstands the principle of equal treatment. There is no need to show that one is in a unique position; one just has to show that one is in an objectively different position from others. So the fact that seven other historic parent companies might have been in the same position just does not detract at all from the force of our point. It is only necessary to consider this argument for a moment to see how flawed it really is. If it were correct it would be the end of the principle of non discrimination. To take an analogy from an entirely different context, for example of an examination board where one of the candidates writes to the examination board (as happens) saying; I suffer from a particular disability and I cannot write the exam so I would like to dictate the exam, please. That person is in an objectively different position from other candidates. The examination board, recognising that difference in position, should make particular provision to take account of that difference. It would not be open to the examination board to say: no, the principle of equal treatment does not apply because there are two other candidates who are in the same position as you. If that were true, the principle of non discrimination simply would never apply; it would be beyond the principle. So we say that argument is just facile and nonsensical. On analysis, it just does not go anywhere.

The fourth point advanced by the OFT is that the OFT says it does not accept that Crest Nicholson received no assistance from Pearce Group or Pearce, or that it was unable to be guided at all by its former subsidiary's likely reply to the fast track offer. It says;

> "Rather, the OFT notes in its letter of 18th December Crest Nicholson stated that Pearce's solicitors had informed us they had not uncovered any evidence to support the OFT's allegations."

That is again in para.352.

Again, that does not stand up to any scrutiny at all. First of all, it is difficult to understand how the OFT can be second guessing the facts here, facts which the Administrative Court accepted. Secondly, the key point is that Crest in fact gained no assistance. That is not disputed at all. It in fact gained no assistance and was in no position to make its investigations, and the OFT knew that when it took its decision.

The fact that Pearce had not accepted the FTO obviously did not help it at all, because in the event, when Crest saw the gist of the evidence underlying infringement 75, it decided that it was appropriate to accept liability in respect of that offence. So clearly the fact that Crest had not accepted the FTO did not assist it at all. So we just do not understand that point.

In summary, we say that none of the reasons of the OFT in its decision really stack up. What the OFT should have done, rather than just paying lip service to the idea of granting a discount of somewhere between 15 per cent and 25 per cent, is it should have analysed in reality whether that was appropriate. We say it was plainly appropriate because there was an objective difference between the position of Crest and other recipients of the FTO. That objective difference led to a very real disadvantage which was the inability of Crest to achieve a 25 per cent discount.

Sir, that is really ground one. Unless there are any questions on ground one, I do not think I can add anything to my submissions.

THE CHAIRMAN: No, thanks you.

MISS DEMETRIOU: Moving on to ground two, which is improper application of the minimum deterrence threshold, as I said at the outset the application of the MDT to Crest resulted in an enormous uplift to the fine as it stood after steps 1 and 2. So it was raised from £2,229 to £5.461 million, so that is a factor of almost 2,500. We say that this was wrong on a number of grounds, which we have explained in detail in our Notice of Appeal and skeleton. What I propose to do today is to show the Tribunal how the OFT applied the MDT to Crest, and then to draw out our key submissions that we have made in writing and summarise them.

Could I ask the Tribunal to have open the OFT's guidance, which is in this bundle at tab 4. Sir, it may be easier to take it from your authorities bundle, because then you could have two bundles open at once. It is in volume 11 of the authorities bundle at tab 135. Could you also have open at the same time the OFT's decision in our paginated bundle at tab 1.1 at page 175.

Turning to the guidance first, this is Part 2 Steps for determining the level of a penalty. We see that step 1 is heading "Starting point", and the starting point for determining the level of financial penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking. The Tribunal will know that relevant turnover means in the relevant product market and the relevant geographic market in the undertaking's last business year.

Turning to the analysis in relation to Crest --

THE CHAIRMAN: This is the 44,000 figure?

MISS DEMETRIOU: That is the 44,000 figure, exactly.

THE CHAIRMAN: I have got the table in front of me in a slightly different form.

MISS DEMETRIOU: Excellent. So 5 per cent of that, which is the OFT's starting point, results in a fine of £2,229. At step 2 no adjustment was made for duration because this was a

single infringement, so that is the fine at the end of step 2; £2,229. Again, going back to the OFT's guidance to step 3 headed "Adjustment for other factors", this permits the OFT to adjust the figure reached at the end of steps 1 and 2 for the purpose of deterrence. We place emphasis on the word "adjust". It is adjust and not replace. That assumes that the figure reached at the end of step 2 will have some bearing or relevance on what goes on next. We see from para.2.11 of the guidance that this means both specific deterrents – in other words, deterrents aimed at the particular undertaking – and general deterrents – deterrents aimed at undertakings generally.

THE CHAIRMAN: You say, presumably, that financial deterrence is not the only form of deterrence.

MISS DEMETRIOU: Absolutely, sir.

THE CHAIRMAN: And that the very fact of the finding and the proceedings is a form of deterrent in certain types of industry of which this may be one?

MISS DEMETRIOU: That is absolutely right. Sir, this is not the be all and end all of deterrence by any means. It has to be seen in that light. It is important, in my submission, to note the requirement at para.2.12 which is:

> "The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step."

We say that the OFT did not do that. What it did was it applied exactly the same approach to all undertakings. So 0.75 per cent of total turnover if there was no infringement involving compensation payments, and 1.05 per cent if there was an infringement involving a compensation payment. That was the same figure regardless of the number of infringements. In Crest's case the OFT applied an MDT of 0.75 per cent of Crest and Pearce Group's combined total turnover reaching a fine of almost £5.5 million.

Having looked at what the OFT did, what I would now like to do is to highlight the main flaws in its approach. We say the first point to make is that the uplift at step 3 is not an adjustment, as it is required to be, that results in steps 1 and 2 being entirely replaced and obliterated. So in other words, at step 3 the OFT has abandoned entirely the calculation at steps 1 and 2, and the basis for that calculation. In other words, the seriousness of the offence and the relevant turnover of the undertaking. It has moved on to something completely different which is group total turnover.

As a result, the penalty has no relationship at all to the seriousness of the offence or relevant turnover, but those are plainly intended to be fundamental considerations. They are deemed to be the starting point, in the language of the guidance, of the penalty calculation. Yet here, far from being a starting point, they have had no impact whatsoever on the final penalty calculation because there is absolutely no link between steps 1 and 2 and step 3. In Crest's case that is very obvious because of the huge difference between the fine at the end of step 2 and the fine finally arrived at at the end of step 3.

In fact, the penalty imposed on Crest is based entirely on group total turnover. This is precisely what the ECJ held to be impermissible in *Musique Diffusion*, which is at volume 5 of the authorities tab 69. If you look at the internal pagination it is page 1908 in the bottom left hand corner, so starting from para.120 of the court's judgment.

What the ECJ said here was that in assessing the gravity of an infringement regard must be had to a large number of factors, the nature an importance of which vary according to the type of infringement, and the particular circumstances of the case.

It goes on to say:

> "It follows that on the one hand, it is permissible for the purpose of fixing the fine to have regard both to the total turnover of the undertaking which gives an indication, albeit proximate and imperfect, of the size of the undertaking."

THE CHAIRMAN: That is the middle of para.121, is it not, I have been referred to this in another case.

MISS DEMETRIOU: Exactly.

THE CHAIRMAN: The passage about disproportionality.

MISS DEMETRIOU: That is right, so I do not need to labour the point if you have seen it already. Really in our case this point applies precisely because here the fine on Crest is a fine based on its total turnover alone, and has nothing to do with the seriousness of the infringement.

That resulted in a fine which is plainly disproportionate. It not only bears no relation to the relevant lack of seriousness of the infringement, an infringement where no compensation payments were involved, where Pearce and Crest did not benefit at all from the contract which was awarded, but it does not take account of the fact that Crest is liable to a single infringement, as opposed to two or three infringements. That is an important point, because it if it is just a one off, that is no evidence of any pattern of behaviour. Thirdly, it has no relationship to Crest's turnover in the relevant market.

The OFT, and for your note this is para.34(a) of its skeleton argument, that it did take account of all of these matters at step one. The point is that although it might have done that in theory, it has not done so in practice, because step 1 has been rendered completely irrelevant.

That is the first submission we seek to make.

The second submission is that the OFT was wrong to adopt a "one size fits all" approach to the MDT, and this was not compliant with para.2.12 of its guidance which, as I have said, requires the OFT to consider the matter on a case by case basis.

In its skeleton argument – again this is para.34(a) – the OFT says that of course it was entitled to adopt a uniform approach because in all cases the policy objectives pursued by the application of the MDT were the same. This is not any answer at all, because of course the policy objectives are the same. They are to achieve deterrence. The need for deterrence in each individual case is not the same and that is the key point.

In Crest's case, just to illustrate that point by reference to Crest's case, it is clear that there is little, if any at all, need for any specific deterrents. There are a number of factors. First of all, Crest no longer has any interest in the construction industry. It is, in fact, a purchaser of construction services, rather than a provider. Secondly, it was not responsible for the infringement itself. Thirdly, as I have said, it was a single infringement. Fourthly, the infringement was not in the scheme of things a serious ones. Fifthly, Crest's financial position, as we have set out in our notice of appeal was and remains such that a much lower penalty would have been a sufficient deterrent, because it was forced, as a result of the economic downturn to restructure its business and, as a result, it has been making a pre-tax loss in the last few years, certainly in the year before the decision, which the OFT would have been aware of. The OFT has taken account of none of these factors whatsoever, and that is why we say this one size fits all approach is misguided.

Thirdly, we say that the OFT was wrong to base Crest's fine on total group turnover. To some extent, I have made my submissions on that, but I would refer the Tribunal to the *Replica Football Kits* case, which, for your note, and I will not ask you to turn it up now, is at authorities bundle 4, tab 50, and para.176 of the judgment where the Tribunal was alive to the fact that basing a penalty on total group turnover could result in a breach of the principal of equal treatment. What it said there was that the solely turnover basis approach of the guidance gives rise to a risk that a company which is no more culpable than another company might find itself facing a penalty which is, in practice, more severe simply

because of the differences in the mix of turnover between the two companies, and this gives rise to a risk of unfairness. We say that is the problem in Crest's case.

So, for all of these reasons, as well as those set out in our skeleton argument, we say that the application of the MDT to Crest was wrong and resulted in an unfair and disproportionate penalty.

I will just say one thing about the *Makers* case, which is relied on by the OFT, and it may be that I will have to come back to this in reply, which is that we say that the approach in *Makers – Makers* is a case which is relied on heavily by the OFT as endorsing its approach to the MDT – was that there was a very key difference between that case and this. In that case the OFT did not take account of the total turnover of the ultimate parent company, which was Keller Plc.

THE CHAIRMAN: It was a car park services company.

MISS DEMETRIOU: Exactly, and in our case that is precisely what they have done. Crest is the ultimate parent company and they have taken its total turnover into account, and that is a key difference.

Sir, I will be very brief on ground three, because I appreciate I have slightly over-run my allotted time, for which I am sorry, but I will be very quick.

Ground three is wrong year of turnover, and we say that the OFT failed to apply the correct year of turnover for the purposes of determining the penalty at step 1 because it used turnover figures from the business year preceding the date of the decision rather than from the business year preceding the date of the infringement. Because of time I will not go through all the submissions we have made in our skeleton argument, and our notice of application but we do rely on them. What I would like to do is highlight one in particular, which is the retrospectivity issue, because we say that is very serious. The OFT has changed its practice retrospectively and this is contrary to Article 7 of the European Convention on Human Rights, because it has resulted in the application of a higher penalty on Crest than would have been the case had the penalty been imposed at the time of the infringement. So the infringement in respect of which Crest is liable occurred in 2001. At that time the OFT interpreted relevant turnover by reference to the last business year preceding the infringement. That was the rule in place then. The OFT changed its practice in 2004 when the Amendment Order, and the Tribunal will be aware of this, no doubt, from other cases. It applied this change retrospectively to Crest and this has resulted in a heavier penalty being imposed on it than would have been the case. It is also arbitrary, it gives rise to something very arbitrary, which is that the investigation took eight years in this case.

What the OFT has done in using the last business year before the decision is base its decision on a turnover which happens to be – the year is an arbitrary year because it is dependent entirely on how long the investigation takes. So it is to be expected that turnover might well increase during the years of the investigation. So had the investigation taken 20 years the date of the decision would be 20 years after the date of the infringement, and that would be the arbitrary date selected for turnover and we say that is completely wrong. So there is an arbitrariness there which is unacceptable, in our submission, because it is totally dependent ----

THE CHAIRMAN: The only way to remove any element of arbitrariness is to average, is it not?

MISS DEMETRIOU: Sir, that would be one way, but we have our first submission, which is that it is unacceptable at all to apply retrospective change of approach. If that is wrong, then it would be fairer to average it out; or, as the OFT has done in the *Tobacco* case, it has applied a reduction for delay.

The OFT argues that Article 7 of the European Convention does not apply, because they say it only applies to the *Uttley* case that it refers to. They say it only applies where the final penalty imposed is higher than the final penalty which could lawfully have been imposed at the time, and that is explained at paras.65 to 66 of its defence. This condition is satisfied here because the question is not what is the highest penalty which could have been imposed in 2001 in absolute terms, the question is what is the highest penalty that could have been imposed in 2001 compliant with the OFT's guidance which it has a duty to have regard to? So this is a true case of retrospectivity.

Sir, ground four, proportionality: I do not think, given that I have gone through the factors during the course of my other submissions as to why we say this is disproportionate, that I need to really trouble the Tribunal with anything further on that now.

In conclusion, we ask the Tribunal to quash or substantially reduce the penalty by the OFT on Crest. The main flaw in all of this is that the OFT has adopted a one size fits all approach, and that is what colours its approach to the FTO, that is why it has not granted Crest more than a 15 per cent discount, the discount it granted to everyone else, and it is what informed its approach to MDT, and we say that is the fundamental problem with the OFT's approach to Crest's penalty in this case.

Unless I can assist any further, those are my submissions.

THE CHAIRMAN: Miss Demetriou, when I remember I am saying to counsel in all these cases that we are very well aware that there is time pressure on oral submissions, which is often a very good thing but not always. If, after the hearings, there is anything that any counsel or

solicitor feels has not been put forward opportunely or as completely as you would wish, then written brief further submissions would be accepted, if not welcomed.

MISS DEMETRIOU: That is very helpful, thank you very much.

THE CHAIRMAN: I think, Mr. Beard, we will have a short break, ten minutes, until 11.40.

(Short break)

MR. BEARD: Sir, I will deal with the grounds of appeal that are being articulated, both orally and in the skeleton argument and Notice of Appeal in the order in which Miss Demetriou dealt with them. But before turning to the first of those grounds of appeal relating to the interpretation of the Crest Nicholson judgment and so on, it is worth bearing in mind the background against which this case is heard, and this issue particularly is heard. The Office does not pretend that pages 246-287 of the decision are particularly exciting. They set out the way in which this investigation was carried out. They set out how leniency policies worked, how the FTO was developed, and how a multitude of representations was made at every stage along the way by a myriad of interested parties. It is worth having those matters in mind because the process of investigation here was the largest investigation the OFT has ever undertaken.

By the end of 2006 the OFT had received 38 applications for leniency under the leniency programme. It is perhaps worth noting that details of the leniency programme are found in volume 11 tab 137. The reason I refer the Tribunal to that particularly is, of course, because under the leniency programme the idea is that you can get immunity, or a discount on any financial penalty, if you come forward with admissions, if there is no sense that you know of anything about what may be going on in terms of any investigation. Indeed, if you want to secure maximum leniency you approach the OFT before any investigation.

THE CHAIRMAN: The *Pharmaceuticals* case?

MR. BEARD: There are myriad cases. It is a structure that is adopted, not only in the UK but in the European Community and in the US, incentivising people effectively to grass first is a very powerful way of breaking up unlawful anti competitive economic arrangements.

So what we had here was a large number of leniency applicants, and the information provided by them, as is set out in para.8 of the OFT's defence, meant that early on in the investigation the OFT had evidence of bid rigging by construction companies in over 3,000 tenders involving over a thousand parties. The initial estimate of the total value of the tenders in respect of which the OFT had suspicion of bid rigging was around £3 billion. That is, of course, leaving aside the calculation of relevant markets turnover in which those bid rigging events may have occurred.

So it is against that background that, following the leniency process, the Office decided that it actually had to manage the number of infringement that it was going to select to pursue. It was for that reason that the fast track offer was developed. This is set out in the judgment of Cranston J. Essentially, what the OFT did was it wrote to all of those parties where it suspected infringements and was intending to pursue those suspected infringements, and said to them: these are the ones we have reasonable suspicion about, so a relatively low threshold and if you admit that you were involved in bid rigging in relation to any of those you will get a 25 per cent discount on any out turn penalty at the end of the process. No details were provided, and Cranston J. makes very clear that there was no requirement on the OFT to do so. Indeed, the very existence of the FTO could not have happened if further requirements of evidential provision were required, because it would not have been possible to use that as a technique to discipline the way in which the investigation was carried out, and to focus it ever downwards.

Miss Demetriou makes comment that there were 18 infringements suspected in the FTO and then it went down to three and then it went down to one in the end after the supplementary statement of objections – all of that is true, but it is no ground for impeaching the manner in which the OFT has gone about this, and trying to distinguish Crest on that basis is simply wrong. In previous appeals we have heard how various appellants have tried to suggest; we only had 11 put to us in the FTO and then we were penalised on three – that is much fewer than some other people had, and then it turns out that actually they applied for leniency in relation to more than 100 instances. Therefore, these comparisons are of no assistance.

I turn to the first ground of appeal. First of all, one particular thing to get out of the way. It is entirely accepted by the Office of Fair Trading that in applying its guidance and setting penalties the principle of equal treatment must be complied with. The Office does not suggest that the example given by Miss Demetriou of the person facing difficulties in relation to an exam was a situation where others that faced the same difficulty should not be made provision for. As I will explain, that is simply a wrong comparison to draw.

The essence of the claim being made by Crest is that the 15 per cent discount for post statement of objections submissions is insufficient. It is said that Cranston J.'s judgment required a higher discount than 15 per cent. Obviously, there is no statement found in Cranston J.'s judgment to that effect. So the argument is that the inexorable logic of his findings leads to the conclusion that 15 per cent is not enough.

In dealing with these points I will look briefly again at Cranston J's judgment, then at what the OFT did, and why that means there was no failure to follow the judgment, and the OFT did not act contrary to the principle of equal treatment.

May I turn to the judgment first. It is in the paginated bundle at tab 2 from page 207 top right hand corner external numbering. I will just provide a series of references initially for the Tribunal since Miss Demetriou has been through it. It is worth noting what Cranston J. actually concluded. First, he made clear at paras.84 and 86 of the judgment that adopting the FTO was a course the Office of Fair Trading was entitled to adopt. Secondly, para.89, in making the FTO, the OFT did not need to provide more evidence on the infringements in respect of which admissions were sought. Thirdly, para.81, there was no obligation to reopen the FTO, which is what Crest had sought. Indeed, fourthly in para.81, Cranston J. makes clear that to have reopened the FTO and afforded 25 per cent discount to post statement of objections admissions would involve "unequal and preferential treatment in favour of Crest and similar parties." So he was saying any putative discount that might be granted to a party such as Crest would have to maintain a fair gap between FTO recipients who actually admitted at the time of the FTO and therefore did not have any evidence before them, just had a list of suspected infringements, and later admissions following the statement of objections. Although the Tribunal has not been troubled with the full weight of the statement of objections, it looks remarkably similar in volume and content to the outturn decision. It is a vast document; it is a detailed document setting out the provisional findings of the office.

What Cranston J. was saying was that if you do not maintain that gap, if you do not recognise that difference, you would be failing to recognise the significant difference between those who admitted pre statement of objections and those who admitted post statement of objections when all the evidence was lined up against them.

Fifthly on the judgment, Crest was in a prima facie objectively different position from other parties under investigation because it was an historic parent with, it said, no information which it could use to consider whether or not the admissions of infringements could be made. That is found at para.63.

Sixthly, in its responses to Crest, Cranston J. found there had been a breach of the principle of equal treatment. The OFT had set its face against that prima facie difference. It did not consider at all whether it existed or whether it warranted special treatment. That can be seen from paras.82 and 87. On the surface, Cranston J. was saying that this is a case where

there may be a justification for different treatment and fairness demanded that that issue was addressed.

Seventhly, at the time when the OFT came to impose a penalty the OFT would need to be satisfied whether Crest was in fact in an objectively different position. That can be seen from para.82 and para.83, to which Miss Demetriou has already taken the Tribunal. Miss Demetriou is quite right that the OFT, when reading para.83 of that judgment, does note that in the first sentence Cranston J. said that in that situation: "… the OFT will need to decide what discount on penalty, if any, should be accorded the claimant because it was not able fairly to admit liability in response to the November Fast Track Offer. It is for the OFT to decide how to do this. It might take into account matters associated with the Fast Track Offer letter itself, for example, the invitation that if a recipient had queries it could ask further about them."

In other words, he was saying: if you have got the fast track offer and you were concerned that you needed to understand more about the list, you could have asked the OFT, as some parties did.

> "It is not for me to force the OFT to exercise its discretion in the application of its penalty policy in any particular way. At the end of the day it is for the OFT to decide, in the light of all relevant considerations, what reduction in ultimate penalty, if any, is necessary. What it must not do is to set its face, as it has until now, against acknowledging that if the claimant was in an objectively different position when it received the November Fast Track Offer, that was not a relevant consideration in the application of its penalty policy."

Then one also sees at para.90, one of the final concluding paragraphs that these conclusions echo:

> "What was needed was for the OFT to have acknowledged, in the way I have set out in the judgment, that the claimant might be in an objectively different position to other Fast Track Offer recipients. Then it had to decide that, if established, it would take that into account as a relevant consideration, in fixing any penalty. As I have explained, the OFT has a very wide discretion as to what effect, if any, that will have on any penalty."

I do not take any point about the qualification of discretion wide, very wide and so on in these circumstances. It seems to me that this not going to assist.

So the conclusion of the judgment was that the OFT could not set its face against the prima facie case that Crest put forward but had to consider it. And if it considered there was an objective difference, that might warrant a discount in penalty.

That being the finding of the judgment, what did the OFT do in the light of it? First of all, it wrote to Crest. We have seen that letter at tab 28 of the bundle at page 545 for your note. I will not go back to it.

But the OFT was further concerned that having been criticised by the court for unequal treatment, it should be careful to ensure that it acted fairly following the judgment. So in fact it did not just write to Crest; it wrote to all the other parties including in particular those that had not accepted the FTO, wholly or in part, (and that included Pearce) and said to them effectively: this is what has happened in the Crest case, are there any reasons why you consider yourself in an objectively different position? That was obviously a sensible and appropriate thing to do. It was ensuring that all who might be relevantly affected could make representations to the OFT. Of course, one of the problems in a judicial review such as that occurred before Cranston J. is he does not have sight of the broader view of what is being said to the OFT, of the extent to which similar submissions are being made by a range of different parties. Needless to say, the Office got lots of responses.

Crest's is at tab 29 page 549 of this bundle. I will not take you to it, but it sets out the basis on which Crest said it was in an objectively different position and echoing the previous submissions that it had made. In broad terms, the difference, it said, was that Crest lacked evidence to decide whether or not to admit the FTO's suspected infringements, and the reason for that was that it was a former parent which had sold its subsidiaries Pearce Group and Pearce Midlands. So there was no surprise there. It did also admit infringement 75. Miss Demetriou said this was the first opportunity to admit the infringement. That is plainly untrue. In the course of responses to the SO, a number of parties did in fact make further opposed SO admissions. It is clear from the guidance on penalty that cooperation at any stage in the procedure can be taken into account. That is a step 4 adjustment. Agreeing you are not going to contest the finding in the SO is clearly an act of cooperation. Indeed, there were 13 other parties, apart from Crest, that made admissions post SO. Indeed, those other parties apart from Crest all made those admissions in their responses to the SO.

In any event, the point is that the OFT wrote to Crest in the light of the judgment and asked it why it was that it was in a different position, and Crest responded explaining to it what the position was. Crest also made an admission, something that it had not done following the SO or otherwise. So when the OFT came to consider whether any discount should be

given for Crest's inability to answer the FTO, matters had moved on. Crest had actually admitted to the infringement and the OFT had obtained further information from other parties.

So turning to Crest's arguments, there are in essence two responses. First, there is no good objective distinction between Crest and other parties who did not accept the FTO. Secondly, even if there were an objective difference between Crest and other parties, it is not such as to justify a material variation in the discount afforded to Crest.

Just to knock one part of Miss Demetriou's argument on the head, you, Mr. Chairman, have already adverted to para.352 of the relevant section of the decision, it is right the OFT did specifically consider whether there should be an uplift beyond 15 per cent.

Of the first of these responses, i.e. no good distinction between Crest and other parties, the essential concerns which Cranston J. identified were two-fold, two components. Crest lacked evidence on which to make a decision relating to the FTO infringements, and that the reason for that was the fact that it was an historic parent. Taking those points in turn: Evidence, Crest was far from unique in lacking evidence about the suspected infringements listed out in the respective FTO letters. Indeed, when, following the judgment in the judicial review the OFT wrote to parties about this, a large number of them who had rejected the FTO had said: we lack sufficient evidence to accept it. This was for a range of reasons. It was believed that no documentary material had ever existed in relation to matters at issue, that documents had not been retained as part of reasonable document retention policies, people who would have known about the issues had left, moved away or died, there were parent companies who contended they did not control the documents of their subsidiaries who were suspected of infringements, subsidiaries were dormant or indeed had been sold. None of these was unreasonable grounds for considering that documents and information would not be held by those parties, meaning that they could not answer the FTO and make admissions on an informed basis. Thus, there was a large number of parties who were similarly disadvantaged if Crest was disadvantaged.

I should stress, this is nothing to do with the point that was highlighted about whether or not you made a commercial decision whether to accept the FTO that is referred to at paras.68 and 69. What the OFT here was doing was looking at whether or not Crest was special in relation to the two components that Cranston J. had said made a prima facie difference. The first was evidential difference, did not have any, could not answer. The second was reasons for that.

Before I move on to deal with the second component, having set out why it is that the OFT says there was a common difficulty that many, many parties had: that they did not have evidence to answer the FTO and that that commonality of difficulty arose for a range of reasons, all of which were understandable, meant that that feature did not render Crest special in and of itself. As I said, before I move on, it is just worth bearing in mind two things about using that component of lack of evidence as a basis for distinguishing in relation to the FTO more generally.

The first thing to note is, it can create, if one were to use that as a distinction, rather perverse incentives on the basis that the less you keep the better you are in subsequent proceedings. It is also worth bearing in mind, as I have already adverted, that no such distinction could ever work in relation to broader leniency policy. Of course, the FTO took over from the leniency policy that was generally operated early on in the investigation, because the OFT closed leniency and then made the FTO. One of the key differences (and there were differences between the FTO and leniency policy) is in leniency if you come forward you have to confess and give full cooperation. That would mean giving information about other tenders where you had been involved in bid rigging. Actually, at that point the OFT did not want that. It did not want more leads to be started. It only wanted information in relation to the particular suspected infringements that it was specifying in the FTO. So there were differences, but nonetheless, it was part of a continuum that sensible policy of having incentives for people to make admissions so that you can streamline investigations and effectively enforce. Of course, in relation to a leniency policy, you cannot have a situation where you say: ah well, you have a different situation if you do not have the relevant evidence, because if you could do that you would end up with a situation where people would not come in for leniency but would turn round later and say; we were not able to get leniency but we want a discount anyway. That would be contrary to the structure of the leniency policy as it operates.

To move on to the second component of the potential distinction, the reason for the absence of evidence: the fact of being an historic parent company. Crest asserted that it was more likely than other companies not to have relevant documents. That assertion does not have foundation so far as we understand it. We do not understand the basis on which that is made. As a matter of fact, we cannot see why that is the case.

Secondly, but for the sale of a company, Crest would be in a position where it would be a controlling parent. The sale of the company provides no better reason for lack of access than any of the other reasonable reasons that have been given by various parties. There is

nothing wrong with having a rational document retention policy. People cannot be criticised if their employees move away or are otherwise such that they cannot be communicated with. It is not a party's fault that in fact people do not use paper, they do not have records going back over time in relation to particular infringements. That is not in or of itself a matter of any culpability or criticism. Indeed, to some extent some of those reasons are better reasons for not having evidence than selling a company. When you are selling a company the entity that you sold continues to exist, you may be able to have contact with it, and of course you can ensure that in any terms of sale there is a possibility of communication going forward if it is necessary in relation to documentary material. The OFT does not place weight on that factor in the decision.

But what is to be noted is that the OFT says: look, the evidential component of potential objective distinction was not good and the reason is not sufficient to make them special vis-à-vis penalties, because other reasons were also good in that context.

I note in passing that Crest makes some play of the supposed conflict between its interests and Pearce Group and Pearce Midlands. There are one or two quick points to make in relation to that. First of all, when the FTO was offered in relation to Crest and Pearce, they were the only companies that were specifically told, not in the letter that was sent but in subsequent communications, that they could actually talk to one another. The second point to note is the response to the FTO from Crest, which is found at tab 16 of the bundle and I would ask the Tribunal to turn that up. This is on behalf of Crest Nicholson from their solicitors. This was after extensions of time had been granted for responding to the FTO.

What one sees on the first page, top right hand corner 325, in the penultimate paragraph:

> "You have asked Crest to admit liability in relation to the 18 matters set out in Annex 1 to your letter of 7 November 2007. However, having made enquiries of current directors and employees and having searched for potentially relevant documentation, Crest has been unable to verify these allegations and cannot, therefore, acting in good faith, admit liability. Indeed, it would be misleading and unreasonable for Crest to do so and it would not assist the Office."

We do not accept, by the way, that it does not assist. If people make admissions in the course of an investigation of course it assists the OFT, particularly where you are talking about relationships between two parties; it can be of great assistance in making findings against both of them. If one turns over the page to 326 last paragraph;

"Further to the OFT's suggestion, we were instructed by Crest to discuss the OFT's letter with Messrs Burges Salmon who act for Pearce. They informed us that they have not uncovered any evidence to support the OFT's allegations."

So they were told by Pearce's solicitors what the state of play was. It is very clear, and other material, that this was a perfectly honest and true response. Thus, the idea that there is a conflict (and of course, Pearce does want to lumber Crest with penalty and Crest wants to lumber Pearce with it) in relation to this matter, whether or not you could make admissions and give discounts, actually a true and proper response was given by the solicitors and therefore this notion that the conflict was significant has been grossly overplayed. It is worth noting in passing that part of the appeal that is being brought by Pearce Group and Pearce Midlands is that it wants the benefit of this admission discount, which rather reinforces the extent to which there is a commonality in relation to this aspect of the inquiry in any event.

THE CHAIRMAN: What may trouble us, Mr. Beard, is whether it really is realistic or reasonable to require a party to accept liability in a quasi criminal context for something the substance of which it is unaware. That is a troubling concept if one takes the quasi criminal context.

MR. BEARD: That would be a troubling concept. The key issue is that the OFT nowhere requires a party to do anything of the sort. Just as with the leniency process, what you have is a situation where a party has an opportunity, if it has committed an infringement to come forward, confess, and get a reduction in penalty, in the FTO what you had was a list of where there was reasonable suspicion, the OFT was giving an indication and saying: we are giving you a specific opportunity – we have closed the leniency option so you cannot come to us now under the ordinary policy which would give you a discount if you now cooperated, and this is the alternative. But that is not a requirement.

THE CHAIRMAN: It is still a confession, is it not, in reality?

MR. BEARD: So is a leniency confession. That is the whole essence of it.

THE CHAIRMAN: It may have consequences in the future if there is, for example, an allegation of a further breach in the future?

MR. BEARD: No doubt, of course.

THE CHAIRMAN: So it would be an unwise party, arguably, who would, in effect, confess to something the substance of which they have not had the opportunity to address.

MR. BEARD: Of course, it is a matter for the party to make its own decision in those circumstances. If it has reasonable concerns about its own conduct, it might decide that discretion is the better part of valour and it may make a confession, that is up to it. But the

idea that somehow there is a requirement being placed on these people is simply wrong. There is no requirement here. It is if you want to obtain a discount you come in for leniency early in the process. Once that leniency scheme has stopped, there is still an opportunity to get a discount, but only if you are in a position to admit any of the infringements.

THE CHAIRMAN: So you are damned if you do, and you are damned if you do not. You are damned if you do because you have made a confession to something you may not have done or you do not know if you have done it, you are damned if you do not, because you cannot obtain the credit for making the confession.

MR. BEARD: The same is true of leniency. It is true that if you do not know, for whatever reason, that you have committed an infringement, there is no way that you could be first through the door and get 100 per cent immunity under the leniency scheme, quite right. If the OFT comes along and says: rather than just leaving it open and not specifying anything about this investigation (when it was commonly known that an investigation into the construction industry was going on) we are not implementing an FTO; we are just going to leave the leniency scheme open, no requirement for anyone to turn up, if the Tribunal wants to characterise that as damned if you do and damned if you do not, that does not seem a fair and appropriate characterisation of the leniency policy, but it is equally applicable (if that is the criticism). That, plainly, would be wrong in the circumstances.

THE CHAIRMAN: OK.

MR. BEARD: The first response, therefore, is that although Crest may have appeared to Cranston J. as in a prima facie different position, and he was (as I have indicated) careful to emphasise it was only a prima facie difference, actually when one properly considers it, the OFT assess that lots of parties would be in difficulties in relation to having relevant evidence, and there were lots of reasons why that might be the case. Neither of those features was such as to render Crest special. This was not just a matter of counting heads; this was a matter of considering why it was that these particular differences existed.

So to the second response. Even if either of those criteria: lacking evidence or the reason for lacking evidence (in other words, being an historic parent) did constitute an objective difference between Crest and other parties, it is not such as to justify any material variation in the discount afforded to Crest. That is the language used in para.352, to which the Tribunal has already been directed.

If there was any objective differentiation by reason of the fact that Crest lacked evidence because of its historic power and status, that differentiation is only really by reason of the historic parent status. As has been said, it is difficult to see on what basis that reason should

mean that Crest should be treated more favourably than other parties without evidence at the time of the FTO.

Assuming it could, that reason of being objectively different does not give a good reason for a material uplift in the level of penalty about which we are speaking here. As Cranston J. rightly emphasised, in deciding how to consider Crest's case and decide what level of penalty should be imposed, and whether any discount should be granted, the OFT did retain that broad discretion. Deciding that 15 per cent discount for admission was sufficient was clearly well within that range of discretion, and the idea that it should be shifted by half a per cent, one per cent, or any other measure, is not one that is sustainable. These, if there are objective differences, are effectively trivial as compared to the objective differences that other parties had. In one respect, every party is objectively different. What we are doing is asking ourselves whether they are relevantly objectively different. I should note, finally, that Miss Demetriou has quite properly not emphasised the argument that if there should be a discount it should be at 25 per cent. That is plainly wrong and entirely unsustainable on the clear findings of Cranston J. Indeed Cranston J's judgment goes further. As I have already indicated, the reasoning in Cranston J's argument suggests that you need to maintain proper clear blue water between the position of an FTO acceptor and those that make admissions after the SO. That again is a factor that must clearly militate in favour of the discount not exceeding 15 per cent in relation to Crest.

Unless I can assist the Tribunal further in relation to the first ground, those are the Office's submissions.

Moving on to MDT, obviously MDT has been canvassed to reasonable and solid extent not only in the decision but also in paras.114, section F, and 297 of the penalties defence, and we will have navigation table to provide to the Tribunal, if that would be of assistance. It is a rather brief one, but just for reference, I have provided it to my learned friend. (Same handed)

THE CHAIRMAN: These are very useful, by the way.

MR. BEARD: Because of the way the pleadings have been broken down into four grounds, it is a relatively broad navigation reference, but for your notes. Just taking it in turn, the first argument in relation to MDT is that somehow the OFT failed to follow its own guidance. This was a point that was argued on Wednesday by Mr. Peretz. It is not an argument that has improved by maturing over the past two days, it is without any foundation at all. Plainly, an adjustment made at step 3 by applying the MDT is an adjustment in the terms of the guidance.

The alteration of the penalty is tailored to the particular case by reason of the methodology. That is why it is a case by case adjustment. Of course, the OFT must be entitled to a margin of appreciation in this context, but the methodology is ----

THE CHAIRMAN: Mr. Beard, I think, if I may give you a metaphor, and this is of concern to the Tribunal – not the metaphor, I am using a metaphor – it is an adjustment a bit like driving a bulldozer through a window and then saying it is still a window, is it not?

MR. BEARD: No, it is not. It is not at all like that. It is an adjustment that is made in order to pursue particular, reasonable, rational, fully articulated policy objectives that are set out in the guidance and have been specifically approved by the Secretary of State. They are to ensure that there is sufficient specific and general deterrence. Of course, Miss Demetriou's submissions focus very heavily on specific deterrents, but that is not the only thing we are dealing with here.

If I could just finish off in relation to the particular challenge to the guidance, the situation is, of course, that the policy objectives pursued by the application of the MDT were the same in all cases, but that does not mean that the criticism of the OFT's approach that it was blanket is correct. The OFT argues that it took no account of the seriousness of the infringement, the fact that Crest was not responsible for it and the absence of any need for deterrent in its case. Actually none of these factors justify a lower MDT. Seriousness is specifically covered and considered at step 1. Any lack of direct involvement is not a mitigating factor in relation to a parent, but could be taken into account if it was at step 4. It is no criticism of the MDT. The likelihood of Crest engaging in anti-competitive practices in future is not a matter which the OFT can predict; and, in any event, the whole of that argument entirely ignores the important need for general deterrence. It is an important purpose of the guidance, the penalty setting process and therefore the MDT.

Earlier on, Mr. Chairman, you suggested to Miss Demetriou that there may be circumstances where there is no need for financial deterrents. The Office simply does not accept that that will in all but the most exceptional cases be correct.

THE CHAIRMAN: I would agree with that. It is an extreme position for the most exceptional cases. I am not suggesting this is one of them. I was simply illustrating the available range. What troubles me, and I am speaking now only for myself possibly, looking at step 3 of the guidance, which we have already been referred to at volume 11, tab 135, I am just concerned to know how you say that any adjustment was applied within the terms of paras.2.11 and 2.12. What was the process of adjustment, if any, or should there have been an adjustment to take into account the process set out in those paragraphs?

MR. BEARD: I think it is important to bear this in mind. The second ground of challenge to the MDT is effectively that it renders step 1 and step 2 otiose and wipes the slate clean, as it was put the other day. That is a similar sort of criticism to the one that you, Mr. Chairman, are floating here. In other words, it just rolls on – the bulldozer effect – but it is not actually correct to say that the MDT wipes the slate clean. In fact, the MDT is inextricably linked to the step 1 process, and the step 1 assessment. If one thinks about how the MDT level is applied, the OFT applied an MDT of 0.75 per cent of total turnover in cases where the seriousness percentage was 5 per cent. That was an approach that had been derived from the approach developed in *Makers*, where one was looking at a situation where they looked at effectively a proxy of relevant turnover being 15 per cent, and then applying a 5 per cent seriousness threshold to that. So what you have is a linkage between the assessment of seriousness and the MDT that gets you the 0.75 per cent. Of course, where you are dealing with compensation payment cases you have a higher MDT of 1.05 per cent. So the idea that it is not linked to seriousness, it is not to be considered as a whole, is wrong. What it does is it takes those factors into account and looks at how they interact with the steps 1 and 2 process. It uses sensible metrics to do that focusing on total turnover, and total turnover in the year before decision. Of course, if one is focusing her on deterrence, as the MDT is, what you are trying to do is administer a relevant degree of pain to a company given its size now. That is what deterrence is about. It is about focusing on ensuring that a company recognises the seriousness of what it has done given its size now. You administer the level of pain concomitant to the level of the beast. This is economic malfeasance, it is a serious matter.

How do you administer that sufficient pain? You do it by reference to the total turnover, which is of course the measure that is recognised in the statutory scheme and is specifically referred to in the guidance. Indeed, to move away from that, we would be criticised for not applying our guidance properly.

In passing, I note that, Mr. Chairman, you also referred to the possibility of aggregating or averaging turnovers. Of course, apart from that not necessarily being fair, depending on different trends at different times and the parameters of the averaging, it would not be consistent with the approach that is specified in the guidance, both in relation to step 1 and in relation to maximum final turnover, because those are specified years that are derived from statute. Furthermore, it would not be fulfilling those policy objectives because average turnover and attaching a value to average turnover in relation to deterrence policy would not be achieving the same aim as using the pre-decision year of turnover.

So there is a range of reasons why it is appropriate to be using that measure, it is appropriate to link the way in which you think about deterrents to the seriousness, but of course we must adopt a consistent practice. We will be criticised if, in the course of making 103 parties subject to infringement decisions. We start trying to work out how general deterrence – and I just focus on that on for a moment, leave aside specific deterrence. How does one vary the criteria for applying general deterrence in relation to each of those cases? It seems to the OFT that you would undermine the principle of setting a serious threshold that indicated to people in the market that if they were going to commit these serious sorts of infringements that they would be caught, and they would suffer severe penalties, at least at this level.

It may be that in some cases, because of the earlier mechanisms in step 1 and step 2, you end up with calculations at step 3 that do not require any uplift by reference to MDT. Indeed, this Tribunal, in a slightly different composition, heard cases of this sort earlier in the week where the protest was, "Oh, step 1 and step 2, they just ride through the penalty calculation, they are all that is driving, MDT is entirely ignored". You cannot have a situation where you are apply a set of policies and a set of processes consistently where you can acceded to both of those submissions. We are being attacked in both directions, quite understandably, because it is in the particular self-interest of each of those appellants, but it does not render the process wrong, it does not render it unfair, and it does not render it out of compliance with 2.11 and 2.12 of the guidance. It is difficult to imagine how in relation to MDT something different should be dealt with.

Just one point in relation to the level of the MDT, and the levels of penalties. Obviously we have heard from various appellants that this is not really a trebly serious infringement and actually this was going on an awful lot – the word "endemic" was bandied around earlier in the week and quite what that meant was a matter of some discussion. The OFT recognises there was a lot of this bad behaviour going on. The OFT says, as it makes clear in its defence, in particular at paras.180 through to 184, there was no legal uncertainty as to the compliance with these sorts of activities with competition law. There has not been since the mid 70s. The Office cites the European sugar cartel judgment in that regard. There is no doubt, if you are deceiving a tenderer by pretending you are putting in a real bid when you are not, when you are assisting a competing tenderer, you are doing something wrong. It does not take a very sensitive moral compass to work that out. It does not take a great deal of knowledge of competition law to work out that that is a problem. These are serious infringements. The level of penalty needs to be concomitant with that. The mechanism set

out in the guidance fulfils that role and the fact that this was an endemic practice, as it was put, that it was wide ranging, is all the more reason why clear, heavy penalties must be imposed. This is a practice that must be rooted out. Unless clear signals are sent out, then it will not be rooted out. Saying the OFT had not enforced these matters prior to the *Roofing* decisions is simply an abject dereliction of anyone's duty actually to apply the law.

Unless I can assist particularly in relation to those matters further, what we do have is a situation where it is suggested that in relation to Crest there are all sorts of particular reasons why it should be treated specially. As I have said, if the MDT is to achieve general deterrence, it is not quite clear why one should dial down the penalty at all in this regard. It would undermine that very principle.

It is true that on the specific definition of the term, Crest is no longer in construction, it is a developer of residential property. The fact that it is only now found to have committed a single infringement is neither here nor there, and I refer the Tribunal to the way in which the particular infringements were identified. I would also emphasise of course that the MDT is only ever applied to a single infringement.

Another point, the fact that it is a parent is again beside the point. What you have in competition law is a responsibility on the parent in relation to the infringement. That is not challenged here.

Finally, the points about seriousness I have already dealt with.

Indeed, there is a degree of irony about the differences that are being put in these appeals. If one recalls, Mr. Peretz tried to dismiss the *Makers* case on the basis that the level of initial penalty that was calculated at steps 1 and 2 was, in his words, "pretty close to a parking fine", and, as was commented upon, £6,000 was a pretty extortionate parking fine, but it was nonetheless a very small penalty in the circumstances, and there was an uplift there of £500,000 or so by the operation of precisely the measure of MDT that is at issue here. Mr. Peretz put the point that if you levied these low fines that were coming out a steps 1 and 2 because you had a diversified large company with low relevant turnover in the particular market, people would laugh at you. They would think that this simply did not matter, and this was precisely the sort of case where you really did not need an emphatic uplift. Of course, his case was very different. To some extent, one is tempted to adopt Mr. Peretz's submissions in this regard.

Dealing with *Musique Diffusion Française*, again a case which has been referred to in previous hearings, but if I could, I would ask the Tribunal to have volume 5, tab 69. If one recalls, the bit that is relied on by Miss Demetriou and indeed by other appellants is the

passage from 120 through to 122. It is cited as a basis for saying that the flaws in the way in which the OFT has gone about its exercise are well made and that really what one should have here is a situation where you should not be looking at total turnover. Of course, this entirely ignores both the guidance, which is crystal clear on these matters, and indeed the statutory instrument, the Turnover Order, as amended in 2004, which clearly deals with total turnover, and we will come to that because, as has been recognised by the OFT, it does have to comply with its own guidance. Actually this authority is no basis for saying that, in fact, the relevant market is the only turnover that should be relied upon. If you recall, Mr. Robertson cited this case as an authority for sub-dividing the relevant market.

Both of those propositions are plainly wrong. The first to bear in mind is that this is a case that was way back in the mists of time. If you recall there had been a situation running through to 1998, where there was no guidance as to how the Commission would apply penalties, and there was all sorts of criticism that effectively they were just generating penalties by way of magic numbers. A lot of the case law criticised the Commission for just making it up on the hoof without any particular reference.

Of course, this is a case that did precede the guidance. It was an infringement that came to be judged upon in 1983. One can note that the only guidance that was applicable at that time is that referred to in 118, and it is no guidance at all, it is merely Article 15.2 of Regulation 17, which said that you can have penalties up to 1 million units of account, or sums in excess of that, not exceeding 10 per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement. What was being said there was that you should take into account just the relevant market turnover, because if you recall, as is clear from 116, and this was the difficulty that Mr. Robertson had with this case, the appellants were actually saying, "You must focus on relevant market turnover", there the hi-fi market. So his use of it to suggest that actually there was authority for dividing down the market was wrong, but what the Tribunal then said was: when you are thinking about this very, very loose scheme that exists, you may have regard to a range of factors – you may. Then at 120:

> "In assessing the gravity of an infringement regard must be had to a large number of factors …"

because there is no guidance in place here. Type of infringement, particular circumstances:

> "Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and

economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market."

So that is more a relevant market turnover aspect. Then it says in 121:

"… it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking …"

– and that relevant market turnover. It is a permissibility in the face of no guidance, and it is saying the Commission can have that much leeway in the face of an argument from an appellant saying, "No, you must only focus on relevant market turnover".

Miss Demetriou tries then to say that this case that we are dealing with today, it is entirely ignoring relevant market turnover because the MDT effectively exceeds the outturn of steps 1 and 2. As I have said, that is the wrong approach. The fact that the MDT is the principal driver of the outturn of the fine neither means that it is entirely divorced from the considerations of step 1 and 2 because of the way the MDT is calculated; nor does it actually say that step 1 and 2 are not applying, because we have adopted a consistent and fair, reasonable, principled basis for calculating penalties that takes into account both steps 1 and 2 and step 3. Here the MDT is the principal driver of the outturn fine; in many of the other cases it is steps 1 and 2. That is the way that calculations work in these circumstances, but as the OFT has previously emphasised, if you adopt fair principles and a fair process, you apply the principle of equal treatment, you apply those principles consistently pursuant to your policies and you comply with your guidance, which you have to do. In those circumstances the outturn is entirely proper.

The final ground of appeal is that the outturn penalty is disproportionate, and some reference has been made to *Makers*. I should emphasise, the Office relies on *Makers* for the MDT methodology. The fact that the worldwide parent in that case was not included is not material. It is not a matter of a challenge or an appeal that the parents can be the addressees of penalties here. We say they should be, they should be made responsible and they should be made answerable in penalties. So *Makers* is of no assistance.

Mr. Chairman, you referred to that as being a car parks case. At one point, I believe on Tuesday, Mr. Robertson suggested that the entirety of the turnover of *Makers* was not the basis for the application of the MDT.

THE CHAIRMAN: He did, yes.

MR. BEARD: That was wrong. To be fair to Mr. Robertson, he has written to the Tribunal to recognise that it was wrong.

THE CHAIRMAN: I have not seen that letter yet.

MR. BEARD: I am sorry, but I do not want to suggest that he has not recognised this now. I was going to pick it up in any event, but Mr. Robertson quite sensibly has recognised that at least in relation to that particular piece of evidence from the Bar it needed a degree of correction. I think there is no dispute about that.

THE CHAIRMAN: Mr. Robertson was in a strong position to give evidence!

MR. BEARD: So *Makers* is relevant for the methodology but takes you no further forward. Unless I can assist further in relation to the particular points relating to MDT I will move on to the last business year, year of turnover point.

THE CHAIRMAN: Yes.

MR. BEARD: Again, this is a matter that has been subject to rehearsal in prior hearings. Crest argues that the use of turnover from the last business year preceding the date of a decision does not reflect the seriousness of infringement is inconsistent with the underlying purposes of step 1 of the penalty guidance. It says it is inconsistent with the approach of the European Commission and the European courts, it is in breach of the principle of non-retrospectivity, and also contends that the OFT has misdirected itself in relation to the turnover, approached matters inconsistently and that it has broadly got the whole matter entirely wrong.

I will not take the Tribunal back through the guidance in any great detail. The Office accepts that the guidance in this regard binds it. The guidance is crystal clear. The reference in the guidance is to use at step 1 and step 5 the last business year of turnover. The ordinary language meaning of that term is plainly "the most recent year prior to the decision". It is used twice in paras.2.7 and 2.17. The fundamental principle of statutory interpretation, and indeed ordinary language meaning means that if you have a term that is used twice in the same document, same context, unless there are very good and clear reasons you should interpret it in precisely the same way.

There is a clear definition of "last business year" at 2.17 of the guidance. Obviously that is the way that the term at 2.17 must be understood. There is a range of benefits of consistency of approach that have been adverted to in submissions and in skeletons, I will not go through them in any great detail, there is a link with the seriousness of the arrangements in relation to step 1.

There is one point that I think is worth picking up in relation to seriousness. It is not a point that particularly Miss Demetriou has emphasised today, but it has been emphasised a great deal in this context by various other appellants. It is said that using last business year as being the year prior to decision is not linked to seriousness and the Tribunal already has the

point that the contrary interpretation that year pre-infringement equally does not really capture any notion of impact.

It is also worth noting that the notion of seriousness is not only related to impact. The notion of seriousness is a component of penalty policy that is essentially getting the punishment to fit the crime, in very loose terms. It is a different policy objective from specific and general deterrents. Obviously, if your penalty takes the relevant pound of flesh it will offer specific deterrents. There may be separate consideration in relation to general deterrents. Although people have poured scorn on the idea that seriousness is being captured in the use at step 1 of relevant market turnover in the last business year, the two things are actually linked. Not only may you be capturing some degree of impact, although that is inevitably attenuated in circumstances where investigations, particularly large investigations, take a long time, but when you are talking about the seriousness of the infringement you are reflecting something that should impact on an entity as it is now. Therefore, seriousness should not simply be equated with impact. Actually there is a clear reason why in those circumstances there is a perfectly good justification, apart from all the other points that are made, as to why you use last business year prior to decision both in step 1 and in relation to step 5.

Of course, when one is talking about step 3, which is the focus of criticism here, we are talking about deterrents. You already have the submissions that, in fact, deterrence is only going to be sensibly achieved by focusing on the state of an entity now. Some of them will grow, some of them will shrink, but nonetheless you focus on the entity as it is now.

In relation to the criticisms that we are not in compliance with the approach of the Commission or the European courts, that is simply not true. Those are matters that have been dealt with both in skeleton arguments and in other submissions.

There is emphasis today on the principle that, in fact, we are not complying with the principle of retrospectivity. Can I briefly take the Tribunal back to *Uttley*, which is volume 3, tab 43. Mr. Chairman, sadly there is no novelty in the submissions. You will be familiar with them. Other members of the Tribunal, this case is a case that was before the House of Lords. It concerned serious sexual offences. What was being said was that there had been a change in the way in which sentencing operated and at the time the offence was committed there was a particular scheme for sentencing. By the time the person came to be convicted and actually sentenced a different scheme was in place, and it was therefore said, "A different scheme is in place, that actually would give us a higher tariff of sentence, that higher tariff of sentence is plainly unfair because when we committed the offence we would

have got a lower sentence, because the old scheme was more lenient to us". The House of Lords considered that it said, no, there is no ----

THE CHAIRMAN: Paragraph 21, is that the key paragraph my colleagues should look at?

MR. BEARD: Paragraphs 20 to 21. I was going to take them to the headnote.

THE CHAIRMAN: Yes, please do, because they have not had this before. If one looks at the headnote, that actually summarises the position. When one goes down to the bottom where it says, "*Held*, allowing the appeal in the context of Article 7.1", which is Article 7.1 of the European Convention on Human Rights which is the principle that is being relied on by Miss Demetriou and others that non retrospectivity means you cannot have a heavier penalty now than you would have imposed under a previous sentencing scheme, in fact the highest court says: no, that does not take you anywhere; what you have to look at is what the maximum was under the old scheme. If the sentence you currently impose is not higher than the maximum under the old scheme, there is no breach of the principle of retrospectivity. As, Mr. Chairman, you anticipate, the relevant paragraphs for reference are; paras.20-21. I would just invite members of the Tribunal to read those. (Pause)

THE CHAIRMAN: So it makes no difference if the process by which the penalty is ascertained has changed in the intervening period?

MR. BEARD: No, that is right; there is no breach of Article 7 or the principle of retrospectivity. It does not take you anywhere. I would also just direct the Tribunal, if I may, to bundle 7 tab 92. You do not need to get it out, I will just provide the reference. It is the *Archer Daniels Midland* case. This was a case of which only an extract was included in the bundle. Earlier in the week I provided a full copy of this decision to the Tribunal. I did commit a gross breach of etiquette in that I did not provide the full version to Miss Demetriou prior to the hearing, and I have only just provided it to her. The only point I take from that is that it entirely concurs with the approach of the House of Lords in *Uttley*. That is from para.38 onwards.

THE CHAIRMAN: Shall I mark 38-46?

MR. BEARD: Yes, those are the relevant paragraphs. It does not in fact advance matters any further than *Uttley* in that regard. Mr. Robertson, I think, tried to distinguish it on the basis that in the context of European Law you did not have the equivalent of Section 38 of the Competition Act, but one does not understand on what basis that makes any difference for the principle of the operation of the principle of retrospectivity.

Unless I can assist the Tribunal further in relation to last business year, the final ground was the wrap up ground that we have heard in relation to a number of appeals, that even if the

OFT got everything right – everything was fair, proper, well within its discretion, the OFT was entitled to apply the MDT and use last business year as it did, and that Crest was not in any special position, nonetheless Crest's penalty is wrong. That is a submission which, with due respect, is redundant. If the OFT has fulfilled the relevant principles and policies, followed its guidance, acted reasonably --

THE CHAIRMAN: Why is it completely wrong? Supposing you have a matrix, something more rigid than we have here – let us say, the American sentencing matrix, and it produces an out turn of 132 years imprisonment, which is plainly wrong because it is excessive in terms of the measure of a human life, and as happens in American courts therefore, the sentencing is usually passed in more realistic terms?

MR. BEARD: I am certainly not going to venture into a discussion of American sentencing, of which I do not have experience. I have to say, I had always understood that the American sentencing scheme did have strange out turns where you can obtain 700 years if you have committed multiple serious offences. It was one of the grave eccentricities of it that it did do that. I would not want to comment on or seek to defend it.

The point here is a narrow one. Of course this Tribunal can say: you got this wrong; there was a material consideration you missed; your guidance has been misapplied; you applied the law wrongly – if all of these things are true, in the end this Tribunal can change the out turn penalty. But if the Office has followed its own guidance, it has applied its discretion in relation to the steps in the guidance pursuant to rational policies, has done that reasonably, has done it in a way that is sensible, that falls within the scope of its discretion, then on what basis can this Tribunal turn round and say: that is wrong? It is a matter that the Tribunal can do, but how can the Tribunal say it is wrong?

Mr. Chairman, the other day you asked how you were going to reach a conclusion that it was wrong in a particular case. I was not seeking to be facetious, but the rhetorical answer was: the difficulty for the Tribunal is identifying the reason for that. It is not just a matter of breathing in deeply, sniffing and thinking this smells a bit wrong, that is not sufficient.

THE CHAIRMAN: I take that on the chin, of course Mr. Beard. But if we are left in a situation in which, to adopt your phrase, we are trying to ensure that the punishment did fit the crime, and we are left with the impression (using the criminal analogy which has been adopted by both sides of these appeals) that if this was a criminal matter heard in a criminal court we would conclude that in this particular case the appropriate criminal penalty might be (just plucking a figure out of the air) £200,000 fine, then if the matrix produced a conclusion of a £4 million fine we would be bound to say that is not just, would we not?

MR. BEARD: No. With respect, Mr. Chairman, you are conflating two issues. The fact that one uses language of punishment fitting the crime must be done in the context of the scheme with which you are dealing. This Tribunal has heard submissions already as to why the analogy with criminal sentencing is simply unsustainable. There is an autonomous system that is put in place in relation to serious economic infringements. Parliament placed the cap on where these penalties should lie. None of these penalties is anywhere close to that cap. The OFT has promulgated guidance as to how it is going to approach these matters. The Secretary of State has approved that. In those circumstances, for this Tribunal to say: no, we should not actually be applying that guidance (because that is what the Tribunal is really talking about – you go through the process of applying the guidance and at the end say: actually we do not fancy it that much) that is not an appropriate approach here. It is not permissible, it would be contrary to law for the Tribunal to reach that conclusion. There is an autonomous system. The Tribunal must consider these issues within the structure that has been put in place by Parliament and is operated under the terms of the guidance: the measures of turnover, whether relevant turnover, total turnover and the cap are all clearly delineated. To move to a situation where one was applying health and safety or other sorts of criminal sentencing guidance in those circumstances would clearly be wrong.

THE CHAIRMAN: Thank you. I wanted you to repeat that in the presence of the two colleagues I have today. Right.

MR. BEARD: Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Beard. Miss Demetriou, we are entirely in your hands, given that this afternoon's case is connected to this morning's case. What do you want to do?

MISS DEMETRIOU: I am happy to press ahead now. I might need an extra five minutes, but I can be quite short.

THE CHAIRMAN: Press ahead now; it is tidier.

MISS DEMETRIOU: Sir, I start with equal treatment. Mr. Beard had two points. He said, firstly, there is no objective difference in Crest's position compared with others because other parties also found it difficult to investigate the allegations and therefore Crest is not special. Then he said that even if there is an objective difference, no discount was warranted. So I will deal with those in turn.

On the first point, no objective difference, I have got four points to make. The first is that Mr. Beard has quite plainly overstated the case. It is not the case that many other parties were in the same position as Crest. As you, sir, pointed out, it is not reasonable to expect

companies to accept liability blindly for what are very serious offences. So the expectation must have been from the OFT that the recipients of the fast track offer, an offer which was made to everybody, will not have been in a position to obtain evidence to assist the OFT. Indeed, what the OFT has said elsewhere, in making their submission that Crest should not benefit from a 25 per cent discount because that would give them preferential treatment compared to other recipients of the FTO, the OFT in making that submission has emphasised the value which the other recipients of the FTO provided to the OFT's investigation. They could not have provided value unless they had evidence to give. So we simply say that is overstating the case.

The second point is that Mr. Beard says the FTO is just like leniency and in leniency you do not get a discount if you do not have information to provide. But that is clearly not the case because here the OFT was extending the FTO to everybody (this is one of the points they made in the judicial review and point of which Cranston J. was very critical of, quite rightly) and the OFT expected parties, if they did not have evidence, to make blind admissions, and they gave them a discount for that, which is not the case in a leniency application. If you turn up asking for leniency and you have got no evidence you get no discount, so there is a big difference.

Thirdly, as an historic parent company we say it is obvious, it does not require much thought to conclude that as an historic parent company of the infringer Crest was inherently less likely to have access to information. This is not the same as a company which itself has directly committed an infringement but may not have retained all of the documents. It is a position which is very different in kind. That is something which Cranston J. recognised.

Fourthly, the point about Crest not being special. This comes back to the analogy I made with the examination board. Crest does not need to be unique. It has to show that it was disadvantaged compared to other recipients of the FTO. We say it has shown this amply. It was disadvantaged; it could not admit liability because it had no evidence, and it lost the chance of a 25 per cent discount. Those are the submissions we make on no objective difference.

On no discount warranted what Mr. Beard says is even if there was an objective difference, this did not warrant a 25 per cent discount. He dealt with it very briefly. His main point was that there has to be clear blue water, in his words, between FTO recipients and Crest. Yet again, and this is perpetuating a mistake in the decision, no proper consideration has been given to whether or not a discount falling short of 25 per cent (say, 23 per cent is appropriate) was considered. Mr. Beard says the OFT did consider that, but in substance it

did not, so none of its arguments for refusing a discount applies to a level below 25 per cent. They are all aimed at showing that Crest was not in the same position as an FTO recipient, but it does not follow from that, it is a non sequitur, to conclude that no discount should be applied to Crest. That is our main point. We just say it has not been adequately dealt with by the OFT at any stage, including today.

I move on to MDT. I have three points on this. Mr. Beard says that we have focused on specific and not general deterrence. He places a lot of weight in his submissions on the need for general deterrence. Yes, we have focus on specific deterrence, but we are not saying (and I want to make this very clear) that general deterrence is irrelevant. Of course we are not saying that. It is plain in the guidance that general deterrence is a legitimate policy objective of the OFT. But what the guidance also says is that deterrence must also be aimed specifically at the company.

Our complaint here is that the OFT has simply not addressed the issue of specific deterrence. We are not saying that it should only have looked at that, but we say that it has not properly looked at specific deterrence. How could it have done if it applies the same blanket approach to all companies?

THE CHAIRMAN: This is para.2.12?

MISS DEMETRIOU: This is para.2.12 of the guidance. In the OFT's defence (I do not have the paragraph to hand but I will look for it over lunch) the OFT accepts in terms (I do not think there is any dispute about this) that specific deterrence is part of the policy objective, but it is plain in any event in its guidance.

It seems to us that the OFT is really trying to have its cake and eat it here. It emphasises the need to impose a deterrent by reference to the size of the company now. Mr. Beard said that on a number of occasions. But at the same time they are failing to take account of the need for deterrence and the countervailing considerations which might make the need for deterrence less in any particular case. We say less in our case.

This leads on to my second point, which is Mr. Beard dealing with factors specific to Crest. He made two points. He said first of all these are irrelevant because of the need to achieve general deterrence. We say that is entirely wrong; they are not irrelevant, because they are clearly relevant to the question of specific deterrence which the OFT has ignored. Then he says: ah, but they have all been taken into account at step 1. But the Tribunal has my point on that, which is that in this case step 1 has been entirely obliterated, so questions relating to the seriousness of the offence simply have not been taken account of because the calculation

at step 1 has been abandoned in favour of a fine which is 2,500 times greater on the application of step 3.

The third point relates to Mr. Beard's attempt to distinguish *Musique Diffusion*. What he said that was in that case no guidance was in play. That is his point of distinction. But we say that this makes our case even stronger, because where you have guidance, as here, specifically saying that factors such as the seriousness of the infringement and relevant turnover must be taken into account, then the principles laid down by the ECJ apply *a fortiori*. So in this case, the OFT has specifically said that these are factors which it must take into account. Do not forget that there is a duty in the Act under section 38 to take account of the guidance. Yet in practice it has failed to take account of these factors altogether because of the approach it has taken to the MDT. The slate has just been wiped clean. I appreciate that this is a term which you may have heard others use during the week. Those are my points on MDT.

Very briefly, on relevant year of turnover (*Uttley* and *Archer*) we say that nothing in those cases weakens our point. The reason is this. When looking at whether a higher penalty could have been imposed at the time, the question is not what penalty could have been imposed in theory. The question is not: does this penalty fall below the maximum that could have been imposed? The question is: what penalty could have been imposed lawfully? That has to be the question. Lawfully means in accordance with the OFT's guidance. This penalty exceeds the penalty that could have been imposed lawfully at the time. That is why it is retrospective. Nothing in the *Archer* case detracts from this. In fact, what the ECJ said in *Archer*, it recognised that Article 7 of the European Convention might well preclude the retroactive application of a new policy if that change was not reasonably foreseeable. We say in this case it simply was not reasonably foreseeable. All the more so, because the order on which it is based does not apply to step 1 on its face. We have made points in relation to that in our Notice of Appeal and in our skeleton argument.

Very finally, on proportionality, we do not accept that this is a redundant ground at all. The Tribunal, as you are aware, has a full jurisdiction. Mr. Beard's submissions made it sound as if this was a judicial review and that the Tribunal is limited and constrained to looking at whether or not the OFT has followed its guidance, properly applied its guidance, or acted lawfully. That is not the role of this Tribunal, with respect. It has full jurisdiction to look at the level of the fine on the one hand, the infringement on the other, and to determine whether there is reasonable proportionality between one and the other. We say in this case there simply is not, for the reasons that we have advanced in writing and orally.

Unless I can assist any further, those are my submissions.

THE CHAIRMAN: Thank you very much, Miss Demetriou. Mr. Beard, you have been provoked!

MR. BEARD: No, not provoked, I was trying to assist. It is a rare thing. Defence para.105 I think is the paragraph to which Miss Demetriou was referring. I give credit to Mr. Singla for that.

THE CHAIRMAN: Well done, Mr. Singla. We will adjourn until five past 2.

_____