IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1117/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 July 2010

Before:

VIVIEN ROSE
(Chairman)

GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GF TOMLINSON BUILDING LIMITED
(2) GF TOMLINSON GROUP LIMITED Appellants

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC and Miss Sarah Abram (instructed by JH Powell & Co.) appeared for the Appellants.

Mr. David Unterhalter SC and Miss Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Good morning. Mr. Robertson?

MR. ROBERTSON: Good morning, madam, members of the Tribunal. I appear with Sarah Abram for the Appellants in this appeal, who I will refer to collectively as Tomlinson. My learned friends, David Unterhalter and Sarah Ford, appear for the Respondent OFT.

Housekeeping issues are relatively straightforward in this case. You have behind you Bundles A to E. Bundle A is the Notice of Appeal and supporting witness statements. B, C, and D are exhibits to that witness statement. Bundle E are the subsequent pleadings in this case and a further witness statement from Mr. Barry Sewards. Confidentiality - there re no confidentiality issues that I am aware of that should trouble this hearing.

As to the outline of my oral submissions, we have covered quite a lot of ground yesterday in the Seddon hearing. Mr. Unterhalter and I have no intention of going back over old ground. In this hearing I will divide my submissions under the five headings that I have used in the previous appeals, but under some of the headings I will be very brief indeed.

Those headings are, firstly, calculation of the penalty; secondly, the Tribunal's jurisdiction; thirdly, the seriousness of the infringements; fourthly, the flaws in the OFT's penalty calculation, and under this heading this really is principally two issues - (1) allocation of turnover; and (2) single stage versus other types of tenders; and then, fifthly, and finally, mitigating factors.

Turning to the first of those headings - calculation of the penalty. The OFT has imposed a penalty on Tomlinson of £1,269,270 (para. 1 of the OFT's skeleton omitted the first £1 million, but I am sure that is just a clerical error and not an offer that we are capable of accepting). The sum of £1.25 million is, on any analysis, a severe penalty. As we set out at para. 39 of our skeleton, it represents some two and three-quarters years' worth of average post-tax profits made by the infringing company in the group - Tomlinson Building. We have used post-tax just at that point just to emphasise that because you pay penalty out of post-tax profits, then we are going to have to, on average, earn the best part of three years' profits to pay it off - if it stays at its current rate.

Obviously the decision is addressed to the group together with Tomlinson Building. We have set out in Mr. Collis' witness statement a description of the group and he has exhibited documents which give an indication of its history. It is a long established construction and civil engineering group. To give you an idea of how its turnover is divided between construction and civil engineering the figures, I do not think there is any need to turn it up – bundle D, tab 5, p.870. In summary in 2008 group turnover was in the order of £125

million. The total group building turnover was about £105 million, i.e. about 85 per cent of total group turnover.

The reason why we have particularly focused on the difference between turnover in single stage tenders and other types of work, particularly framework or partnered arrangements. If you take out partnered work, framework work, then you are left with £40 million group building turnover in tendered work, that is about 32 per cent of total group turnover.

The construction work is undertaken by three companies in the group: GF Tomlinson Building which is an appellant. GF Tomlinson Birmingham, which was not involved in the investigation, and also to a lesser extent G F Tomlinson & Sons Limited, that is the civil engineering branch of the group.

The appellant, GF Tomlinson Building, only does building work. Its turnover in 2008 was in the order of £52 million, about 41 per cent of total group turnover, but its tendered work was only about £11 million, i.e. about 21 per cent of its turnover, and about 9 per cent of overall group turnover. I make those points just to emphasise why the difference between single stage tenders and other types of turnover is an important issue for us.

On a group basis the £1.25 million fine represents 75 per cent of total group 2008 pre-tax profit.

THE CHAIRMAN: What was that figure again?

MR. ROBERTSON: 75 per cent of the 2008 pre-tax group profit.

THE CHAIRMAN: Pre-tax there?

MR. ROBERTSON: Pre-tax.

THE CHAIRMAN: Why do you say there is a percentage pre-tax therefore?

MR. ROBERTSON: Because I am now going to go on to the comparison with *Sainsbury's* and *Imperial Tobacco* and the comparison we draw there is between the fines in those cases which we have calculated and the figures have not been disputed, as being 5 per cent of pre-tax annual profit.

The source of the 75 per cent that is in our notice of appeal at para. 53 and it is also in Mr. Collis' witness statement at para.56, which is bundle A, tab 4, p.171.

I drew the comparison with the *Sainsbury's* and *Imperial Tobacco* cases yesterday. There has been one development. I mentioned yesterday in the second hearing that there was an issue about access to the decision and another appellant was raising that as an issue, and was seeking to draw the Tribunal's attention to that. I understand that is a debate that is taking place in court 2 this morning in that appeal.

THE CHAIRMAN: That was in relation to the *Imperial Tobacco* decision.

MR. ROBERTSON: Correct, because there has not been a decision yet in the *Sainsbury*'s case That is just early resolution at this stage. I am told the OFT is going to publish the non-confidential version of the *Tobacco* Decision today. It was not on the OFT's website this morning. If that is correct I will address submissions on it in the GMI appeal next week before the President's panel. I would ask this Tribunal to have regard to what submissions I make on the non-confidential version of that Decision.

We are appealing this penalty because, in our view, and by comparison with Sainsbury and Tobacco it is disproportionately high. We co-operated with the investigation and accepted the fast track offer. You have our written submissions and, as I have already indicated, it is not the purpose of this hearing to repeat those submissions or to repeat debates that I have had with my learned friend, Mr. Unterhalter, before this panel yesterday. Obviously to the extent that I do not comment orally on submissions advanced in writing by the OFT, that is not to be interpreted as any acceptance of them.

THE CHAIRMAN: But we do nonetheless need to be clear what the scope of your appeal in this case is so that we know ----

MR. ROBERTSON: Yes. I am going to run through the headings and where it has been covered yesterday I will indicate that we adopt the submissions that were advanced in the Seddon case. That is a way of short-cutting it.

The Tribunal's jurisdiction - the second of my headings. Simply, this is one where I can just simply adopt what was said yesterday.

Turning to the seriousness of the infringement and in particular the comparison with fines in criminal prosecutions - again, this is an area in which I can simply say that we adopt what was submitted yesterday in the Seddon case. Just as a footnote to what was submitted yesterday, I said that we were advancing those submissions on, as I think I said, the coat-tails of Sol. You will be hearing from Sol this afternoon. I drew your attention to the prosecution of Serco. Mr. Thompson, who is appearing before you this afternoon on behalf of Sol, is aware that I have do so, and is aware of the figures that I gave to the Tribunal as to Serco's profit, its turnover. Mr. Thompson informs me that he will be addressing detailed submissions to you on the case law.

THE CHAIRMAN: Yes. I understand why you adopt this procedure of adopting his submissions, but, of course, if you are going to do it like that, you have to accept the good and the bad because it may be that the Panel, or Mr. Unterhalter, make a point to Mr. Thompson that he deals with in a certain way, and if we do not accept what he says then

your client accepts that - even though we have not put the same point to you and enabled you to respond to them.

MR. ROBERTSON: Yes. Madam, if you recall, the Tribunal's order after the case management conference made provision at para. 3(f) ----

THE CHAIRMAN: Yes, for you to come back once you had seen the transcripts.

MR. ROBERTSON: That is right. That is how we would intend to deal with additional points that you might raise in front of Mr. Thompson which were not raised to the extent that we went through the case law yesterday.

THE CHAIRMAN: Yes.

MR. ROBERTSON: That is all I need to say about the seriousness of infringement.

Turning to the fourth of my headings, the flaws in the OFT's penalty calculation. The first issue is allocation of turnover. This is the issue on which the Tribunal wrote to us on 17th June, indicating that you wanted submissions on principle - not on the facts of each individual contract and as to whether it is correctly classified as education or, as we say, in fact, it is not educational turnover.

The facts in relation to this, for your note, are summarised in our Notice of Appeal at paras. 100 to 101. The supporting evidence from Mr. Collis is at paras. 29 to 34. In summary, we supplied a turnover figure for education - and that is the principal component of our penalty - of over £30 million when the true figure, having re-visited it as explained in Mr. Sewards' witness statement served with our skeleton argument. The true figure is less than £20 million. We invite the Tribunal to substitute a penalty, if it does nothing else, based upon the corrected turnover.

THE CHAIRMAN: What is the status of these new figures because the figures that you gave to the OFT at the time of the investigation, I think, was certified by your auditors or by your accountants, or both?

MR. ROBERTSON: That is correct. These figures - I think my learned friend is just turning up the reference - are found at Bundle E, Tab 4, p.85. Perhaps the best place to start actually is at p.31, which is where the OFT picks up the point and asks that it requires 'Certification of the revised figures, undertaken by a different partner at Smith Cooper'. There then follows, at p.33, a letter of instruction. The 'Smith Cooper' was a mistake. That is another firm of accountants. It is in fact Cooper Parry who certified the original figures and then have undergone the exercise. So, that is a typographical error in the OFT's letter. You will see over the page, at p.33 the instruction from my instructing solicitors to Cooper Parry, our auditors, explaining what the exercise requires. You then see their reply beginning at p.39.

On p.41 you will see the report from Cooper Parry explaining (just above the heading '2008 Turnover'):

> "The partner responsible for the work described in this letter is Edward Rands, The partner responsible for the earlier work was Paul Rowley".

THE CHAIRMAN: In a nutshell, what was the reason for the original mistake?

MR. ROBERTSON: That is set out in the witness statement of Mr. Sewards, which is at the previous tab, Tab 3, at paras. 26 to 29. The essential nutshell is para. 27. Previously the figures had been supplied from our accounting information maintained by Tomlinson.

> "In the accounting information maintained by Tomlinson, the description of each particular project from which one of Tomlinson companies derives turnover is necessarily kept short. The general practice has been to relate it to the location at which the construction work is to take place rather than giving a large amount of the detail of the nature of the project".

So, if there was a construction of a SureStart centre, which is classified on the OFT's classification as a welfare centre, it is not a school, but, if it was a SureStart centre next to a school, the location was given as a school and therefore was initially thought to be education. In fact, as we have explained in our Notice of Appeal, with the supporting evidence, it is a welfare centre and that is a separate classification.

THE CHAIRMAN: The OFT classifications are derived form some accepted construction industry practice, are they?

MR. ROBERTSON: It is the statistical analysis maintained by what was the DTI, then at the time BERR.

THE CHAIRMAN: Now something else.

MR. ROBERTSON: Whatever reincarnation. But it is a statistical analysis that the OFT relied upon to classify different types and that is as explained in our notice of appeal. So that deals with certification.

We invite the Tribunal to substitute the corrected figure and we have four submissions as to why the Tribunal should do that. First we say, as a matter of principle, an appellant must be able to obtain rectification of a penalty made on a mistaken basis on appeal even if the appellant has been responsible for the mistake. Costs are a sufficient sanction to prevent abuse. It is in the interests of justice that a penalty should not be imposed on the basis of incorrect information.

Secondly, we refer to the Tribunal's judgment in *Napp* – I do not think there is any need to turn it up – (authorities bundle vol.2, tab 27). The relevant paragraph is para. 76 where the Tribunal, discussing the nature of an appeal before the Tribunal, said:

> "… the appellant is not limited to placing before the Tribunal the evidence he has placed before the Director [as it was, OFT, as it is now] but may expand, enlarge upon or, indeed abandon that evidence and present a new case."

So the scope of appeal to this Tribunal is wide, we say that is clearly wide enough to encompass the supply and correct the turnover information and ask for a penalty to be substituted.

The third submission that we make is that it would be fair to allow us to rectify the incorrectly notified turnover figures. The OFT permits this to be done during the administrative procedure and, in fact, in this decision there is an example of that being done, not by us but by another one of my clients, my instructing solicitors in that case were Watson Burton, the party is party 77. Their penalty calculation is set out in the decision on p.1807, and perhaps if the Tribunal could just turn the decision and see the party 77 calculation.

If you are working from the same document I have you will see that the final penalty was £711,000 – is that the figure?

THE CHAIRMAN: Yes.

MR. ROBERTSON: What happened was when the decision came out we realised that that penalty had been calculated on the basis of the original turnover information that had been submitted by that party to the OFT. The client realised the mistake they had made during the course of the administrative procedure, went back to the OFT and submitted corrected turnover information properly certified. That was accepted by the OFT. Unfortunately in the decision the OFT proceeded on the basis of the originally submitted turnover information so when that decision came out we went back to them and said that we had revised the turnover information; "During the course of the administrative procedure, you proceeded on the basis of the wrong figures". They said: "Yes, you are correct, we will correct it" and they did so by withdrawing the decision as against that party and substituting an amended penalty calculation. That penalty calculation is shown on the table available on the OFT's website. The decision on the OFT's website is the non-confidential version with all the figures deleted, but on the table of penalties, and perhaps I should just hand up a copy of the table of penalties which I printed off this morning. The final penalty is now on

p.5, and you will see party 77 just slightly below half way, and you will see just under 25 per cent reduction in penalty as a consequence.

We say that if the OFT can withdraw the decision to correct an error it has made we should be entitled to ask the Tribunal to substitute the correct penalty in the same way to correct an error. The fact the error is corrected is realised during the administrative procedure as opposed to during the time in which an appeal may be brought before the Tribunal, and we say that should not be a relevant point of distinction.

As to the final submission on this point, the OFT's only substantive response in its skeleton argument on this point is to warn the Tribunal against the dangers of opening floodgates. As to that we have two submissions. First, there is no obvious sign of floodgates in this case. This issue has been raised by us and by one other appellant, Durkan, it is not raised in any of the 23 other appeals. Secondly, it is difficult to see why it would open a floodgate, your incentive is to get it right first time round rather than having to engage in further legal expenditure for which you are going to be liable in raising the point on appeal. The time for bringing an appeal before the Tribunal is a relatively short one, this is not opening decisions years into the future; there are two months in which to realise your error and appeal.

THE CHAIRMAN: The fact that there are obligations as to the accuracy of information that is provided in response to requests for information, does that have any impact on the question of principle?

MR. ROBERTSON: It is not a point that has been raised by the OFT at any point from us raising this as an issue. Obviously you are under an obligation to supply information to the best of your belief. If you make an error then you are under an obligation to correct that error once the basis of your belief changes. Of course, this was an error that was to our detriment, but if you make an error during the administrative procedure and understated your turnover figures you would be under obligation to correct it.

THE CHAIRMAN: Yes.

MR. ROBERTSON: That is what I have to say on the allocation of turnover issue. Turning to the second of our flaws, and that is the tendered v non-tendered work issue. This has been advanced on behalf of the appellants that I have appeared in front of the Tribunal and its various Panels so far. It was, for the Tribunal's note, also the subject of oral submissions in the Thomas Vale appeal before the President's Panel. The relevant passages from that transcript the Tribunal will no doubt wish to take note of are in the transcript at p.6, line 25 to p.11, line 16. That is Miss Bernadine Adkins for Thomas Vale. The OFT's response, which was Mr. Unterhalter, is at p.22, line 15 to p.26, line 20. Miss Atkins' reply is at p.31,

line 33 to p.36, line 17. I simply draw that to the Tribunal's attention because you will want to have a look at it.

In our submission, essentially there are three aspects to our submission. Firstly, what is the basis upon which we ask the Tribunal to review the OFT's decision not to make a distinction between turnover in single-stage tenders and other types of procurement; secondly the evidence of fact as to where cover pricing took place; and, third, the extent to which it is permissible for the OFT to invite you to make inferences as to cover pricing taking place - or the risk of cover pricing taking place - outside single stage tenders.

Dealing with the first of those points - what is the basis on which we make the submission, it is simply this - as we have set out in our Notice of Appeal: the OFT, in choosing product market turnover excluded turnover from certain types of construction work based on the type of procurement method - namely, PFI and other public/private partnerships. It did so on the basis that only larger firms could engage in that type of procurement process to secure that type of construction work. We say the same logic should apply to framework agreements and partnered agreements. They are categories of construction work which have different types of procurement. This Tribunal has heard, in the case yesterday afternoon, that smaller firms seem to be excluded from getting on to framework agreements. We say that if it is fair to exclude turnover in PFI, and public/private partnerships that is turnover that would be earned by the large national construction firms, then it is only fair to exclude turnover earned in other types of work procured through methods in which cover pricing, the evidence shows, did not and could not take place. So, it is a fairness submission.

We base that on the *Pioneer* case referred to in para. 72 of our skeleton.

So, that is the legal basis for the submission.

Turning to the second aspect of the submission, we say that the evidence before the OFT is that cover pricing did not, as a matter of fact take place other than in single-stage tendered work. The OFT have cited six examples in the Decision which they shows it taking place outside single stage tenders and you have seen in out Notice of Appeal our response to that, saying, "No, on a correct analysis, on the face of the Decision, those were single stage tenders".

The third aspect of my submission is, as I understand it, that my learned friend will invite you to infer that cover pricing could take place other than in single stage tendered work. As to that, we say that our evidence clearly demonstrates that there is no reasonable basis for that inference. If I could take you to that evidence it is set out by Mr. Collis whose witness statement is in Bundle A, Tab 4. The full passage is paras. 35 to 56. Obviously the

Tribunal will read the witness statement in full, but the key passages that I wish to refer to in this hearing start at para. 38 at pp.158 to 160. If I could invite the Tribunal to read para. 38? (Pause whilst read): The point that Mr. Collis making - in particular in relation to framework agreements (we see that in the second sub-paragraph (2) on p.160) – it is something which has been put to us in oral hearings by the OFT and again was referred to by counsel for the OFT last week - is that in framework agreements, okay, you have selected your contractors and that is not on the basis of the typical tender where you are pricing up the work, you are just proving your ability to do work. They then hold mini-competitions, and it has been that at the mini-competition stage you could give or take a cover. The point is that the client here requires you to give a very detailed price using a Bill of Quantities. It is a very transparent process because the client will, and does, inspect the costings underlying the prices quoted. They actually come and look at your books. That does not happen in single stage tenders. In single stage tenders you are just getting a series of figures to go in the final column. One of the things you will have seen in the evidence generally is that cover prices were always given at a level which was sufficiently high that the person taking the cover was at no risk of coming second. The reason why you do not want to come second if you are taking a cover is that sometimes the client will say, "Let us have a look at the two lowest and we will see if we can play them off. Come and show me your working-out", and you go, "Erm, I do not have any working-out because I took a cover". Here they come and look at your working-out. That is why there just could not be ----

THE CHAIRMAN: Yes. If the people who had got on to a framework agreement were found to have been colluding with each other for the work as and when it is called off, then they would be in very serious trouble with the partner to the framework. But, with a framework agreement there is the initial selection of people to go onto the framework which I understand you say is not then related to any particular work. But, it is my understanding that the work then that is called off under the framework over whatever period the framework lasts for may be individually smaller pieces of work than would be likely to be covered by a single stage tender - the idea of the framework being that you do not, for a relatively small value of work, have to keep going out to tender each time.

MR. ROBERTSON: There certainly are contracts of a similar size to those being procured under single stage tenders in frameworks. So, you might get a school or a sports hall being built pursuant to a framework agreement which could also be being procured under single stage

tenders. The process of being selected to go on to a framework is completely different. That is sub-paragraph (b) here of Mr. Collis' statement where he explains that it is ----

THE CHAIRMAN: Yes. I am just trying to remember. Is there not something in the regulations which limits the value that can be covered by a framework agreement?

MR. ROBERTSON: I know Mr. Unterhalter took the Tribunal to the Directive in the Thomas Vale case. Maybe he will deal with that issue. I do not have it in front of me.

THE CHAIRMAN: One final thing: frameworks have existed and existed under the earlier Directives, did they not? It is not like they negotiated procedure that was ----

MR. ROBERTSON: That is correct. There was a question as to their legitimacy under the earlier Directive; now that has been made clear, in particular through the efforts of the United Kingdom government in negotiating the more recent Directive, that they are legitimate as a matter of European law. In paras. 39 to 41 of Mr. Collis' witness statement he explains the growing use of frameworks in UK procurement. That is as a matter, essentially, of UK policy following the Egan Report in 1998 which said, essentially, that single stage tenders were giving bad value for money. We have set out in our Notice of Appeal the criticisms that are made to that effect.

The key point that is being made here is that there is no scope for cover pricing once there is a framework. Appointment to a framework is essentially a qualitative assessment. Mr. Collis explains that at sub-paragraph (b). Once you are on to a framework then when you bid for a particular piece of work in a mini-competition there is no scope for taking covers because you know the client will come in and look at your detailed costings. You have to price it up. So, that is why we say that there is no incentive for it to take place. We say we are in the situation here of having to prove a negative. However, Mr. Collis' evidence is that it did not take place. That is evidence that has been given by a number of my clients. This was an issue in traditional single stage tendering.

The impossibility of cover pricing is tackled by Mr. Collis at para. 53 of his witness statement. That is the second and final paragraph to which I specifically wish to draw the Tribunal's attention.

MR. MATHER: Just before we leave para. 38 and, again, looking at sub-para. (b)(1) and the second sentence,

> "Every time that work is to be done under the agreement one of the contractors will be selected to consider the project feasibility and negotiate a price for the work".

Just to be absolutely clear, you are saying that all those selection processes are always done by a mini-competition which has the attributes you have just mentioned.

MR. ROBERTSON: That is a decision by the client to select - "For this project we are going to deal with such-and-such a company who is on our framework". The point I was getting at was the point which had been raised in argument against me. If it is just purely bilateral, then that is just a negotiation. So, there is no cover pricing there. That is clear. The point which has been raised against me by the OFT in oral hearings was that, "Well, there could be mini-competitions under a framework. Would those not just be like singe stage tenders?" That is the point being addressed there by Mr. Collis in para. 2.

MR. MATHER: Sticking with that, there are three, typically, contractors in a framework agreement as advanced in that part of the witness statement. Every time work is done under that agreement one of those contractors will be selected, can you just explain to me a little more exactly how they are selected?

MR. ROBERTSON: I will take instructions on that. I should explain, Mr. Collis has retired from the Group. I think you will have seen that from Mr. Sewards' witness statement. (After a pause) As I understand it the position is this, the client has contractors with whom he has a partnering arrangement, they are carrying out work for the client. The client will know when a particular piece of work is coming to an end, so when it wants to start the next piece of work it knows that contractor has got capacity and will then approach it to go into feasibility study.

MR. MATHER: Thank you. It is a rather less competitive arrangement in some ways, a framework agreement and more, perhaps, efficient in its allocation and more qualitative.

MR. ROBERTSON: That was really the subject of the Egan Report because there are differing views. We have referred in our notice of appeal, in our submissions to the OFT to the Egan report and to the Lathom Report. It is a matter of policy, but one thing plain in these lateral negotiations there is not scope for cover pricing.

The final paragraph that I wanted to draw your attention to was para. 53 of Mr. Collis' statement, and para. 54, and that is pp. 169 to 170 and if I could just invite the Tribunal to read that section.

THE CHAIRMAN: (After a pause): Yes, that is the other point at the end, is it not? Once you are on the framework then your concern, which is said to be the concern that prompts the giving of the cover price that you might not be asked again is not really relevant because you are part of the framework and therefore they are going to ask you.

MR. ROBERTSON: I have just been reminded by my learned junior that there is a neat schedule – I do not think we need turn it up – just to illustrate the point I was making, about work being called off under a framework, in bundle D, tab 6, p.881, it is one of the exhibits to Mr.

Collis' statement; it also shows the various values of the contracts as well – it may be helpful to look at that.

The point I am making on the back of paras. 53 – 54 is that there really is not any scope for the OFT to invite you to make inferences that cover pricing could have taken place outside single stage tenders. If they wanted to invite you to do that, they could have called Mr. Collis, he would have attended for cross-examination. That is what I wanted to say about single stage tendering.

To go through the other points – I am mindful of the indication that you want me to be clear about the points that we run – high turnover and low margins in the construction industry, and the fact that a large proportion of turnover reflects payments to subcontractors, we make the same points as were made yesterday in Seddon. The only additional point is – for your note – to invite you in due course to look at Mr. Sewards' witness statement on this topic, paras. 19 to 23 and the bundle references E, tab 3, pp. 6 to 7, lack of effect on price, we maintain that as set out in our notice of appeal and the skeleton, but I have nothing to add to the discussion we had yesterday.

Similarly, multiple penalties and arbitrary choice of infringements, we maintain that as set out in our notice of appeal and skeleton, but I have nothing to add to the discussion we had yesterday.

Discrimination by comparison with undertakings involved in compensation payments, again the position is as it was in the Seddon hearing yesterday. This is a point on which Tomlinson does feel particularly aggrieved. Its local competitors – there were local competitors of it – that were caught up in compensation payments yet received proportionately lower fines.

THE CHAIRMAN: "Proportionately" – as a proportion of what?

MR. ROBERTSON: As a proportion of overall turnover.

THE CHAIRMAN: "Overall turnover"?

MR. ROBERTSON: The figures are set out, if you remember the table in our notice of appeal where we set out the percentage of overall turnover and ours is higher than nearly all of those involved in compensation payments.

The reason why we are aggrieved by this is because those involved in compensation payments, or some of them, were our local competitors, but because we have received a heavier penalty the perception amongst clients is that we are more culpable than them, and Mr. Collis addresses that point in para. 71 of his witness statement at p. 179 of tab 4 of bundle A. Use of last year business turnover, again the principles as are discussed

yesterday in the Seddon case. Our infringements, the most recent one was in 2004, the position is as it was in the Seddon case. I simply draw your attention to the fact that Mr. Collis carried out a recalculation of the penalty, and it is set out in his witness statement, and he seeks to do so in a way that reflects the OFT's original fining Guidance not the revised Guidance that came in at the end of 2004; it is at para. 65 of his witness statement, the penalty is 55 per cent lower, and that is taking into account the adjustment for allocation of turnover issue. So having adjusted for allocation of turnover it is still 55 per cent lower. We also emphasise the choice of 2008 was particularly unfortunate from our perspective, not just because of the general point that it was the peak of the public sector construction boom, but in particular for us, as we have set out in Mr. Collis' statement, paras. 25 and then 61 to 64, we had in the mid-2000s engaged in a period of substantial expansion, particularly investing in new premises, namely a flagship head office – previously we were tucked away down a back street in Derby and now we occupy a prominent position in the City, and we have expanded on the back of that. We feel that we are being punished for our commercial success.

We have also addressed submissions on MDT and financial hardship. I refer you simply to what I have said in our notice of appeal and skeleton on those issues. We are not caught by the MDT on the current calculation so our submissions on MDT are a back stop as against some sort of recalculation and then being subject to an MDT, but the points we make about the use of an MDT are the points that Seddon make about the use of an MDT – the points in principle – and we are saying it is inappropriate.

MRS. HEWITT: In para. 97, Mr. Robertson, you are saying that Tomlinson does not accept that an MDT is relevant or should be applied in the present case?

MR. ROBERTSON: Yes, we say however you carry out the penalty calculation at the moment it is not relevant because it has not been applied to us, because our education penalty is quite a bit in excess of 0.75 per cent – we see that on the penalty calculation turnover. What we are saying is that if the Tribunal substitutes different figures and the OFT were then to say: "But, you ought nevertheless to apply an MDT uplift on the basis that they have done in the decision " we say that would not be justified because whatever figure you came up on the recalculation that would be sufficient to punish and deter.

THE CHAIRMAN: I see, so – you must have done the maths yourself – on the basis of the new figures for the education turnover, does that then take you below the 15 per cent?

MR. ROBERTSON: (After a pause): Sorry, I am told by my Junior that this is addressed in para. 37 of Mr. Collis' statement. (After a pause): You can tell that my learned Junior is rather

better at maths than I am! Paragraph 37 sets out calculations with alternatives based on whether or not you include a single stage tendered turnover only or, as the OFT have done, all turnover.

THE CHAIRMAN: So the cumulative effect of correcting the figures, and cutting out the framework turnover, if you narrowed the market to that extent, might then get you into MDT territory?

MR. ROBERTSON: That is at para. F, yes.

THE CHAIRMAN: Unless you took the partnered work out of the total turnover of the group?

MR. ROBERTSON: On the basis of the 2008 figures, that makes quite a big difference.

THE CHAIRMAN: Yes, I do not want to take up time now, we will need to go back over that.

MR. ROBERTSON: We have set it out as fully as we can in Mr. Collis's statement. The basic point we are making is that MDT is not currently an issue for us but it might be, and if it becomes an issue then we adopt the same submissions that we did in the Seddon case.

On financial hardship I do not want to add anything to what is said in our notice of appeal and skeleton.

The final point I want to make is under the final heading "Mitigation", the factors we ask the Tribunal to take into account. Again we have set that out very fully in our skeleton argument, at paras. 219 to 257. The only additional point we do want to emphasise is that the OFT have said that the danger of being removed from tender lists was mere perception. We did provide a specific example to the OFT at the oral hearing of us being removed from a tender list by Nottingham City Hospital, and that is set out in Mr. Collis' witness statement at para. 11(a). Again, that is good, hard evidence, it is not contested yet it does not seem to be reflected in the final decision.

THE CHAIRMAN: The high turnover, low margin and subcontractors' point, where does that slot in? If we were to agree that something needs to be done about that, at what step would that be taken into account?

MR. ROBERTSON: That has to be taken I think at the first step of determining what the relevant turnover is order to start with the 5 per cent starting point. It is not something which I think is specific to us. What we have said is across the industry ----

THE CHAIRMAN: Yes, you said yesterday that we have to look at turnover "intelligently" – was the word you used – I am just trying to drill down a little bit what that would actually mean in terms of applying the Guidance.

MR. ROBERTSON: If you are starting with product market turnover they have taken all of their definition of product market turnover and we say that is not an indication of financial

strength in the construction industry because 60 to 80 per cent, and the Tribunal has heard Seddon was 60 per cent ----

THE CHAIRMAN: Yes, but what are you asking us to do about this point?

MR. ROBERTSON: Reduce the starting turnover by 60 to 80 per cent recognising that there is only 20 to 40 per cent is an indication of our financial strength.

THE CHAIRMAN: I see, so that would deal with both the specific subcontractor point, and the more general high turnover/low margin point?

MR. ROBERTSON: Yes , the reason why this is a high turnover/low margin industry is the high turnover component of it, a large part of it – in general terms three quarters, 70 per cent on average – is subcontractor turnover, it is not an indication of the financial strength of this particular undertaking.

THE CHAIRMAN: Yes, I had not understood that previously, thank you very much. Thank you. Yes, Mr. Unterhalter.

MR. UNTERHALTER: Thank you, madam. We will in our submissions principally deal with the question of the allocation of turnover point that has been raised, and the question of the tendered/non-tendered work, and then we will sweep a number of other points that have been made by our learned friend.

If we could commence with the allocation of turnover issue. We accept, of course, that the Tribunal has the jurisdiction to admit this evidence if it thinks that it is warranted that it should do so, but we would ask you to consider a number of matters that are relevant to whether you should do so and, in particular, it is relevant, in our submission to determine not just who made the error, but what is the error about that is being corrected, because we can of circumstances in which there is an error of computation that is made, and no one would hold such an error against a party if it slipped through. But the exercise that is contemplated, and with which you are being invited to engage is of a completely different kind. Here we have a situation in which the appellant in the course of the investigation was invited by the OFT to put up its relevant turnover figures, and the OFT indicated that it would treat the categorisations that parties made for that purpose on a reasonably liberal basis. Had there been any need to correct what was put up by way of those turnover figures it could have been done in the administrative process. But what has been done by way of this evidence is not simply to say: “My word, we made some trifling error, or some computational error”, but there is an ex post working back over the figures, and it is a process that involves – as I shall show you in a moment – a variety of impressionistic judgments that are now being made by this appellant on a non-independent basis, that the

auditors do not certify. Therefore, not only is the exercise one that should not permissibly be engaged by an appellate tribunal but it is indeed one the evidentiary value of which is extremely limited, and it is for those reasons that we wish to suggest to the Tribunal respectfully that it should not engage in this exercise and admit the evidence.

As to the partiality of the exercise, one of the extraordinary features of it is that what they did as they went through their classifications, and they tried to determine which of those classifications that had been included under the education category might have been wrongly classified. What they did not do is examine the entire universe of their contracts to see whether perhaps there were other mistakes of classification that had been made, which should have bumped up the turnover for other reasons, and I shall take you to the kind of exercise that was done and the way in which, in our submission we would say, a very impressionistic approach has been taken to the matter.

Could I ask you to have regard to bundle E. My learned friend took you to some of these, these are attachments to Mr. Sewards' witness statement, so it is under tab 3 of bundle E. As my learned friend indicated at p.31 the OFT requested that there should be a proper certification of the revised figures. There followed instructions given to the auditors, and if I could take you to two of the passages that, in our submission, are relevant. At pp.39 and 40 there is an indication as to how the original work was done, and it indicates that the procedures, which you will see at p.39, were to agree the extraction of turnover from the statutory financial statements, and at para. 3:

> "For a sample of contracts selected randomly during the relevant year, agree the classification of contract type to supporting documentation."

That was the procedure that was adopted. It says in the penultimate paragraph:

> "For clarity, our review did not extend to a detailed examination of every document in each file."

So that was the original process that was followed and is explained ----

THE CHAIRMAN: When you say the OFT asked everybody to divide up their turnover into the categories, you gave them the categories which they were familiar with because they are BERR categories.

MR. UNTERHALTER: Yes.

THE CHAIRMAN: At the stage when you asked them to divide up their turnover into those categories did they know which infringements you were investigating? Did they know which of those categories were going to be relevant markets for the purpose of calculation?

MR. UNTERHALTER: I am told the answer is "yes", they did know.

THE CHAIRMAN: So they were already "alerted" I could say, at the time that you asked them to divvy it up, which ones were going to be the ones that would be investigated.

MR. UNTERHALTER: So I am instructed.

THE CHAIRMAN: One further question, I know that in the process you went through you cut down to five or six the ones that were going to be investigated and then you focused on three or fewer?

MR. UNTERHALTER: Yes.

THE CHAIRMAN: At what stage between those was the request for turnover – at the stage when you were investigating a slightly larger number or ----

MR. UNTERHALTER: If I may take an instruction, I do not know the answer.

THE CHAIRMAN: Yes.

MR. UNTERHALTER: (After a pause) I am told it was at the stage of the statement of objection, in other words it was the three that had been winnowed down.

If you would then have regard to p.41 of this bundle, because here is the exercise that Cooper-Parry undertakes, and particularly important is what is said under the "2008 Turnover" heading:

> "1. We note that you do not expect us to express any opinion on whether individual contracts can properly be described as having been carried out in the education sector. Accordingly, we have not considered whether the classification of each contract as 'Education' or 'Non-education' is appropriate."

Then they explain:

> "2. In respect of the year ended 31 December 2008, 22 contracts which were originally classified as 'Education' have been reclassified as 'Non-education' by yourselves. The procedures we have carried out and the results are described below: …"

Then all that they do is to indicate that the contract description was consistent with the specific documents in the contract file. So this is not an independent assessment by an auditor indicating that the classification under which these contracts should fall is indeed "non-education" or "education"; it is simply saying we looked at the contract description ----

THE CHAIRMAN: What does it mean the "contract description"?

MR. UNTERHALTER: Perhaps I could ask you to turnover the page to p.42 because there we see a table setting out what was done, so if one looks at the first entry 2008 the client is Trent College Limited – "New Sports Pavilion and Dining" that is a description of the work.

Then there are contents in the file, and all they are making sure of is that that description – the contract description is consistent with what is contained in the file.

THE CHAIRMAN: That description is not "education" or "non-education".

MR. UNTERHALTER: Absolutely not, all that the description is "New Sports Pavilion and Dining" Trent College", that is the description of work. So in fact this exercise is virtually worthless because all that it is doing is ensuring that the contents of the file is meaningfully connected to the description of work that appears in respect of that contract.

THE CHAIRMAN: But as to whether a new sports pavilion and dining is properly education or non-education, where has that ----

MR. UNTERHALTER: That is not to be found in the auditors' report at all, so there is no independent verification of this at all, and that is the first difficulty that we have with the evidence that is being advanced on this score.

What we do have are a number of rather general comments that are made by Mr. Sewards in his witness statement, which is in the same bundle under tab 3 at pp. 8 and 9, where he indicates at para. 27 where he is explaining how it all arose:

> "During the investigation, the OFT requested turnover figures analysed between three market sectors … The request was referred to …Chief Accountant. In the accounting information maintained by Tomlinson, the description of each particular project from which one of the Tomlinson companies derives turnover is necessarily kept short."

- which is his explanation as to how the error was made. That is not a proper explanation at all because however short the description is you have to engage in an analysis as to whether what sort of work this is, and into which market does it fall? The shortness or otherwise of the description does not really tell you how you undertake the exercise. What is it then said at para. 28 is:

> "Following the making of the Decision … I referred it not only to the Group Chief Accountant but also to the Directors of Tomlinson Building …"

- which we would emphasise –

> "It was then recognised by two of the Directors of Tomlinson Building that although the locations of many of the projects which had been identified as falling within the education sector were at schools or other educational establishments …"

- and these are the important words:

> "… the true nature of the particular projects was not educational."

That is just at the level of tier assertion, because it was the directors of building that apparently came to this judgment, that even though this was an extension to Trent College in respect of its new sports pavilion, because presumably it was thought that sport is not part of education – perhaps something that may or may not be true depending on your value system – but ordinarily one would have thought that if a sports pavilion is built at a school, and those who are at the school use the sports pavilion it is an educational building.

THE CHAIRMAN: Is there somewhere that we find what detail they were given as to the classification. There is this BERR classification that says "Education", does that classification give any guidance as to whether a sports hall at the school is to be counted as education or not?

MR. UNTERHALTER: I cannot say, but the point here is these are people in the business and they know, one would have thought ordinarily, that when you are doing building works at an educational institution you would generally be thought, under any reasonable scheme of analysis in respect of market definition, that you are in the educational segment of the market. I am going to come very briefly to the way in which relevant market definitions work. The issue, at least from the economic point of view, is, of course, one of substitutability. What is now being engaged in is not to say that you have a broad classification, in fact, it is relatively narrow. But, within the conception of education market that was a delineation that is not intended to allow for these kinds of differentiations that are being made because the notion that this firm, this undertaking, could not actually have competed for this work because it was a sports hall at an educational institution ----

THE CHAIRMAN: Yes. That is the difficulty of taking a classification that is produced by BERR for some particular purpose and applying it in another way. It may be that you had no choice if you were going to do this, but, you know, something might be classified as education, or not, for the purposes of the local authority's budget, or something, according to criteria which are not really appropriate for the job to which you are then putting that classification. Your point here is that although the accountants or the auditors may have certified that, yes, looking at it, it was indeed a nursery, there is then a description in the Notice of Appeal of whether that nursery is properly considered education or not. But, I must say, I understood from your pleading that you were not challenging that.

MR. UNTERHALTER: All that we are saying, when we said we were not challenging it, was saying, "You can look at this evidence for what it is worth". We say it is actually worthless.

MR. MATHER: Just to perhaps get a clear picture of what the OFT thinks many of these works are SureStart centres. What view does the OFT take of the proper classification of a SureStart centre?

MR. UNTERHALTER: In fact, the OFT has classified a SureStart centre as part of the education market. The relevant references for that are 1893 of the Decision, read with 1575.

THE CHAIRMAN: Just remind me where the twenty-one mis-allocated ones are?

MR. UNTERHALTER: There is a table of them. I will have to ask my learned junior to assist. I think it is in D, as I recall it, at 864. (After a pause): There is an attachment to the Cooper Parry report which I think also lists them.

THE CHAIRMAN: No. I am talking about the pleading. Is it paras. 100 to 101 of the Notice of Appeal? Or is it in an annexe to the Notice of Appeal? Somewhere, someone has gone through each of the twenty-one and said it was this or that.

MR. ROBERTSON: Madam, can I assist? The reference is indeed paras. 100 to 101 of the Notice of Appeal, which then refers to Mr. Collis' witness statement at Tab 4, paras. 27 to 34 at pp.153 to 156. Those paragraphs deal with the issue. Each of the twenty-one contracts is then described in an annex to the witness statement at pp.183 to 193. You will see that we go through them contract by contract, explaining why they have been wrongly classified. The BERR classification which was used by the OFT is in Bundle E, Tab 2.

THE CHAIRMAN: Let us just take one example and see where we get to with this.

MR. UNTERHALTER: I wonder whether, since I was going to take the Tribunal exactly to that annex to make some examples, I could just proceed and do so?

THE CHAIRMAN: Yes.

MR. UNTERHALTER: In Mr. Collis' statement - and in particular one sees at para. 34 which is at p.156, what he says is that,

> "In the spreadsheet we have identified twenty-one contracts which generated income that we included in the education turnover figures that we submitted ... I have attached to the end of this statement an annex in which I consider each misallocated contract or group of contracts in turn, explaining why they should not have contributed to the education turnover figures and exhibiting relevant documents".

Then he gives an example. If one then looks at what he does in this annex – and perhaps I could ask you to turn to p.185, which is the Cripps Hall bathroom refurbishment – what he says is this,

"We undertook a project ... which is student accommodation provided by the University of Nottingham ... the market is divided into various sectors; education and student accommodation are separated. This work fell into the 'student accommodation' ---"

But, student accommodation is not one of the relevant markets. That is identified by the OFT. So, in the Decision, if you would compare that statement to what is said by the OFT as to the relevant markets at II.1727 ----

MR. ROBERTSON: Madam, I hate to interrupt, but my learned friend did not take you to the totality of what is set out at para. 3 in relation to Cripps Hall bathroom refurbishment. At p.185,

"I can see that at Question 7 of the Market Questionnaire which the OFT asked us to complete during the course of this investigation, the market is divided into various sectors; education and student accommodation are separated".

Madam, I have a real concern about what my learned friend is attempting to invite the Tribunal to do here because, as you indicated, there is no indication in the OFT's skeleton that it was going to invite the Tribunal to dispute these contracts on a contract-by-contract base.

THE CHAIRMAN: This was precisely why we wrote this letter, saying that we did not really want to get into this. As I understood from the skeleton - and I think there was also a letter - ---

MR. ROBERTSON: (After a pause): I have copies of the letter here, if you wish, madam.

THE CHAIRMAN: (After a pause): There are two questions here. The first is whether the other side were on notice, having regard to what you say in your skeleton that you were going to take this point; second, that you have not asked to cross-examine Mr. Collis, or any other person, as to the correctness of the reallocation. You do now seem to be inviting us to say, "Well, this was not certified. It was done partially. The Tribunal ought not to accept what Mr. Collis has decided is the proper allocation of the turnover".

MR. UNTERHALTER: What we have said is that in our defence we have pointed out that this evidence is evidence that we may raise objections about - not at the level as to whether it can be admitted, but as to what the value of this evidence is. In our skeleton we say we do not *per se* reject the possibility that you will have regard to this evidence. What we are saying is that in deciding whether to have regard to it - to allow this evidence in, and if you allow it in what weight, if any, to attach to it, one has to have some regard to what this evidence is. Therefore, we submit we have not in any way sought to change our stance on

the school. All that we are saying is, "Look at the evidence". We are not cross-examining it. We are saying, "Take it on its face". We are making three fundamental points about it. The first is that this is not a clerical error of a simple kind that permits of rectification (to use the words that my learned friend used). Secondly, to the extent that independent verification would ordinarily be a requirement sought by the OFT, it has not been forthcoming because the auditors do not certify the classification that has been made. Thirdly when you come to what is said by Mr. Collis on this score, all that he gives you is a very impressionistic account as to why it is, often by reference to what one sees on the website, and so on, of a particular educational establishment and what certain of its facilities are used for, that he has reached certain subjective judgments as to why this should be classified in the way that it is. Those are the points that we are making about the quality of this evidence.

THE CHAIRMAN: But with the original exercise that was undertaken, was anything more than that done? What was certified by the auditors in the original provision of turnover material? Did you require them to certify that it was education or not education?

MR. UNTERHALTER: As I have indicated, the OFT took the position originally that it would allow parties, as it were, a measure of latitude for the purposes of honestly making determinations of where the turnover was and how it should be classified. We were allowing parties, as it were, that measure of latitude. But, here we have a completely different exercise that is now sought to be engaged, which is that having done all of that, with the assistance of their auditors and presented it all as a proper basis for considering the turnover, they are now engaging in what is a partial exercise of reworking matters ex post, and not on the entire universe of their contracts. It is a partial exercise, a one-way street, and on very, very flimsy evidence.

So, we would submit - and I do not need to make any further submissions on this score - and all that we would say, is that in considering whether to allow evidence of this kind and to permit it, the kind of error is not one which is of a sort that you should readily permit of correction. It is not just a correction. It is actually opening up a whole range of judgments which the appellant is now asking you to consider as to the quality of the evidence. We submit that quality is ----

THE CHAIRMAN: They are not asking us to consider it because we specifically said that we were not going to go through that. The question was whether, if we decide as a matter of principle to make the correction, we should make it ourselves, and if it is not accepted that these things were originally misallocated to education and are now properly allocated

elsewhere, that we would have to remit it to you. It was to have a look at it and decide whether you were going to accept it. But, what we understood from the skeleton, and what I perceive Mr. Robertson understood, was that there was not going to have to be that second iteration of remission because you accepted that a mistake had been made and this was now a better classification of the turnover and that all that remained was for us to decide whether, as a matter of principle, people ought to be allowed to go back over what they had intended.

MR. UNTERHALTER: I am sorry if there was a misunderstanding as to what we were saying. We comprehended by what we were saying that in order to decide whether to allow this in, one has to assess the error and assess the kind of evidence that is being put up in substantiation of the error. You cannot make the judgment as to whether to allow this in unless those considerations are brought to your attention. That is all that we are seeking to do.

So, we do submit that there is no warrant to allow this in for the reasons that we have suggested. We also do not accept that if you were to, that this is an incidental case. The likelihood is that in many, many cases there will be a further trawling over the figures in exactly the kind of exercise that has been undertaken here. One will not get finality and certainty, which is at least one of the attributes which one would seek to foster in proceedings of the OFT.

If I might then deal with the question of tendered and non-tendered work? Now, there has been much evidence which has been offered by this appellant to suggest that in fact there is no influence that cover pricing can conceivably have on what are variously described as two stage tender processes, framework agreements, partnership arrangements and the like. The key submission is to be found in our learned friend's skeleton at para. 81. If I could ask you to turn that up? He refers to the discussion in the Decision concerning traditional and non-traditional methods of procurement, and the conclusion that was reached on that score is that they belong in the same market. Then the submission is offered,

> "That conclusion is arrived at on the basis that tendered and non-tendered work each constrain the price of the other. Whether or not that economic analysis is correct, it misses the main point, which is that cover pricing could only affect work put out to tender and it is therefore wrong to include turnover in non-tendered work as a basis for a penalty".

With the greatest of respect to our learned friend, that is a *non sequitur*. The question is - and there is a very careful analysis that is made of these matters in the Decision itself - that

one has to define the market and one has got to work out what kinds of demand and supply side substitutability is taking place between different categories of work in arriving at a product market definition. The OFT, in its economic analysis which went, for reasons I had explained yesterday, considerably further than would have been required – it went into a very careful analysis of where there is demand and supply side substitutability – found (and it appears at least at para. 81 not to be put in contention) that there is in fact a constraint that exists between these two classes of work. Well, once that is the case, how it can then be contended that you would exclude from the relevant market turnover which is in respect of the non-tendered work when that category of business is directly affected by the practice that can be directly influenced by cover pricing, is, in our respectful submission, a mystery. The point is that there is a very careful consideration of these matters from an economic perspective. So, if one believes that cover pricing can affect tendered work, and if tendered work constrains the pricing of non-tendered work, then they are in the same market, and therefore that is the relevant market for the purposes of doing the work that is necessary at Step 1.

THE CHAIRMAN: Because it is your case that the Guidelines, in talking about relevant turnover, is talking about turnover which is relevant because it is turnover from the relevant product market in the technical term of art sense that competition lawyers are familiar with.

MR. UNTERHALTER: Yes. In other words, that is the relevant market that is affected by the practice here. Cover pricing. It cannot then be contended - as it is by our learned friend - that because cover pricing cannot, even if you accept the evidence, affect the non-tendered part of the business it simply does not follow that it is not affected by the practice. Of course, it is - hypothetically. If there is a weaker constraint that arises because, let us assume, as there was, pervasive cover pricing which affects tendered work, and consequently there is less efficient tendering that is going on, then that has an effect on the non-tendered work because there is substitutability between these two forms of work. One can look at the problem in a slightly different way, which is to say, "It is a matter of choice that a client has as to whether to use a framework arrangement or to use traditional tender". The product that is procured does not depend, usually, upon the means by which it is procured. That is a question of choice. So, on either level - whether one is trying to define the relevant product market, as the OFT did, or whether one is simply concerned with saying, "Is there demand or supply side substitutability - that is to say, how easy is it for firms to move between these types of tendering or non-tendering practice, or, from the demand side, how difficult is it for clients to utilise these different forms of tendering? The

answer is the same. The economic analysis has been offered. There is no challenge, and nor could there be a proper challenge under this appeal, to that analysis.

THE CHAIRMAN: In fact, we have heard, following the Egan Report, because there was a perception that single tenders was less efficient, that people have moved to framework agreements for the same kind of building project.

MR. UNTERHALTER: Yes. No doubt there will be an assessment made as to which of these mechanisms suits clients better and where they think they get a better result. The market should ultimately determine which of those is the more effective. But, that is no part of what you would need to consider. The key proposition is simply that once the market has been correctly determined there is little more to be said about this point.

Could I just very briefly take you to II.1687 at p.315? Just to pick up the analysis, it commences at II.1684 at p.315 where the question is posed,

> "Finally, even if it were not possible to directly enter into cover price agreements using non-traditional methods of procurement ----"

That is a matter as to which the OFT in its Decision is far from clear and in fact reaches a different conclusion and says there are instances where non-traditional agreements are within the reach of cover pricing, but putting that aside for one moment it says that even if that were true,

> "-- the relevant question when determining market segmentation is whether entering into cover price agreements using traditional methods of procurement could have resulted in higher prices for non-traditional procurement methods [the very question that we are posing here]. This question turns on whether traditional and non-traditional methods of procurement are in the same relevant market and is considered below".

What then follows is a very traditional consideration at 1687 of the demand side substitutability and, at 1688, the supply side substitutability. The conclusion is, as one reads at 1695,

> "The OFT has considered the possibilities for demand and supply side substitution between sectors of work"

Then it gives a recitation of what it has found. It then derives the product markets as one sees reflected at 1699. So, in our submission, the relevant question was asked. Then analysis was done. The relationship between tendered and non-tendered was considered. There was a particular view taken. There is therefore absolutely no warrant whatsoever to do what is here suggested by the appellant, which is to take out the turnover attributable to

non-traditional work because that is simply asking an entirely different question. It is saying: Could cover pricing affect non-traditional work? The answer is: Yes, it can because it can do so through the way in which it affects tendered work. As to the reliance that is placed upon public/private partnerships - and it is said by our learned friend that really the analysis that is offered of that should be extended to non-traditional work more generally - we would submit (and this is to be found at II.1693) there is a discussion of partnered agreements and the conclusion that is reached is,

> "-- for more complex projects such as larger PPP projects including PFI projects, supply side substitution by construction companies may be more limited and as such for the purposes of this investigation the OFT has concluded that such contracts fall outside the relevant market definition".

So, it was upon an analysis of particular kinds of complex projects and what it had to say on the evidence around supply side substitution that the conclusion was reached. You cannot just apply that analysis as if to say, "Well, the same circumstances of supply side substitutability would necessarily therefore apply in all non-traditional tendering tender arrangements".

There is, of course, much that can be argued over - and I shall not take up time doing so here - as to how cover pricing may indeed affect even the non-traditional types of work. One of the factors that the OFT does refer to in its decision is to say that your reputation in being considered for a framework agreement may well derive from how you performed in the tendered market and therefore there is in fact a relationship between these two. The credibility that you sustain may have depended on cover pricing. So, the questions are not absolutely remote from each other.

We would also submit that even at the first stage in a framework arrangement, although price may not be the overriding consideration, it is a consideration and therefore it is presumably possible that a firm - and we do not put it any higher than this - may want to appear to be a potential candidate in a framework arrangement for the same credibility reasons and would put up some of the pricing factors in a co-ordinated way through the taking of a cover, meaning to fall out of that arrangement, but doing so by way of exchange of some pricing information. It is not impossible..

Similarly, in respect of the second level of consideration which is that once a party has been appointed it is said that there is very detailed pricing information that is procured. As we read the witness statement that is relied upon for this purpose, there is simply an example which is offered in respect of Derbyshire County Council (I believe the example was

given). That does not seem to be evasive evidence that at the second stage, once you have been accepted on to a framework agreement, and the question is: "Are you going to get this piece of work?" it is inevitably the case that there has to be detailed pricing information that is offered.

So, for those reasons we submit that it is not clear that in respect of these framework arrangements it is necessarily the case that cover pricing could not be relevant. But, even if you were to accept that that was the case, it does not alter the fundamental point which is that for the reasons that we have given there is no warrant to alter the relevant turnover and subtract that part of it which is attributable to what has been described as two step tendering work.

MR. MATHER: Could I just ask you to expand a little on the distinction between PFI and PPP and the other framework agreements? I am finding it a bit difficult to establish what the dividing line is which you are seeking to draw between them.

MR. UNTERHALTER: I think the Decision itself simply sought to say of those agreements that they were very, very complex agreements involving very substantial amounts of money and capability. That seemed to be the characteristic feature of these PPP arrangements. Consequently, it found that at least from the perspective of supply side substitutability it would not be easy to move, within a year or so, rapidly to make offerings in that field. We hear from this appellant and others that traditional tender work at different levels in the construction sector is now sometimes being arranged through framework arrangements. In other words, it is a much more pervasive form of contracting which occurs more frequently at different levels, whereas the PPP is a very particular kind of arrangement usually involving very large projects. It is for that reason that really on a precautionary basis - because in fact one reads what the Decision says on this score, and it is really saying, "We will just be careful on this one". It is not seeking to say that the analysis is necessarily clear that in fact there is not supply side substitutability. It is just said, "Perhaps because of these special characteristics we will take it out".

THE CHAIRMAN: But insofar as some of the parties seem to have said, "Oh, well, look, they have excluded PFI projects because those are ones in which cover pricing cannot take place. So, why do they not also exclude other frameworks?", you say, "Well, that was not why we excluded PFI projects. We excluded them on an entirely conventional economic analysis that there was no supply substitutability". On that aspect of them, it cannot read across to frameworks.

MR. UNTERHALTER: Nor is the economic analysis challenged. In a different situation, if anything was said to challenge it from an economic perspective, but there is no challenge. Therefore, those delineations must stand and, consequently, that challenge is bad.

If I might just make one or two observations? My learned friend has not said much about financial hardship. But, there is a good deal that is said in the skeleton, both challenging the matrix that are utilised, and then challenging their application in this case. We have dealt with the actual matrix themselves. The notion that they are somehow arbitrary is entirely unclear to us. That is to say that to utilise proportions of NAV, or to look at how far a fine paid over three years will have an effect on net profits after tax, seemed to be very rational indicators to go and look at in order to see 'would meeting this fine do something to the firm, for all the reasons that I suggested yesterday, that might give rise to a problem as to the viability of the firm'?

In our submission, this appellant has confused the question as to whether because there may be some pinch that is felt by this firm, that for that reason something is due to it by way of financial hardship relaxation. But, again, in our submission, that entirely misses the point. The question is not whether it will operate under some greater constraint than it might otherwise have done. That is not the relevant consideration. The question is: Is there any threat to the viability of this firm? The answer to that is that on any of the matrix, and whether one uses the 2007 figures, or whether you use the 2008 figures, this is a firm that is very well-situated to pay this fine. Indeed, in 2008 it seems to have had an historically high level of turnover and profitability. So, we do not understand how it can conceivably be contended against the facts in this case that these matters should trouble the firm at least on any viability standard.

Could I very briefly - and I will not take more than a moment - just ask you to have regard to Bundle D, which is where the financials are to be found? One sees the financials for the Tomlinson group commence at p.799. At p.802 the directors report, right at the foot of the page,

> "We consider that the business is now in a good condition to progress further during 2009 despite the economic situation. As with all businesses in this country, 2010 will still remain something to be concerned about".

So, they report that there is nothing that they are troubled by. At p.804, just above 'Principal Risks and Uncertainty' they say,

> "We anticipate that our turnover will be £140 million during 2009, depending on the depth of the recession. However, with the number of partnerships we have

over the group and the amount of future orders already secured, we anticipate being able to achieve this".

Then one sees in the paragraph under 'Principal Risks and Uncertainty',

"Currently we have a good cashflow and expect that with the lack of capital commitments we will have a stable cash position throughout the group during the coming year".

This is somewhat in contrast to what is said - that profits are being ploughed back into investments and consequently it will be difficult to pay the fine.

Just have a look at p.809. One sees that the NAV is very substantial in relation to the fine that is contemplated. In 2008 that NAV grew. In respect of contingent liabilities which will see at p.823, there is reference to the outcome of this investigation, but all that is said is that,

"Currently there is insufficient information available to determine the amount of any penalty".

But, nothing is said by way of any concern in respect of making payments. At p.827 you will see a very substantial amount of cash is in the bank and in hand - in excess of £10 million. That is in respect of 2009 on the consolidated balance sheet.

Therefore, we do submit that even the most cursory examination of these financial statements, this is a company that is well able to meet the fine that has been imposed, and nothing remotely approaching financial viability is in question here. So, we submit on the facts there is again nothing to be said for the proposition that is being offered on this score.

Just finally, in respect of the MDT and the question of the uplift, my learned friend says, "Well, if any of this arguments should prevail and it reduces to the point that at Steps 1 and 2 the 15 per cent threshold is not met, no MDT should be levied". The question is why that would be the case. The answer is the usual answer, which says "Well, there is enough deterrence that is done at Steps 1 and 2". I will not repeat the submissions we have made on that score, but the fact is that this is a sizeable undertaking and it warrants proper deterrence being done by the usual application of MDT and there is nothing distinctive about Tomlinson form this perspective. Therefore, we would submit that if any part of its calculations reduce down by way of the relevant turnover for Steps 1 and 2 there is no reason why deterrence is any less in need of service by way of the adjustment and uplift that is ordinarily contemplated at Step 3.

THE CHAIRMAN: But if we were to get to a stage where we decided, for whatever reason, that the MDT should not be applied in these cases, we may then get to a stage where we say,

"Well, which of the appellants has really challenged the MDT in their Notice of Appeal such that they ought to get the benefit of that success on the part of everyone?" Do you accept that if we were to be in a situation that they posit where this might become relevant, that there is enough in their Notice of Appeal for us to say, "Well, they have challenged this sufficiently that they benefit from a success that has been had on the basis of other arguments that we have not rehearsed in this particular case, that they have challenged it sufficiently." Do you see what I mean?

MR. UNTERHALTER: We accept that if two conditions hold - one that for varieties of reasons that have been advanced the figure that emerges at Steps 1 and 2 drops below the level at which -- and hence MDT would ordinarily become applicable and for a variety of reasons that are advanced that MDT, root and branch, is no good, then we cannot think that this appellant should not benefit from the challenge. It has at least said that MDT should not be applied. But, that would require that not only is MDT at large no good as a policy in the methodology, but that nothing more, on some new account of how deterrence is to be done, is needed by way of deterrence for this entity, this undertaking and we, for our part, cannot even speculate as to what that could be. All that we would say is that deterrence is required and there would have to be some consideration as to why a figure was, or was not, enough on some rational account.

THE CHAIRMAN: No. No. It is just a pleading point.

MR. UNTERHALTER: Indeed. Then, just the absolutely last submission on the question that the Tribunal posed in respect of the high/low turnover and whether there should be any reduction that takes place, we would submit that the standard way in which this argument has figured has largely been at the level of deterrence arguments which have been to say, "We seem to be big, and therefore perhaps we would ordinarily need to be deterred by reason of our economic power, but actually because of the particular way we engage in contracting we are not as big as we seem, and consequently something less is due by way of deterrence". That is the usual structure of the argument - not an argument that says, "At the level of working out in very narrow relevant markets, what effect did you have on those markets that for that purpose you would apply the high/low analysis?"

THE CHAIRMAN: Yes - and some others have used that argument to say, "Well, it should not be 5 percent. It should be something less on a seriousness basis. That is one of the features of these cases - that sometimes the same basic characteristic of the industry, if I can put it there, is put forward to challenge a different step in the process and it may be for us to wrestle with as to what we do about that, should any of those arguments appeal on their

merits for any purpose. What do we then do about it - whether we have to do the same thing about it for everybody who has raised it, or whether we can do different things about it depending on how that company has sought to bring that point into its aid.

MR. UNTERHALTER: We would just submit that conceptually - at least at Step 1 and Step 2 - what one is asking is: How serious is the conduct and how has it affected the relevant market. As to the effect, the effect is felt upon the client that has entered into the transaction on a false basis. That is reflected in a relevant turnover calculation, unaltered by these different considerations which seem really conceptually, if they are to have any force - and we submit they have none, but if they have any force - is all about economic size in relation to deterrence.

Those are our submissions on that score.

THE CHAIRMAN: There is just one factual point, if I could ask, Mr. Unterhalter. On this with the chief financial analyst and this NAV threshold and the 150 percent of profit threshold, were those regarded as cumulative, i.e. if you met one or the other, then you went on to the next stage of -----

MR. UNTERHALTER: Yes - and, indeed, the Decision at a point makes that clear. It is said by our learned friend that you had to meet all the thresholds, but in fact the way it worked, and it is reflected in the Decision and I will find the reference ----

THE CHAIRMAN: I think it is clear in the Decision, but I had not got that from how it had been explained somewhere else.

MR. UNTERHALTER: Yes, and they were then just thresholds for further investigation.

THE CHAIRMAN: Thank you very much. Yes, Mr. Robertson?

MR. ROBERTSON: Madam, if I can briefly reply. I think the battle lines are drawn on a single stage tender turnover against other types of turnover, and my learned friend presents this as it is presented in the decision as an exercise in economic analysis. From our perspective it is an exercise in looking at the reality, that there is effectively a sliding scale. They have excluded those contracts at the top, PFI, PPP, framework agreements are in the middle, single stages tend to be smaller, but they have excluded certain types of procurement, they should exclude others, but you have heard my submissions on that previously.

In relation to financial hardship, we are not pressing that point in this case, but we are pressing the observations that we made at para. 214 of our skeleton as to the “inappropriate level of the metrics” as they referred to. In our view if we were exceeding those thresholds we would be ending up having to sell off our prized head office, and Mr. Sewards gives evidence as to that.

The only point on which I think I can really assist the Tribunal comes back to the allocation of turnover issue. That is to make it clear that the evidence as to the misallocation of turnover in relation to the 2008 contracts, the evidence is the evidence appended to our notice of appeal, that is Mr. Collis' statement, and then the annex where he goes through, contract by contract, that evidence has not been challenged, and I will just draw to the Tribunal's attention – I am sure the Tribunal is well aware – the Tribunal has written to, I think, two appellants, that is Quarmby and GMI. I have the GMI letter because I am acting for GMI. It is a letter of 10th June 2010, it is a letter to the OFT, and it is setting out the Tribunal's approach to evidence, and essentially it says at para.3:

"If the opposing party intends to submit to the Tribunal that something stated by one of the witnesses is untrue, however, then the Tribunal can only decide whether to accept that submission if the witness has had an opportunity in the witness box to respond to the allegation, it is not sufficient to make inferences."

I refer the Tribunal to that letter, that is the correct approach to evidence. In fact, the OFT did not challenge the evidence that we filed, they asked for certification and you have seen the letter from Cooper-Parry, it was a considerably more extensive exercise in fact than we had to undergo in response to the statement of objections. In the statement of objections we were asked to provide figures and they be certificated by the auditor. You will see the letter, it is a standard letter sent out with a statement of objections, just simply one line. The OFT in this case said "Please certificate", we did and we have received no objection in the defence, so that is why we were rather taken aback by Mr. Unterhalter's submissions. We say it is for the Tribunal to weigh the evidence, but we say that you can take Mr. Collis' evidence as being reliable.

Those are the only points I wanted to come back on in reply.

THE CHAIRMAN: Thank you very much. I think we will still start at 2 o'clock – it is going to be Mr. Thompson this afternoon – so we will have a slightly longer break, which I am sure will be welcome. Thank you very much to everybody, and we will let you know our decision in due course.

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