IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1119/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 June 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

BALLAST NEDAM NV Appellant

– v –

OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Christopher Vajda QC and Ronit Kreisberger (instructed by CMS Cameron McKenna) appeared on behalf of Ballast Nedam NV.

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

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THE PRESIDENT: Good morning, Mr. Vajda?

MR. VAJDA: Good morning, I am not going to start with any introductions.

THE PRESIDENT: You can never be said to have a "bit" part, Mr. Vajda.

MR. VAJDA: I will do my best. The Tribunal will know that I represent Ballast Nedam, a Dutch company who I will call "BN", and it received a fine of just over £11 million for three infringements committed by Ballast Plc, who I will call "Ballast" to which it pleaded guilty. That fine, the £11 million was reduced by 25 per cent for Fast Track leniency.

Nevertheless, it was still the third highest fine in this case. Before the Fast Track reduction that fine stood at 135 per cent of the amount of Ballast last year turnover in all three relevant markets where the infringement was committed. I will give the Tribunal the figures and the reference. The total relevant turnover in 2001 for Ballast PLC was £8,136,000 and the reference is para. 45 of BN's letter to the OFT in September 2008, which is annex 5 to the notice of appeal. So that is a rather striking figure.

As the Tribunal is aware the essential reason that BN received such a high fine was that the OFT based itself exclusively on the worldwide turnover of BN. We say that in doing so the OFT erred in law and acted conspicuously unfairly. What I say to the Tribunal this morning is only intended to supplement our written submissions on which we still rely.

I will follow the order of our grounds and deal first of all with the proxy point. Can I ask the Tribunal to turn to annex A to our skeleton, and there is a useful little table from the OFT decision – it is right at the end of the skeleton.

We see there are three infringements, and for the Tribunal's note, 41 and 47 are proxy, 48 is MDT. The OFT identified the relevant market for the proxy infringements with considerable precision. Infringement 41 was the relevant market was construction for the Defence sector in the East Midlands, and infringement 47 for public housing in Yorkshire and Humberside. The Tribunal will be aware that the OFT devoted no less than 50 pages (p.288 to p.338) of its decision on market definition, concluding that there were in this case 15 different product markets and eight geographic markets. I also draw the Tribunal's attention to para. II 1696 of the decision where the OFT acknowledged "the need for" – and those are its words not mine – "a cautious approach to market segmentation".

The reason that the OFT was so precise in its market definition is because it is the turnover of the undertaking in those relevant markets that is the relevant turnover for the purpose of Step 1 of the OFT's guidance, and I invite the Tribunal to take that up and that, as I understand it should be in vol. 11 of authorities bundles at tab 135, and we need to go to p.6 of that guidance. The Tribunal will see "Step 1- Starting Point" and looking at 2.3 it says:

"The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

* the seriousness of the infringement"

- and then in bold, this is the OFT's bold and not mine:

* the **relevant turnover** of the undertaking."

And I ask the Tribunal to read to itself all the passage that is sidelined, but I will just look at some of that, looking at 2.5:

"It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point for the financial penalty. When making its assessment, the Oft will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties".

Then, at 2.7,

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

So, that is what we found in Infringement 41/47 East Midlands defence, Yorkshire and Humberside construction. Then we see at 2.9 - and this is of critical importance so far as my clients are concerned,

"Where infringement involves several undertakings an assessment of the appropriate starting point will be carried out for each of the undertakings concerned in order to take account of the real impact of the infringing activity of each undertaking on competition".

If we go over the page to p.8 we have Step 3 adjustment factors. What I am concentrating on here is that Step 3 was used to bring in the proxy. The important provision here is 2.12.

"The assessment of the need to adjust the penalty [and here we have the proxy adjustment] will be made on a case by case basis for each individual infringing undertaking."

It is quite clear, therefore, when one looks at those provisions that Step 1, with or without a Step 3 adjustment for proxy, involves a very different form of investigation from Step 5. If the Tribunal go back to 2.1 you see the five step approach. The fifth blob at 2.1 is the 10 per cent cap. Step 5 is a cap to ensure that the 10 per cent turnover -- It is important to bear in mind that at the relevant time it was UK turnover. That was a 2000 turnover order. That

was then changed from 1st May, 2004 to worldwide turnover is not exceeded. Step 1 is not a cap, but is directed to look at the impact of the infringement in the relevant market and the size of the undertaking on that market. So, you look at the undertaking's turnover solely within that relevant market. It is a very, very different exercise. The Oft chose to assess the relevant turnover at Step 1 - not at the date of the infringement (which is 2001), but in the calendar year before its Decision - namely, 2008). As the Tribunal is aware, other parties have argued that the Oft is not entitled to do this since Step 1 is looking at the impact of the infringement and one can see considerable force in saying that looking at relevant turnover some seven years after the infringement is not consistent with Step 1 at all. However, it is not necessary for BN to enter directly into that debate this morning. In the case of BN there was no relevant turnover in 2008 since Ballast had ceased. That was the UK company which ceased trading in 2003. The Oft therefore had to find another basis for its Step 1 calculation. Of course, BN accepts that the Oft is entitled to impose an infringement in relation to Infringements 41 and 47 because Ballast was on the market in 2001 when those infringements were committed. As the European Court says - and I am going to just read the reference - you do not need to take it up. It is a case called *Britannia Alloys* and it is in the authorities bundle, Volume 8, Tab 109. What the ECJ said at para. 25 - and this was under Regulation 17 - was that,

> "The Commission must, in assessing a penalty take into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed".

In UK speak that is Step 1. You are looking at the impact when the infringement was committed. What the OFT did in BN was to apply a proxy of 0.14 per cent of BN's worldwide turnover for 2008 and, as we know, that translate to penalties of over £3 million for those two infringements.

Before looking at the reasoning to justify the OFT's approach, one can immediately see that the OFT approach is what I call a top-down approach, which is based on a different company, namely BN, different turnover, namely worldwide turnover but bears no relationship whatsoever to turnover achieved by Ballast in either the market for construction for defence in the East Midlands, or for the market for public housing in Yorkshire and Humberside, and that is whether one takes 2001 or any other year, it has absolutely nothing to do with it.

On its face, this radically different approach, as I say, is completely at odds with Step 1 and for such a radical departure one would wish to scrutinise with particular care the

justification for such a departure. The relevant reasoning in the decision is, we say, both laconic and simply does not begin to grapple with what the OFT actually did, and it may be convenient at this moment if I could ask the Tribunal to have the decision to hand. It is in section 6, we can pick it up at p.1684 of the numbering, if the Tribunal has the same numbering that I have in the decision.

The first point they make is that the reason they apply the proxy was to ensure that no party escaped a penalty, that is the point they make at 257, and also they make that at 263. We do not take issue with that, we are not saying "no penalty" because we accept that we were economically active on that market. The decision then goes on to say at VI 258:

"The OFT indicated in its letter …" and that is the letter that it sent the parties before the decision –

> "… that the proxy figure would be based on some kind of average percentage of total turnover, represented by the penalty reached at the end of Step 2 for ***all*** infringements (regardless of the market in which they occurred) where the relevant turnover is more than nil. The OFT considered this to be a robust proxy that, in view of the number of infringements involved, would be relatively unaffected by the particular market positions of other Parties."

So the decision is quite explicit that the proxy takes no attention to any relevant market. It says, very curiously:

> "[The proxy]would be relatively unaffected by the particular market position of other parties."

That is completely bizarre because the relevant question is not whether the proxy would be affected by the particular position of other parties, but whether it would genuinely reflect the relevant turnover of each undertaking at Step 1. It appears, and we are not entirely sure on this and no doubt Mr. Unterhalter will explain precisely what the OFT sought to do, but between that letter and the decision the OFT made a small adjustment to its proxy methodology because we see at VI 269 that it seemed to be saying – we see that is the bottom of p.1687 – that it decided to include in the methodology also those infringements where the parties' relevant turnover was nil – that is what they say.

I have to say that we find that sentence in 269 to be inconsistent with what they say at 698 – if we can go to 698 at the bottom of p.1648:

> "The OFT is therefore using a proxy figure for these Parties' relevant turnover figures, which is based on the median percentage of total turnover represented by

all of the Parties' relevant turnover for ***all*** infringements … where relevant turnover is more than nil."

So there seems to be an inconsistency between what is said at 698 and what is said at 269. If I just give the Tribunal two further passages, not from the decision but the OFT's pleading, at para. 93 of the defence the OFT says that "deriving a figure of relevant turnover from average percentage of total turnover in other cases was a fair and reasonable method" and then the same is said in para. 42 of the skeleton, and no doubt Mr. Unterhalter will, as I say, explain to us whether in fact they did take account of infringements where a party's relevant turnover was nil. That is, in a sense, a minor detail because it does not in any way affect my criticism of this methodology.

What we understand the OFT did was to look to see for each party that did have relevant turnover in 2008 what percentage of the undertaking's total turnover was accounted for by its relevant turnover. The OFT then took a median figure, and we see that if we go back to 698 at p.1649, that the median figure there is 2.9 per cent. Does the Tribunal have that, that is the figure in bold?

THE PRESIDENT: Yes.

MR. VAJDA: Then the same is raised at 269, the OFT is therefore using a figure broadly based on the median percentage of total turnover represented by the penalty reached at the end of Step 2.

They said the starting percentage at Step 1 is 5 per cent, so we will apply that 5 per cent to the figure of 2.9 and we get a figure 0.14, and we see that from para. 270 of the decision where we get the proxy figure of 0.14 per cent. In its defence (para. 96) the OFT said, and we think what they said is correct as a matter of principle, that they totally misapplied what they said they were going to do. They said the proxy was not intended to achieve deterrence, but was intended to provide a proxy for relevant turnover.

THE PRESIDENT: Yes.

MR. VAJDA: As we have seen, contrary to what they did say at para.96 the proxy was based on a formula concerning other undertakings' ratio of relevant to total turnover. They do that in relation to other undertakings which have nothing to do with Ballast in order to replicate what BN's relevant turnover may have been. Now, given the magnitude of BN's worldwide turnover at group level you will recall that 99 per cent of its turnover is outside the UK. This approach was bound to throw up an apparent result in our case. This is for the very simple reason that Ballast's relevant turnover would represent a much smaller percentage of BM's worldwide turnover compared to the proportion of most other parties' worldwide

turnover. So, really, the alarm bells should have started ringing at the Oft at that stage: "My goodness! There is something going on here".

I come to what we say are the errors. The first error is - and in a sense I have foreshadowed it - that the Oft ignored completely the methodology and purpose of Step 1 in its guidance, and that the proxy was at odds with that. That is the point we really make at paras. 59 to 61 of our Notice of Appeal. As I say, what they have done is that they have based the relevant turnover for BN solely -- There is no other basis than that they have just taken one methodology which is the base of the medium, or average, ratio of other undertakings' turnover, relevant turnover and total turnover, in 2008 and they do that seven years after the infringement.

In failing to do any cross-check against the relevant turnover for each of the undertakings the Oft, we say, have plainly omitted to have regard to the individual situation of the undertaking to whom the proxy has been applied. I refer to the passages in the guidance that I have already taken the Tribunal to. There is another passage in *Britannia Alloys*. This time it is para. 44. That, in a sense, is a statement of the obvious. I will just quote the last bit:

> "The Commissioners required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned".

That is really ABC law. But, the Oft did not follow that here. That is why the starting point is fixed by reference to the undertakings' relevant turnover - that is to say, the turnover in the affected market. Again, relying on what the ECJ said, this time in the *MDF* case (*Musique Diffusion*), this gives, as they put it, 'an indication of the scale of the infringement. The reference there is 121 of that decision which is at Volume 5, Tab 69 of the bundles. This is absolutely critical because one of the Oft's twin objectives in setting penalties is to impose fines which reflect the seriousness of the infringement. The imposition of fines based on effective turnover, which reflects the gravity of the infringement lies at the heart, we say, of the penalties regime - or, at least the starting point. A key precept of that is that a less severe penalty is imposed on an infringer generating a smaller amount of relevant turnover than one that generates a larger amount of turnover. The proxy simply fails to address that point.

That brings me then to the second point, which again builds on the first point. It is quite clear that the decision fails to have regard to BN's individual circumstances. That is the point we make really at paras. 50 to 58 of our Notice of Appeal. Again, we need to take up the Decision. In the Decision the Oft asserts, in answer to the criticism of the proxy with

the arbitrary and unfair, and would bear no relation to the infringements, it confidently asserted - and let us just look at what it did say at p.1687 -- The passage that I want to look at is at 6.267 at p.1687. This is what the Oft said.

> "Some parties suggested the proposal [the proxy] would result in arbitrary and unfair outcomes whereby, all other things being equal, parties with very low relevant turnover in a market would end up with a lower penalty than parties with nil turnover in a market. The Oft acknowledges that this is a potential concern but notes that the impact of this is in fact minimal given the relatively low amount by which penalties are in fact being increased where a party's turnover in the relevant market is nil".

Of course, BN falls flat into that situation because we had our fine increased because we had nil turnover. We say that is a complete mis-use of language because the impact was far from minimal.

Then we see at 6.268 the Oft states,

> "Again, the Oft acknowledges this might be the outcome if it were to impose a large additional amount at Step 3 for additional infringements where the turnover of the relevant market is nil, but does not consider this has happened in the present case given the relatively low amount by which penalties are in fact being increased where a party's turnover in the relevant market is nil".

So, the impression is given to the reader, "Do not worry. We have looked at this. We have done the cross-checks. There is no need for concern". Now, of course, that is just complete rubbish, I am afraid, in the case of my client. As the Tribunal will know BN provided the Oft with our relevant turnover figures for 2002, which was the business year following the year of the infringement - 2001 - which was Ballast's last full trading year. That was supplied (and I will just give the reference; we do not need to go there - para. 45 of the letter of 26th September, 2008, which is Annexe 5 to our Notice of Appeal). The relevant turnover for Infringement 41 (and the figures are there set out) was £2.7 million. The relevant turnover for Yorkshire and Humber was, in fact, under £500,000. It was only £420,000. If you apply a Step 1, 5 per cent penalty to those figures you get a penalty of £136,000 for Infringement 41 and £21,000 for Infringement 47. Now, no-one can seriously suggest that the penalty that was imposed which was over £1.5 million for each of those infringements in total over £3 million is mainly minimal. That is plainly a mis-use of language. Of course, what we see here is that the Oft have completely ignored all the careful work it did in establishing the relevant markets when it imposed a Step 1 penalty on Ballast. In terms of

multipliers the £1.5 million that we have got under the proxy is over eleven times what the fine would be if you took the 2002 figures, and over seventy-one times the fine that we would have had for Infringement 47.

What we say, and what was said to the Oft, is that, "You should have made the penalties at Step 1 by reference to turnover in 2002" - or, at the very least, those figures should have been used as a cross-check in the way that the casual reader might assume that the Oft had actually done it because they referred to it at 267 and 268. That is what they said in the Decision. They maintained that position in the pleadings. At para. 120 of the defence they say that they consider the individual circumstances of each appellant, and at para. 26 of the skeleton they go further and they say that they carried out checks in the course of the penalty assessments to ensure the penalties imposed on particular undertakings did not fall significantly outside a central range of penalties imposed under that Decision. They do not actually tell us what checks they carried out. The reality is that they performed no checks at all.. Indeed, the Tribunal will observe that the only reference in the whole of the decision which runs to thousands of pages to BN's turnover figures is at 2.193, which simply sets out BN's worldwide turnover in 2008. No mention whatsoever of the figures for 2002.

This, in a sense, has been confirmed because what the Oft has also said in their skeleton - and this is at para. 46 - is that it did not investigate the voracity of the reliability of the figures produced by Ballast. It says, "We do not have any knowledge of them".

THE PRESIDENT: Just remind me, Mr. Vajda, when it was - it may be in your letter which is at Annexe 5 - that you sent them the letter.

MR. VAJDA: Yes. The letter, Sir, is 26th September 2008. It is before the decision, and it is in response to a request for information from the OFT. The OFT was asking for information, we gave it to them, but they ignored it.

THE PRESIDENT: Did they ask you for any further details of it at all?

MR. VAJDA: Nothing at all. We have to say that we were somewhat surprised and, with respect, it does the OFT no credit whatsoever to assert in its skeleton a few weeks before the hearing that these 2002 figures may not be reliable. With the greatest respect that is simply an impossible submission to make at this stage. If the OFT had done what it said it was doing in the decision at paras. VI 267 and 268, namely to see whether the proxy would be minimal, it would have considered the figures provided by Ballast. It did not do so, it did not even explain why it would reject those figures, it is silent. The Tribunal will see that those figures are a result of a careful exercise of BN which is far from being the back of an

envelope, and again in view of the time I am not going to go to that, but you can look at that at your leisure, paras. 42 to 45of Ballast's letter; they were not plucked out of the air.

There is another point here which is that we know that Ballast – BN – not Ballast the UK company but the Dutch Group, total turnover in the United Kingdom in 2008 which, of course, did not relate to the relevant market for infringement 41 or 47 was £11 million, that is at para. 79 of our notice of appeal. That figure is supported by a verification by KPMG which is at annex 6 to the notice of appeal. No suggestion has been made that that figure needs to be verified. Yet at para. 43(b) of its skeleton the OFT blithely asserts that the proxy it used are the equivalent of BN having a turnover of £31 million in each of the affected markets, and then astonishingly the writer of that skeleton says, and I quote: "that is not as inconceivable a scenario as BN seeks to suggest."

Once again the OFT is operating in a parallel universe. Nowhere in the skeleton does the OFT explain how it is conceivable that Ballast's turnover in 2008 in these three relevant markets – and if we multiply 31 x 3 we get to £93 million would be over eight times the total turnover achieved by the whole BN Group across all markets in the United Kingdom because the total turnover of BN in 2008 was £11 million, yet the OFT says it is not inconceivable that Ballast would have been earning turnover of £93 million in 2008 in these three little markets.

It gets worse, because nowhere does the OFT also grapple with the point, if you go back to 2000 now, which is where the UK turnover was £390 million, how, even in 2000 a quarter of that turnover – that is the figure of £93 million – would be attributable to these three narrow product markets. So I am afraid that these belated attempts by the OFT in its skeleton to prove that the proxy figures were reasonable and realistic serve simply to confirm that the OFT took its eye off the ball when it applied the proxy to BN and that, even today, its case is completely divorced from reality.

That brings me to the third and last area that I am going to deal with in relation proxy, which is the equal treatment point and that is notice of appeal 65 to 70. The Tribunal will be well aware that the justification given for the proxy is the OFT's reliance on the general requirement to treat all undertakings consistently and a specific requirement to adopt the same reference year for all penalty calculations, proxy and non-proxy alike. They are saying: "If we do everything in the same way that must be right."

We have dealt with this in our written submissions and I am going to be brief on what I say this morning. The first point which I wish to emphasise again is a point we have made in the skeleton, that it is, of course, well established, that the application of an allegedly

consistent set of criteria to undertakings is in breach of the principle of equal treatment where it fails to recognise that two undertakings are in objectively different situations. We have a very good illustration of that in this very case in the *Crest Nicholson* case that we refer to in our skeleton, the judgment of Mr. Justice Cranston, if I can just give the Tribunal the reference, that is authorities bundle 4, tab 66 and we deal with that in our skeleton.

What the OFT says, and I understand this, that we need to be consistent because otherwise the parties will complain about the tiniest inconsistency. But nobody seriously disputes, certainly BN does not dispute, it is only material differences which justify difference of treatment. We have seen in the case of BN that we are not talking about a tiny discrepancy, but a massive magnification of the BN fine which has gone up by a factor of about 50 when you combine 41 and 47.

In its skeleton, the OFT identified three difficulties with the approach of taking Ballast's relevant turnover for its last trading year, which was 2002. The first point that it made is the issue of the reliability for 2002 and I have dealt with that.

Secondly, it says that an undertaking's relevant turnover may vary widely between one year and the next, and that of course is true, and that may well, the Tribunal may think, cast doubt on the OFT in this case using the relevant turnover from the year before the decision which is seven years after the infringement.

So far as BN is concerned, the point I wish to make is that BN's relevant turnover in 2002 is a figure that was actually achieved, whereas the OFT's proxy is a construct which bears no relationship to reality at all. No company, within BN has ever generated anything near the £31 million that the OFT attributes to BN in each of the three relevant markets. The only company within the BN Group that was within those markets no longer exists, thus we cannot accept the OFT saying that the proxy was a better method than the inherently uncertain exercise of trying to project what the undertakings' turnover in the relevant markets would have been in the year preceding the decision.

The OFT then justifies its choice of the reference years based on the fact that using the relevant turnover from the year before the decision ensures the penalty is calibrated, and I quote: "… to the seriousness of the infringement, and the scale of the undertaking in the relevant market." That is para. 67 of the defence.

I have already explained how a proxy based on total turnover is not so calibrated. I have also explained the reason for determining relevant turnover is to ensure co-relation between the penalty and the scale of the infringement. We say that to adopt a reference year some seven years later may well undermine such co-relation and it has done so in the case of BN.

We are not saying that the OFT can never base its Step 1 calculations on turnover the year before the decision, it is always a question of fairness on the facts, but what we are saying is that in BN's case the OFT's slavish devotion to 2008 has produced a plainly anomalous and unfair result.

The last point that the OFT make as to why they cannot adopt the approach that we put forward is that it would enable BN's penalty to be calculated by reference to a different year, 2002, then other undertakings 2008. The OFT does not say that this would be unlawful and, on the contrary, we have Europe high authority in Luxembourg in the *Böel* case, the reference is vol.5 authorities, tab 74, and the *Britannia* case which I have quoted from already (vol.8 tab 109) where the European Court has expressly upheld the use of different reference years where relevant turnover is not available in the standard year or to use the same year would lead to unfairness. So it is all a question of the facts.

In fact, the OFT itself has not followed its own consistency guidelines.

If we take up the decision at VI 94, p.1648 there is a heading "Parties that did not trade in the business year preceding the decision", and it mentions a number of parties, one of which is an appellant in these proceedings, Corringway. Effectively what they did there, was to say you are not trading in the year preceding the decision so we are going to take the last period for which accounts have been published or prepared, and that is what happened in Corringway and we see that, if there is any doubt, at the OFT skeleton in these proceedings, para. 44 in the Corringway case.

So they have not even been consistent with their own consistency, and if one then looks at p.1648, there is no reference to Ballast at 694 to 697. We then have another heading: "Parties that were unable to provide any relevant turnover figures" which is at 698; Ballast was not unable to provide turnover figures, they did provide them. As I say, there is nothing in the decision as to why they were rejected.

THE PRESIDENT: You are not mentioned there.

MR. VAJDA: No. We have, in an sense, fallen in the crack, or a rather large black hole. To conclude on proxy, the effect of using the proxy for BN is that it suffered a double whammy because its fine has been solely based on worldwide turnover, not just for the MDT infringement, which I will come to in a moment, infringement 48, but also the proxy infringement 41 and 47, and that is one of the reasons that Ballast goes right up to no.3 in the size of fines in the case. We say that the penalties of over £3 million bear no relation to what is required in step 3 and fail to give regard to BN's individual circumstances and was

conspicuously unfair and discriminatory. That is all I want to say on proxy, and I am going to be much shorter now on MDT.

The MDT penalty relates to infringement 48. The basic point that Ballast, BN, takes in the notice of appeal is that the OFT was wrong to base the MDT on BN's worldwide turnover. I am conscious, Sir, that there has already been debate yesterday afternoon, and there may well be debate in future as to whether it is appropriate for the OFT as a general proposition to take worldwide turnover as the basis for an MDT, and I do not propose today to add to that debate.

In my submission there is, however, an important prior question that the Tribunal needs to deal with, and it is this: was the OFT entitled in the circumstances of this case and, in particular, the circumstances of BN to base the MDT on worldwide turnover. The starting point here, we say, is that the relevant infringement - Infringement 48 - was committed in February 2001 under the old pre-1st May, 2004 regime. As we point out in our Notice of Appeal, under that regime the maximum fine was limited to 10 per cent of the undertakings' UK turnover. Now, there was nothing in the accompanying 2000 guidance to suggest that the Oft would have regard for anything to worldwide as opposed to UK turnover. Indeed, the only reference we can find in that guidance to turnover generated outside the United Kingdom is in Step 1 where it is said that "this may include turnover generated outside the United Kingdom if the relevant geographic market for the relevant product is wider than the United Kingdom". So, in effect, if you have got a market which covers Ireland and Northern Ireland you might have a look -- Again, that is Step 1.

THE PRESIDENT: Yes. So, we are not in that situation.

MR. VAJDA: We are not in that situation, absolutely, sir. The Oft has now confirmed in its defence (paras. 59 to 61) that its policy has always been to interpret turnover under Step 1 in the 2000 and 2004 guidance consistently with the turnover orders - that is to say, the 2000 order and the 2004 order.

Thus, we say that prior to the change on 1st May, 2004 the concept of worldwide turnover of an undertaking was not a relevant consideration in the determination of fines. Accordingly, we say that the Oft cannot justify its approach by saying it was entitled to apply the MDT to worldwide turnover because of its policy objectives of looking beyond the undertakings' UK turnover to its total turnover. We say that to do that would be to ignore the 2000 guidance in respect of infringement committed at the time the 2000 guidance was extant. This is the important point: that, of course, this is not just the Oft's guidance. They have to seek, and may obtain, the consent of the Secretary of State. So, plainly, if they were going

to depart from the guidance they would change the guidance they would need to seek the consent of the Secretary of State. So, the Oft do not have *carte blanche*.

What we say is that the Oft's approach in this case is improper in public law terms. Since the infringements were committed at a time when the 2000 guidance was in force, the Oft has had regard to an impermissible consideration in setting the MDT by reference to worldwide turnover and in doing so has acted not only unfairly, but also in breach of that guidance as well as BN's legitimate expectation that the Oft would follow the guidance which had been approved by the Secretary of State.

Indeed, one might well ask, "What is the point of issuing guidance which the Secretary of State has approved if the Oft can simply depart from it? What is the point of asking Parliament, requiring the Oft to seek the consent of the Secretary of State, is the Oft can depart from it without reference to the Secretary of State?"

There is nothing in the later 2004 guidance which changed the turnover for Step 5 - what is called the s.36(8) turnover from UK to worldwide to suggest that it had retrospect effect to apply to infringements committed before 1st May 2004. Indeed, we say it is clear that the 2004 guidance is intended to have prospective effect only. We refer to paragraph 2.18 where it makes clear that in respect of infringement which ended prior to 1st May 2004, the old cap of 10 per cent of UK turnover is to apply.

Contrary to what the Oft suggests at para. 55 of its skeleton we are not saying that the action of the Oft was *ultra vires* the 2000 turnover order. It is not an *ultra vires* point we are taking because we accept that we are below that 10 per cent. The point is - and this is the public law point - that the Oft was not entitled to act inconsistently with the guidance at the time the infringement was committed. It is really a *Wednesbury* point - a *Wednesbury* and legitimate expectations point. It is a not a *vires* point.

We say that that submission is sufficient for BN to succeed in its challenge to the MDT based on its worldwide turnover. I would add that I express no view whatsoever in whether or not, looking beyond the UK turnover in terms of deterrence that is a relevant and permitted policy objective in relation to infringements committed on or after 1st May, 2004. That is a different situation which is not this case. We do not need to really get into that - certainly so far as my clients are concerned. That is for another day.

That brings me to what I call the *Makers* point. The Tribunal will recall that it was the Oft that sought to justify the MDT in this case by reference to *Makers,* as endorsed by the Tribunal. I just give the Tribunal the reference: the Decision is at 6.211. Again, there is nothing in the decision to suggest that the Oft addressed its mind to the fact that the

practical effect of what it was doing went way beyond what it did in *Makers*. While the Decision makes it clear that the Oft took a deliberate decision to include the parent company as the addressee on grounds of deterrence - and the reference to that is vi.61 - that is an approach which leads, at least in the case of an undertaking such as BN, to radically different results. Let me just explain that by reference to figures.

If you take BN's total UK turnover, which was £11 million in 2008, then MDT would be £82,500. That would be the MDT if you do the *Makers* approach. The MDT that BN actually received was not £82,000, but over £8.5 million. I am very good at maths, but I think that is an increase of over 100 times. We set out the figures at para. 79.

Again, and we have put it the other way, let us assume that the Oft in *Makers* had imposed an MDT on Makers' parent company, Keller. The MDT in that case would not have been fined £20,000, but £5 million - that is, a ten-fold increase. That is the point we make at para. 45 of our skeleton. So, we say it is wholly disingenuous for the Oft to pray in aid *Makers* as some kind of precedent to justify the level of the fine in this case. There is no way that *Makers*, on my client's case, justifies a fine of £8 million as opposed to £82,000.

The Oft, in its skeleton, now accepts - with, I would add, a degree of under-statement that "There were some differences between the *Makers*' case and the present case.". It does not actually tell us what they think those differences are. It then goes on to say that the lawfulness of the MDT here does not depend on the circumstances being identical to *Makers*." We agree with that. But, that simply reinforces the point that I have made that nowhere in the Decision does the Oft consider whether the circumstances justified in the case of BN such a massively different result. Again, this is an exercise that the Oft recognises that it should have done as it accepts, in the case of the MDT, that it must look at the individual circumstances of each undertaking. Again, it is those two quick passages at para. 120 of the defence and para. 26 of the skeleton.

So, we say that there is, again, a total failure to look at the disparity between the £82,000 (which is the *Makers* approach) and the £8 million. You might say, "Well, okay, we can start with that", but then we have got to then explain why £8 million should be right - and not £82,000. One would expect some reasoning. Given that there is a difference of nearly £8 million one expects the reasoning to be pretty substantial.

I should finally - and I have then just two more things to say on totality - in relation to MDT, finishing up, we of course, as I suspect other appellants, are proceeding on the assumption that *Makers* in the Tribunal is correct. That is the basis upon which we are proceeding. Of course, that may yet go further.

I come then, finally, to totality. This is the shortest bit of my speech. We know in criminal law that when you are looking at any penalty, when you look at whether it is consecutive or concurrent you have to look at the principle of totality. That is well-established. Ultimately, what the Tribunal needs to look at is the fairness of the overall level of the fine. We say that on any view a fine of over £11 million - and that is just the reduction for, in a sense, co-operating with the Oft - is out of all proportion to the scale and nature of the infringements attributed to BN.

First, as the Tribunal will know - and, indeed, the Oft have found - these infringements were committed in relatively narrowly defined local markets. This was not something nationwide. The nature of the infringement - cover pricing, as the Tribunal will no doubt be told many, many times and perhaps already has been, is, on the scale of infringements less serious. Here there was no orchestrated plan to share markets, customers within the context of bid rigging. We just had a series of *ad hoc* cover pricing. Indeed, the Oft itself, in its decision - and the relevant paragraph is 6.104 - says that the instances of cover pricing were individual, discrete infringements and that there are less serious forms of collusive tendering than those involved in an overall scheme. The Oft then acknowledges that there was a widespread ignorance about the illegality of cover pricing - a matter which it claims it took into account in setting the fines (6.173). We would respectfully suggest that in imposing a fine of over £11 million on my clients, that was not given sufficient weight. One comes back to the point at the end that the fine that BN has got is one which is over 135 per cent of the amount of Ballast's last year of turnover in all three markets. Forget about profit. Just turnover. And almost 100 per cent of BN's total turnover in the United Kingdom in ----

THE PRESIDENT: 135 per cent is the 2002 figure?

MR. VAJDA: Yes, that is right. Exactly, Sir. It is almost 100 per cent of BN's total UK turnover in 2008. That is, of course, the reference here that the Oft took. We say - and there is absolutely no evidence in the Decision - that the Oft stood back and said to itself, "Well, let us just look at Ballast. Let us look at Step 1. Let us look at Step 5. Let us look at *Britannia*.. Let us look at *Boel*. Is this fair?" There is nothing. What is particularly unfortunate in our case - and I come back to it - is that we have been the subject of this double whammy which is this thing that, "We are going to go for worldwide turnover --" As we have said, 99 per cent of the turnover was outside the United Kingdom. It is done both for the proxy and MDT. Again, we come back to the passage in MDF which we have just quoted again - and I am really coming to the end - at para. 121. Again, this is sort of

ABC law. The fixing and appropriate fine cannot be the result of a simple calculation based on the total turnover." That is particularly the case where the goods concerned only account for a small part of that figure. It is not rocket science.

THE PRESIDENT: Is that *Musique Diffusion*?

MR. VAJDA: Yes. It is not rocket science. Sir, we say that the fine contravenes both the totality and the proportionality principles. In our respectful submission the Decision, so far as BN is concerned, has imposed penalties which overstep by a vast margin the considerable the bounds of reasonableness. We invite the Tribunal to strike those penalties down and substitute the reduced penalties along the lines of what we have set out in our Notice of Appeal.

Those are my submissions.

THE PRESIDENT: Thank you, Mr. Vajda. I do not know whether there are any questions at this stage? (After a pause): No. Mr. Unterhalter?

MR. UNTERHALTER: I wonder whether we might seek a very short adjournment? There was one issue of computation which I must be clear that I have proper instructions on.

(Short break)

MR. UNTERHALTER: Sir, there appear to be three points that are common ground. The first of them is that the relevant markets that were defined for the purposes of the Decision were extremely narrowly framed. This has consequences for the debate as to proxy. The second is that it was warranted to arrive at a proxy in respect of the UK company which had ceased trading. The fundamental question is: How should that proxy be determined? The third point, which appears to be common ground, is that the question of turnover generated in these narrow, relevant markets may very well be of a variable character. That sets up the difficulty as to how properly to determine the proxy. Just to reinforce those points, if one looks to the decision at II.1727, which is where the conclusion is reached in respect of relevant markets, p.329 of the decision. One sees both as to geography and as to product markets there is very finely grained determination of relevant markets. The OFT might easily have taken a more robust approach to markets as it has on other occasions, but this is the approach that it took and there is no dispute between the parties that this was the approach and that it was not unwarranted in doing so.

The consequence though is that where a party such as Ballast has ceased trading, the question is then to determine what is the right figure to attribute to it for the purposes of turnover? As you have heard it is the central submission that is made by our learned

friends that indeed what should have happened is that the OFT should have looked back to the turnover figures that were relevant for the 2002 year.

Might I go to those immediately, because it is said that we have simply taken far too robust a view in suggesting that these figures are ones the reliability of which is in doubt because they were very carefully constructed.

THE PRESIDENT: This is Annex 5?

MR. UNTERHALTER: Yes, it is Annex 5 to the notice of appeal. What is plain, and it is really the paragraphs from 41 onwards, if one reads how this is styled, it says: "relevant turnover" and "attempt to identify relevant turnover in 2002". That is an absolutely fair reflection of what follows because it is no more than an attempt and it is predicated upon an effort to reconstruct and what one reads in this account – reading at 41:

> "In spite of the OFT's intention to base the calculation on the turnover of the year preceding the OFT decision BN NV provides a breakdown of PLC's turnover that was generated in the last year."

Then reading a little beyond that at para. 43:

> "BNNV has made its best effort to assess whether the clients for which Ballast PLC was working on projects in 2002 were active as a buyer on any of the three relevant markets mentioned in point 39 above."

Then we see how they went about it, and it is perfectly plain from this account that there just are not complete records for this purpose and it is a matter of surmise and construction. For each of the clients listed in relation to a project, Ballast conducted a search using publicly available data. It first determined, mainly with the assistance of Google, where the plant was located, whether the address was in one of the areas, secondly, it tried to determine whether the client was active on any of the three product markets relevant in this case – tried, but with what success we know not.

The research results were then combined. So it is not clear what those research results were, they were simply an attempt to determine and some results were generated as a result of that, they were then combined which allowed Ballast to establish whether the turnover generated for a particular client was attributable to any of the three relevant markets. But since we do not know what that data was, and we see in its context how this was a construct, it is very hard to know what we are looking at and with what level of accuracy or confidence we can attach to this exercise. Where there was doubt as to where the client was located or as to the nature of the activity of the client, the turnover achieved by that client for the listed project was included, so they give the benefit of the doubt there. But then they

say where there was no relevant information regarding the client, or the project available as to where the client was located, or as to the nature of the activity of the client, the turnover achieved by that client for the listed project was excluded. So a number of variables there are listed and strongly suggestive of the fact that there were significant gaps in the data that they had available for the purposes of the computation. Then they say that Ballast takes the view that the outcome of its investigation which is included in annex 3 hereto, and summarised in the table below accurately reflects the position of Ballast PLC in each of the three relevant markets, but the conclusion, the accuracy does not flow from the explication of the exercise which is captured in para. 44.

THE PRESIDENT: What they seem to be saying at the end is it provides a useful insight.

MR. UNTERHALTER: Yes. So when we raised the proposition which is to say: "We now read this, we say what is said here, but we cannot vouch on this account that is given as to the accuracy of what is there contained. We are really doing nothing more than reflecting upon Ballast's own account of what it did, and we understand it was done many years later after this company had ceased trading apparently based on some reports that were generated when local management was seeking to sustain the entity in the UK. One understands it is partial and a reconstruction and therefore not inherently reliable as the very account there would seem to indicate. So it is for that reason that the apparent attractiveness of these 2002 figures is not a self-evident reference point for the purposes of trying to determine the issue which is central from our perspective, which is that this is an entity which ceased trading, and the question is then: how does one develop a proxy for the purposes of deciding what relevant turnover figures to use?

If I might just explain as best I can how the proxy was derived ----

THE PRESIDENT: Just before you do that – we are putting the letter away now, I assume, are we?

MR. UNTERHALTER: Yes.

THE PRESIDENT: The reference to £361 million, as I understand it that is the UK turnover, is it?

MR. UNTERHALTER: Yes, that is so.

THE PRESIDENT: The total UK turnover of the dissolved company.

MR. UNTERHALTER: Yes, and it is these figures which are then utilised and are reflected in the table in the notice of appeal. So if one examines the table, on this construction there is a total turnover of £361 and then they have generated by this constructive device what they

attribute as the turnover in these very particular markets that are reflected as the relevant markets for the infringements that were involved.

THE PRESIDENT: Was the £361 million of any interest to the OFT?

MR. UNTERHALTER: It was not directly taken into account for the purposes of deriving the figures but we have certain submissions to make on that for the purpose of testing reasonableness which I shall come to because that £361million is a useful number, and perhaps I can just indicate where I shall ultimately want to go as far as that is concerned. If one looks at £361 million one sees that on their own account PLC was not a small undertaking in the context of the UK market, and if one combines that proposition with what appears to be accepted, which is the variability of such turnover in markets of this kind, what we are really confronted with here is an undertaking that in relevant markets is quite a big undertaking and consequently when one asks, which would ordinarily be what we would be seeking: what was the relevant turnover in these markets in the year prior to the decision which is how we understand and how we have applied our guidance. Then the question is in an undertaking of this size it might easily have engaged in sizeable projects in relevant markets given this overall turnover that it had, such as to generate the kinds of proxy numbers which we will come to by way of the computation.

So it is a combination of what they say their size was, combined with the variability of the kinds of relevant turnovers that can be generated in these very small markets, it would only take a sizeable project in one or other of the relevant markets in order to generate relevant turnovers of the orders of the proxy that were utilised, and therefore fundamentally we say this is not unreasonable in the ways that our learned friends would suggest.

But if I might move to the proxy, and how it was calculated. These passages are to be found, and perhaps beginning most usefully in the decision. The discussion commences at VI 256,p.1684, and the general problem is postulated at the end of para. VI 257. In that last sentence it says:

> "There is a need to deter undertakings from infringing also in markets they have exited, or where they have never carried out any work, and this would not be achieved if companies faced no penalty in respect of infringements affecting such markets.
>
> The OFT has therefore used a proxy figure for any second or third infringements in respect of which the penalty is nil at the end of step 2. The OFT informed the parties that it was going to do so by means of a letter… that it proposed to use a percentage of the relevant Party's total turnover in the business year preceding the

OFT's decision for this purpose. The OFT indicated in its letter that the proxy figure would be based on some kind of average percentage of total turnover …"

- but these are the important words –

"… represented by the penalty reached at the end of step 2."

Just to illustrate how that works if one looks at the summary at the end of the decision where each party's penalty is derived, one will see, just to take any number you might take but there is a standard format, if you were to look, for example, at p.1786, it is in every single table, one will see that there is each example – I am sorry, that is not a very good example because there is a zero percentage there – perhaps if one uses Kier, which we were dealing with yesterday, at 1787 one will see in the table that there is a line for "Penalty after Step 2 [Confidential] penalty as a percentage of total turnover", and that line is to be found in each one of the computations that are done for each one of the parties. What happened here was that the proxy was calculated by taking that line and computing it across all of the infringements to work out the figure that one sees ultimately at p.1688, which is VI.270:

"The proxy figure is 0.14 per cent and the OFT is applying this percentage to the Parties' most recent turnover figures for any infringements where the most recent relevant turnover figure is nil, in order to derive a figure to be reached at the end of step 2(and at the end of step 3), for any infringements to which the MDT does not apply."

Now in order to see that 0.14 arises from this computation of all of those line items across all of the parties, it is elucidated by the commentary one reads in para. VI.269. There was particular objection that was raised by one of the parties, Mowlem:

"Mowlem suggested that when calculating the proxy figure, the OFT should base it on an average percentage of total turnover represented by the penalty reached at the end of step 2, for ***all*** infringements, not only regardless of the market in which they occurred, but also including those infringements where the Party's relevant turnover was nil."

So in other words you would include it across the range even where there was a nil return in respect of turnover, and the OFT says it has considered it and then you get what it did, and it decided it would provide a fairer outcome than the original proposal since this reflects the aggregate situation of all parties in all infringements.

"The OFT is therefore using a figure based broadly on the median percentage of total turnover …"

- but again these are the important words:

"…represented by the penalty reached at the end of step 2, for all infringements." So it is a median point taken across that universe in respect of these percentages. The reason, apart from wanting to know how the proxy was in fact arrived at, which is relevant for the purposes of the legal points that are taken, is that it is not correct to say t hat this is simply the application of a total turnover standard, because the proxy is derived from where the party is in the universe, where they had got to at the end of step 2, which is a relevant turnover amount. In other words, in each case there was a computation of how much relevant turnover was at stake, and then that was expressed as a proportion of total turnover. So although the words "total turnover" figure in the proxy calculation, and there is no getting away from that point, it is a very low number precisely because it is a computation taking the starting point derived from steps 1 and 2, which is relevant turnover, and expressing that as a percentage of total turnover, which is why it is 0.14.

My learned friend raised the question as to whether this was somehow connected to a separate computation that was done in respect of VI.98, I am told – and these are my instructions – that a proxy was not derived from 5 per cent at 2.9, it just happens to coincide, but the fact is that these parties that are treated under this heading here at VI.98 were given the same treatment, and there was no different treatment that was meted out to them as it happens because it mathematically comes to the same thing, 0.14. It just happens to be the case, I am told it was not actually the reasoning that was utilised for generating the 0.14 figure.

MR. VAJDA: You mention 2.9 per cent as the proxy there.

THE PRESIDENT: It is 5 per cent of 2.9.

MR. VAJDA: Perhaps my learned friend can explain how they get from 2.9 to 0.14 then, because I thought it was by reference to 5 per cent of 2.9, and he says "no" it is not, so we would like to know how they got to 0.14.

THE PRESIDENT: Some other means of getting there.

MR. VAJDA: That is the reasoning.

MR. UNTERHALTER: The computation is exactly as I have indicated, they have literally taken that line item. I am told that if you take those tables at the end of the decision and you look at the percentage at the end of Step 2 at the "Percentage of total turnover" and compute all of those percentages you will get to a proxy figure of 0.14.

MR. VAJDA: So why is there a reference to 2.9 at VI.98 then?

MR. UNTERHALTER: I can only tell you what my instructions are that that was not how 0.14 was calculated; I cannot go further than that.

PROFESSOR BAIN: Mr. Unterhalter, is it not the case that the figure of 2.9 is derived from the 0.14, it is calculated in reverse from it, is it not?

MR. UNTERHALTER: It may be, it may be. The key point, Sir, that in our submission does not get lost in this debate is simply that in deriving that figure of 0.14 it is not a figure that is simply a total turnover standard that is being applied, it is a figure that meaningfully is derived from the figures generated by way of relevant turnover, not simply from total turnover which is what the appellant has sought to contend for.

If I might explain why it is, and the reasons that have been advanced as to why we did not utilise the 2002 figures. The first of them is, as I have already indicated and do not need to repeat that the figures as we see them, and as we see the account given of them are just not inherently accurate figures.

The second point that is relied upon is the main point that we wish to make, and that is the question around variability and size of contracts. This is an inherent feature, as I have already sought to indicate, of very narrow markets, and so if one is going to adopt, as indeed we say we do and must for the purposes of consistency the year prior to the decision as the relevant year for the purposes of deciding upon turnover, then we are necessarily looking for a proxy and these framework considerations need to be taken into account, which is to say: what is the size of the entity that we are dealing with and, given this potential variability, is there anything intrinsically problematic about the averaging that is done for the purposes of generating the proxy figure? Undoubtedly the proxy is a rather robust approach to the matter, but all that it is really doing is saying we take an overall – it is not really a true average – median of the kinds of levels of relevant turnover that were being generated relative to party's overall turnover. But it is certainly engaging with the relevant turnover that parties were generating for purposes of the decision.

Even if one uses the sense check that our learned friends press upon the Tribunal, we suggest that does not give rise to outsized answers of the kind that are contended for.

If I may return to the £31 million turnover, which is on the figures offered by the appellant. We have done, as we reflect in our skeleton, an exercise that says: "If you had applied the ordinary 5 per cent rule to the company as it existed and as reflected in terms of the total turnover it generated, given that the relevant turnover figures were approximately 1.5 in respect of the two infringements, how much relevant turnover would that have to represent, and that is where we get the figure of approximately £31 million. It is for that reason we say that given the size of this entity and the kinds of activities that it was undertaking in the UK at the relevant time is this an intrinsically problematic figure.

PROFESSOR BAIN: Mr. Unterhalter, £31.8 million, there are 120 markets, if this was the average over the 120 potential markets that would imply a turnover of £3.8 billion plus. That does not look terribly plausible to me, why does it look plausible to the OFT?

MR. UNTERHALTER: It is not that we are applying an average what we are saying, and this is the variability point that we are seeking to make, is that it could have operated in any one of the relevant markets.

PROFESSOR BAIN: Indeed, that is exactly my point. If, on each of those 120 markets, it had the typical turnover, not just the particular one in the year, but a typical one of 31.8 million, which takes your year to year variability point into account, Ballast would have had to have a turnover of £3.8 billion, which I know that theoretically you are trying to get a turnover for 2008, but by the standards of any construction company I am aware of in the UK that looks an awful lot of turnover.

MR. UNTERHALTER: The premise there of the argument does not proceed in that way. We are not suggesting, and I do not believe that the appellant is suggesting, that it would have operated in every one of the 108 markets. On the contrary, what it does is that it operates selectively in different markets at different times.

PROFESSOR BAIN: Have you any evidence from that schedule that they produced that they were operating in only 10 of the 120 regional/product markets that existed?

MR. UNTERHALTER: I will check as to whether we have. I am not certain that we do have, but the point is that variability means exactly this, which is that you bid in different markets at different times, and the contracts are lumpy in that sense, so in our submission this is not an unusual proposition to be advancing, which is that you do not have constant business in all 110 markets, you will sometimes win tenders and sometimes lose them.

PROFESSOR BAIN: I entirely agree. Sometimes they may only bid at 50,000, they may benefit the market with 30 million, though I doubt it, it is quite conceivable. But what you are looking at is what they have in the typical market, that is what the proxy is about, taking an average to get at what is typical. The implication of what you are saying is typical is that if they were operating in all the markets they would have had a turnover of £3.8 billion. If they were operating in 20 markets they would have a turnover of £650 million. Now, 20 markets may be more reasonable than 120, but it is still way above the actual turnover that they had.

MR. UNTERHALTER: We submit that there is nothing typical about choosing a figure to average across all the markets, that what is justifiable here is to say a firm would have won

tenders in a number of markets, so these figures are not outliers, because they could have had these kinds of turnovers in relevant markets.

PROFESSOR BAIN: But with respect, Mr. Unterhalter, your methodology is averaging over all markets. That is what you get by taking the average of all the contracts. If you had wanted to look at the particular markets you could have identified the sort of markets in the parts of the country Ballast was operating in, you could have taken the data for all the infringements in those markets and based your estimate on it, and that would be looking at the particular characteristics of the particular company. But you did not do that, you looked at the average across everybody and you come out with answers that do not seem to satisfy my test of plausibility.

MR. UNTERHALTER: I cannot take this further than to say that the kind of average that is generated here – if one accepts the 'lumpiness' proposition and the high variability proposition that we say is intrinsic to tender work of this kind, that the sorts of proxy figures that were generated was not such a huge outlier because although I accept that there are certainly other ways in which this could have been done, we accept that that is so, there might well have been a different way of doing it, that the question ultimately for the Tribunal is whether this method generates an outcome which is so way out of the scale of what could have been achieved by this entity in the relevant markets.

PROFESSOR BAIN: Surely the question for the Tribunal is whether this method generates an outcome which would be a realistic proxy for what on average they would have done, not in the year that it happened to be large in that particular market, because you are trying to get rid of that variability, you are looking at the average. I accept that that is what you are trying to do, I am not trying to challenge your ability to find a sensible proxy here, all I challenge is whether or not you have found a sensible proxy.

MR. UNTERHALTER: The difficulty intrinsically in this is that if you seek an overall average over all of the markets, you are not taking account, at least in my conception of it as to the high level of variability that would occur because it is incredibly hard to predict who would have won what tender in what market and at what time.

PROFESSOR BAIN: I agree with that, but I think we perhaps disagree about the implications.

MR. UNTERHALTER: Yes. In our submission there may well have been other ways of doing it, the question is whether the figure that is arrived at here makes no sense in relation to these kinds of activities in these very narrowly framed markets, and we submit it is a function of the narrowness of the market definition that gives rise to the problem. Had we had more expansive market definitions you probably would have got figures that would not have been

apparently out of line at all. So in our submission the second point is around variability and the judgment of a proxy against the conditions of variability.

The third proposition, which is fundamental to our view about the proxy, deals with the issue of consistency which is that we have chosen and interpreted our guidance on the basis that it is the year prior to the Decision that is relevant. We do that for a number of reasons which are not called into question by this appellant. We may have occasion to debate it on another occasion. But, it is the Oft's position that upon a proper interpretation of the guidance it is the year prior to decision that counts.

Once that is the relevant year one has to find some basis for consistent treatment. Before you there will be many who come to say, "Had you adopted a different year at a different time because turnovers change from time to time we would have got a more advantageous result". Many of the appeals are all legal arguments which are directed towards an end which would derive a more favourable turnover simply because that is how you get a better outcome in terms of pounds and pence. But, here, for our purposes, we did, and we had to, adopt a consistent approach. That meant that we had to use a proxy that would be a proxy for 2008.

Our learned friends say that if you apply that reasoning, if you look at the audited statements that are to be found in Annexe 6, you will see that the total turnover was of the order [here stated] of nearly 14 million euros, which is the audited accounts -- These are the KPMG figures. It is audited as 19th November, 2009. Those were plainly not figures that were made available at the time that the Decision was taken. These are subsequent figures that have been produced for the purposes of showing what in fact had happened to this firm and what business it undertook in the course of 2008. So, this is new evidence for the purposes of what is now being pressed before you.

In our submission, this sort of evidence is evidence which will be treated with some caution by the Tribunal because the question is, "How was the Oft to utilise this for the purposes of its own computation?" But, even if you take account of it, what is now being pressed here upon you is a UK total turnover standard for the purposes of deriving a Step 1 and Step 2 relevant turnover which we had always understood this appellant to be hostile to as a matter of principle. We would also submit that the key issue for the Oft is to try and determine what is a hypothetical question, which is, "Had Ballast remained on the market, what is the right proxy figure in 2008?" - not to ask a different question which is, "Given that the company has been restructured and has undertaken activities -- Its holding company in

Holland has undertaken activities in a different way, what sort of activity does it now engage in in the UK market?"

In our submission, the question has to be that if a firm -- if an undertaking ceases trading then you cannot have a penalty that simply is derived from some notion of what the holding company may or may not be doing on the market. You have to try and hypothesise. If the company had remained on the market, what would its turnover plausibly have been? That is what the proxy is intended to catch on.

So, we submit that there is no warrant for a move to utilising these audited figures for activity of Ballast in the UK - rather, you have to engage in the hypothetical exercise that I have indicated.

In our submission it is those three issues that are at stake in justifying the use of a proxy and justifying the use of this proxy, and particularly variability is relevant to that. It is said, on this score, by our learned friends that this approach simply violates the guidance and that we were not ----

THE PRESIDENT: Is this a legitimate expectation point?

MR. UNTERHALTER: That is the MDT context.

THE PRESIDENT: Sorry. Absolutely right, yes.

MR. UNTERHALTER: That is in the MDT context. In our submission the guidance under 2.13 makes clear that we are permitted to engage in an adjustment where there is a nil figure at Step 2. This is exactly what we have done. So, the question will be for the Tribunal to determine since it is common ground here that a proxy was required. The question is: Were the 2002 figures the ones which should have been relied upon? I have given you my reasons as to why they were not reliable and were not a proper basis for determining a proxy. We have adopted a different standard for a proxy. I have indicated the basis of that proxy. But, if the Tribunal believes that that is not the best proxy, or a proxy which properly captures this matter, then the question is, "What is the better proxy?" That is a matter in respect of which we have heard nothing from the appellant because although -- Its case is founded upon the 2002 figures. So, if we were justified in not accepting the 2002 figures, or using any extrapolation based on the 2002 figures, then the question is, as is put to me by the Tribunal, "Well, there may be other forms of proxy that could be done". They are somewhat dependent on data and how one would engage in that computation, but the issue is then not whether a proxy is problematic, but, we say, that this is a properly grounded proxy, but that if you should take a different view on the subject we submit there is no warrant to adopt the 2002 figures simply in default because the use of a proxy and a

proper methodology for a proxy is something that would have to be squared up to in relation to the hypothetical test that I have indicated, which must be applicable as of the date of the Decision. We submit that this proxy will serve adequately for that purpose, but that if you should take a different view then there would have to be another kind of proxy and another form of proxy to be adopted that would do better service.

In our submission, therefore, on this score we do submit that the proxy is defensible and that it should stand.

If I might then very briefly move to the MDT argument where there are two fundamental points that are being made? The first of them is to say, "Well, there is a retrospectivity problem here because, it is said, there was a legitimate expectation, in effect, that the 10 per cent of UK relevant turnover would be the limitation and that that has been thwarted by reason of the application of the 2004 figure". We make this submission as far as that is concerned - and I wonder whether I could ask, in that regard, if you would turn to the authorities bundle, Volume 8, Tab 102, the *Archer Daniels* case. In this case the question arose as to what consequence the change the Commission's guidelines would have upon the expectations of a party. The relevant passage is to be found at para. 20 at I-4493.

> "A change in an enforcement policy, in this instance the Commission's general competition policy in the matter of fines, especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines, may have an impact from the aspect of the principle of non-retroactivity.
>
> However, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.
>
> It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines.
>
> Consequently, in the present case, the undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past".

This authority is therefore clear on the proposition that when it comes to guidelines there is no legitimate expectation which arises which says that you have an expectation that guidelines that were of application at the time that the infringement was committed will be of application for the purposes of limiting the extent of the penalty.

THE PRESIDENT: Is this para. 25 also? Can I just glance at para. 25?

MR. UNTERHALTER: (Pause whilst read): That deals with the reasonable enforceability. In other words, you have to understand that these are guidelines and subject to change. Therefore, it does not grant legitimate expectations.

As a matter of authority we would submit that there is no legitimate expectation which arises in these circumstances. But, there is a second point of principle that we would want to raise which goes to the question of what is being done at Step 3, which is to ensure that a proper penalty is applied for the purposes of deterrence. Deterrence is intrinsically a forward-looking consideration. I think there is little doubt about that proposition. Therefore, it is not the guidelines that would have been of application at the time that the infringement took place that would be relevant, even if one were to allow for some notion of expectation. But, it is what penalty will be of application to the undertaking for the purposes of guiding and incentivising its future conduct. Therefore, the relevant norm to be applied as the norm at the time, or just prior to the Decision for the purposes of applying the principle to the undertaking as it then stands, and then determining what incentives would be applicable to that kind of an undertaking as so constituted for the purposes of ensuring that the requisite incentives are applied to it. So, as a matter of principle, given what the guidance here is intended to achieve, we submit that it has that consequence for the purposes of what expectations might be generated. You must expect that it will be applied to you in such a way as to govern your future conduct. Therefore it is not an unexpected result that it would be applied in the way that it was.

If then, finally, I might briefly deal with the question of *Makers*? Again, it has been suggested by our learned friends that that was a very different kind of case and that the adoption of a worldwide turnover standard is something new and, at least in the case of this appellant is out of all proportion to what should be imposed upon it. We submit two things: firstly, that if one looks to the European case law one sees very clearly in a sequence of cases which I do not now have time to take the Tribunal to, but which we have ventilated before - *Archer Daniels*, *Degussa*, *BASF* and others - that there is a ready recognition in those cases that the size and scale of the undertaking at the time of the Decision is the relevant consideration for the purposes of applying deterrence, and that it is properly applied on a worldwide turnover standard, and nothing about the cases suggests otherwise. So, as a matter of Community law that is the proposition that is applied. There is a reason for it - that is, that it is concerned with the scale of the undertaking across markets, and in relation to conglomerate activity, even where that activity might take place on a worldwide

basis. It is the scale of that undertaking that is relevant for the purposes of applying deterrence.

So, this appellant says, "No, that should not be of application because it is only the UK turnover that will be relevant for the purposes of applying a proper standard of deterrence to this particular appellant. We submit that that is not the correct principle at all. The principle is: How will you deter this undertaking? This undertaking is a large undertaking that operates in many markets, and it is in order to assess its size and what will provide the requisite incentives upon it that the MDT applies and it applies to the scale of the undertaking as it exists.

THE PRESIDENT: So was *Makers*, of course.

MR. UNTERHALTER: Yes. In *Makers* - and this is where there is a point of difference between us and our learned friends as to how properly to interpret *Makers* - there is no question that on the facts *Makers* was addressed to the UK holding company and not to Keller, the ultimate holding company which operated on an international scale. That happens to be so as a matter of the facts of the case. But, does it impact upon the policy that was approved in that case? Was it said in any way in the case. "We can approve MDT for the purposes of a UK total turnover standard, but we would not countenance it on some other basis if there were a broader definition of turnover".

THE PRESIDENT: It makes a big difference, does it not? It does make a big difference whether you take the worldwide parent or you do not. So, one has to look at what was said in that context, does one not?

MR. UNTERHALTER: It certainly makes a difference to the numbers. That is unquestionably true. Does it make a difference to the principle in the case? We submit that it does not because the principle of the case is entirely in accord with the European cases, which is to say, "We want to assess size. Size is what matters for the purposes of undertaking the deterrence analysis". That is the methodology that emerges out of the case. So, again, if I might ask the Tribunal very briefly to turn up *Makers* at Volume 4, Tab 57?

THE PRESIDENT: That is true, but you only looked at part of the size in *Makers* because you had ignored -- I think that is the distinction that is put against you.

MR. UNTERHALTER: We understand the point. One cannot say for certain, had the turnover been more widely cast would some aspect of this reasoning have changed? But, we submit that nothing about the way the reasoning is styled seems to relate to the UK base of the total turnover. It is not suggested that this methodology is finely tuned to what one is using as the total turnover of application. What is being addressed is whether the approach that is

adopted by the Oft gives rise to any form of illegality. If I could ask the Tribunal to have regard from para. 121 thereafter -- The Tribunal firstly refers to the acknowledged importance of deterrence as a matter of principle, and the provisions in the relevant passages in that are then referred to. There is then an explication of the Oft's decision on penalty and what is entailed by Step 3, which is exactly what we have in this case.

Then there was the issue as to how was the figure under Step 3 in fact arrived at? One sees from para. 128 onwards that this had to be teased out of the Oft. It was. But, the result of it, which is to be found at para. 132, says this,

> "The MDT depended on comparing the undertaking's turnover in the relevant market (used in the calculation of the starting figure at Step 1) with the undertakings total turnover".

The proposition is very generally framed and it is not said to somehow be dependent on whether it is UK turnover or worldwide turnover.

> The Oft considers that if the undertakings turnover in the relevant market is less than 15 per cent of total turnover ----"

Then there is an account that is given in general terms of the methodology, and then the calculation that follows. Of the objection that is made, which is captured in para. 133, is,

> "The Oft calculated that Makers was in a position where its Step 1 figure was insufficient to act as a deterrent in that its relevant turnover was much less than one per cent of its total turnover".

There the 0.;75 per cent figure is arrived at. Then there is a comparison of the £520,000 with the Step 1 figure of £6,500. But, the conclusion, having applied this methodology, is what we say is binding here by way of reasoning.

> "We therefore reject Makers' assertion that the uplift of £520,000 imposed at Step 3 of the calculation of its penalty was arbitrary or unjustified/ the adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance".

Now, the question is whether the move from a UK-based turnover to a total turnover figure at a worldwide level is now no longer one that meets the objective of deterrence as set out in the guidance.

THE PRESIDENT: That is the question.

MR. UNTERHALTER: In our submission there is no reason why that should be so because it is the scale of the undertaking and the ability to apply proper incentives to that undertaking that lies at the heart of what deterrence is about.

THE PRESIDENT: Because of the choice of what was the undertaking in *Makers*, it only actually reflected a part of what would be the undertaking had you adopted the same approach here. I think you cannot necessarily therefore treat what the Tribunal felt was appropriate there as being appropriate in a different situation where you have in fact adopted the global undertaking.

MR. UNTERHALTER: Indeed.

THE PRESIDENT: I think that is the difficulty with *Makers*.

MR. UNTERHALTER: In our submission it is not so much a matter of looking at the relative proportions of £6,000 to £500,000 and how many orders of difference that makes. The question is really an issue of principle which is that in order to secure the objectives of deterrence, is it impermissible as a matter of principle to have regard to the total turnover of the undertaking because that is what you are trying to incentivise ultimately for the purposes of deterrence. Now, if that is not wrong in principle - and certainly the European case law does not appear to think that it is - then there is no reason why the methodology that is here advocated by the Oft in this case is suspect because there is a workable reason why deterrence is being applied in this way through the incentive structures that we have previously alluded to.

THE PRESIDENT: What one has always got to look at is the result, is it not? One has always faced with: Is the ultimate penalty wrong? Disproportionate? So, all I was really doing was drawing the distinction between *Makers* and the current case where I think the Oft has adopted a different approach than it did on the facts of *Makers*, but neither in *Makers*, nor in the present cases is one able to escape the ultimate question of the final result in the light of the case.

MR. UNTERHALTER: In our submission plainly one has to look at that final result. The question, though, is, "What are the component parts that make up that result? " If the component parts are justifiable in principle then it is hard to know what that further intuitive sense of disproportionality is - because in our submission if each of the steps meets justified objectives, and there is nothing disproportionate about them and their application, then the question is, "Is there then some residual intuitive judgment that is required? What does that consist of? What is the rationality of it, other than just a feeling?" We would submit that

the one virtue of the Oft's approach is that it has sought to apply the steps in a rational way with justifications. We are now seeking to explain why those justifications are warranted.

PROFESSOR BAIN: Mr. Unterhalter, does there not have to be some limit to the extent to which you take account of UK turnover? I see what you are doing. I ask myself the question: "What would have happened if Shell or BP happened to have had a UK subsidiary in 2004 with £100 million turnover in this industry?" The answer is that using your principle you would have come up with a fine of over £1 billion. That just seems to me to go beyond the level of plausibility. You cannot conceivably fine a company £1 billion for the kind of infringements that there are here, whatever the reasons. It just does not seem right. So, do you not have to modify your principle in some way, again to take account of the particular circumstances? I have not heard an argument from you that says, "Well, in the case of Ballast it does not go beyond the point - given that it is 1 percent UK and 99 per cent overseas - where the rigid application of the principle maybe just does not seem quite right?

MR. UNTERHALTER: In our submission it is not the 1:99 that matters, though I take it that there are perhaps always a universe where there are some genuine outlier. In our submission Ballast is not such an outlier. The question is not how much business it was doing on the relevant market. The question is what is the scale of this undertaking for the purpose of incentivising those who are capable of acting in relevant markets to prevent them from doing so? That is the proposition. Therefore, one is asking in deterrence whether the scale of penalty will suffice because otherwise if one uses what would then be, in our submission, a contrary, but equally rigid notion, which is to say, "Well, there is some principle that says UK turnover is all that matters", then you could have a circumstance in which a conglomerate which is very sizeable and very economically powerful just happens to have a small UK turnover and then escapes with a very modest penalty wholly disproportionate to its size and influence, and ability to harm markets in the UK.

THE PRESIDENT: Is that not a good reason for adjusting the penalty upwards? I do not see that that is a problem. It is just that that is what you have to do, is it not? You have to take a view on what you need in a particular case. That is the merit of looking at each individual case as well as having a structure. The argument against you is that you have a perfectly rational structure, but you have not actually gone and looked at each individual case as well.

MR. UNTERHALTER: In this instance our submission is that there was no warrant to make an adjustment because the turnover, although it has a large worldwide turnover relative to its UK turnover is not the fundamental consideration. It is not that proportion that matters. It is hard to understand why that is relevant to deterrence. It is not the proportion of UK to total

turnover that makes you more likely to be deterred or less. The question is whether adopting a total turnover standard would ordinarily suffice. We would allow that there may be exceptional -- The BP example -- There may be instances where you get such extraordinary numbers that you would need to have another look. We would accept that. But, the question is, standardly, there is nothing objectionable about adopting a total worldwide turnover standard because it applies the incentives at the place that matters, at the level where it matters, and it is a just measure of pain, as it were, in order to induce compliance.

Those are our reasons for suggesting strongly that a UK-based turnover standard has no magic about it whatsoever and is not rationally connected in any obvious way to what deterrence needs to achieve in respect of a large conglomerate undertaking such as the appellant. For those reasons we would ask that the appeal be dismissed.

PROFESSOR BAIN: I am afraid, Mr. Unterhalter, I have to come back to this issue of the proxy because you do say that your proxy is robust. I am a little uncertain about whether it is robust. I think we understand how you get to the £31.8 million. I think we understand that really you are engaged in a statistical exercise here. You are trying to get a reasonable way of finding a proxy figure for turnover in particular relevant markets. You have done it by taking the actual figure implicitly of turnover in the market against total worldwide turnover. You could equally well have done it by taking the actual figure in the market against UK turnover. Since we are talking about UK turnover in every case, arguably that would be preferable statistically. Now, if you will accept my calculations on trust, so that I do not have to drag you through them, if you had done that, the figure you came out with was not £31.8 million, but £310,000 in round numbers. That is the assumption. The median would not change very much because most of the companies are UK based. Now, if using two equally valid statistical methods, one based on worldwide turnover and one based on UK turnover as an attempt to get at this proxy, you come out with answers that differ by a factor of 100. I do not want you to say that mine is better than yours. All I want you to do is to agree that if they differ by a factor of 100, and statistically they are equally valid, neither is robust.

MR. VAJDA: The orders of difference are obviously substantial, and I cannot, and I do not suggest otherwise. The question is whether this, I think the sense of robustness that was meant in the decision was simply to say “We are taking an overall average view”.

PROFESSOR BAIN: What you were saying was you were using a lot of data, and my point is, if you do not process it properly because you have got the wrong denominator in this case,

you come out with an answer that would be as nonsensical as the one I was putting to you as the alternative.

MR. VAJDA: We would not accept that it is nonsensical. It simply sought to take an overall view against – obviously the objection that is made here is that even though it is relevant turnover that is being derived, nevertheless it is against a total turnover standard, and that is what makes it a very, potentially it generates large numbers.

PROFESSOR BAIN: It is purely a statistical exercise, and it is nothing to do with the relevant turnover or anything of that sort. We are simply trying to find a statistical method of finding a proxy for relevant turnover. And I would suggest that, actually, using UK turnover as your base in this made more sense statistically than using a worldwide turnover. There is less variability, for example, you could better measure central tendency. For statistical grounds it is probably slightly superior, but I do not really care whether it is superior or not. All I want to point out is that making this slight change to the methodology you change the answer by a factor of 100; and that must cause you to doubt the robustness of the methodology.

MR. VAJDA: I am not certain I can take that any further. The proxy is what – it is what it is.

PROFESSOR BAIN: I just thought I should put it to you.

MR. VAJDA: Thank you.

THE PRESIDENT: Mr Vajda.

MR. VAJDA: Yes.

THE PRESIDENT: We can probably stretch you another five minutes beyond one o'clock, but probably not much more than that. If you are going to be longer than that then -----

MR. VAJDA: I am not. I would hope to finish by one, but, yes.

THE PRESIDENT: Right.

MR. VAJDA: Can I first deal with proxy? It is clear from what my friend has said, and just confirms what we see from the decision, that the decision did not take account of Ballast Nedam's individual circumstances. As we have seen, indeed, the questioning from Professor Bain has further illuminated this was a proxy statistical calculation without any cross-check whatsoever. And we say that such an approach does violate step one of the guidance. We are not saying that any proxy violates step one. That is the answer to my friend's point that there is a possibility of adjustment. We are not saying that you cannot have an adjustment. What we are saying is if you make an adjustment you have got to look at the individual circumstances. Otherwise you are at risk of falling foul of step 1. We say

that the approach here, which is a pure statistical exercise, has fallen plainly foul of step 1 which itself reflects the European case law that I have indicated.

One then comes to the question "What should the OFT have done?" And in a sense it is slightly disingenuous because the question is not in a sense, "What should the OFT have done?" because obviously the OFT has a range of possibilities, it is a question as to whether what the OFT has done is lawful or unlawful. It is true that we have relied on the 2002 figures. They were before the OFT. My friend took the Tribunal to the letter, and perhaps we can just go back to the letter, which is at annexe 5. The English language version of the letter which is behind the Dutch at p.8. I accept, of course – does the Tribunal have that?

THE PRESIDENT: Yes.

MR. VAJDA: That it is Ballast's best efforts to calculate the turnover. But when I said this was not back of an envelope stuff, you can see what was done, and if I could ask the Tribunal to go to annexe 3 of the letter which in fact is the third 'bijlage' if I have my Dutch pronunciation correct. That is the annexe 3 which is the last -----

THE PRESIDENT: Yes.

MR. VAJDA: You will see there they have listed every single project that has been, Ballast Plc was involved in. Indeed this goes very much to Professor Bain's point about all the relevant markets. Did the OFT consider the relevant market? If you look you will see, if I could just do a bit of translation, you have the project, 2002, you have then the project number, name -----

THE PRESIDENT: "Omzet".

MR. VAJDA: Omzet is "turnover".

THE PRESIDENT: Thank you.

MR. VAJDA: But then you have first, that is the East Midlands Defence sector, that is project.

THE PRESIDENT: Yes.

MR. VAJDA: Then the next one is Education, South East of England, and then the third is Public Housing in Yorkshire and Humberside. You will see that a lot of these projects actually have addresses, so for example one that does not, which goes into the first one that is in east midlands is 2.7 million. But then, two below that, we have 22 King Street, London SW1 where there is a turnover of nearly as much as in east midlands. So this is a very careful exercise. And if we go over the page, we see that the sectorRAF "Menwith Hill" that has been put into Public Housing in south Yorkshire. And then you go over the page and you see all the other projects that were, it is involved in. So, what we say is that this was a careful exercise. And I have to say it is not right and fair or proper for a public authority

now at the Tribunal stage to criticise these figures, saying "They are not good enough, we wanted more". All that that shows is that the OFT should have done this if they had some concerns about this they should have put them to Ballast before they took their decision. But there is absolutely no suggestion anywhere in the decision that the reason that they rejected these figures because they thought they were unreliable. These figures just do not appear in the decision at all. They were provided to the OFT. They were a good effort to replicate what happened in 2002. No explanation was given in the decision as to why they are rejected, and it simply is not right for the OFT to stand up on an ex post justification here today and in the skeleton to say, "Well, actually, these are not sufficiently reliable". And indeed, we would be prejudiced by this, because we pointed out in our notice of appeal at para.54, if the OFT was going to take a point we would have put more evidence in about that, and there was no answer to that in the defence. So, these figures were before the OFT before it took its decision, and there is no basis in the decision for rejecting them because the OFT simply took this "One size fits all" approach.

Now, so far as the turnover figures for 2008 are concerned, the ones in annexe 6, Mr Unterhalter is entirely right that those figures were not before the OFT. But, of course, what he does not say is that the OFT could perfectly well have asked Ballast for those figures. This is again to get back to have some sort of cross-check, because there has been no answer to the point that these figures of £31 million turnover in east midlands bear absolutely no resemblance to the total turnover of Ballast Nedam in the United Kingdom in 2008. And indeed I took a note of what my friend said. He said "What the OFT sought to do, had BN remained in the market, what sort of activity would it have been engaging in?" Even if you had gone to a crystal ball gazer, you would not be able to, it is just a complete and nonsensical exercise, because they were not in the market in 2003. So, it is just an impossible task and therefore you just have to say, "I am afraid you cannot do that" – no court can accept that. So, if you cannot do that, you then have to say, "What can you do?" And 2002 turnover figures are there. There is some general criticism but, as I say, none of that was put to Ballast at the time. We also have, for the Tribunal's benefit, because obviously the Tribunal is now going to be in a position to set the fine, we are not saying "No fine at all", but the figure, those turnover figures for 2008, are here and may, we say, assist the Tribunal in reaching a figure for infringement 41, 47 which we say is a fair figure.

THE PRESIDENT: Well, the €30 million.

MR. VAJDA: Yes, the £30 million, which is £11 million, yes. Now, some final words, then, on the proxy methodology. There are two things on has to remember about proxy. The first is

how it was calculated, and as we know it is a comparison of relevant turnover to total turnover across the board, and it is a comparison, as Professor Bain has pointed out, or emphasised, relevant turnover to worldwide turnover across the board in relation to a whole host of undertakings. It does not purport to look at the individual circumstance of any company. When you have one company, as I say, which has 99 per cent of its turnover outside the United Kingdom, warning bells should start to ring.

The second element, and that was the one that I stressed in my speech this morning, is that once you have then got the figure of 0·14 per cent it was applied mechanistically solely to Ballast's worldwide turnover. That is the point, that once they have got the figure, they simply applied it to the worldwide turnover. They did not then do any cross-checks at all. So, although my friend is right in saying that in reaching the 0·14 per cent figure one did not have regard solely to worldwide turnover, one had at stage 1 a comparison between relevant turnover and worldwide turnover. When one gets to stage 2, when it is actually applied to Ballast, it is simply applied to worldwide turnover.

I think then the last point about the variability of the contracts in a sense is a complete non point. If anything it harms rather than assists the OFT that just shows the need for caution. But much the most important point so far as Ballast you simply cannot have an exercise of trying to guess what turnover Ballast would have obtained had it remained in the market; it is just impossible counter factual.

Can I then come to MDT? I apologise for the fact that we do not actually have *Archer Daniels* here in court, but if I could just make the following points, as it were, on the hoof.

THE PRESIDENT: We have got it.

MR. VAJDA: No, I do not have it myself.

THE PRESIDENT: I am sorry, you have not got it, yes.

MR. VAJDA: Yes, and it may be that if there is some other point, we can let the Tribunal know.

But the following points I wish to make are these.

First, that the Tribunal will be aware that the Commission guidelines do not have an equivalent requirement to consult somebody else if there is a change. That is a major difference. Here there can only be a change to the guidelines with the consent of the Secretary of State. So, that is point 1.

Point 2 is that the change that has been made between 2000 and 2004 so far as the UK regime is concerned, is a change of fundamental significance. It is effectively saying "We are going to look for the first time at worldwide turnover, whereas previously we looked at UK turnover", so that is, and there is a jurisdiction issue there because previously you only

looked at, that maxim was 10 per cent of UK turnover. And therefore we would respectfully submit that if this was in the administrative court the administrative court would reach, on this particular point, a different conclusion from what the ECJ reached in *Archer Daniels* in relation to the Commission's own guideline, and of course it is well established that in administrative law terms in this country, one actually looks quite carefully at the facts, and we respectfully say that on these facts it would be in breach of English law principles for the departure to be made from the guidelines which were in force in 2000. So, that is what I want to say on *Archer Daniels*.

In relation to *Makers*, I can be much shorter. I adopt all the points that the Tribunal have made and in particular that the President. Can I just perhaps go back to para.134.

THE PRESIDENT: Bundle 4.

MR. VAJDA: Is it bundle 4, yes.

THE PRESIDENT: Yes, tab.57, yes. Paragraph 134?

MR. VAJDA: Paragraph 134, yes, at p.50 of the judgment. What the Tribunal was focusing on in *Makers* was whether or not the uplift of 520,000 (does the Tribunal have that?)

THE PRESIDENT: Yes.

MR. VAJDA: Whether the uplift of 520,000 was arbitrary or unjustified. And they reached the conclusion that that uplift was not arbitrary or unjustified. So that was a decision on the facts. And I do not accept that *Makers* is, there are some sort of overriding principle which binds this Tribunal to say, "You must apply that same principle when you are applying it to a totally different situation". It would be very interesting to speculate what the Tribunal would have said in *Makers* had the OFT taken worldwide turnover and indeed, if you look at our case, going back is it conceivable that the Tribunal would have said, "Well, in relation to an MDT of 82,000 yes, that is okay and therefore it is perfectly okay to have an MDT of 8 million". I rather doubt it. It comes back to look at, "Is this fair in all the circumstances?" And so far as deterrence is concerned, yes, of course, I accept that it is forward looking. But, again, one then has to look at the circumstances of this case. This is a company which for various reasons, is now very very small in the United Kingdom. One has seen that effectively it had what one might call a significant UK operation, 60 million turnover in 2001, it now has a very small UK operation, about 11 million turnover. So, it has basically pretty well exited the UK market. The turnover that it now has is not related to any of these activities and that is a forward looking factor that needs to be borne in mind, again, by looking at the individual circumstances of Ballast, because otherwise you are simply effectively penalising it in relation to turnover achieved elsewhere in the world,

when it is effectively no longer in the UK market. And one comes back then finally to this principle that I have stressed again and again, which is the principle of totality. And we say that the figure of 11 million is really an extraordinary number, and we do not accept the suggestion that has been made that there was no warrant to make an adjustment in this case, which is effectively what the OFT's case is on MDT. We say that simply again reinforces the point that they did not begin to look at the circumstances and, had they looked at the circumstances, an adjustment inevitably should have been made, and it is that that we are looking for the Tribunal to make.

Thank you.

THE PRESIDENT: Thank you, Mr Vajda. Thank you both very much.

(Adjourned for a short time)