IN THE COMPETITION Case No. 1125/1/1/09
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BARRETT ESTATE SERVICES LIMITED
(2) FRANCIS CONSTRUCTION LIMITED Appellants

– v –

OFFICE OF FAIR TRADING Respondent

_____

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

_____

HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Boyes Turner) appeared on behalf of the Appellants

Miss Kelyn Bacon and Miss Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

_____

THE CHAIRMAN: In a room not very far from here, but they cannot see us, are some people who are desperately trying to take down every word that is said. Could counsel speak right into the microphone, please. I have had a small plea from that distant room, to which we send our greetings. Mr. Robertson.

MR. ROBERTSON: Sir, yes, I appear for the appellants in this appeal, Barrett Estate Services and Francis Construction; my learned friends, Miss Kelyn Bacon and Sarah Ford appear for the respondent, OFT.

If I can deal with housekeeping first and check that the Tribunal has the following: one bundle consisting of Francis's notice of appeal – I will refer to Barrett and Francis collectively as Francis, that being the name of the construction company.

THE CHAIRMAN: Yes, we have got that.

MR. ROBERTSON: We have got the much thumbed by now OFT's penalty defence.

THE CHAIRMAN: Yes.

MR. ROBERTSON: Francis's skeleton, together with the second witness statement of Mr. Barrett.

THE CHAIRMAN: That is our green bundle.

MR. ROBERTSON: The OFT's skeleton.

THE CHAIRMAN: Yes, we have that.

MR. ROBERTSON: Then the third witness statement of Mr. Barrett replying to one aspect of the OFT's skeleton.

THE CHAIRMAN: Let me just check that I have got that. Yes. I read that last night.

MR. ROBERTSON: Sir, you will be glad to hear that although there is some confidential information in the witness statements there is nothing that I need to refer to in open court and therefore we will not need to go into a private hearing.

As with my other appeals, the outline is as follows: firstly, the impact of the penalty on Francis, secondly, the Tribunal's jurisdiction, thirdly, the seriousness of the infringement, fourthly, what we say are the flaws in the OFT's penalty calculation, and fifthly and finally, mitigating factors.

THE CHAIRMAN: And as in the other cases I will repeat, we have heard you addressing us now in three other cases and I am sure your lay clients will understand that we do not expect you to repeat everything you have already said, we will take into account all that the generic material that you mention.

MR. ROBERTSON: Sir, thank you. Miss Bacon and I have just noted privately that there are some issues where, frankly, we have done them to death by now and the Tribunal knows what our respective positions are.

The penalty imposed by the OFT on Francis is £530,238. It is a very high penalty. As a proportion of overall turnover it comes in at 2.05 per cent on 2008 figures, indeed a higher proportion of the latest 2009 figures, even though we submit that Francis's infringing conduct is clearly at the bottom of the scale of seriousness. The evidence is that there were five instances of cover pricing instigated by Mansell over a six year period.

I would just like to start off by explaining who Francis and Barrett are and the best way of doing that would be to go to a diagram which is the notice of appeal at tab 2. The diagram at p.220 was supplied to the OFT as part of the written response to the statement of objections. You will see that the ultimate parent company is Barrett Estate Services Limited. This is essentially a family owned, family operated company, with some directors from outside the family, but essentially family owned, family operated. You will see Francis Construction on the left hand side. It is owned by Gables Homes Limited. Gables Homes constructs retirement homes. Francis Construction is a construction company. Also in the group are Entric Services Limited, that is an electrical contractor. You will see at the bottom there Marshall. It says "acquired 2007". We will go into Marshall in a bit more detail later, but essentially it was acquired, it was a disastrous acquisition for us. It generated loads of turnover upon which the fine is based and it is now defunct, it is no more. On the right hand side you will see that we also own, it is now 80 per cent in fact, a roofing contractor.

THE CHAIRMAN: I am sorry, what did Marshall do, was that electrical as well?

MR. ROBERTSON: Mechanical services. We will take you to the relevant paragraphs of Mr. Barrett's witness statement.

There is a formal description of the companies in Barrett's consolidated accounts. I do not think we need to turn it up, but for your note it is at notice of appeal, tab 3, the accounts begin at p.366, and the relevant page describing the various entities is at 369. I think it probably would be sensible just to turn it up because this does give the overall position for the year on which the turnover was based. Could I invite you to read the review of business at p.369.

THE CHAIRMAN: (After a pause) Yes.

MR. ROBERTSON: As I say, penalty 2.05 per cent on group turnover for 2008, Mr. Barrett's estimation based upon information from his group accountants in his second witness statement, para.4, is that in relation to 2009 turnover it is 3.86 per cent of group turnover. We have already in previous hearings referred to comparisons with *Sainsbury* and the *Imperial Tobacco* case, and I do not think there is any need to go over that ground. We have said that establishes, if you like, a benchmark for serious infringements, and we have been hit more hard than this. We have been hit hard in relation to the Francis Construction subsidiary as a result of the recession.

I think the best way to explain where we are is to take you the various paragraphs of Mr. Barrett's witness statement dealing with the position of Francis Construction. His first witness statement is tab 3, paras.7 to 10 of that witness statement, which are pp.285 to 286. I would ask the Tribunal to read those paragraphs, and then paras.16 to 18 at 288 to 289.

THE CHAIRMAN: (After a pause) Yes.

MR. ROBERTSON: We emphasise in particular the opening words at para.18:

> "In the circumstances it is not surprising that it is impossible for Francis on its own to pay the penalty, and but for the trading activities of other companies in the Barrett Group it would be facing immediate insolvency. Even for Barrett the penalty represents an extremely daunting figure."

One of the reasons why the penalty is so high is that the 2008 basis for the penalty calculation included turnover attributable to the now defunct Marshall. The position of Marshall is dealt with at paras.24 to 27 on pp.292 to 293, and I would invite the Tribunal to read paras.24 to 27.

THE CHAIRMAN: (After a pause) Mr. Barrett then updates the position in his witness statement, served with the skeleton in April, and I invite the Tribunal to turn to that skeleton argument and read paras.3 to 11.

THE CHAIRMAN: (After a pause) I feel the word "*Makers*" coming on!

MR. ROBERTSON: It is not actually *Makers*.

THE CHAIRMAN: You can do better than *Makers*, can you, on this one!

MR. ROBERTSON: It is *Makers* and it is then some. The point obviously is that the turnover that has been used as the basis for calculation, only a small proportion of it relates to Francis's activities, and we submit that is unfair and is that the *Makers* point that we covered this morning and which Miss Bacon indicated that she would come back on in writing at a later point.

THE CHAIRMAN: Yes, thank you.

MR. ROBERTSON: You can see that Mr. Barrett is not over-egging the pudding, he recognises the reality of the situation as regards Barrett, but in reality due to practices that had little to do with construction.

The final passage in the witness evidence to which I wish to refer the Tribunal is in Mr. Barrett's third witness statement, served last week. I would invite the Tribunal to read paras.3 to 5 of that witness statement.

THE CHAIRMAN: (After a pause) Yes.

MR. ROBERTSON: Can I turn then to the penalty calculation, why is it this penalty is so high.

The penalty calculation is to be found in the notice of appeal, tab 1, p.48.

THE CHAIRMAN: Again we have a copy with the numbers. This one has the numbers in full.

MR. ROBERTSON: One can see that there are three penalties of roughly equivalent amounts, two in the education sector, one in public housing. The geographic market is the South-East, that is the only market that Barrett operates in. The South-East was actually drawn pretty widely by the OFT. I think it extended over to Hampshire. All of our turnover is generated in the South-East. As you can see, at the end of step two the OFT has done its MDT cross-check, and you can see there that each of the penalties is above the MDT of 0.75 per cent.

If the OFT take the view, as they appear to do, that the 0.75 per cent MDT on its own is sufficient for punishment and deterrence then we have got three penalties, each above that level. It actually works out – it is over three MDTs, it is nearly three and a half MDTs effectively. In our submission, that is, on any analysis, harsh.

That is why the penalty has ended up being a high one.

The second topic that we have covered is the Tribunal's jurisdiction, and we really genuinely have done that to death by now, so there is nothing that I wish to submit further. I adopt the submissions that have been advanced previously.

In relation to seriousness of infringement, this is covered in our skeleton argument at paras.27 to 40, and again we say that this is a case where the OFT seem to have ended up fining at a level appropriate for the most serious infringements of competition law, as they refer to matters in para.14 of their skeleton, yet the OFT, correctly we say, adjudged this to be worthy of a 5 per cent step one starting point. Again, in relation to the appropriateness of a comparison with penalties in other areas of law, particularly criminal sanctions, I adopt the submissions that I have already advanced on behalf of other appellants. Again, I think we have got that to a point where the Tribunal knows what the respective parties' positions are on that.

Turning then to the fourth of my topics, the flaws in the OFT's penalty calculation, our submissions are set out in our skeleton at paras.41 to 175. The first tendered versus non-tendered work, again you have my submissions on that from this morning's hearing. There is nothing I wish to add to what we have covered orally and in writing.

Secondly, we maintain the high turnover/low margin point. This is something where there is an additional point in relation to Francis, and that is really the point that we have just touched upon – that is to say it is true of Francis Construction's turnover, i.e. its construction activity – and we say that that is where that should have been taken as the basis, and there is no justification for taking in group turnover. Obviously you have seen Mr. Barrett's evidence in relation to turnover generated elsewhere, for example, the investment property held by Barrett Estates Services, and that is not something which is high turnover/low margin, it is completely different because it is no construction. Barrett Estates Services, as a matter of history, came into being a long time before Barrett acquired Francis Construction through Gable Homes.

Thirdly, no effect on price: we have already covered this morning the reasons why we say the *Umbro* case is not relevant. We covered yesterday the reasons why the OFT's reliance on *Archer Daniels Midland* is not in point and why it is plain that, following *T-Mobile*, the OFT does have a discretion to take into account the effect, or lack of it, of any object infringement and that the OFT has simply failed to have regard to that. Again, I adopt the submissions advanced in previous hearings.

Coming on to a point that we have not covered today, multiple penalties and arbitrary choice of infringements, we have received three very high penalties, but the evidence of infringement by Francis is that essentially it was approached for a cover on five occasions in six years by Mansell. It seems to be that a former Mansell employee joined Francis, and that was, as it were, the point of contact.

The scale of infringement, we submit, is on any view low, and we draw the comparison with companies such as Irwins, where the evidence in that case shows 130 infringements over a six year period as opposed to five by Francis, and yet we have received a treble penalty just as they have.

In relation to discrimination against small and medium size firms, this case seems to us to be a classic example of that because we have been fined on the basis of turnover generated in the South-East of England, but we do not operate outside the South-East of England. In relation to education, that represented for 2008 17 per cent of its turnover. So we have got two penalties based on 17 per cent of turnover, and 5 per cent of 17 per cent is 0.87 per

cent, therefore, those two penalties account for 1.74 per cent of total turnover. The public housing penalty was based on 5 per cent of 16 per cent of all our turnover. We can do these calculations from the table set out in the decision that we looked at earlier. That adds another 0.83 per cent. So the penalty comes out at 2.5 per cent of total turnover. Yet, by comparison with the national firms, the MDT only captured 0.75 per cent of turnover. So the penalty is, as I say, about three and a half times an MDT.

We say that for those people who are regionally based, such as us, that is inevitably discriminatory.

We set out in our notice of appeal the figures which show that we have been very hard done by by comparison with undertakings involved in compensation payments. The OFT say, "You are ignoring the step one starting point which is high for compensation payments", but our submission is, as it has been for others, that advancing this the outcome is plainly far worse for us, yet our infringements are less serious.

Use of last business year turnover: the infringements for which we have been fined, the first dates back to August 2001, the second November 2004, and both of those took place before the change in the OFT's guidance. The OFT asked for historic turnover figures and we supplied those figures to them. The OFT asked for historic figures from everyone to whom the statement of objections was sent. The OFT cannot, as they do in para.44 of their skeleton, say, "There are practical difficulties in obtaining those figures". There were not practical difficulties, we did it.

We, of course, advance the *Uttley* point and I adopt the submissions that I made on that point this morning.

I have taken you to the evidence about financial impact, financial hardship, and the Tribunal has already heard submissions about the effect on the construction industry of the economic downturn, and the Tribunal has seen this morning independent reports on the current state of the construction industry. There is no reason to dispute the view expressed by Mr. Barrett in his witness evidence about ongoing problems in the construction industry.

There is one final element in the penalty calculation which does not arise in any of the other cases in which I am instructed, and that relates to the refusal by the OFT to enable us to assess whether or not to take advantage of the fast track offer and admit infringements. As you will have seen from the penalty calculation, we do not have any reduction of the penalty under leniency for fast track. We did not know about the investigation until we received the fast track offer letter. The position is the same as the appellant this morning. We received the fast track offer. It related to infringements for which we simply do not

have the records and did not have the records. The position is this: construction companies do not keep records of tenders which they have submitted but have not been awarded. There is no obligation to keep records and there is no commercial reason why you would do so. I am instructed Francis received something like three a week.

THE CHAIRMAN: Three invitations to tender.

MR. ROBERTSON: Invitations to tender. There is simply no reason to retain documentation for any period after the decision whether or not to award you the tender has been taken and communicated to you. Obviously, if you have been awarded, you will retain the documentation, but if you have not been selected or chosen not to bid, then you do not retain the documentation. In practice, I am told that Francis kept the documentation for about six months and had, effectively what we lawyers would call, a document retention scheme, i.e. a weeding out of unnecessary documentation scheme which meant that after six months we disposed of it. This is, as I understand it, pretty standard in the industry.

So when we received the fast track offer we explained to the OFT that we did not have the documentation, we did not have the evidence, and so we could not work out whether or not these were indeed infringements that we had committed. So that is why we did not take a gamble when we received the fast track offer. We simply were not in a position to go and investigate whether there were instances of covers taking place. We had no way of knowing.

This issue, of course, has been litigated before Cranston J in the High Court, not by us but by *Crest Nicholson*. This Tribunal will be hearing (I do not know whether it will be this constituted Panel or another Panel) the *Crest Nicholson* appeal. So you will go into that decision in detail there.

The paragraph that we rely upon is the observation by Cranston J at paragraph 69 of the judgment (no need to turn it up) --

THE CHAIRMAN: It might be helpful if we do. I have this in my computer, but I would just like to look at it, if we may.

MR. ROBERTSON: Certainly. We actually annexed it to the Notice of Appeal, but would it be easier for you to go to it in the bundle?

THE CHAIRMAN: Probably, yes.

MR. ROBERTSON: In that case it is at volume 4 tab 66. The passage we rely upon is paragraphs 68-69.

THE CHAIRMAN: Can we just read that. (Pause) Yes.

MR. ROBERTSON: We say that is judicial recognition that we were placed in a difficult situation, an unfair situation, being asked to admit liability in a situation where we just had no way of getting to the bottom of things ourselves. The OFT were not willing to share the evidence with us or anyone else who was in our situation. That is a factor that we would invite the Tribunal to take into account. I appreciate the Tribunal will be going into the fast track offer process in much more detail in the Crest Nicholson case. Sir, those are what we say are the flaws in the penalty calculation. In relation to Miss Bacon's submissions this morning, I have already said that you agree that those are flaws, for example tendered/non tendered, or basing it on group turnover not infringing construction companies' turnover – you can adjust for those and you would end up with a much more sensible penalty. We are not seeking to take a wrecking ball to the OFT's guidance. It is about how it is intelligently applied in this case.

As to the matters on mitigation which we ask the Tribunal to take into account, that is set out in our skeleton at 176-215. You have already had submissions in other cases in relation to that. I do not think there is anything I can usefully add orally. And in relation to the Europe Economics report again, you have had submissions that you should have regard to that and what they found, both pre-2008 and post-2008. Sir, unless I can assist you further, those are my submissions.

THE CHAIRMAN: Thank you, Mr. Robertson. I emphasise we will take full account of all the submissions already made in the absence of your lay clients in other cases. Miss Bacon, would you like a brief break? You look as though you might like a break.

MISS BACON: Sir, five minutes?

THE CHAIRMAN: We will have ten. Ten to.

(Short break)

THE CHAIRMAN: Yes, Miss Bacon.

MISS BACON: Sir, I hope I was not prolix this morning!

THE CHAIRMAN: You were not prolix this morning at all!

MISS BACON: Sir, I am grateful for that. I hope I will not be prolix this afternoon. I am going to respond to Mr. Robertson's points but in addition I do want to reply to his reply to me this morning and pick up a few points that he made in relation to GAJ .

THE CHAIRMAN: OK.

MISS BACON: Francis, unlike GAJ, was not subject to an MDT uplift, which is one of the major differences between GAJ and this case. That means that to a certain extent some of the points made this morning are not relevant, in particular the *Makers* point. For that reason, I

was a little bit surprised when Mr. Robertson acceded to your invitation to rely on *Makers*. It may be that he was not going to but, as I will come to when I make my submissions on financial hardship, *Makers* is entirely irrelevant because there was not an MDT here.

THE CHAIRMAN: That is a very polite way of putting it, Miss Bacon!

MISS BACON: I am going to dive straight in and get on to the specific flaws that are alleged by Francis in relation to the OFT's penalty calculation, starting with tendered and non tendered work. Mr. Robertson did not make much of that just now, but I do want to reply to what he said this morning. He said, in response to my citation of *Umbro* that the reason why shorts and socks were included in the product market in that case was the court held that their prices were likely to have been affected. I am aware of the points the Tribunal made this morning about the relevance of this point, and the Tribunal's own thinking about this. I do want to just correct any misconception that may have arisen in relation to this decision. Here, equally, the OFT considered that non tendered contracts were also potentially affected by reason for their price.

THE CHAIRMAN: Can you give us the page?

MISS BACON: Yes, the page number. Page 317 in my copy, paragraph II-1689.

THE CHAIRMAN: Do you want us to read that paragraph?

MISS BACON: I do not need to ask you to read anything else but that single paragraph. (Pause)

THE CHAIRMAN: I must say I have been puzzling, since I first started reading the papers in these cases, about the proposition that seems to be made that cover pricing could not occur in non tender work. It seems to me as a matter of logic that it could occur, but just in a different way. It is an issue of communication, is it not really?

MISS BACON: Sir, yes, it is all about communication. The point being made here by the OFT is there is an inevitable spill over effect. So if one is making an argument about product market by reference to substitutability, an impact of a price rise in one product on a possible price rise in another product, that point is made here in the same way.

THE CHAIRMAN: Yes. I thought Mr. Robertson was really making the point not that it could not occur, but there was absolutely no suggestion that it did occur. That is certainly the way he put it this afternoon.

MISS BACON: Sir, as Mr. Beard said yesterday, we do not accept some of the examples that he gives anyway in relation to first stage and second stage tenders. But as I understand it, the main point here is that, as in replica kits where there are two different products, here there were two different methods of procurement and it is inconceivable that over an industry in relation to tendered products there was not an overall increase in prices because of the

practice of cover pricing. It is inconceivable that would not have had some kind of spill over effect in relation to non tendered work. But the essential point here is that if Mr. Robertson wanted to, he could have challenged the product market definition in exactly the same way as the parties did in *Umbro*, and that was really the point that I wanted to make. There was very similar reasoning relied on by the OFT in this case as in the *Umbro* case. He could have come along, he could have said that this is something incorrect. Because, he says, this could not occur, and because, he says, there could not have been any spill over effect on price, the OFT had not found any he says, and he says you could have drawn the conclusion that the product market was incorrectly drawn. He has not done that.

In our submission, it is not open to him to submit that this ought to have been taken into account in some way. The proper way of doing that would be to have challenged the product market definition.

His other point that he made this morning was he says the OFT did depart from its guidance in relation to use of PFI. So he says. I cannot say that in this case PFI could legitimately be excluded, but his particular non tendered contracts were not excluded. He says you should have treated them the same; you have departed from the guidance in relation to PFI so it is open to you to depart from the guidance in relation to non tendered by reason of the principle of equal treatment. I am afraid that is just not the case. The OFT did not depart from the guidance in relation to PFI. What it found in relation to PFI was that PFI was not in the same product market; it was not in the relevant market. If you just turn over the page, the conclusion is there at paragraph 1693:

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

THE CHAIRMAN: Just pause there. What page was that?

MISS BACON: It was page 319. We had been looking at page 317.

THE CHAIRMAN: I am sorry, I closed the book. I am sorry. Yes.

MISS BACON: So the short answer is the OFT carried out a market definition, it found that something was inside it and something was not. There is no possible basis for saying that in relation to PFI the OFT somehow left its guidance to one side.

Sir, I am aware that you have already indicated the Tribunal's preliminary views on this, so I will not take up your time further. I just wanted to draw your attention to those passages in the decision.

The second point is the high turnover and low margins. Again, we have probably got as far as we can to a certain extent. I just want to pick up a few points from Mr. Robertson's reply again. He says it is not an answer to say that he should be addressing what should happen to all 103; that is not right; I just need to address what should have happened in my case. That is in relation to GAJ this morning, and I presume that is his case under Francis.

My response to that is that if, on this particular point concerning the alleged low profitability of the construction industry, Francis is saying that the OFT got it wrong in principle, then it needs to come to the Tribunal and say how the OFT should have got it right in principle. It is not open to Francis simply to say: one should make some kind of ad hoc adjustment in this case as a matter of principle. What it can say is the OFT did make ad hoc adjustments in relation to financial hardship, and that is where it can deal with the point. It cannot say: overall the OFT did something that was completely wrong by failing to take into account low margins, but I am only going to tell you how to put that right in relation to Francis. It has to be some kind of methodology that could have been applied across the board which would have been fair and reasonable towards all 103. That brings in my question this morning about how exactly do you do that when profitability is such a difficult matter to have reference to?

Actually, Francis' account show the difficulties in making any assumptions about profitability. I will come back to that under financial hardship, but if you could perhaps just look at the year end 2007 accounts at tab 3 of the Notice of Appeal bundle, page 343. This is Barrett Estate Services Consolidated P&L Account.

My submission this morning was that one problem about profit is that it does fluctuate from year to year, and that makes it very difficult to know on what basis the OFT is going to judge that an industry is particularly unprofitable. You can see that really quite starkly from these accounts. If you look at the position in 2006, if you take, for want of a better metric, the profit on ordinary activities before taxation of £1,416,963, as a percentage of turnover in that year that is 8.5 per cent. In the following year (those behind me have done the calculation) it goes down to 3.4 per cent. £533,520 is the profit on ordinary activities before taxation, and their turnover figure is £15.6 million-odd. So this really illustrates the difficulties, even at individual company level, of taking into account profitability. As I said this morning, the problems are exacerbated if you try to make those kinds of comparisons across an industry.

I come back to my point that in so far as this is relevant, the best way of dealing with this is on a case by case basis in a financial hardship analysis.

The third submission of Mr. Robertson was the known effect on price. I do think we have done that to death. You have our case on that.

The fourth point is more substantive and that is the multiple penalties point. Of course, that did not arise this morning because GAJ was only fined for one infringement.

Mr. Robertson makes, in his written pleadings, two submissions in this respect which we say are inherently contradictory. The first submission he makes is that the OFT had no jurisdiction to impose separate penalties for separate infringements; even if it had such jurisdiction, the imposition of separate penalties was unnecessary. For the reasons that we have given in our skeleton argument, that is wrong. Mr. Robertson has, I think rightly, not pressed this point in the Tribunal either yesterday or today.

Instead, the focus has been on his second submission which contradicts the first, which is that actually the OFT should have differentiated between the various undertakings to a greater extent than it did. He refers, for example, to companies such as *Irwins*, who were leniency applicants, and says they have hundreds of infringements and we only had a few, so this is all grossly disproportionate and why is it that we are found for the same maximum number of three?

Part of the answer to that is that companies such as Irwins were leniency applicants, and as a result of that inevitably the information that the OFT had on their infringements was obtained as a result of their admissions, and they frequently admitted large numbers of infringements.

The decision at paragraphs II-1475-1476 explains why the OFT gave parties in that position 100 per cent immunity from tenders. It did not want to compromise its leniency programme. That is page 257. That is a comprehensive explanation given in those two paragraphs: 1475 and 1476, why the OFT granted 100 per cent immunity for the "but for" tenders. That is the tenders, but for the evidence provided by the leniency party, would not have been in the OFT's information.

If you can keep that page open, then at 1477 and 1478 the OFT then goes on to explain that some of the leniency parties still had a number of not but for infringements. So infringements which the OFT was independently aware of, which it was not purely aware of because of the admissions, and in that respect the OFT took a policy decision again to fine those undertakings for only three infringements. That was again so as not to compromise its leniency programme. As the OFT says:

> "In this way, any company found to have infringed the Chapter 1 prohibition, whether as leniency Party or a non-leniency party, is having penalties imposed

in respect of no more than three infringements, thus ensuring that the leniency parties are in no worse a position with respect to penalties than the non-leniency Parties and thereby safeguarding the integrity of the OFT's leniency programme."

So Mr. Robertson is absolutely right to say that the decision does not penalise leniency parties such as Irwins more heavily than non-leniency parties such as Francis. He is absolutely right, and that was the decision taken by the OFT as a matter of policy. Mr. Robertson has not challenged those paragraphs in the decision, he has not challenged that policy reason, and he has not challenged the OFT's overall methodology in this respect with relation to its leniency programme as being unreasonable. So that is a first answer to the multiple infringements point.

The second, and perhaps even more important, answer to the point is that the information held by the OFT on the scale of cover pricing by the various companies was inevitably piecemeal, because it had limited resources. The OFT did not carry out a comprehensive investigation into every instance of bid rigging by every company that it was looking at. What it did was it started off by dawn raiding a number of companies, and dawn raided a few more, then took a large number of witness statements and so on, and proceeded incrementally, and then got to the stage at which it said; we have enough information; we are now going to consolidate our investigation.

So when a party comes to the Tribunal and says: we only have a few infringements, the answer is: you only have a few infringements that the OFT found to have existed; there is no way of saying how many infringements have been committed by a party such as Francis. I will take you to Mr. Barrett's witness statement. He frankly admits that Francis was engaged in cover pricing. There is simply no evidence on which a party can assert that it is only instances of cover pricing were ones found by the OFT. It just happened to be where the OFT looked in its investigation.

I have been asked to point out, in relation to Hobson & Porter (and a similar point was made yesterday and Mr. Robertson said that Irwins have 100-odd infringements and we had only 11). Actually, that is not the case. There were 11 infringements that were investigated further by the OFT, but it had examples of hundreds of infringements by Hobson & Porter. It simply did not proceed those, but those are the examples from the various leniency evidence and other evidence in the case. The truth is that the OFT will never know how many infringements certain parties committed. It had to draw a line under its investigation

at some point and that is why it chose to consolidate it in the way that it did, by reference to only a maximum of three in the statement of objections and the decision.

In fact, in this respect, one can draw a good comparison with other cases involving fewer parties, such as replica kit, where it was possible to reach detailed conclusions on the relative culpability of various parties. For example, in the replica kit case there was a very small number of undertakings involved, there was a small number of infringements, a few agreements, there was an enormous amount of evidence. I was acting for Umbro in that case. There was an enormous amount of evidence on the way in which each agreement had been reached, down to the precise times on which Mr. Whelan's helicopter touched down on Mr. Hughes' lawn! This is something not comparable to the present case where these agreements are not written down, we do not have evidence of when and where every agreement was reached. As I said, the OFT inevitably has to take a view at some point, enough is enough, it is going to stop with the information it has, and penalise people on that basis. There is simply not enough evidence, and the OFT has not got the resources, to make a comprehensive finding as to which parties are more culpable than others in this investigation and in these infringements.

Francis' fifth argument of principle is the SME point or the geographic market definition point. As I explained this morning by reference to the fact that GAJ in fact was a beneficiary of any discrepancy that may have occurred, it is not really an argument about SME's at all, or even regionally based other firms. What is an argument about is about the differences between relevant and total turnover to specific infringements. That is not causative of a particular bias one way or the other for SME's or regional firms. One way that this was corrected was by the analysis of MDT which occurred in GAJ's case. The other way that any possible discrepancies in this was corrected was by adopting cautious product and geographic market definitions.

I have taken you to the product and market definitions in the decision. I can just give you the relevant references to the paragraphs. The geographic market definition is explained at paragraphs II-1701-1723 of the decision. Again, I come back to the same point as with the product market. If Mr. Robertson wanted to, he could have challenged this and he has not brought a challenge to the geographic market definition. He has not said that any part of that analysis was wrong in fact or law. We rely on the fact that, as stated in the decision, if anything it was conservative. So it brought the geographic markets to fairly narrow limits which would have had the effect of reducing the relevant turnover in those markets.

I have three more points. The sixth point is the discrimination by comparison with undertakings involved in compensation payments. This is another example of the problem that statistics can prove everything and nothing. It will always be possible to slice up the decision and find one group of undertakings with a characteristic who are penalised more or less than a group of undertakings with a different characteristic. In this case the OFT did not have a kind of policy of penalising undertakings involved in compensation payments less than other undertakings. In fact, quite the contrary, as Francis recognises. These were found to be more serious infringements justifying both a higher starting point (7 per cent comparison with 5) and a higher MDT (1.08 by comparison with 0.75).

So the reason why some undertakings who had been involved in compensation payments have a lower penalty by reference to their total turnover was simply due to the particular facts of those cases. In particular, in most cases the major factor will have been that the relevant turnover in the particular markets on which the infringement was committed was fairly small by comparison with the undertakings' total turnover. That does not give rise to any kind of discrimination; it is simply a function of the fact that the OFT's methodology, properly applied, will give rise to different penalties on some measures for infringements with different factual circumstances.

The only way one could have possibly avoided this is by having a much cruder measure of calculation. For example, by referring simply to turnover and saying we are going to fine all undertakings who are not involved in compensation payments, say, 0.75, and we are going to fine all undertakings who were involved 1.05. As I said this morning, that is not an approach that would have found favour with the European Court. In fact, the European Court said the opposite: turnover is too crude. So the only reason why there are discrepancies like this is because the penalty guidance is nuanced, it is sophisticated methodology, and when you put lots of different factors in you get different results out. That is just how it is, unfortunately. This is, as I say, another example where you can pick out some characteristic and say: that results in a different results from some undertakings.

Last business year point. That has been addressed yesterday and this morning. I only want to add this point. That is that the Tribunal asked this morning whether the recession made it appropriate to look at a different business year in this particular case. So whether it was appropriate to depart from the normal, consistent practice in relation to this particular industry in these economic circumstances.

As I said, the first answer to that is that each undertaking's circumstances will differ. Some undertakings will be more profitable, other undertakings less. The point that I have been

reminded to make over the break is that, of course, there are a number of undertakings who were subject to penalties who have not appealed. They are presumably the ones who have benefited from the business year that was adopted. It is quite clearly the case that some undertakings will have benefited from the last business year before this decision, and others will have benefited from the last business year before the infringement. The only consequence of trying to adopt a different last business year in this case would be that you would get a different set of appellants. So the point there is that it is swings and roundabouts. There are some beneficiaries and there are some losers. Inevitably, you are seeing the losers in the Tribunal. But that does not mean that across the board a different measure or different reference year should have been adopted.

I come back to the deducer point that Mr. Beard made yesterday, which is that the European Court specifically affirmed that the best way of looking at deterrents is by looking at the current status of the undertaking. The OFT maintained that was a fair approach in the present case. Actually, using the last business year before the decision favours those undertakings who are in difficulties by comparison with their position at the time of the infringement. It favours those undertakings who had a relatively high turnover then, but for whatever reason (including recession) have suffered. So it takes into account their current ability to pay, and their current susceptibility to deterrents.

If you were to look at the year before the infringement, that would not tell you anything about how the fine was going to deter an undertaking going forward by relation to its current status and its current size.

The last argument of principle before I get on to financial hardship is the *Crest Nicholson* point. I think I need to take you back to the judgment of Cranston J. My learned friend obviously read out the bits that he likes.

THE CHAIRMAN: You are going to read the bit that you like!

MISS BACON: It is volume 4 tab 66. Can I just ask you to read paragraphs 76 and 77, which are the sections of the judgment that we rely on. (Pause) Sir, the reason I rely on that passage is that there Cranston J is ruling quite explicitly that there was no requirement for the OFT to give evidence of its suspect tender because that would have increased its administrative burden. The FTO letter was aimed at decreasing the administrative burden. The way it did so was by offering parties an opportunity, if they wished, to accept the alleged infringements and then proceed to a faster resolution of the case with a discount given for their cooperation in that respect. It was not a case where the OFT was compelling any kind

of admission on the part of parties. It was simply giving the opportunity: if you wish to take this you can and you will get 25 per cent discount for cooperation.

THE CHAIRMAN: The two passages are completely compatible, as one would expect of this particular judge, are they not? On the one hand he is saying that the OFT obviously cannot be required to provide detail of every transaction that is referred to – not on the one hand, but first he is saying that. Secondly, he is saying you cannot expect a company to admit liability when it does not know it is liable, just to make life easier. This is a quasi-criminal matter.

MISS BACON: Yes, and what he was saying was that on the circumstances of that case, the OFT should go away and take another look at the position of the company there, Crest, which was a historic and direct parent, and could not make any admission of liability because it did not have access to the relevant documents or the relevant personnel. It was no longer associated with the company. I am not going to go into detail about how that panned out in the case of *Crest* because that is the subject of an appeal later this week, Friday and Monday I believe, in this court. But what he is not saying is that by providing the FTO letter we were compelling any admission on the part of the generality of the parties to whom it was addressed.

That may well be the case, but some undertakings did not have access to documentary records because they destroyed them, which was a commercial decision for them to take. It was not because they actually separated as in the case of *Crest*. In our submission, that is neither here nor there. At the very least, what they could have done is gone to their employees and said: did you give any cover prices; here are the alleged infringements; is this the kind of thing that you did? That would have been enough, we submit. Even if they had not done that, a commercial decision could have been taken: we know it was going on so we are going to accept it.

THE CHAIRMAN: It is that simple, is it? They go to their employees and ask: did you give any cover pricing? A defensive employee in the knowledge that there is no documentation is bound to say no, and it may not be true. What is the responsible company director to do in those circumstances?

MISS BACON: The responsible director is going to then have to take a view, based on their knowledge of what occurred. Perhaps now is a point to take you to the statement of Mr. Barrett.

THE CHAIRMAN: Maybe, because it occurs to me that the right view to take in those circumstances might be: I am terribly sorry, but I have no idea.

MISS BACON: Mr. Barrett's witness statement is at tab 3 of the NOA bundle. It is actually very helpful on this point. At paragraph 11 he makes a few personal comments about his experience. At page 286 bottom right hand corner. He says at paragraph 11:

> "I can confirm that throughout most of my career I have been aware of the practice of companies requesting and providing cover prices for the purposes of customer tenders. Indeed, although I have not personally encouraged it, I am aware that this is a practice in which Francis has been involved in the past."

Then over the page at paragraph 12 he explains when he was first aware that the practice was unlawful and how he dealt with it:

> "I think initially I probably just dealt with it by speaking informally to staff and negotiators saying this was something we should not be getting involved in any more."

That is premised on the fact that he knew that it was going on, and he knew that it was going on among his staff. Then he says at paragraph 13:

> "Some of the tenders that were dealt with for us in the past were handled by independent negotiators rather than our own staff and it is probably true to say that I and my colleagues did not exercise controls over independent contractors in the same way that we would have done with our own staff. To the best of my recollection most of our experiences with cover pricing involved the provision of covers when requests were made of us from time to time by other parties. Rightly or wrongly, partly perhaps because the industry and the trade press did not appear to view such activities as serious wrongdoing, I believe that I, like most others, viewed the provision of covers as a fairly harmless activity …"

So this is not a case where a party can come and say: this was not our practice; we had a policy not to engage in cover pricing; we never did it as far as I know. Now, there are some appeals which you will hear in which that is said, but that is not the case in the case of Francis who is taking this particular point in *Crest*. So it was wholly open to Francis there, knowing that Francis had engaged in cover pricing activities in the past, to accept the FTO offer.

The other point to make is that even if there had not been that evidence available to it, even if the directors had no knowledge of what was going on, at the end of the day the FTO letter was an opportunity, it was not a compulsion. It was simply a way of streamlining the procedure and thereby giving the undertakings who were able to assist in that regard a discount for compliance and cooperation. There was no element of compulsion there at all.

It certainly was not the case that across the industry there was a widespread practice of destroying documents. We know that, because the leniency parties were able to provide evidence of a large number of infringements on the basis of their retained documents. So at the end of the day, this was an opportunity that was made available to all undertakings on a completely fair and non discriminatory basis. Leaving aside companies such as *Crest* which you will hear submissions on at the end of this week, there is no suggestion with Francis that in some way this could have been carried out in a manner that produced more fairness across the board. It simply says it did not have any documents, but many of the companies were in exactly the same position. The OFT's position in relation to the FTO letter was the same as relating to all. It was a position that was endorsed by Cranston J.

That brings me to financial hardship. The Tribunal will not be surprised to have another mea culpa, the same one as in relation to GAJ. I have a document which sets out the correct position as far as we can calculate it on the basis of Francis' profitability and net assets in the most recent financial statement. (Handed)

Sir, perhaps while you have got that document in front of you, you could then turn up the 2008 financial statement which is at tab 3 of the bundle. It starts at page 368. Can I start with the Profit & Loss Account at 374.

THE CHAIRMAN: We have got exceptional items of £1.313?

MISS BACON: Yes, exactly. Exceptional items £1.313. If you look at Note 7, that explains how part of this has been calculated. That is replicated in our base figure section at the top of the page. So Note 7 at page 385, the exceptional items there set out amount to £782,949. If you subtract that from the figure of £1,313,187, lo and behold, you get the amount of the fine. So as far as we are aware, the exceptional items is the 782 figure in note 7 plus the amount of the fine.

THE CHAIRMAN: That sum being unexplained in item 7.

MISS BACON: It is unexplained in item 7, but it is explained later on in relation to balance sheet, because there is an explicit note. I will take you to that in a minute. Where you get to on a comparison of profits, you get the profit after tax after the fine is listed as £683,883, and that is the lost profit for the financial year after taxation. That is the third row up from the bottom of the P&L page. Then you have got the comparable figure for 2007.

THE CHAIRMAN: It is in note 24.

MISS BACON: I am sorry, the exceptional items. It shows up on the consolidated balance sheet as well, which is where note 24 arises. The profit after tax in these accounts was stated as having taken account of the entirety of the fine. The document I have handed adjusts for

that and then gives you the correct percentage of the fine by reference to the three year average profit after tax, which is not 247 per cent as we stated in the skeleton argument, but 136 per cent.

THE CHAIRMAN: And again, payable in instalments.

MISS BACON: Again, it is payable in three instalments.

So that is well below the threshold which the OFT employs for looking at whether an undertaking's financial position gave cause for concern. As you will recall from the skeleton argument the threshold was 150 per cent of three years average profit after tax, and this is 136 per cent.

The reason why I have not done a similar calculation as for GAJ by reference to the most recent annual profit is that in this case there was a loss in the year ended December 2008, and that is the loss that is explained in the witness statements. It was caused by an exceptional insolvency of the Marshall company, and that is why such a large loss shows up in this account. That is the P&L.

This morning the Tribunal had a few concerns regarding net assets, and that is something we are going to come back to.

THE CHAIRMAN: It is a different issue in this case, this is property.

MISS BACON: Yes, exactly, and I wanted to make the point that in relation to Francis the problem about debtors forming a large part of the balance sheet does not arise to the same extent because most of it is not debt, and you can see on the consolidated balance sheet. So, in our submission, certainly in this case, it is appropriate to look at the net assets.

There is a figure for debtors of £3 million, but that is not the preponderant part of the balance sheet, as it was in the case of [Confidential].

I have done at the bottom of my document a calculation of the percentage of net assets if you take into account the fine. Actually, because it is such a very large balance sheet, because the total net assets are almost £7 million, adjusting to take account of the fine does not make an enormous amount of difference. In both cases, if you round up or down it gets to 7 per cent. In the case of not taking account of the fine, it is 7.27 per cent, and if you do take account of the fine the percentage is 6.78 per cent. If you are rounding to no decimal places you get to 7 per cent in both cases. The real issue here is the profitability.

THE CHAIRMAN: I am really directing this at Mr. Robertson, but it may be helpful if we could have an explanation of the meaning of note 18, which I do not fully understand. It is the note that deals with development property and net assets. I am not sure if it deals with the

valuation of all property or some property. I am not asking for the explanation immediately, you carry on.

MISS BACON: There were only two more points that I wanted to make. I think I have said everything I need to about the balance sheet, on any view a healthy balance sheet. It is notable that Mr. Robertson's points in relation to Francis were not the same as those in relation to [Confidential]. He is not saying that Francis is going to be put in serious difficulties as a result of the fine.

As I said there were two more points. One is the dividend. You have on the sheet which I handed up figures for the dividends paid in all three of the last financial years, so £70,000 in 2006, £125,000 in 2007 and £150,000 in 2008. These are very large figures. It may well be that with the benefit of hindsight the directors of Francis and Barrett regret paying such a large dividend in the year to December 2008. The fact remains that very large amounts of money have been taken out of the company in all of the last three years, and that is inconsistent with a picture of an undertaking that is suffering such severe financial hardship on an exceptional scale such as to justify an adjustment on the basis of the legal principles that my learned friend Mr. Beard referred to yesterday. That is the first point.

The second point is the *Makers* point. As I understand it, when Mr. Barrett in his witness statement was referring to an injustice in looking at group turnover he was not making the *Makers* point about the MDT, what he was saying is that in determining financial hardship you should not take account of the group assets. In our submission, that is clearly wrong. The decision was addressed to the holding company as well as the relevant infringing company. There is every reason why, in such a case, you look at the financial position of the addressees of the decision, and Francis and its parent company were both addressees of the decision, so it was entirely logical to look at the group consolidated position in assessing financial hardship. In fact, not to do so would have been blatantly unfair as compared to other group undertakings for whom the consolidated picture was looked at.

Those are my submissions on financial hardship, and that is all I have to say.

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

MR. ROBERTSON: Sir, dealing with the last point first, the explanation of note 18 of the accounts, may I deal with that in writing subsequently?

THE CHAIRMAN: Please do. I just noticed, and it may be that there is nothing in this, but it would be helpful if we could have an explanation in writing, that there were dividends of £150,000 in 2008 and that the highest paid director in that year was paid £136,000, which is in another note (which I cannot immediately find but it is there somewhere); and also there

is the point about net assets, including property. My interest in note 18 was whether the £500,000 odd mentioned is all the property that is held or relates only to some of the property that is held as part of the assets. I think it is a reasonable question. If it is not, you will say so. It might be best to deal with it in writing, Mr. Robertson. Your client hears what I say.

MR. ROBERTSON: We will deal with that in writing. My learned friend's note that has just been handed up there in relation to the accounting treatment of the fine, there is no secret about that, it was dealt with in Mr. Barrett's first witness statement, paras.10 and 17, we explained it all. I do not think there is really anything in that point.

In relation to the points in reply, I have got, I think, nine points in reply, it might be slightly longer than nine minutes.

THE CHAIRMAN: It is all right, take your time, we have got plenty of time.

MR. ROBERTSON: In relation, first of all, to the issue that you raised at the outset communication – this is tendered versus non-tendered. I do appreciate that I am on an uphill slope on this one, but one does need to understand that there is no evidence before the Tribunal, or before the OFT, that cover pricing took place in relation to any type of construction work except that procured in single stage tenders.

THE CHAIRMAN: I think that is the point I put to Miss Bacon, is it not?

MR. ROBERTSON: Yes, and she said that it is inconceivable that there was no spill-over from tendered into other types of work. There was no spill-over. The reason for that is this: cover pricing, the reason why it was done was because it takes time and therefore money to put together a fully priced tender. For negotiated work you are just into a bilateral negotiation with the client, you are not putting in a priced up tender.

THE CHAIRMAN: This is dealt with in Mr. Barrett's first statement, I think.

MR. ROBERTSON: It is dealt with in any number of people's statements before the Tribunal. So for negotiated work there is just no role for it. Two stage tenders are where you put in a short, as it were, preliminary tender dealing with what your overheads are going to be and then the client selects a short list to negotiate with. That first stage, putting together that first tender is as a matter of an hour's work, it is putting in things that you know off the top of your head, your charges for site preliminaries, the cost of just running a site.

THE CHAIRMAN: Your best point is your first point, is it not?

MR. ROBERTSON: We have gone through the various types of procurement. The OFT have excluded PFI and public/private because it is only the larger firms that engage in that. It is still construction work. From the point of view of a client, they are procuring the

construction of a hospital or a school or whatever, it is just that those things are procured through single stage tenders. We say that if they exclude those it would only have been fair to exclude all other types of construction work, save for those procured through the method of procurement in which cover pricing uniquely took place.

We directly contradict, on the basis of evidence, my learned friend's statement that it is inconceivable that there was no spill-over. There was no spill-over.

Secondly, when dealing with the low margin point, my learned friend said that I was making that submission somehow only in relation to each one of my clients, and it was not an across the board submission. I could not have made it clearer this afternoon that it was an across the board submission, because I said that the evidence is that margins in the construction industry are 1 to 3 per cent, and that if you take a starting point of the MDT at 0.75 per cent then you are starting off immediately fining people three-quarters of a year's profits, and that is just too high a staring point. Look at *Sainsbury*, look at *Imperial Tobacco*. So it is an across the board point. You need to adjust your starting point to take into account the low margins in relation to turnover.

The third point is that my learned friend again says profitability can fluctuate. She did that by reference to Barrett's consolidated group accounts. As you have seen, Barrett is not a construction group. It has a construction business, that is Francis Construction limited. Yes, profits can fluctuate, but the evidence generally is 1 to 3 per cent margin, and there is not any evidence that I am aware before the Tribunal, certainly none from any of my clients, that anyone is operating at margins outside of that.

My fourth point relates to multiple penalties. The point comes down to this: the OFT has fined some addressees one penalty, e.g. GAJ this morning; it has fined some two penalties, e.g. GMI, whose appeal comes on 12th and 13th July; it has fined the majority three penalties. The OFT's case is, "We cannot distinguish between the levels of infringing behaviour, sometimes we have got lots of information from leniency parties, sometimes all we have got is some information from responses to fast track offers. If that is the case, if they cannot distinguish between the level of the scale of infringing activity, why is it that some have one penalty, some two and others three? What is that distinction based upon? It is not based upon any rational basis. One penalty alone in each case would have been sufficient to punish and deter. Even if you accept everything else about their methodology and we end up with a ridiculously low penalty, a nominal penalty, then they can do a *Makers* MDT. 0.75 per cent is obviously too high for the reasons I have just mentioned, but they could adjust. That is what the OFT should have done in this case actually. They

should have just taken an across the board approach to tendered turnover, taken a proportion of that and come up with a sensible level of fines across the board. They have attempted to be too clever by half.

The fifth point – and I do not think I am going to get to nine because I have collapsed some points together – is small and medium sized enterprises. Whichever way you look at it, there has ended up being a bias because some of the small regional contractors have all of their product turnover caught at the starting point whereas the national companies only get one-ninth of turnover, if turnover is spread evenly across the country.

There is a similar point in relation to compensation payments. The OFT say that they attempted to adjust and if it comes out with fining people who have been involved in much more serious infringements, relatively much more likely – as my learned friend said, that is just how it is, unfortunately. That is no good answer, you have got to look at the outcome. What they could have done, if they had taken the approach I have just suggested on one penalty, they could have had 1.5 penalties or two penalties for those involved in compensation payments.

At the end of the day we have been fined much more heavily relatively than those involved in compensation payments.

Last business year approach: my learned friend is, I am afraid, here making it up as she goes along, because she says there can be some winners, there can be some losers. As I have already mentioned to this Tribunal, I have acted for 20 of the addressees of the statement of objections at one point or another and the consistent message across all is that turnover was increasing in the first decade of this century, peaking in 2008, and then walking off the edge of a cliff. Sir, everyone would be better off by not having 2008 as the peak year of turnover.

THE CHAIRMAN: We are back to skinning cats, are we not?

MR. ROBERTSON: What the OFT could do, my learned friend does not actually have to make it up as she goes along because those sitting behind her were provided with the turnover information. Every addressee of the statement of objections was asked to provide their turnover going back to 2000. They could have reworked and just done the figures again on the basis of the turnover information they had and compared the difference in penalties because they have got the information. They have never suggested to any of my clients that it has not been provided or that it is inadequate. They asked for it, they were provided with it and we thought they were going back to the year of infringement approach. They may have considered it and rejected it, but whatever the situation is my learned friend does not

have to speculate, they have got the information, they can do the exercise. As it appears to me, on the basis of the instructions I have had from a large number of clients, the position is that the OFT unfortunately through the last business year approach have picked the peak year of turnover during the period covered by this investigation.

Finally, in relation to the fast track offer, the reason why I drew your attention to that passage in Mr. Justice Cranston's judgment was just to point out that the submission cannot be made that it was our own fault that we did not accept the fast track offer. It was reasonable to behave as we did. We have been perfectly candid in Mr. Barrett's witness statement and in my instructing solicitor, Mr. Robinson's witness statement about how we reacted to the fast track offer. It was a reasonable reaction for us to take and that is something we would ask the Tribunal to take into account if it is prepared to revisit the penalty in this case.

Sir, I think that is all I can deal with orally. We will be, I think, in all likelihood providing a further witness statement from Mr. Barrett to address the question that you asked at the outset of this reply.

THE CHAIRMAN: Just bear with me. Yes, thank you very much, Mr. Robertson. Can I just ask about – and I do not wish to put undue pressure on you because I know that all counsel in these cases have got a lot to deal with – when we might expect any additional written submissions, bearing in mind they are going to be succinct?

MR. ROBERTSON: The ones that we have referred to in front of this Tribunal over the course of today and yesterday, I would hope by the end of the week.

THE CHAIRMAN: By the beginning of next week any. We will not hold you to it. You can have a week-end obviously, or you can lose the week-end!

MR. ROBERTSON: I do not think I can do that, it is my wedding anniversary on Saturday.

THE CHAIRMAN: Happy anniversary. Thank you very much. I do not think either of you is in front of us tomorrow, or are you?

MR. ROBERTSON: No, sir.

THE CHAIRMAN: We have Mr. Peretz and Mr. Beard tomorrow.

MR. ROBERTSON: It is like the line up at Wimbledon!

THE CHAIRMAN: Yes. Thank you very much.