IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1129/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 June 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

CORRINGWAY CONCLUSIONS PLC
(in liquidation)

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Paul Harris (instructed by Nabarro) appeared on behalf of Corringway Conclusions PLC.

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 ladies and gentlemen.

MR. HARRIS: Sir, members of the Tribunal, good morning. I appear on behalf of the appellant. My learned friends, Mr. Unterhalter and Mr. Bates, appear on behalf of the Office of Fair Trading.

Sir, I have two preliminary remarks. The first is that I am very conscious of the time limits guiding today's proceedings. I shall stick to them. The second is that in my skeleton argument there is a slight typographical error at para. 127. The numbers that appear there should, in each case, be preceded by a minus sign. It is the ones that describe the desperate financial hardship of my client. Although the context makes it clear that they are negative, unfortunately the minus sign in each case has been omitted. So, each of the four numbers that appear in para. 127 should have a minus sign in front of it. Of course, we have let the Office of Fair Trading know that.

Sir, the way I propose to structure these submissions in the fifty minutes available to me is as follows: opening remarks under four headings; then to turn to each of the five substantive grounds in my skeleton argument with the preponderance of my submissions being devoted towards MDT, the first substantive ground.

By way of the first opening remark, it is our submission that what protects our corporate human rights is a full and independent judicial scrutiny of the penalty which has been imposed upon us. In opposition to that full independent and individual scrutiny, the OFT consistently relies upon on what they describe as their discretion or margin of appreciation. We say that one of the principle flaws with this decision and the way it has been applied to us is that there has been an undue and unlawful reliance upon what is described as the discretion or margin of appreciation. That is particularly as regards MDT. In short, our submission is that although there is, in applying the guidance, a degree of latitude available to the OFT they have very significantly overstepped the bounds of that latitude in coming to this decision. So, the jurisdiction of the Tribunal is at large and it is notwithstanding a degree of latitude on the part of the OFT which we say they have overstepped.

Secondly, I would like to put the infringements in context briefly for a moment, making some remarks firstly about the general nature of these infringements. The Tribunal will, of course, be familiar with the fact that certainly in the case of the client I represent, they are relatively small players in the relevant market. There were regional markets - indeed, very fragmented regional markets. The infringements were of small - indeed, one might say minute - duration. There was no proven effect upon any consumers. Indeed, big rigging, as a term, has degrees of seriousness. The bid rigging - a pejorative phrase as it is - in our case

was limited to the provision of cover pricing which, with respect, we say is a relatively - and I emphasise 'relatively' -- I accept, of course, that bid rigging is an infringement and can have serious characteristics, but of those infringements, cover pricing is relatively minor. The value of the contracts was, in many cases, low, including in our case.

As regards HCL - that is to say, the undertaking that actually infringed on the facts of my case, there were no compensation payments provided, there were no directors involved, that was the finding on the part of the OFT, if you want the reference in the appeal bundle it is tab 1N, there is a table there saying whose directors were involved and none of ours were, and there was no evidence of dishonesty.

What we say by reference to those broad remarks about seriousness is that despite all of this the fines have come out in this case with an inordinate degree of magnitude, as if there was a much more serious type of culpability or infringing behaviour. Indeed, we say and, of course, the Tribunal is very familiar with the range of fines because you will be hearing all the appeals, but there is a table which sets out the fines on other corporate appellants and they stretch into millions or, indeed, tens of millions of pounds in some cases. They are fines that are on a part with the type of fines that are imposed upon companies that have killed innocent civilians. We say, just taking a step back, that that is a wholly inappropriate order of magnitude.

In one of the cases that is in the authorities – I do not invite you to turn it up – it is tab 59, *Balfour Beatty* – that is the one about the Hatfield rail crash which was again recently in the news. The Court of Appeal in that case refers to *R v Fawcett* I of course accept that these are criminal cases, but in that case they said:

> "Would right thinking members of the public with knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?"

In that case Railtrack were fined £3.5 million, but you will recall, I am sure that four people died and over a hundred were injured, some of them extremely seriously.

What we say is at heart what has gone wrong in this case is that fines of that degree of magnitude, millions or multi-millions have been imposed on undertakings in this market, that this sort of relatively insignificant anti-competitive behaviour, or at any rate not so significant as to warrant multi-millions of pounds, and in particular in the case of the appellant that I represent, this was a small company distorting a bidding process in a regional market of small duration, with no proven effect on a few occasions and yet it has ended up with a fine which, prior to the leniency discount that I will come on to later, is

over £1 million. We say there can be no serious or sensible suggestion that this sort of behaviour is worthy of the same degree or magnitude of condemnation and punishment and deterrence as a company that kills innocent civilians through its oversight, or possibly indeed, there were criminal prosecutions in *Balfour Beatty*.

What I am attempting to do with those opening remarks is just put these offences in context, and it is further relevant in terms of the context who or what Corringway is, i.e. the appellant. We are a company in members' voluntary liquidation; that means, of course, that we are no longer active in the relevant market and, indeed, we are not active economically at all. The only reason we continue to exist is because of the existence of this liability from the OFT. We are owned by 174 members, many of whom are small individuals or trust funds, and we say that there is no conceivable basis for treating us in the same way as big, ongoing construction companies that remain active in the relevant market, and yet we have been treated in the same way. We say that that is a deep unfairness at the heart of the fine and, indeed, it is worse in our case because to the OFT's knowledge prior to the decision being issued the other two companies potentially liable for the fine, that is to say the more recent parent company and then the actual infringing company Hamils Group and HCL respectively have gone into insolvent administration, so we are left carrying the can. The entire responsibility and burden of this fine falls upon Corringway, the appellant that I represent.

Indeed, the fourth opening remark is that operation of law. Why is it that Corringway is liable? That is, of course, the doctrine of joint and several liability, and we do not take issue with that *per se* that is obviously the operation of law, but what we do say is that in the real world and in assessing with this jurisdiction that you, the Tribunal, have at large, we respectfully contend you should take account of the fact that we are a former parent company and that is all. It is interesting that on this issue the OFT blows very hot and cold. On the one hand they say at para. 3 of their skeleton that that is all misconceived, indeed, they say this is a fundamental flaw in my argument because Corringway is part of the same "undertaking" as HCL. That is true. But, on the other hand, the OFT then say in two other parts of their skeleton - in particular, paras. 56 to 59, and then 40 to 41, and they single out Corringway within the very undertaking that they say is one indivisible whole. So, for the purposes of financial hardship - which I will come on to in due course in my fifth, and I think final, substantive heading - they single out Corringway and describe it individually. Then, as regards the manner in which they have applied MDT, again, they describe Corringway as 'heading' the undertaking. With respect we say that that inconsistency is a

flaw. What we draw from that is that in the real world - and assessing this fine as you do today with your unlimited jurisdiction, you both could and should take account of the fact that I am here today arguing on behalf of somebody who is only a former errant undertaking and did not commit the infringement itself. Indeed, it had no knowledge of it.

So, to wrap up the opening remarks, what we say is that at its most basic, this is a small company. It is no longer economically active, and yet it is ordered to pay a pre-leniency fine of well over £1 million circumstances where its former subsidiary who did commit the infringement will not, and cannot, take its share of the medicine. Ultimately, that is, frankly, not just too high, but far too high.

THE PRESIDENT: Just remind me, Mr. Harris, how much the company is worth? I think we do know, do we not? It is in the papers somewhere.

MR. HARRIS: Yes, it has got considerable assets. I can ask those behind me to turn up in the accounts shown at Tabs 13, 14 and 16 -- I can get the number. Of course I accept that MVL is not insolvent. Far from it. I will revert back to the relevance of the financial hardship is one of my later grounds. We will see that it is common ground that the relevant company upon which to focus for the purposes of financial hardship is HCL. They are in insolvent administration. That is common ground.

That then takes me on to MDT which I said I would devote most of my time to. The key problem, of course, as you will have seen from my skeleton, and multiple others, is the inherent disproportionality. Two key problems. Inherently disproportionate and disproportionate in its application to us. I do rely to found the submissions in my skeleton at para. 13 on the two supplemental authorities – we do not need to turn them up. This is in the supplemental bundle. *Huanga* at para. 19 and then, sir, your analysis of proportionality in the *Tesco* case. I rely on both of those.

What I will do, however, is read one sentence of *Ex parte Daly*, cited in my skeleton, and then I will take you to certain paragraphs in *Lindsay*. I think that is the only case I am going to be taking you to. The one sentence I will read out (for your note at para. 27 between E and F in *Ex parte Daly* at Tab 29) is Lord Steyn in the House of Lords. The facts do not matter. This is just a discussion of proportionality. It reads as follows:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions".

That strikes a note, of course, because we are told by the OFT that although you can interfere under your jurisdiction with their fine, you probably ought not to because it is kind of a measure of their discretion.

THE PRESIDENT: That fuels the debate about whether, in an EU context, proportionality requires the reviewing court to descend into the detail rather than just to take an overview because of direct effect and arguments of that kind. Was *Daly* the export of live animals? Just remind me.

MR. HARRIS: *Daly* was the cell searches case. It was all about the prisoners ----

THE PRESIDENT: Yes. So, it was not an EU context.

MR. HARRIS: No. Again, it is common ground, and in particular *Argos* - with which I know you are deeply familiar - that you have the unlimited jurisdiction as regards this fine. What I am saying to you is that as regards proportionality that includes looking at the manner of the balance. You do not have to defer just because there is a balance involved. The only case I would invite you to turn up is Tab 34, which is Bundle 2 of the authorities. That is the case of *Lindsay v. Commissioners of Customs & Excise*. Just whilst you are turning it up - and I would not normally do this, but I am conscious of the time constraint - I will explain what the case was about as you turn it up. This was a case of supposed smuggling - namely, people bringing back too much tobacco and alcohol through channel ports. The Commissioners had been clamping down more and more in order to eradicate this problem that was said to be costing the Exchequer hundreds of millions of pounds. Mr. Lindsay had done this trip a number of times. It was found as fact - although the Court of Appeal then doubted this - that he was doing this for personal use only (for him and his friends and family); he was not doing it commercially. Nevertheless, the policy required the confiscation not just of the smuggled goods - that is to say, the non-duty paid goods, but also his car. That was the principal point upon which he appealed. It was an expensive car. If you could turn up para. 52, Tab 34. Can I invite the Tribunal, please, to read para. 52?

THE PRESIDENT: Human rights?

MR. HARRIS: Yes, please. (After a pause): In particular, the final sentence I emphasise, the court, the Master of the Rolls, was here saying that one must consider the individual case no matter how strong the public interest, which, of course, in this case is said to be the dual objectives of deterrence and does not justify subjecting an individual - so, somebody like my client - to interference with their fundamental rights - that is unconscionable.

THE PRESIDENT: Just forgive me one second.

MR. HARRIS: (After a pause): Over the page, I will take you now to paras. 55 and 57. In para. 55, whilst prevention of evasion of excise duty was legitimate, much of the deterrence is legitimate. There is no issue there. Both specific and general deterrence are legitimate. But, nevertheless, the final sentence --

> "The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to the legitimate aim".

Then, at para. 57, and this is now descending into the particular facts of this case,

> "It is true that the DCL [Departmental Circular Letter (which set out the confiscation policy)] referred to making the decision to restore when it would be 'entirely disproportionate to refuse to restore' ----"

Pausing there, the policy actually purported to build in the requirement of proportionality, but as we shall see in just a moment it did not in fact do it.

> "The general tenor of the letter made it plain, however, that the restoration should only be ordered in exceptional circumstances ... The policy did not suggest that any regard should be paid to the value of the car. More significant, in my view, it did not suggest that save in the exceptional case referred to above, it was relevant to consider whether goods were being purported to be distributed between family and friends or whether the importation was pursuant to a commercial venture under which the goods were to be sold at a profit".

So, it did not take account, in fact, of individual circumstances such as, "What was the use to be made of these goods?" Then, the last two paragraphs at 64 and then 66. Indeed, the Master of the Rolls makes the very point that I have just made.

> "The Commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends ... I consider that the principle of proportionality requires that each case should be considered on its particular facts ----"

He goes on to give some examples, including hardship. Then, at para. 66,

> "Unfortunately, in the present case, and I suspect in others, the Customs officers have drawn no distinction between the real and true commercial smuggler and the driven importing for goods or family. Because of the confusion to which I referred at the outset [that is to say, as to how to apply a policy] the cars of both are being treated as being subject to almost automatic forfeiture".

That was unlawful. The Master of the Rolls said so. Last but not least, in para. 73, Lord Justice Judge picks up the theme and says,

> "The question whether the power to seize the vehicle of a non-profit making smuggler should be exercised is fact-dependent requiring a realistic assessment of all the circumstances of the individual case, including alternative sanctions available to the Commissioners rather than the virtually automatic imposition of a burdensome and at times oppressive prescribed policy".

Mr. Justice Carnwath agreed. So, there was a unanimous decision there of the Court of Appeal. What it rejects is a failure to look at individual circumstances and all the individual facts and a virtually automatic application of a policy that has such burdensome effects.

So, that sets the scene for the submissions which I now wish to make about MDT. I am going to begin with the following two submissions that the MDT policy is flawed by design and then secondly that it is flawed in its application to the appellant.

As to the first, flawed by design, we say that the MDT policy is simply not capable of taking account of individual circumstances. You will recall, I have no doubt you are extremely familiar with the guidance and steps 1 and 2, and what those steps are intended to do are to assess the specific and individual culpability of the particular undertaking in question and they do. They do so by coming up with a starting percentage for seriousness and then applying it to the market in which the offence took place. But what goes wrong, by design with the MDT is that that specific assessment of culpability of that individual on that market for that offence is then literally abandoned; you do not adjust it, there is no uplift, there is no multiplier, it is literally abandoned, and in its place is substituted a totally new figure which bears no relationship to the nature of the activity or the scale of the infringing activity because it is simply a percentage of worldwide turnover, and that is the key problem at the heart of the MDT. I can put it in two principal ways. The OFT takes a deemed 15 per cent figure of relevant turnover at the MDT stage, having abandoned the first figure, but that 15 per cent is identical, whether or not the offence or infringement that one is considering is serious or minor, it is still 15 per cent, and that must be wrong we respectfully say under the principles of proportionality.

Secondly, the 15 per cent deemed relevant turnover figure bears no relationship to the market in which the infringement occurred. Again, that simply cannot be right as a matter of proportionality. Instead what it focuses on is the fact that the particular undertaking in question has other activities, so those other activities are in other markets which, by definition, are not the markets in which the infringement and the anti-competitive behaviour took place. So again, it literally cannot be related to the culpability of the behaviour in question and we say that is a fundamental design flaw in the MDT.

THE PRESIDENT: Could it be cured, Mr. Harris, if there were a further step at some point where the OFT said "This is what all these steps produce, including the MDT step, but now we must look at it in the round and see whether, having regard to all those circumstances this produces a disproportionate result."

MR. HARRIS: Yes, it could but there are two problems. The OFT actually does say that as regards its other, what we say, no disrespect intended, is the tinkering at later stages. Let me give you the prime example, 5 per cent for compliance is like division 4 compared to the premier league in terms of the adjustments. Our fine went from £70,000 to £1.5 million at step 3. It is no answer to say that we then adjust the 5 per cent of the £1.5 million at step 4; it is a wholly different order of magnitude, and in relative terms one is not proportionate to the other. You could do it, if you did it properly, and proportionately by reference to the individual facts of the case and, indeed, if one began by adjusting the number that was specifically related to your client, to that particular infringing undertaking. In other words, instead of abandoning the figure that one reached after step 1 and 2 one adjusted it, for the sake of argument, multiply it by 1.5 or possibly by 2 in exceptional circumstances. But then the number would still be referable to culpability and adjustments to that number would be of a more acceptable scale, they would not be in a completely different ball park. You would not be starting from a completely different level, or in a different ball park.

The other answer that the OFT gives is: "You get this new worldwide turnover figure and then you do apply a starting percentage to it and you do apply the duration multiplier", but that is an incoherent response, because if you start with a number which, in our case, is over £1 million – the new number – and then you start mathematically multiplying that number it does not matter what you do to it, it still cannot be related to the underlying culpability. If you halve it, double it, triple it, do what you like, it can never be related to the underlying culpability. So that is simply no answer.

There is a number of other points that the OFT make, and I will quickly respond to them. They say that the MDT does not apply to everybody – well, so what? It does apply to us and it has affected us extremely badly and, as we know from the Court of Appeal in *Lindsay* you have to assess our individual circumstances.

The OFT say – I have already dealt with this one – "adjustments at a later stage". Well they are of a different order of magnitude. Then the OFT curiously place a large degree of reliance upon the principle of consistency. They say "We had to treat everybody in a like manner and that is why they all had the MDT applied to them". With respect, that is simply not a permissible approach on the *Lindsay*-type guidance. There was no lawfulness in

taking Mr. Lindsay's car, just because you have taken other people's cars. What you have to do is look at Mr. Lindsay and say: "Does he merit the forfeiture of his car on the facts of his case, and analyse those and do not be hide bound by this virtually automatic confiscation that is set out in your policy.

So that is what I have to say on flaw by design. Then flawed in application, of course, follows on from that. A policy flawed by design simply cannot be proportionate when applied to the individual case, but in our case it is worse because the MDT is said to be based upon two specific justifications or objectives: (1) specific deterrence, and (2) general deterrence.

As I said before, we do not object to either of them, they are legitimate but, and this is something the OFT simply does not grapple with in my case, specific deterrence cannot be of any relevance to me, because whether one looks at Corringway or HCL, the actual construction company that infringed, they are both no longer economically active at all. It makes no sense to say that looking forward – that is the OFT's phrase, "forward looking deterrence" – means to deter those two individuals and they are not going to be doing anything looking forward – they cannot, one is MVL and one is insolvent administration. That only leaves general deterrence, but what we say is the OFT has failed to recognise the fact that one of their two supporting columns for imposing such a massively higher number at step 3 than would have been arrived at if they had only applied steps 1 and 2, and even then adjusted that figure, is one of their two supporting columns does not exist, and on proportionality grounds in my case therefore the fine is flawed. Because if you have double need or double column, double justifications that can lead to a certain number by reference to the need to meet those two objectives, but as soon as you put one of them away then the need is less, and on proportionality grounds it is common ground that you cannot go further than you need to in order to meet your legitimate objectives. So on that ground alone the fine in my case simply must be flawed.

THE PRESIDENT: I seem to remember seeing somewhere an argument that there was some justification for specific deterrence on the basis that the individuals concerned with Corringway might still want to be in the business.

MR. HARRIS: Sir, yes. I raise my eyebrows about that. That is not in the decision and that is not in the defence, it appears to have been, with great respect, dreamt up at the last minute in this skeleton. We say there is no justification or evidence whatsoever for seeking to suggest that the individuals who are the part owners of my appellant company are going to be involved in future economic activity in this or any other relevant market, let alone that

they as individuals need to be specifically deterred and, with respect, we say the OFT is going to have to do a great deal better than that by way of justification if it is going to rely upon the need specifically to deter anybody who is anything connected with Corringway. It is also rather odd that they seek to pierce the corporate veil in that rather haphazard and last minute manner when para. 3 of their skeleton says it is all about focusing on the undertaking. The individuals are not the undertaking.

PROFESSOR BAIN: Mr. Harris, you seem to be saying that at least conceptually the penalty for deterrence is split into two parts, part general, part specific. Is it not possible that the same sum could be directed to two objectives without it necessarily being split, so that the amount that was sufficient, let us say for general deterrence would also suffice for specific deterrence, or vice versa, but that you did not actually have to break it up into 80 per cent one, and 20 per cent the other?

MR. HARRIS: Sir, I take that point but the difficulty here is the one to which I adverted a moment ago. The OFT is said to need a certain number for deterrence purposes. It then says that the need is in order to meet two objectives, and my simple point is that whilst I accept you do not take in our case what we end up with is £1.5 at step 3, and say "£1.25 is general and £0.25 is specific. Nevertheless, it has to be, as a number, supporting two supposed needs. That is their case. All I am saying is that if you take away one of those needs plainly you cannot have such a high number because you do not have the same degree of justification, of the same magnitude, of the same magnitude of need.

PROFESSOR BAIN: Thinking purely of hypothetical numbers, is it not the case that a penalty of £1 million could be what was judged necessary for general deterrence? Half a million would have done had it been specific deterrence alone. So, you impose the fine, or penalty, of £1 million which covers both needs.

MR. HARRIS: We have another difficulty with the over-degree of reliance by the OFT upon general deterrence. What we say is that general deterrence, by definition, has proportionality problems because by its very definition it does not focus upon the individual circumstances of the case, which is what the Court of Appeal in *Lindsay* says you simply must do. It only focuses on the needs of others. What we say in those circumstances is that you have to be very careful as a fining authority not to lose sight of the actual picture that you are supposed to be looking at when addressing the fine. You get side-tracked by other general considerations and then you lose sight of the little guy who is actually being fined. What we say is that in imposing a general deterrence figure, even a doubling of what would otherwise have been appropriate for the culpability of the individual offence would require

the most extraordinary justification. Let me give you an example -- let me give you a driving example. Let us say I drive home tonight and I speed by 20mph and I get caught. Let us say the standard penalty for that is a £200 fine for 20mph on such-and-such a day. Shall we call this Day One of Year One? But, then, everybody does it for the whole year. The police are getting fed up to the back teeth and there are all kinds of local protests, and what-have-you. Day One of Year Two: I drive home. I stupidly go over by 20mph in exactly the same way on the same stretch of road and I get caught again. This time it is said, "Well, look, it is just not enough. People are not taking enough notice". So, instead of the £200 fine, suddenly it is £2,000, or I get my hand chopped off, or my car confiscated. Then I say, "Hang on a minute! That is not fair! I have only done the same thing as that guy who got £200 last week or what I did a year ago". They say, "Yes, but, Mr. Harris, never mind about you. If I had a lovely car -- Never mind about your car. The fact is that other people are just not taking enough notice. Therefore you need this massively higher figure". What we say is that that has lost touch with the necessary focus that the proportionality doctrine requires. This is why I have a problem with the point that you put to me. You cannot justify to such an enormous degree of magnitude by a reference to factors that, by definition, have nothing to do with the individual case.

THE PRESIDENT: What is the appropriate approach then to deterrence?

MR. HARRIS: The appropriate approach is that if it is warranted then what you do is you take Step 1 and Step 2, and then you adjust. Funnily enough, that is exactly what the guidance says. You adjust the figure after Step 1 and Step 2. That is not what the OFT has done. The OFT has abandoned the figure. That is one of the complaints that I have made about non-adherence to the guidance. They completely abandoned it. What we say is that effectively deterrence allows you to adjust, but not massively multiply (I will come back to the type of magnitude that I am talking about) provided you are still within the ball park that is conditioned by the degree of culpability of that particular person for that particular offence. So, for example, coming back to the point I said I would come back to -- Let us say my client's fine is £70,000, £70,000 and £70,000 for each of the infringements after Steps 1 and 2. One might, if there was sufficient justification having looked at that individual, say, "Oh, well, times that by 1.5 to reflect the fact that they need to be deterred and other people need to be deterred". In a truly exceptional case you might even say, "Double the fine. Take those £70,000, £70,000 and £70,000 and double them". It is a bit like the driving example. One can take a step back. It is the right-thinking members of the public test that I adverted to earlier. If I were fined £400 on Day One of Year Two for my driving offence, I

might think, “Oh, blimey! That’s twice what the actual culpability merits, but, you know, enough’s enough. People have to be sent a wider, more severe message”. That is the sort of thing that one might do appropriately in a case like this. This is almost in a different universe, in my case. I have £70,000 for Infringement 2 after Steps 1 and 2 and suddenly it becomes not £140,000, or even £280,000, but £1.5 million. It is just baffling, with respect.

So, what that then says - and I am conscious of the time - is that those are the two sets of submissions that I make. They are the key submissions about proportionality on MDT. Disproportionate by design. Disproportionate in application to us. Ignores me, even though I am said to be the culpable infringer.

In my skeleton - and I will deliberately not develop these except very, very briefly - I have three other points. There is the arbitrariness, there is the guidance, and then that it is discriminatory.

You have my submissions in the skeleton. I am just going to take one point on each of them.

Arbitrariness. Now, the OFT accepts in its defence at para. 138 - we do not need to turn it up that they could have taken another number instead of the 15 percent deemed relevant turnover - or, as it is expressed in the decision - 0.5 percent -- 0.75 percent of worldwide turnover. They could just change the number. They are quite candid about this. At para. 24 of the skeleton, they say, “Well, that was our view of what the relevant number was”.

My point is this: that that is arbitrary. If it is the case that tomorrow they could choose 10 percent or 20 percent, then how am I - for these purposes a citizen subject to the law -- a corporate undertaking subject to the law -- How am I supposed to know what it is? It is unforeseeable and arbitrary.

The particular way I put it before this Tribunal is as follows: As I set out in my skeleton, by reference to the relevant case law, I am entitled to have effective judicial protection against arbitrariness. I rhetorically ask this question: how can you, the Tribunal, effectively, judicially protect me against a number which you cannot assess because the OFT simply says, ‘Well, that is the number that we chose because we thought in our margin of discretion and appreciation that that is what was required’

THE PRESIDENT: Is that not always the case with a penalty? If people choose a sort of level of penalty for whatever reason, as long as it does not exceed the maximum which provides a certain amount of legal certainty -- How predictable does it have to be as long as it is below the maximum?

MR. HARRIS: The answer is that you have to base it upon (a) evidence and (b) an assessment of the individual circumstances. The OFT has deliberately - it is their choice - not done that. They have said by reference to broad and general policy considerations, "We think 15 percent". What they have not done - and this would have been acceptable had it been done - is, "Ah! Corringway. Let us have a good look at you. What exactly do you need by way of specific deterrence?" "Should have come up with nil because we are out of business." What is the appropriate, within the ball park of your culpability, figure for general deterrence?" "Well, that is an adjustment [properly so-called] of the £70,000 figures for each of the infringements. But, they have not done that. So, that would have been acceptable. As regards certainty - and this is a point that is thrown at me by the OFT -- They say, "Mr. Harris is saying effectively you need to know the nuts and bolts and the final figures in the guidance". I do not say that at all. I say that what would be proportionate is in my case, as in the case of every other fined undertaking, is that the fined undertaking knows that it will be fined by reference to its own individual circumstances. It is certain that it will be fined proportionately by reference to its individual behaviour. Of course, I know what my individual behaviour was. So did everybody else. What I had no idea of is what the OFT will wake up next week and say, "Well, 15 percent -- We thought that last week, but now I think it is 20 percent". They say that quite clearly. They say, "In the OFT's view --" They think that that is the number that is acceptable. At para. 138 of the defence they say, "Yes, it could have been a different number". That is the very essence, we respectfully contend, of arbitrariness. It denies my human rights for the reasons I have set out in my skeleton.

Sir, I am going to skip over the guidance points save only to say this: those are fully set out in the skeleton. We respectfully contend, as regards the guidance, that it would not have survived the statutory scrutiny processes - namely, consultation ----

THE PRESIDENT: Have they put the MDT in?

MR. HARRIS: Yes, had it been subject to consultation, it would not have survived. Had it gone to the SO, he or she would not have approved it. But, one thing we do know - and this is my lawfulness challenge - it was not subject to those processes. That is unlawful. It is quite clear what you have to do under s.38. It is set out in my skeleton.

Last, but not least, two points on MDT. We say that it is discriminatory to have applied it to only one of the three infringements - not because the effect of that has meant that my appellant client shoulders the entire burden of the fine even though other people -- The OFT has not responded to that. So, I will keep any points on that to my reply. It is

discriminatory. If there is a justification which hitherto there has not been, then I will reply to that.

Then, finally, *Makers*. Other people, I am sure, in your other appeals, will deal with this at length. I will keep it very, very brief. The basic point that I wish to emphasise is the inconsistency, and hence the arbitrariness and the inability judicially effectively to protect my rights. The inconsistency is as follows: in *Makers*, as you will be well aware, the parent company was not included jointly and severally for the liability to the ... whereas I am here as a former parent that has been included. That is inconsistent.

Similarly, in this very decision, Strata Homes Ltd. is the former parent company of Strata Construction Ltd. (party no. 87) and they have not been included for fining purposes.

THE PRESIDENT: That is an oversight. I cannot remember ----

MR. HARRIS: Yes. But, be that as it may, the fact is inconsistency. That is unfair. We say it is unlawful. If you are going to insist on treating former parent companies in the manner in which we have been treated, the very least you have to do is to do it to everybody - otherwise it is unfair to the people to whom you do do it and the other people get a windfall.

So, in summary, and I have taken slightly longer on that than I had intended, the MDT is flawed by design and by application. You should set it aside in our case. It is too arbitrary and denies effectively your judicial protection. You might ask, "Well, what do you say you want out of it?" I said, "There should be nothing applied to us at Step 3. Steps 1 and 2 should have been where it ended - or, at most, bearing in mind no application of specific deterrence then what should have happened is that there should have been a very minor adjustment to those three £70,000 figures at Step 3 stage on grounds of general deterrence, but bearing in mind that it still has to very truly remain within the ball park referable to the culpability of the infringer in this case, and a true adjustment - not just, with respect, some random new figure.

That then takes me on to the next ground of appeal - year of relevant turnover. This is a lot briefer. There are two central points. One is what is the current size of the relevant undertaking; the other is, will Corringway escape a fine altogether? I will take them in that order.

The OFT's case is that you have to choose a year of relevant turnover that reflects the current turnover of the undertaking that is being fined. Well, that is fine. We do not have any problem with that. But, what has gone wrong is that the OFT itself acknowledges that on the facts of my case - and here I am quoting directly from para. vi.94 of the Decision (if you needed that it is in Tab 1K of the Notice of Appeal, p.1648) - the OFT's own words are

that 'Corringway did not trade in the business year preceding the decision". So, it did not have any turnover. Its current size as at the date of the decision was nil. Corringway, I am talking about here though - not HCL. This is a fundamental problem with the OFT's analysis. So, firstly, current size is the yardstick. We agree. Our current size (Corringway's) is nil. But, this is where the OFT goes wrong. They then say in their skeleton at para. 43 that that will lead to a 'nil penalty'. But, with respect, that is just wrong. It does not lead to a nil penalty because Corringway is only ever liable jointly and severally. Who is it liable jointly and severally to? Well, HCL - the company that actually did the infringing. HCL did have a current turnover in the business year preceding the decision. What is more, it was quite large. Obviously, we are going to still be subject to that. Indeed the number, if you want it -- We would still be left with a pre-leniency penalty on what we say is the correct approach of £927,000. So, it is not nil. They say in their skeleton ----

THE PRESIDENT: How much was it?

MR. HARRIS: £927,000 before the fast track offer leniency discount -- for all three infringements.

THE PRESIDENT: I see.

MR. HARRIS: That reflects the fact that HCL did have significant turnover. The OFT makes a second mistake. At para. 42 they say that HCL did not have relevant turnover. Well, it was just wrong. They did. They had a lot of it. Then there is a third mistake. For some reason they refer to calendar year when analysing this issue.

THE PRESIDENT: When did HCL go into insolvency?

MR. HARRIS: It was about a month before the decision - August 27th, 2009 was insolvent administration. But, it had obviously been having quite a lot of financial difficulties in the run up to there. We say that the OFT's reliance upon the definition of business year is flawed. That is effectively all they say. They get it wrong factually and then they say, "Ah, yes, but look at the definition of business year and the turnover order" – this is their skeleton – we say that is wrong for two fundamental reasons. First, there is the very passage that I have just cited from their own decision, which is repeated twice in the decision, namely Corringway did not trade in the business year prior to the decision, so it is obvious that they had no turnover in the "business year", that is their phrase. In any event, we do not accept that there is any reason for coming up with a turnover figure, which they did in our case, for many, many years previously, by reference to the definition of business year in the turnover order. The turnover order has nothing to do with this, the turnover

order is about assessing the magnitude of turnover for step 5 cap purposes. We are not in step 5, we are nothing to do with cap, we are not even anything to do with magnitude of turnover. Here we are talking about the relevant year of turnover. It is a complete red herring but, for what it is worth ----

THE PRESIDENT: Does it get you far though? That still sounds quite a big figure.

MR. HARRIS: I accept that, Sir, in terms of the figure that is attached to it, it is nowhere as important, for example, as MDT. Nevertheless, what it betrays, we respectfully contend, is the very same problem as is manifested in the case of the MDT, lack of attention to the individual circumstances of our case. To say, as the OFT does, that this argument will lead to a nil penalty is wrong, and they have not analysed what has been going on in our case. We say that is sadly thematic, or emblematic of their approach to us in this case.

My next ground of appeal is very, very brief. I rely upon what I say about leniency in the skeleton, my simple and sole remark orally is that the fast track offer, and the OFT's application of its lenience policy has to be subject to general principles of Community and administrative law. We take on board what the OFT says in its skeleton about how they have to have a degree of flexibility about leniency and leniency, if you like, sits slightly outside and at the back of the fining process, it is largely for them to determine when and how it should apply. I take all of that on board, but the fact is that we have been discriminated against and that is a principle of law to which the OFT remains subject. The discrimination is as follows, very simple: other people were given a full opportunity to demonstrate that on the facts and individuals and circumstances of their case they should be entitled to claim a greater discount and we were not given that opportunity. Bear in mind that in my case it is all the more aggravated because I represent a former parent company. This is a former parent company who, for several years prior to the FTO letter being sent, had been economically inactive and was not present on the relevant market at all. My simple point is that it is all well and good applying a leniency policy but it still must be within the bounds of general principles of law such as fair treatment and equal treatment, and we have been denied that opportunity.

THE PRESIDENT: Would that be cured, just for the sake of argument, if the FTO discount coincided with the bottom range of the leniency?

MR. HARRIS: Not necessarily because the only cure for this is to allow each individual fining undertaking to be given the same degree of opportunity to present whatever their discount story is. It is the denial of the opportunity and it may be that some people would have been given another opportunity and they could not have got higher than I think the FTO was 25

per cent anyway. But for the reasons we have set out in our skeleton, there is absolutely no reason to think in our case that that would have been true.

What happened in our case is that several years after the infringement we were sent a letter saying: "You are not even a party to this infringement, so you do not need to worry, but please send us some information about your former subsidiary you sold years ago." We said: "Yes, as far as we can, we do not know much about it, but here is what we have". Then about six or eight months after that they said "joint and severally liable you are for your former subsidiary. And, by the way, the leniency programme closed a long time ago". That is not fair, it is as simple as that, other people were allowed to get a bigger discount, and we were not.

I have two substantive topics left, and 30 seconds of closing remarks. Frequency of infringements. We say it is a cardinal principle of sentencing that the more culpable you are the bigger your fines should be. Indeed, the OFT curiously agrees with that very principle at para. 252 of their defence they say: "Where three infringements have been committed a more serious penalty was imposed than if the undertaking had committed only one infringement. That is clearly sensible and proportionate" Of course, that is exactly what we agreed, but whilst the OFT applied that cardinal principle below the threshold of three infringements, as soon as its arbitrarily imposed threshold of three infringements is reached then it abandons the principle, so there are plenty of recipients of this decision who are manifestly guilty of more than three infringements, there was oodles of evidence of it, but it was not pursued because they said "We are just going to impose a cap on the number of infringements", and we say that you cannot abandon a cardinal principle of sentencing – well, probably ever – certainly not unless you have the most overwhelming of justifications and yet the OFT's justification, what is it? "We could not really do it because it was administratively inconvenient" and the very word they use is "impractical".

We say, with great respect, and even taking on board the fact that it may well have been administratively inconvenient, it may well have been impractical, and even having sympathy for what it is worth for the OFT case teams, it still does not mean that on the basis of such a weak justification you can take a truly core principle and set it to one side. That is point one.

Point two – and here frankly we have, again with respect, a bit less sympathy, this is something that the OFT brought entirely upon itself. It had no need to pursue hundreds of undertakings simultaneously. It had no need to have a massive multi-party decision. We rather suspect that they will not do it again because of all the trouble that it has caused, but

the point is that the only reason that this has created the degree of impracticality and administrative inconvenience is because of their own freely chosen decision to behave like this. In other decisions, as you will doubtless be well aware there have been either individual undertakings pursued for this sort of behaviour or, at most two, three or four, at once. That could have been this case. The OFT chose to do it a different way and they then say: "Now we cannot manage it", we say: "Sorry, but that is just not good enough".

We grasp this nettle. The logical consequence of this submission is that it has gone so fundamentally wrong, failing to account for relative culpability that they have to do it again. I do not shrink from that consequence. The result of this submission, if it is correct, is that the decision has to be remitted and they have to assess relative culpability of all the infringing parties, it may take them some time, they may split up, that will be a matter for them. But it is so wrong for my appellant to be treated as if it were as culpable for defining purposes as somebody who is manifestly far more culpable; it is just wrong.

That takes me then on to the final ground of appeal – financial hardship. This is where the OFT displayed, we say, the fatal inconsistency, to which I referred in my opening remarks. So at para. 57 of their skeleton they refer to a "windfall" if somehow Corringway should now get a higher degree of discount for financial hardship. The jointly and severally liable body got 33 per cent, my case is that it should be very considerably higher than that, and the OFT says "No", that would be a windfall.

Then they say at para.59 there must be something wrong here because that is effectively Corringway acting as a parasite upon the financial hardship of HCL, but we simply do not understand these submissions, because it is the very essence of joint and several liability that Corringway is part and parcel of the same undertaking as HCL. Indeed, those are the exact words of the OFT in its own skeleton, para .3: "C was part of the same undertaking". If Corringway is part of the same undertaking as HCL it makes no sense to describe Corringway as getting some kind of parasitical windfall benefit out of another part of the same undertaking, we were all the same undertaking.

THE PRESIDENT: Could it dilute the financial hardship?

MR. HARRIS: I am sorry, Sir?

THE PRESIDENT: If within an undertaking you had one part that was insolvent, and another part of the undertaking that was not insolvent and doing all right, I suppose if you treat them as one undertaking for the purposes of any financial hardship approach to fining, it could dilute ----

MR. HARRIS: I follow the point but it is common ground, if one has regard to the way in which this is addressed in the decision, which we specifically address in our skeleton argument, it is common ground that the focus is upon HCL, the entity that is doing the infringing. When one focuses upon that entity then on the facts of my case one can see that the financial hardship is extreme, indeed, it is hard to imagine anything that is more extreme.

THE PRESIDENT: You accept that it is the undertaking that is the right approach throughout? You do not challenge, as it were, the joint and several liability? I am only asking as to whether that means that there can be a sort of sharing? Either extreme could be said to be wrong, I suppose, just thinking aloud, could it not? To give no financial hardship because of your position would be arguably unfair, because on assumed facts you were okay. And to focus on the insolvent entity part of the undertaking, as it were, might also be wrong in principle. Is it maybe a halfway house? I am not sure.

MR. HARRIS: The way we approach this, if you have my skeleton argument, p.25, footnote 14, which refers to para. 122. Again, I am conscious of the time ----

THE PRESIDENT: We have asked you a few questions, so you have another minute or two.

MR. HARRIS: What the OFT in its decision has done is focus, for these purposes – financial hardship purposes – upon HCL. So that was the construction company doing the infringing, and we accept that.

What we are saying has gone wrong is that they have, on their own approach, not appreciated the actual facts that are relevant. So on their own approach of looking only at HCL, which is the one that did the undertaking, as we point out in footnote 14 of course the appellant (my client) was not engaging in any economic activity at the time of the fine, it was not active at all. If you recall the way the financial hardship approach is adopted by the OFT it is look at the state of the infringer as at the date of the fine, because you have to address the question of whether or not effectively the fine is going to destroy them, or completely knock them out. That is why they do it, and we accept that. What they have not done, they purport to have taken account, and I am quoting here – para. 124 of my skeleton, quoting from defence para. 172 – on its own approach the OFT purport to have "taken into account that Haymills was in administration". Haymills there being the construction company, not my client the former parent. But they have not done it properly, because a month prior to the decision it was public knowledge that Haymills, and for that matter its then parent company called Haymills Group, had gone into insolvent administration, and so it is a simple point that I make, which is that 33 per cent financial reduction, that is one thing, but it is difficult to see how you could be in any more financial

distress than insolvent administration. So 33 per cent frankly does not cut it, but then it is all the more explicable if you turn over the page to p.26 of the skeleton and have regard to footnote 15 that other parties got vastly higher financial hardship discounts than did this undertaking, some of them got 99.9 per cent and yet some of those undertakings are still economically active, indeed on the relevant market. We just say, and the OFT has not addressed this in its defence, or in its skeleton argument, that it cannot be understood how the ultimate position of financial hardship can only result in 33 per cent, and yet on the face of it lesser financial hardship has resulted in vastly higher discounts.

In response, Sir, to the point that you put to me, we do say this is one of the points where one has to take a step back and say: "How and why is it that Corringway, the named appellant, is actually liable?" Corringway is liable by means of a doctrine of law, joint and several liability from an historic period. In those circumstances we say that when addressing financial hardship and asking yourself the question: "At the moment when I am going to impose the fine, what is the financial status of the person upon whom I am imposing the fine?" Well I am imposing the fine upon HCL, it has absolutely no money, is completely bust, and it is not appropriate under this heading to turn to a former parent, from many years earlier and say "They have some money in reserve."

THE PRESIDENT: Except that it is not vicarious liability, is it? You are not liable vicariously, you are liable because of decisive influence. Sorry, you were going to ask something?

PROFESSOR BAIN: I was listening to you, Sir, first. This actually raises an issue that I wanted to raise with you, Mr. Harris, anyway. Were we on any of the grounds that you have raised, to find in your favour, we have the task of finding what is an appropriate penalty. One issue that concerns me in that connection is supposing HCL had not gone into liquidation. Supposing it was trading profitably, who would be paying the fine or the penalty if you were jointly and severally liable? That would depend, I imagine, on the terms of the sale when you got shot of HCL in 2004. Is it the case that HCL would have been responsible at least for its own share of the liability, and part of it is obviously due to turnover for non-HCL Corringway in an earlier year as the decision is set up at the moment. But would HCL have paid that and Corringway have paid the balance? Or, was it the case that when you sold HCL you would have retained the liability for any fines in respect of events that took place before that anyway, in which case the fact that HCL was insolvent would have no bearing on the amount that HCL had to pay. Are you in a position to tell us anything about that?

MR. HARRIS: I may be, if I could just have one moment. (After a pause) Yes, I am grateful. The position is that there was no legal obligation or warranty or anything in the sale contract that made liability, at the time that Corringway was the former parent company, liable for the whole fine, and not the liability of HCL. There was nothing in the contract to that effect. Equally, there was nothing in the opposite direction, but the net result of that would therefore have been true contribution territory, such that Corringway would have said to HCL if it had not gone bust: "It is your responsibility, you can pay all of that", and then no doubt there would have been a fight if needs be in contribution terms in the court about who actually shouldered the burden. I hope that that answers the question, but it is certainly not the case that for reasons connected with the sale the fact of HCL's insolvency at the time that Corringway was the parent means that it is irrelevant that HCL became insolvent.

PROFESSOR BAIN: Thank you.

MR. HARRIS: I do also take a step back, the OFT has to defend its decision. Its decision was to focus on HCL. In focusing on HCL, which we say was quite proper, they have got it wrong and they do not address that, so it will be interesting to hear what will happen.

Just by way of wrap up remarks, I go back to where I started, which is we say taking a step back this fine ended up at £781,000 after leniency, and £1,041,000 prior to the leniency, is just the wrong ball park. It does not pay specific attention to the individual circumstances and facts of my case and is therefore disproportionate and excessive, and that is what I invite you, with respect, to correct for any or all of the reasons that I have put forward.

Sir, unless I can be of further assistance those are my submissions.

THE PRESIDENT: Thank you, Mr. Harris, Mr. Unterhalter?

MR. UNTERHALTER: Our submissions will broadly follow those of my learned friends, but we will concentrate on the MDT issue, since that is where perhaps the greatest attack has been made by this appellant.

If I may begin by making one or two introductory observations. The first concerns a theme that my learned friend came to on a number of occasions which was to suggest that the jurisdiction enjoyed by this Tribunal as he put it was unlimited. We respectfully suggest that that is not the correct way of understanding the inquiry that this Tribunal is required to engage. Whilst we fully accept, as we have indicated in our skeleton, that this is a merits based appeal and the Tribunal may consider how the decision was taken, and whether it was warrantably taken in the manner that it was. We have referred in our skeleton to the Achilles paper decision and, in particular, the language which has been used by the

Tribunal on a number of occasions which goes to the issue as to the margin of appreciation enjoyed by the OFT both in respect of the interpretation and application of the guidance. In our submission this goes to the question as to how one isolates the error that is at stake, because there are really two rival conceptions that are offered before you, namely, the one of my learned friend which simply says, as it were, scrub the slate clean, and reconstruct all of this by your own lights and in your own way, and across all the cases that are now going to come before you, which will put you in the situation where, effectively, you will confront the same issues that the OFT confronted in seeking to construct a rational and consistent scheme within which penalties can properly be applied to the appellant before you.

The second view, which is the one that we would ask you to accept is that one has to consider the margin of appreciation in relation to the kinds of errors that one will identify the OFT to have potentially made, and those are really of the following kind.

First, it may be said that the OFT did not properly understand or interpret the guidance, even though there would be a margin in respect of that interpretational question. Secondly, that the OFT did not properly apply its own guidance, or thirdly, that the OFT should have indeed applied some other principle in addition to, or supplemental to the guidance which it failed to do, and that is the nature of the error. But even in that last case, it is certainly necessary then to understand how any supplemental principle would be integrated into a scheme of guidance which is not itself subject to any challenge of illegality. So we would submit that it is in the scheme of trying to determine the error and which of these errors would lend coherence to an overall scheme of penalties that are fair and proportionate that there is a margin, and there is simply not, as our learned friends sought to describe it, this jurisdiction at large, which simply does not work within the scheme of the guidance, in the sense it at least pays regard to it and seeks to utilise it for the purposes of seeing what are the errors and how have they been made, if any.

If I might then move to the question of the MDT, because here the appellant has made two very broad challenges. First, that the scheme of the MDT as a methodology is simply unfair and disproportionate and that in the circumstances of Corringway's case it has not been properly applied because of the fact that it is in MVL and therefore is not in a position to trade and consequently nothing is due by way of specific deterrence.

We would begin the submissions on that score, if we may, by taking the Tribunal back to the decision itself, and if I might refer you to part VI, para. 209. I will make the general submission, I will not take time reading extensive portions of the text. Perhaps it would be useful simply to situate how the MDT arises as a methodology that is deployed, and there

the language is cast in the following way. For some parties the financial penalty calculated at the end of step 2 of the calculation represents a relatively low proportion of the undertakings total turnover as a consequence of that party's relevant turnover being a low proportion of its total turnover, because it may have significant activities in other markets. In such cases the OFT considers that the penalty figure reached at the end of step 2 is unlikely to represent a significant sum for that party and it will therefore be necessary to increase the party's penalty at step 3 to arrive at a sum that represents for that party a sufficient deterrent having regard to the seriousness of the infringement and the participant's total turnover.

That is the introductory explanation and justification for MDT and there is then a very extensive discussion that follows as to how this methodology is to be understood and some of the criticisms that have been raised against it. Might I make a number of submissions about the MDT?

The first is that it is an attempt to work out a scheme of deterrence, which is not a simple intuitive judgment of the kind that our learned friend sought to present to you. My learned friend on a number of occasions said "Would not X or Y be a sufficient deterrent?" without any reason for that beyond the assumption that there is some intuitive metric of deterrence that one will simply understand when one sees it. The OFT has taken an entirely different view as to how this should be done, which is that it has sought to indicate why size is the relevant consideration in determining how deterrence is to take place, because it is contrasting a situation in which the activity in the relevant market may be a very small part of what a large conglomerate operating in diversified markets does and consequently a fine that was solely related to the relevant turnover would simply fail to capture either the seriousness and scale of what is necessary to do the work of deterrence, and that essential idea, which is borne out both in your own decisions both in *Makers* and is also exemplified in European law is the essential concept that underlies the MDT methodology.

So it is not the case that it is a methodology simply based on an intuitive judgment of what deterrence requires, it is essentially saying that if you are very big and very diversified and operate in many markets then there must be a penalty that makes those, particularly those in senior positions, alive to what has been done, so that they will take proper action and it will hurt sufficiently, to ensure that that is the case.

In our submission this is where Corringway's submissions diverge from what is the point of deterrence. Deterrence is not an alternative means of sanctioning culpability. Deterrence is about a forward looking concern that is intended to deal with future conduct, both of the

undertaking concerned and those who will observe what has happened to it as a guide to their future conduct. Therefore, it is not a question of reinventing culpability now in the guise of deterrence. On the contrary, the very logic that is deployed here is to say the OFT makes a determination of seriousness, that is step 1 and 2 and no challenge is made on that score by Corringway. It then is a question of how is deterrence to be served, which is an instrumentalist doctrine. It is saying, "We must use this undertaking in order to make an example so as to influence future behaviour". It is not a further judgment upon culpability. So, the manner in which this operates is entirely within the scheme of how deterrence can be effected given the size of an undertaking.

Now, it is also not the case, as our learned friend has sought to suggest, that this is simply a means at Step 3 which pays no regard to what has happened at Steps 1 and 2. As the logic of MDT is explained in the Decision, there are circumstances in which an assessment of seriousness at Steps 1 and 2, depending on the activity of that undertaking within the relevant market, will be such as to constitute a significant proportion of the overall size of that undertaking so that deterrence will be adequately served at Steps 1 and 2.

Therefore, two submissions. Firstly, Steps 1 and 2 does the work of seriousness in the first place and may do some, or all, of the work for deterrence depending on the particular compositions of turnover in the relevant market relative to the total turnover of the undertaking as a whole. But, deterrence is a separate objective. It requires separate consideration and it is intended to do just that. It is not intended to work on a simple principle that says, "Well, if that is the penalty that was good enough to do justice by way of culpability, then there is some modest factor of increment that will do service in the interest of deterrence". On the contrary, what it is intended to achieve is that there will be a set of incentives that are put in place that will remind those who will ever be tempted by this conduct in the future; that it will hurt them and hurt them significantly, in what is relevant to those who make these decisions, which is the economic value of the undertaking because that is what total turnover, as a standard, is measuring.

So, if one is concerned with deterrence one is concerned with how the economic value of the entity as to its size will be effected if there is recidivism in respect of this kind of activity. Therefore, it is neither a case that Steps 1 and 2 are abandoned - they are not; they are necessary steps -- they do their own work and they can form part of what feeds into deterrence , but deterrence has its own logic and is, of necessity, something that has to be considered for the purposes of securing a separate objective as is set out in the guidance. Corringway has no difficulty that deterrence must obviously be sought.

So, the question then ultimately around proportionality is a choice for the Tribunal. Is the Tribunal going to say, "Well, we will simply make these intuitive judgments about what is deterrence in any particular case, and why we get there, and the reason that that is right for this particular entity, which is the strong theme that our learned friend has addressed to you, is a matter that we must just take case by case. When we review all of these cases together and others that may come in the future, you will simply know that we did the best we could in each case, although we can give no consistent account as to why it was right in this case or that. The OFT face that very issue. So, although our learned friend says that the OFT raised consistency to a virtue beyond its desserts, we submit that that is not the case. It was necessary to have a rational scheme of deterrence that would be of application taking account of what had been done by the various undertakings who are therefore the subject of the investigation.

Secondly, and as referred to in the decision, and as the OFT found this was a practice that was widespread in the industry and had continued to occur notwithstanding the roofing decisions that had been made by the Tribunal. So, there was clearly a job of work to be done in respect of deterrence. Then the question was to ask, "Well, what is an approximate way of trying to ensure that deterrence is done?" That is where the norm that was adopted in *Makers* - which is the 15 percent threshold that says that attributing 15 percent of the total turnover of the undertaking and applying a percentage which is derived from the seriousness of percentages (the 5 and 7.5 in respect of Steps 1 and 2,) - in respect of the 15 percent of the turnover which was the logic underlying the position in *Makers* and was again applied here was essentially a fair and reasonable basis for determining deterrence in relation to the consideration of size - that is, how do we reach far enough, given the economic power and size of this entity - so as to have that effect?

We submit that that takes account both of the kind of conduct that is engaged here which is cover pricing and its two variants, which are differentiated for the purposes of the percentages that are adopted, and it takes account of what was found in this industry. It is the pervasiveness of cover pricing in this industry, and the fact that those who participated in it had failed to heed what had been determined by way of the illegality of the practices of cover pricing that required a proper response, and that response was the *Makers* response.

We do submit - and I do not want unduly to take up time by referring extensively to *Makers* - that it is not the case that *Makers* is a special case where very peculiar circumstances required that the logic underlying MDT was an application to that case but to no other. The decision is in the authorities bundle, Bundle 4, under Tab 57. If I could just very briefly

take you to that case? If I could refer you in particular to paras. 132 to 134? I shall not read it all to you, but at para. 132 where the OFT was required to explain its methodology, in the second sentence it says,

> "The OFT considers that if the undertaking's turnover in the relevant market is less than 15 percent of its total turnover, then the figure arrived at by Step 1 will not act as a sufficient deterrent".

In other words, Steps 1 and 2 are not irrelevant, but are referred to to see whether they are sufficient for the purposes of doing the work of deterrence .

> "In such a case therefore the OFT calculates what the figure arrived at at Steps 1 and 2 would have been, if the undertaking concerned had derived 15 percent of its total turnover on the relevant market".

An amount is then added at Step 3 to bring the overall figures up, broadly speaking to the threshold figure and at para. 133 there is the calculation about which the 0.75 figure is derived. Then if I could briefly refer you to para. 134 where the following is said, "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".

So, Makers is not an incidental authority that happened to be peculiar to the circumstances of that case. It looked at the methodology that was derived in that case. It considered it and it was found there was nothing arbitrary about it. Indeed, it was a proper approach in order to capture what work deterrence had to do in the overall scheme of penalties.

THE PRESIDENT: So, the factual matrix was that you had not gone for the parent company and the holding company. Therefore, the scale perhaps of what the Tribunal was there looking at was rather different. Here you have gone for the holding company which is what, in some of these cases, has led to the very large number of factors which the effect of the MDT application has been to multiply the original fine for culpability. I am not sure how helpful *Makers* is, with all due respect. The background is very different.

MR. UNTERHALTER: We would make two submissions as far as that is concerned. The first is that in *Makers* there was a very considerable uplift as a result of the application to the extent that what was being considered to be arbitrary was the uplift of Steps 1 and 2 to 3. We can look at the mathematics, but it was very, very considerable.

The second submission that we make is that *Makers* was a case which considered the methodology. It did not say that this methodology is simply a function of the fact that it

was not addressed at the ultimate holding company that makes this somehow a different case. It was addressed to the holding company of the UK part of the entity.

THE PRESIDENT: Not the worldwide.

MR. UNTERHALTER: It was not addressed to the ultimate holding company which was Keller Group, which was offshore. The approach that was made and the addressee was still addressed to a holding company. It just was based within the UK rather than more generally. So, we submit there was a methodology being considered. It did involve a considerable uplift. That uplift was found to be non-arbitrary and a proper approach. So, ultimately, our submission is that it is the approach that is not found to be problematic. So, the question is, "Does the approach suddenly unravel because now the addressees are those offshore rather than onshore?" That cannot be a function simply of the orders of magnitude because the approach was found to be correct in the sense that what it is concerned with in terms of its ultimate justification is, "What is the relationship between size and deterrence?"

THE PRESIDENT: Assuming you do not get up to the 15 percent of turnover, you can forget Steps 1 and 2 because you are then concentrating on total turnover. Steps 1 and 2 then become irrelevant, do they not? The only purpose they serve is to see whether you are going to need to apply the MDT. Once you decide you need to apply the MDT -- Because Steps 1 and 2 go out of the window and you just apply the total turnover and whatever your chosen percentage of that is. So, at what stage in the scheme do you actually look at the figure that that turns up and say, "Is this appropriate either for deterrence or for an infringement of this kind?"

MR. UNTERHALTER: With respect, our account, and the account given by the OFT of Steps 1 and 2, is not that it is simply overthrown by Step 3, but rather that Steps 1 and 2 determine the seriousness and what is due by way of seriousness - or, to use my learned friend's language, culpability. But, the question is then, "What is due by reference to deterrence in addition ?" Now, there may be circumstances in which nothing more is due.

THE PRESIDENT: That, you would say under this scheme, is where you get up to the 15 percent.

MR. UNTERHALTER: Yes. Thereafter you are applying a norm which is intended then to capture two things - both seriousness, because you have dealt with that at Steps 1 and 2, and then there is the something more, and the something more is what in addition is required in order to make good deterrence. So, it is not a question of abandoning, as it were, all the

work that you have done on seriousness at Steps 1 and 2. Rather it is to say what in addition ----

THE PRESIDENT: Yes, because you add on Steps 1 and 2.

MR. UNTERHALTER: Indeed. Therefore, the argument that was much emphasised by my learned friend, we would submit, is simply not consistent with the methodology as it has been explained, and the rationale underlying that methodology.

I do not want to spend time referring to the European cases, but if I could just give you a reference? There are many of them. They all say very much the same thing, which is that in effect large conglomerates with diversified interests that engage in serious conduct must be accounted for in a proper policy of deterrence, and that allows you to use the total turnover standard as a means for addressing deterrence. Just one example of that is the *Archer Daniels* case which you will find in Volume 7 of the authorities under Tab 96, and particularly the passage at para. 131. There are others that are very much in that vein.

THE PRESIDENT: Can I just get your views on, as it were, what is the process for looking at the global figure you arrive at? Having applied the MDT how does one then approach this to say "Well, now we have got a figure here. It has been produced, in a sense [I do not want to us the word 'arbitrarily' --] according to the formula. We have the total worldwide turnover. We have the 0.75 percent and that produces this figure" -- Where does one see the OFT saying, "Now, is this an appropriate fine, sweeping up deterrence and culpability and the nature of the infringement? Is that figure an appropriate and proportionate figure?"

MR. UNTERHALTER: In our submission obviously there is a richer analysis because, of course, there is aggravation and mitigation which is the part of the analysis where, in effect, having reached Step 3 you are then at Step 4 asking yourself, "Well, now let me look at the various kinds of factors that bear upon this particular undertaking in order to trim the sails, if it be necessary, to cone to a proper number. So, it is not a mechanistic or mechanical application of formulae. It is a question of saying that for the purposes of deterrence there is an uplift, if it is due. That is worked out, true enough, on a particular formula, but the formula is related to a rationale and that is the rationale of size. Thereafter, there are other factors to be taken into account. Those are aggravation and mitigation. In this instance we have a very good example of the hardship, an aspect of which is contested before you. But, nevertheless, that is an example where you would say, but in the circumstances that apply to this undertaking there are particular features that require an adjustment, and then the adjustments are made.

In our submission this is a logical progression of steps, each of which has its own rationale and justification and is an attempt to do two things: firstly, to subject penalties to a scheme that is capable of justification and is rational. It is not what has sometimes been done, perhaps historically, which is just to say, "I will look at all of the factors and simply come up with a number, and no-one can ever then scrutinise why that number is right or wrong". That has been perhaps the traditional view about sentencing historically in a criminal context. Nobody knows why five or six years is the right number for a particular category of crime - it is only because it has been done that way in the past. There is no other justification. What the OFT has sought to do here is to say, "We will try and work out a scheme according to principles where there is a rationale behind it, and then we will apply it to everyone so that you know where you stand".

Now, the multiplicity of appeals that you have before you is because everyone is seeking, in one way or another, to look at their circumstances and try to find some point of differentiation for the purposes of altering the penalty. What is, from the OFT's point of view, the more significant consideration is that there is a scheme here - and a rational scheme - not based on the kinds of judgments that are just offered up with out justification or rationale.

If I might very briefly proceed - because I am running against the clock - in respect of the specific issues that are raised concerning Corringway? In essence, deterrence rests on special and general considerations. We are not a trading entity. Therefore, there is no prospect that we will trade in the future. Therefore, something is due on proportionality grounds for a reduction in deterrence. Although there may be general deterrence, surely there is no prospect that this undertaking will infringe again. Therefore there is nothing due. We have three submission on this score.

The first of our submissions is that deterrence, although it is understood in terms of special and general as part of what one is trying to do, it does not cohere to some rigid metric whereby you can apportion aspects of deterrence in accordance with some formulaic view as to what is to be given by way of general and what is to be given by way of special. It is rather like concurrency as might arise in certain sentencing regimes where you are saying that an amount is due for deterrence. Now, it may be that it will serve both purposes, but we would submit that nothing about the notion of deterrence requires some apportionment according to percentages. One has to understand that deterrence is not a science. It is, at best, a way of approaching matters that are relevant for the purposes of trying to ensure a valid policy objective is secured. That is our first submission.

The second submission is that it is not the case that the investors in Corringway should not suffer some sanction by way of future deterrence. Those are parties who, depending on the distribution which is made ultimately in due course, will no doubt go and invest in other companies as they see fit, and the way in which investors will choose to use their funds either to invest in companies that engage in proper compliance of competition laws, or exercise pressure as shareholders in order to ensure that such compliance takes place, is a further ground upon which we submit deterrence is due through the shareholders to companies of a kind. It may be a species of general deterrence, but it is nevertheless one that is linked here. It seems a great oddity that simply because members choose to put themselves into voluntary liquidation they can thereby avoid what are the general norms of deterrence.

There is an authority to which I should direct your attention, which is the decision in Nintendo in Volume 8, Tab 100. There, a very similar argument was made, which was to say in that case that something was due to the party there concerned - Nintendo - on account of the steps that they had taken to prevent future occurrence of future infractions, and what was said, and particularly this appears at paras. 73 and 74 of that decision, was that nothing is due by way of any proportionality challenge simply because there was a general figure that was given for deterrence and there was not some special attribution that was made for various steps that have been taken to ensure that future violations did not occur. So, at least within the scheme of the decision it did not appear that there was any warrant to differentiate the kinds of objective served by deterrence, and there seemed no warrant then to make any allowance for that in the way that our learned friend has suggested.

If I might then pick up one or two very short points finally in respect of MDT? Our learned friend did say that there is something unfair/arbitrary about the fact that his client is shouldering a disproportionate amount of the burden, and that this should not be the case. So, something is due there because there should be, as it were, a spreading of the burden of deterrence, and why should his client alone carry that burden? Again, we submit that this is not the correct analysis. There was an undertaking that was made up of Corringway and its subsidiary, which was subsequently sold - HCL. But, nevertheless, it was that undertaking in respect of which Corringway had a responsibility. It must suffer the full consequence of its actions - because they are its actions; you cannot simply divorce them because your subsidiary happened to have engaged in them - and therefore it is not a question of trying to find some distributive principle of deterrence. The issue is the undertaking, represented in this instance by Corringway, must suffer the burden of the deterrence because that is an

entailment of its responsibility. So, we do not submit that there is, again, some divisible notion where you divide up the penalty to make sure that different parties will carry the burden. The proposition of joint and several liability is that each is liable to the full extent of what is warranted, and there is no warrant to have the division ...

THE PRESIDENT: I suppose it is the fact that you have a maximum of three infringements. Here we have got a split between parent companies and deterrence is only applied once. The particular parent company picks up the tab rather than it falling at all -- All the deterrence is on one infringement. That is not a problem when you do not have a split parent or a split undertaking in that way.

MR. UNTERHALTER: Yes. But, in our submission, it is a contingency that it happened to be the case that they disposed of the subsidiary and the subsidiary subsequently went insolvent. But, those are contingencies which should not make a difference as to the liability of the undertaking. Corringway is liable for the whole of that undertaking's wrongdoing. If it could have claimed, in due course, from its erstwhile subsidiary or its now holding company, well and good. If it cannot, it does not in any way absolve it or ----

THE PRESIDENT: No, but Corringway is not liable for the infringement which occurred after it disposed.

MR. UNTERHALTER: No. It is just the two.

THE PRESIDENT: There is no deterrence in relation to that infringement. As I understood it, that is the sort of superficially quite attractive -- It does seem inequitable in a way. It is a factor simply of the fact that you only apply the deterrence to a single infringement when there are three and it so happens that single infringement is caught by this parent and not by the other. I know the subsidiary is the same one all the way through. You would say that is just because we choose the infringement to apply the deterrence to by transparent objective approach.

MR. UNTERHALTER: It was actually a policy that was intended to be beneficial to the addressees in the sense that one could have thought about deterrence in respect of each infringement. But, in fact, it was thought that it would be better simply to select one infringement which was the highest infringement by value after Steps 1 and 2 and then apply the deterrent standard.

THE PRESIDENT: It would be helpful, but not to Corringway obviously. Helpful to others, but not to them. I think that is their point really.

MR. UNTERHALTER: Nevertheless, there are two -- One could perhaps see some equity if it were the other way around, but, in fact, Corringway is liable for two of the three. The MDT

has been applied to the most serious of those two. It does not seem that some, as it were, reduction is due to it because there was a third that it might have had to pay a penalty for, but did not because that was an infraction committed by its erstwhile subsidiary after the sale had taken place. So, we do not submit that that makes a relevant difference for the purposes of reducing the fine.

So, on specific deterrence I have made my submissions. We submit that there is no warrant on those special grounds to make an allowance of the kind that is sought.

I want to deal with leniency and frequency of infringement very briefly, if I may. In our submission there can be no claim that each person has the same opportunity at every point in time to participate in a leniency programme. Leniency is not a way of, as it were, reducing the incidence of guilt or in any way altering penalties in order to do justice in a different way. Leniency is a completely pragmatic policy that simply seeks to strike a bargain at a point in time as an incident of the manner in which the OFT engages its investigations. It is simply part of the way in which it undertakes its investigation. It is simply the case that where the OFT has occurred in this instance, closed the leniency process because it has said to itself, "We have now secured sufficient evidence of where we want to go in this investigation. We have evidence and ... our further investigation and we do not need further co-operation from those who might still want to come forward". We submit, in those circumstances, that is a perfectly justifiable and proper position for a regulator to take. It does not have to say, in respect of parties still to come who we will investigate in due course, or perhaps who we do not think we will investigate now that should arise at some point in time, that there is some equal opportunity always to get the same discount, as it were, for co-operation. Co-operation counts in different ways for the OFT at different times. That is simply an incident of its powers to engage the investigation as it deems proper so as to ensure there is a proper utilisation of resources and, indeed, this process finally comes to a conclusion.

No-one ever said that Corringway and others could not seek leniency at the time that the policy was open. They say they did not know; they had no reason to engage the policy, but that that hardly is availing. The issue is: this is not a benefit that is somehow equal to all at every time, and some injustice is done because the differentiating factor is that it is the parties who are of utility at a time in the investigation when it matters that determines whether leniency is granted. The notion that the powers of leniency and when to stop that process could become subject to these sorts of challenges would significantly undermine a

policy. This has probably been the most successful means by which investigations take place.

That leads to a second submission and concerns the frequency of infringement. It can never be the case that a regulator, as indeed those who enforce the criminal law in the country, are under some obligation to investigate every single infraction that has ever been committed or could reasonably be pursued, because there is a discretion that exists in respect of all investigations, which are necessarily done under time limits and with limited resources as to how best to deploy those resources, and that must be an intrinsic part of the powers of the regulator to decide. Unless one can show that there is an irrational policy that is being pursued, that you are only going after companies that begin with a letter C or some absurd policy of investigation it can never be the case that there are powers of intervention that the Tribunal would have that we will shape the manner, form and timing of your investigation on the resources you must contribute to it, because otherwise some unfairness is done because you are not willing to pursue every single infringement that has occurred by an undertaking and then take that into account for the purposes of looking at overall culpability. That can never be the case. In our submission it is perfectly proper to say: "We are going to cap this investigation and we will cap it at three violations and we will use that universe as the basis for fining those who have committed infractions."

We submit there can be no claim of arbitrariness or lack of proportionality, unfairness, call it what you will, which would then seek to hedge about the powers of investigation where they are directed and for what purpose.

If I might then lastly come to the question of hardship and here we would seek to indicate what the purpose of hardship considerations are, and why they are engaged. There is a distinction between the question of hardship as to whether an undertaking is likely to be threatened as to its viability, which is the criterion adopted by the OFT in its decision, and the criterion that our learned friend and his client seek to press upon you, which is some notion of the ability to pay, and they are not the same consideration.

The OFT has looked at financial hardship from the perspective of: "Will the fine that will otherwise be paid cause this entity no longer to be viable", which would have not only the consequence that the fine may not be paid, but much more particularly that it may give rise to the liquidation of the entity and hence those competitive assets would leave the market, and that would hardly be a sensible thing for a competition regulator to do. So viability is the criterion.

When one deals, as one does here, with insolvent entities we have a situation where Corringway itself sought relief under grounds of hardship. It simply invoked the members' voluntary liquidation. That does not suffice, and it does not take any point on that, because of course it has very substantial assets as is sufficient to permit it to pay the fine in question, and there seems no reason at all why a wholly solvent entity like Corringway should have any allowance made for it, given that ultimately all that will be affected by this is what sort of distribution will ultimately take place to its members, because that is the only question that is really at stake in respect of Corringway.

The question is: Is anything then due to Corringway in respect of the insolvency of its erstwhile subsidiary HCL and its now holding company Haymills, because that is the consideration that is now pressed upon you by the appellant. We submit that in fact although 30 per cent was granted here there was in fact nothing that was due to Corringway at all on the grounds of the insolvency of its erstwhile subsidiary. We say that for this reason: there is joint and several liability which is accepted, so the question is Corringway is liable for the full penalty that is due in respect of this undertaking. If it can pay, and it can pay, and there is no question about its viability because it does not mean to trade in the future and, indeed, its assets are perfectly sufficient for the purpose of paying, that in our submission is really the end of the argument, because it has an independent liability for the wrongdoings that occurred of the undertaking. So why is it then that something might be said to be due by reason of the subsequent insolvency of its erstwhile subsidiary. We, in our submission, can see no reason why anything is due by reason of that consideration, because first, that entity, HCL, according to the figures that are now produced, is wholly insolvent. It is never going to trade, therefore the only issue is not whether it might become non-viable, the only question is does theoretically the OFT become a current creditor with other creditors upon the distribution that might take place in respect of that entity.

So although the considerations that were given were to allow something by way of recognition of the insolvency of HCL in our submission the viability standard which is the correct standard in our submission which should be applied, actually should allow for nothing to be due at all to Corringway. We do not in any way seek to resile from the allowance that has been made but there is certainly no warrant for any additional allowance that is claimed to be due because it is said that these entities are wholly insolvent and they are an extended case of instances where parties are financially compromised.

The comparable situations which my learned friend referred to, such as the case of *Harper* and the like, these are instances (at least in the case of *Harper*) the question would be

whether this company could continue to operate, and a very substantial hardship allowance was given in that case because it was found that if the fine was imposed it would be precipitated into insolvency, so that is a proper application of the viability standard. It is not the case that if you are already insolvent anything is due, because it matters not, it is simply a question of participation with other creditors, and certainly nothing is due to Corringway, which is in a position where it is wholly solvent and can meet its obligation and there is no question about its future viability because it does not intend to trade at all.

In our submission therefore, the appellant should simply be satisfied with what it has and should not press further for additional reductions.

If I could just refer very briefly to two authorities that might be of some assistance as far as this is concerned. The first is *Achilles Paper* in vol. 4 tab 53. At para. 55 it is said:

> "But in any event, the OFT submits, the fact that a fine may result in a company going into liquidation and exiting the market is something that the OFT should take into account but is not necessarily a reason for reducing the fine. The OFT cites the *Tokai Carbon* case where the Court of First Instance stated (at paragraph 372) that:
>
> > 'the fact that a measure taken by a Community authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by Community law. Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible, or intangible elements represented by the undertaking would also lose their value.'
>
> 56. The Tribunal considers that the same principle applies here. Achilles' concern that a substantial fine would result in it becoming insolvent was raised by the company …"

And then it indicated what the letter says –

> "The OFT's decision not to reduce the fine in response to this request is, in our view, well within its margin of appreciation and is not something which this Tribunal should disturb."

So the possibility of liquidation was the relevant consideration even when it was threatened the OFT was found to be well within its margin of appreciation in not making any allowance in respect of a true case of viability. Here this is a much lesser availing case for the reasons that I have indicated and if I could finally on this score just refer you to the

decision under part 6 in para. 281, where the *Sepia Logistics* case is referred to. It simply stands for the proposition that a party seeking hardship bears an onus of putting up the evidence that is necessary for that purpose, and if it has failed to do so, and does not produce an availing case for hardship, hardship is, by its nature a somewhat exceptional state of affairs and if the onus is not discharged then there is no arbitrariness or unfairness that results from no allowance being made in respect of hardship.

We submit in this case Corringway, on its own account of things did not put up proper evidence, because its only evidence was that it was in members' voluntary liquidation and on its own account that was not sufficient to warrant any hardship reduction. The fact that subsequently it has chosen to put up evidence of the insolvency of its erstwhile subsidiary for the reasons that I have given is unavailing because it cannot be of assistance to Corringway in the discharge of its independent liability for which it remains liable for the wrongdoings of the undertaking which have been found and determined, and which it accepts by way of admission. So we do submit for that reason also that the financial hardship case is not availing.

It is for these cumulative reasons that we submit there is no warrant for intervention in this case, that there was a logical and rational policy that was pursued in respect of deterrence, that the calls for special treatment need to be treated with care, because it is not simply a question of what is special about Corringway and, as far as we can see the only thing that is said to be special about Corringway is that it is not intending to trade in the future, but we have dealt with that, that is the significant point of difference, and in our submission it is not a difference that matters or matters in any sufficient way to give rise to concern.

As to the root and branch challenge to MDT we say that it is a scheme, it is a rational scheme, it is a perfectly proper way of dealing with deterrence, and the alternative is to, as it were, overthrow that principle, and say: "We will just do the work of deterrence on a somehow or another basis. We know it when we see it", all of these ideas that are utilised from time to time. We know that that would not be the best way of proceeding because it would give rein to a scheme of deterrence and a scheme of penalty imposition which is simply much more likely to be impressionistic and potentially irrational and is not warranted. It is not the kind of error, given the sorts of margins that must necessarily be made, or allowed the OFT in making determinations around deterrence which it has done in a sensible and rational fashion in the decision. So we would ask that the appeal be dismissed

THE PRESIDENT: Mr. Unterhalter, I think there just might be a question or two?

PROFESSOR BAIN: Two questions, actually, Mr. Unterhalter. I want just to follow up on one of the issues that we were discussing a little while ago. In the decision, for each company you selected three infringements, and you did that using a procedure that was set out in the decision. That procedure did not actually rule out the possibility that there were other suspect tenders by HCL after the sale in 2004 that you chose not to follow up. It is perfectly possible that one or more suspect tenders after that date would have been in a relevant market with a turnover of more than £1.406 million in which case it would have given rise to a larger penalty than either of the two infringements for which Corringway has responsibility. That could perfectly well have happened, and indeed may well have happened, because the particular infringement that you have after 2004 is actually in a rather small market. It is very likely that the average market would have been bigger than that given the scale of HCL. Does it not look really pretty arbitrary that Corringway has found itself liable for the MDT?

MR. UNTERHALTER: With respect, we see no arbitrariness here at all because it relates to the proposition that we had raised earlier which is that an investigative authority, such as the OFT is entitled to place a guillotine on its further investigations. So, whether or not there may have been other infractions that could have yielded up a higher amount that would have burdened HCL and its new owners is not the relevant question because it is, dare I say it, a counter-factual world of possible infringements in respect of possible investigations that were not undertaken. The key point is that the only way one can reach those conclusions would be to insist that the OFT has a statutory obligation to pursue investigations in respect of additional infringements. We say there is no such obligation and there is no warrant to impose such obligation. If there is no such obligation, then there is no unfairness that is done.

PROFESSOR BAIN: Was there not a feature in the case of this particular company or undertaking - HCL and Corringway together - which was different from the generality? In the generality of cases it did not matter which three infringements you chose so far as who was going to end up with a liability was concerned. In this particular case it did matter. What you are telling me is that that was a consideration - a special consideration that affects this case, that the OFT did not take into account. Now, as I understand it, you say there was no reason why they should have taken it into account, but you would confirm that it is not something that they took into account and which you accept that the fact that this is a different situation because of the sale of the company and the distribution of liability as a result of that is different from the generality of cases.

MR. UNTERHALTER: With respect, we would not allow for the notion that it is of such orders of difference of the kind suggested to me. One of the complaints that is made is that leniency parties may well have been involved - in fact, often were involved - in many, many more infringements than the three that were selected for consideration. There may well have been other parties who could have attracted much higher penalties had this further investigation gone on. The proposition, as I think is being put to me, is that there is some special duty that arises because in circumstances where your erstwhile subsidiary is no longer under your control and may itself have engaged in additional infractions, you must at least look at those and investigate them because otherwise you will never be fair in apportioning liability and potentially the deterrence in respect of HCL and its new owner versus Corringway, and that the decision then ultimately about deterrence will rest on one set of shoulders rather than another, depending on the scope of the investigation. We submit that there is no such duty as there are always circumstances in which the argument can be tested in like circumstances. One could say that you should further investigate additional infringements of the same entity in order to see whether a higher MDT or a higher set of punishments, or fine, should be levied upon a particular undertaking. It is the same principle which says that you must investigate more because it is ultimately unfair if someone gets away with something less than they should. We submit that there can be no part of any legal obligation that rests upon an investigative agency. They are entitled to a apply cut-offs. No-one can insist that they go further to discharge some general duty to all in respect of potential infractions that may have occurred.

PROFESSOR BAIN: Let me move on to my second question, which would arise were we to uphold any of the grounds of appeal. Corringway sold HCL in 2004. The Step 1 and Step 3 penalties are calculated using HCL's relevant (for Step 1) or total turnover (for Step 3) in 2008. That is a time when Corringway had no control over HCL and no responsibility for it. Now, I understand how this comes about through the standard application of the methodology the OFT has followed, and through the fact that Corringway and HCL have joint and several liability for whatever penalties the OFT computed on the basis of HCL's 2008 turnover and some of Corringway's 2002/2003 turnover. That is what it was on. Clearly, Corringway did have some responsibility for the infringements while it was still in control of HCL. I do not understand how it can be said to be fair and reasonable to compute its liability for a penalty payment in this way. I do not see how it is fair and reasonable to compute Corringway's liability on the basis of HCL's turnover several years after Corringway had disposed of this. If you had done it all on the basis of 2004 turnover I

would not be raising this issue because Corringway was responsible at that time. When it is a later period, when turnover may have been quite different - and certainly in the case of some of the other companies that we have to consider on other occasions and turnover has changed quite considerably between 2004 and 2008 - I do wonder whether in fact doing it in this way is consistent with 2.11 of your own guidance where it includes amongst considerations determining any adjustment at Step 3, the special characteristics of the undertaking in question. There is no exhaustive list of what those special characteristics may be. Can you explain to me why it is reasonable to calculate a penalty for Corringway to pay on the basis of HCL's turnover four years after Corringway disposed of it?

MR. UNTERHALTER: It is obviously simply an application of what was a standard rule that was applied. I take the point that one might say that the undertaking had split, and so why is one attributing for the purposes of Steps 1 and 2, which is in the relevant markets, because it is only that turnover ----

PROFESSOR BAIN: It is Step 3 as well.

MR. UNTERHALTER: As far as I recall, Step 3 is derived from Corringway's 2003 turnover, which is part of its point ----

PROFESSOR BAIN: It is the same problem with Step 3 as Step 1 ----

MR. UNTERHALTER: Step 3 is made up of two sources of turnover, as it were.

PROFESSOR BAIN: From different years.

MR. UNTERHALTER: Yes. One is 2003 and the other is 2008. The only principle I can suggest as far as that is concerned is that there are reasons why the most recent year of turnover has been utilised, which is that it is, for reasons that we explain in other cases ----

PROFESSOR BAIN: Yes, I understand.

MR. UNTERHALTER: It is a consistent way of doing it. That was therefore applied practically in the circumstance. We would say that it is true that Corringway could not control the activities at the later date, but that is not really why that is the turnover figure that has been utilised. The turnover figure is being utilised because of a general policy of being consistent with the turnover order. That is why it is consistency within the scheme of the penalties that gives rise to the mixed use, as it were. I think we must accept that there is a certain pragmatism that is certainly utilised for the purposes of the 2003 turnover that is attributable to Corringway of which they complain. However, that is not, I understand the ... which we say is just a practical accommodation. I can only say that the mixing of the sources of turnover comes about simply by reason of the consistent application ----

PROFESSOR BAIN: It is not the mixing I am concerned about. It is the fact that the turnover was for a period when the parent company was no longer the parent company - it had disposed of it. That looks to me - if I can coin a phrase - like the mechanistic application of a standard methodology.

MR. UNTERHALTER: In our submission that does not affect the MDT in its methodology so much as what is the relevant year of turnover that is being utilised, which is a slightly different set of considerations. In other words, it may be that one could have had a different view as to whether in this particular case one should have used a different year of turnover. That is possible. It does not affect anything of the methodology of MDT generally. We would simply submit that we used it because we have always applied to Step 3 the notion of what is the relevant business year in a fashion which is consistent with the turnover order. That has been the basis of application as to what our guidance actually means. Now, we are either right or wrong in that interpretation. We submit that we are perfectly correct in that interpretation. So, we simply applied the interpretation as we understood our guidance required.

THE PRESIDENT: Thank you very much, Mr. Unterhalter.

MR. HARRIS: Sir, I am very grateful. I appreciate the timetable I circulated made provision for a short break but I apprehend the Tribunal ----

THE PRESIDENT: We will not worry about that.

MR. HARRIS: It is perhaps fortunate that I am on the first morning of Day One. I will take the issues, if I may, in the order in which Mr. Unterhalter raised them. Apologies that it will be a bit of a skip through, subject to the Tribunal's questioning, for obvious reasons.

My first point then: Mr. Unterhalter said, as regards MDT, that he was attempting to defend an OFT approach that was working out a scheme that was not just intuitive judgment. Those were his words. Can I just invite you to turn to p.138 of the Defence of the OFT? What he was saying was rationality, consistency not just a matter of the OFT's judgment. That was the Leitmotif of, indeed, his entire defence to MDT. Paragraph 138 of his own defence says that, "The fact that as Corringway suggests there might be scope for the OFT to set a higher MDT on the basis of his reasoning is accepted". That is the passage to which I drew the Tribunal's attention in my opening. We can change the number - 10, 15, 20 -- Be that as it may. But it is the next sentence which sits uneasily, in my respectful submission, with Mr. Unterhalter's submissions just a moment ago: "The OFT accepts that the assessment of specific and general deterrence is a matter of judgment". Then, in its skeleton argument the OFT described that in a slightly different way and it just says that in

its view that was the appropriate number. So, we say that Mr. Unterhalter's clients have not escaped the very thing that he says they spent such efforts trying to escape - namely, that it was a matter of arbitrary judgment.

Secondly, he said that deterrence is intended to deter people in senior positions. However, with respect, there is no evidence whatsoever that people in senior positions, whether within this appellant, or others, would not be deterred by a proportionate fine - that is to say, a fine that is based upon the individual circumstances of that company. He then said that MDT is not a judgment upon culpability. That is for Steps 1 and 2. However, you have got my submission on this: deterrence has to be within the ball park of culpability, assessment of seriousness. He gave the game away, we say, the very next moment. What he said is that deterrence is - and here I quote as best I can - "designed to hurt them and hurt them significantly". That, with the greatest respect, is back to front. One does not start in the sentencing context by saying, "What is it that is going to hurt this person going forward and other people". To take my speeding example - and it obviously has to be a different driver, not myself, on this occasion -- Let us say there is a very rich driver driving home who does 20mph over the limit, one does not say, "Well, crikey! He earns so much money that the only fine that is going to be appropriate for a person with that degree of earning power is £50,000". Let us say he is a multi-millionaire as opposed to the £200,000 which is the ball park for the culpability of a 20 mph over-the-limit speeding offence.

THE PRESIDENT: I seem to remember there was a movement a little while ago to try and actually tailor motoring penalties to the means of the people concerned on the basis that a £400 fine was nothing to a millionaire. I think that might not be ----

MR. HARRIS: Sir, there the proof is in the pudding. I stand by it. Why did that not succeed? Answer: because it is grossly disproportionate to the level of culpability associated with the nature of the offence in question. That is notwithstanding the fact. What happens in a situation like that is that one submits - I hear on the grapevine - earning figures and then there is an adjustment made to what might have been a standard £200 fine. But, it does not go from £200 to £50,000 if you are a multi-millionaire. Why not? Because that has not got anything to do with the culpability of a 20 mph speeding fine.

Mr. Unterhalter then relies upon consistency. This is a key theme for the OFT. This is pretty much make or break stuff, in our submission, for the OFT. MDT had to be done this way because that is consistent. That does not withstand the scrutiny of the analysis that is set out in a case like *Lindsay*. If I could just invite you to turn back to *Lindsay* in Volume 2 of the authorities at Tab 34, the passage of the background facts to which I did not take

you in opening is at para. 19. That is under the heading 'Commissioners' Policy'. It is an excerpt from the evidence below of the Commissioners which could not have been contested. But, picking it up at the second sentence of the indent,

> "In 1993 when the Single Market was introduced the revenue eroded on smuggled excise goods brought into the UK was in the region of £30 to £40 million. By the year 2000 this had escalated to £3.8 billion from tobacco smuggling alone".

So, that is not even taking account of alcohol. So, what was going on in this case was that the background was the very one that I was talking about with my speeding example - a whole year of people completely ignoring the fact that it is illegal to speed, or to import goods without paying duties, and rising exponentially in cost, and therefore a huge, it might be said, justification for general deterrence of a much more severe magnitude. Yet, what happened in the case? What happened was that the court still said, "Look, Mr. Lindsay - you need to look at him individually. You cannot take his car simply because this problem is growing - indeed, growing exponentially. You have to look at whether it is appropriate on the facts of his specific case".

Mr. Unterhalter then said that there is a problem with recidivism. With respect, there is obviously no problem in Corringway's case with recidivism. We were at MVL. So, that cannot be applicable. Besides, the infringements for which Corringway is responsible pre-date the other roofing decisions of this tribunal. I will come back to that point in a minute when it comes to HCL and Haymills Group. That was one of the points that he relied upon as justifying the size of the fine in the case of Corringway.

I will not dwell upon Makers. I expect you will know every line of every sentence of Makers by the end of these hearings. But, I do just point out, of course, that £6,500 was the starting point in para. 122 for the fine in that case. That is a completely different level than the £70,000 per infringement - so, seven, fourteen, twenty-one - £210,000 is the starting point after Steps 1 and 2 in this case. £6,500. £210,000. It is completely different. The other reasons I rely upon are set out in my skeleton.

In response to a query from the Tribunal that I gratefully adopt, which is, "Well, Mr. Unterhalter, where does one step back? Where does the OFT step back and really assess the question of proportionality in the round in a case like this?" We say that the answer is deeply unsatisfactory. Mr. Unterhalter said, "Well, at Step 4 one can trim the sails". I will gratefully adopt that metaphor. But, one does not trim -- That is what the OFT has done after Step 4 - it has trimmed the sales. But, what really needs to be done is you have to double-reef the mainsail and drop the jib. A trimming of the sails by 5 percent (Step 4) pales

into utter and meaningless insignificance compared to the elevation from £70,000 to £1.5 million at Step 3. The trimming is not good enough. He then went on to talk about specific and general deterrence and how one does not apportion between the two of them. I accepted that in response to a query from the Tribunal. I am not suggesting that one can say that that £100,000 is for specific and that several hundred thousand is for general. But, what he did not address, as far as I could make out at all, is that in a case where there are two supporting columns, two justifications, two needs, that leads to a higher number than in a case where, as in the case of Corringway, there is only one supporting column and one justification. *Nintendo* does not address that issue. So far as we can make out, that was just left open. Again, I do deliberately pick this up, but it was mentioned in opening, the question of investors -- As I recall, he said the investors in Corringway should be sanctioned -- there should be effectively pressure on them as well. We reject that. It arose at the last minute. It is no part of the decision. It is no part of the defence. We have scrutinised in vain the guidance for any reference to how deterrence is supposed to impact on somebody behind the corporate veil. With respect, that is a non-starter.

Mr. Unterhalter then talked about the disproportionate burden. This is the point of view which I said I would address in reply if I needed to. Perhaps if I could just locate this in my skeleton? Still talking about MDT, the complaint that we raise is that the MDT has been applied unfairly because it all bites upon one of the two infringements for which Corringway is liable and nothing upon the third infringements for which it has no liability whatsoever. The complaint that we raise is that that is discriminatory.

THE PRESIDENT: Is it para. 33?

MR. HARRIS: It is para. 69 and following. I said that so far no justification for that has been put forward. I will deal with it in reply. Mr. Unterhalter's submissions did not provide any justification for that. It is mere pragmatism or mechanistic application of a formula that has been applied to anybody else. But, in the real world, and on a proportionate approach, one does have to ask oneself the question, "Is it just, and is it therefore not excessive, for Corringway to have ended up facing the entirety of the fine, including the whole of the enormous MDT figure?"

THE PRESIDENT: I do not think he said it, but I sort of wondered if one of the answers he was implying was, "Well, supposing they had chosen in your special case to apply the deterrence also to the infringement to try and equal it out?" You would not have been any better off.

MR. HARRIS: No. No. We would have been. We would have been?

THE PRESIDENT: Would you?

MR. HARRIS: Yes.

THE PRESIDENT: If they had gone to another £1 million (I cannot remember the exact figure) for deterrence also on HCL in respect of the infringement that Haymills Group was -----

MR. HARRIS: The way we have conceded it is that if one splits it up equitably - strictly equitably - effectively one applies -- Instead of 0.75 worldwide turnover to just one infringement on one day, one does 0.25 to the first infringement of worldwide turnover, 0.25 to the second and 0.25 to the third, that would be a perfectly sensible, equitable way of splitting it up. Because, of course, Corringway is only liable jointly and severally for the first two, the net effect when you trace it down is obviously a discount, or a lower number at the bottom, as regards the amount ----

THE PRESIDENT: It would be a different total turnover too, would it not, because in one case it would be the other parent's turnover.

MR. HARRIS: Yes, that is right. But, the point is that when I rhetorically invited my learned friend to provide a justification, he did not come up with one. What he said - and I did note this down - is, "Well, ultimately one just has to decide to opt". We say, "But that is another example of a failure to approach us in a proportionate manner." Proportionality demands that the individual circumstances of our case are assessed. In our case we are in a relevantly different position, as was pointed out by the Tribunal because in our case we disposed of this former subsidiary years ago, and then it went on infringing when it was nothing to do with us. That has not been taken into account. That is a flaw in the penalty.

Mr. Unterhalter said that there is a problem with the arguments on frequency of infringement because regulators can draw a line somewhere. They can drop the guillotine. That is fair enough. But, we have never put our case so high as to say that there is an unending duty of perpetual investigation upon the OFT. What has happened in this case is completely different. The OFT itself chose to investigate all these offences for multiple connected parties in respect of the same infringements and bid rigging for the same markets. That is the difference. They chose to do it. They then cannot shut their eyes to germane and relevant factors that arise in that context. Imagine two robbers go into a jewellery store and they steal the jewels, but on the way out one of them - but only one of them - commits the additional offence of bashing the doorman on the head with his mallet, or his gun, or whatever the case may be. One does not go into the court to determine sentencing and say, Oh, well, they both committed the robbery, but let us just forget about the fact that he has

also bashed somebody on the head on the way out. He is plainly more culpable - second robber - than the first.

THE PRESIDENT: What you would not forget would be the fact that the other one might have committed fifteen other robberies whereas it might be the other robber's first offence. Your case, as I understand it, is that they should have made themselves aware of to what extent, as it were, the different parties have been guilty of cover pricing so that they can differentiate between them in terms of penalty. I think the answer to that, if I have understood it as well, is that, "We could not do that. We decided to concentrate on three of these. To try and investigate fully the whole picture would have been impossible on the scale of things. That is something we are entitled to do in the exercise of our discretion. It means that there will be sort of swings and roundabouts - there will be people who gain from that approach and there will be people who ----

MR. HARRIS: I am no criminal lawyer and I do not wish to get drawn into the whole sphere of criminal sentencing, but what little I do know about it is that if he has committed fifteen other robberies, then there would be 'offences taken into consideration'. But, what has happened here is that there are no TICs. The OFT knows about them. It could have behaved in a different way, in which case this problem would simply not have arisen. But, because it itself has chosen to proceed in this way it then does not take any notice at all of these other offences. That is the problem. We are being told, and approached, and fined as if we were as culpable as the most culpable other infringer in this context. That is the problem.

Financial hardship. Just a moment in the few minutes available on that. My learned friend submitted that "Corringway sought relief on grounds of financial hardship". Flatly wrong. It is just simply inaccurate and wrong. Corringway has never sought any relief on grounds of Corringway's financial hardship. Corringway has relied upon - as it is entitled - as part of the same undertaking the financial hardship of HCL. There is a fundamental flaw in my learned friend's argument. He said - and this is the logic that he cannot avoid, we respectfully say - that he does not resile from the allowance that has been made to Corringway (here he is splitting up the undertaking that in para. 3 of his skeleton he says is impermissible, but -- be that as it may) -- It was okay for Corringway to have 33 percent financial hardship by reference to HCL's hardship. Yet, the thrust of his argument in response to my ground of appeal here is, "Well, Corringway has got lots of money. So, why give them any discount". He cannot have it both ways. Their approach that we agree with should be common ground is that one focuses on HCL. If one focuses on HCL, which

is what they have done for HCL and for other people, then one has to live with the consequences. The consequences are that that is the person whose financial hardship one looks at and if the financial hardship is extreme, as it is in our case, then there is an inevitable knock-on effect on those parties who are jointly and severally liable with that party. You cannot say, "Oh, well, 33 percent -- That is kind of enough". You have to actually look at the figures. We have done that in our skeleton argument. If you recall, the minuses that I corrected at the beginning that are drawn from Stephen Holgate's witness statement show that on the OFT's own metric we were hopelessly and utterly financially hard-up - on their own approach. Yet, we have not been given credit for it. That is my complaint. We further say that it makes no sense to give less discount to somebody who has greater financial hardship. That is what my learned friend's submission is saying. He is saying, for example, "Take J.Connaught. They were less financially hard-up than us. They were teetering on the brink but they nevertheless survived and went on trading." That plainly means less financially hard-up than HCL who went out of business -- bust altogether. It just makes no sense. That needs to be corrected.

Finally, if I may, Mr. Unterhalter's wrap-up remarks. He said, virtually rhetorically, "Well, why should Corringway have 'special treatment'?" We reject that. We are not asking for special treatment. We are asking for individual treatment on the facts of our case. Then he said, "Well, what is the alternative to the OFT's, if you like, MDT, fairly sort of global-type approach?" He said something that I noted down as being a 'somehow or another basis'. But, again, we reject that. I am not asking you to come up with a random, arbitrary, somehow or another basis'. I am asking you to focus upon the individual facts and circumstances of my case. That is what the ct demanded in the *Lindsay* case.

Unless I can be of further assistance, those conclude my reply remarks.

THE PRESIDENT: Thank you very much, Mr. Harris. Thank you, Mr. Unterhalter.

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