**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1130/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) RENEW HOLDINGS PLC**
**(2) ALLENBUILD LIMITED**

Appellants

– v –

**OFFICE OF FAIR TRADING**

Respondent

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

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# HEARING

## APPEARANCES

Mr. George Peretz (instructed by DLA Piper UK LLP) appeared on behalf of the Appellants.

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

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THE CHAIRMAN: Yes, Mr. Peretz.

MR. PERETZ: Good morning, sir, I appear on behalf of the appellants in this matter and my learned friends Mr. Beard and Mr. Woolfe appear for the Office of Fair Trading. As the Tribunal will know, you are going to have the pleasure of listening to me both this morning and this afternoon. This afternoon I am appearing for different appellants. There are certain overlaps between the grounds of appeal advanced by the appellants this morning and the appellants this afternoon. It seems to me more sensible to deal with those matters this morning.

THE CHAIRMAN: Yes, certainly.

MR. PERETZ: Although my clients this afternoon will repeat and adopt what I will say, the Tribunal will be relieved to know that this does not mean that I will repeat what I say this afternoon. As a result, I am likely to be somewhat shorter this afternoon than I will be this morning. I hope not to go over the 50 minutes allotted, but as I have got a certain amount of ground to cover, I hope the Tribunal will bear with me, particularly if it wants to pose questions.

Renew and Allenbuild appeal against the penalty imposed for the usual three infringements in this case. For the three infringements none of the facts of those are in dispute. All of them involved cover pricing, there are no compensation payments. The relevant figures imposed in terms of penalty are set out at tab 5 of the Notice of Appeal. It is probably helpful just to look at them.

THE CHAIRMAN: Yes, we have read them.

MR. PERETZ: I probably do not need to go through the particular facts of the infringements, but simply to note that infringement 39 (the infringement in 2000 concerning public housing in Yorkshire and Humberside) that concerned refurbishment work to flats owned by Leeds City Council in Saxton Gardens. The infringement there was committed by Bullock, which is a former subsidiary of my client, Renew. The OFT's methodology, which one sees if one goes down to the fifth line of the table. What the OFT did was it took the basis of the turnover calculations, it amalgamated the turnover of Renew and Bullock as they stood in 2008 for the purposes of infringement 39, which is why the total worldwide turnover figure that one sees is a rather higher figure than for the other two infringements, because that turnover figure includes Bullock's turnover as well, and that was not relevant to the other two infringements.

Renew and Allenbuild make essentially three submissions concerning the OFT's penalty calculation. The first submission is that the OFT chose the wrong year of turnover. The

difference between what I call pre-infringement turnover and pre-decision turnover. We say the OFT should, in accordance with the guidance and indeed principle and common sense, have chosen pre-infringement turnover and not pre-decision turnover.

The second point we make concerns the OFT's use of the minimum deterrence threshold (MDT). We say that the OFT's use of that is completely flawed, both in principle and because it is plainly contrary to its guidance.

Finally, we make a point concerning the decision of the OFT to impose a penalty on Renew in relation to the conduct of its ex-subsidiary, Bullock, in relation to infringement 39. We make two points on that. First we say that that involved unequal treatment and discrimination because the OFT did not take that course in relation to certain other companies in a similar situation. Secondly, we say in any event it is wrong in principle in the circumstances of this case.

As a preface to the first two of those submissions, submissions concerning the year of turnover and the submission concerning the minimum deterrence threshold. It is important to analyse the legal nature and effect of the OFT's guidance. It is probably helpful there to start with s.38 of the Competition Act, which is in volume 1, or tab 4, or if you have the **Butterworth's** purple book it is p.43. I want to look at s.38 of that Act. What one sees in s.38, first of all s.38(1) is that the OFT is required by Parliament to prepare and publish guidance as to the appropriate amount of any penalty under this part. In sub-section (2) one sees that the OFT has power to alter that guidance at any time. Then (3) says that if the guidance is altered the OFT must publish it as altered.

I am going to go to sub-section (6) next:

> "If the [OFT] is preparing or altering guidance under this section [it] must consult such persons as [it] considers appropriate."

Then finally, going back to sub-section (4), the Secretary of State must approve the guidance before it is published.

What one sees there is that Parliament requires the OFT to have guidance. They appear to have given them flexibility, if it thinks that guidance is inappropriate, to alter the guidance. It is not fixed in stone, but the alteration requires consultation and the approval of the Secretary of State. Obviously, the Secretary of State is accountable to Parliament for his decision. The purpose of all this is fairly obvious, it is to make sure that the OFT's penalty policy is subject to public debate, consultation, and ultimately control by a politically accountable elected politician, the Secretary of State, now the Secretary of State for Business, Innovation and Skills.

So the OFT's penalty policy is not just constrained by the maximum cap provisions, the no more than 10 per cent of turnover provision, but also by s.38. It does not have free rein to change or set its policy under the cap just as it feels like it, one must go through consultation and get democratic approval before it sets off changing its policy. It is perhaps quite sensible for the OFT's fining policy to have this form of possible sense check. Like all regulators, there is a danger that the OFT gets carried away with the wickedness of the sins that it is trying to regulate, or conversely, as sometimes happens with regulators, probably not perhaps in this case, but potentially happens, it takes a rather too indulgent view of regulatory capture.

So its fining policy is subject to that external check and balance, which is a part of the framework.

The role of this Tribunal in relation to that is, of course, the Tribunal, itself, is not bound by the guidance, and is true that the guidance itself must be subject to judicial control and scrutiny. It is perfectly possible for the OFT and the Secretary of State, when he approves it – even, one is tempted to say, a Liberal Democrat Secretary of State – to make an error of law ----

THE CHAIRMAN: That will get you nowhere!

MR. PERETZ: -- which is why the Tribunal is not, itself, bound by the guidance, if it can stand back and say, "Hang on a moment, this guidance is wrong" in the circumstances of a particular case or generally. It is another check in the system.

We do say that it is also part of the function of the Tribunal, given that Parliament has set up the checks and balances mechanism of s.38 to make sure that the OFT does not disappear off on a frolic of its own and do something which is plainly not contemplated in the guidance, or contrary to the guidance. If the Tribunal allows the OFT to do that then effectively s.38 becomes a dead letter because the OFT can go off and develop its fining policy and give completely unexpected and unforeseeable directions without being subject to the controls that Parliament has seen fit to put on that.

One finds an example of that in a rather similar context in the case which I hope the Tribunal now has in front of it, which my solicitors sent to the Tribunal yesterday.

THE CHAIRMAN: We have no less than two copies, one for each case.

MR. PERETZ: I am grateful, which is the *Royal Mail Group Plc v. Postal Services Commission* case, a decision of Collins J in the High Court. I can take the Tribunal fairly quickly through that case. If one goes, first, to para.7, what one sees there is the terms of the relevant section of the Postal Services Act 2000, which was the statute in question in that

case, and s.31, which one sees about two-thirds of the way down p.3 of 11, which provides at 31(1) the Postal Services Commission shall prefer and publish a statement of policy in relation to the imposition of penalties. Subsection 2 one sees that the Postal Services Commission shall have regard to the statement of policy.

THE CHAIRMAN: Very similar.

MR. PERETZ: Very similar, indeed, very similar. There is a provision for the revision of statement of policy and publication. Interestingly there is no requirement that Postcomm policy be subject to any external control beyond consultation. In so far as that is a relevant distinction, we say it is a distinction in our favour because the court should be more vigilant to hold that form of external check then in the Postcomm case where there was not. That is the statutory background.

If you go on to p.4 just over halfway down the page under the heading "The amount of the penalty", this is an extract from the relevant guidance that Postcomm have issued. The guidance at para.14:

> "In deciding the amount of a financial penalty, Postcomm will first consider the financial benefit obtained by the licence holder and the burden imposed on others as a result of contravention of the licence condition."

That was the provision in the policy that was of importance in that case. Then if one goes on to para.22 of the judgment, on p.8 one sees there this is a further report at an interlocutory stage of the procedure before Postcomm. Postcomm there, if one looks at the passage in quotes, is beginning to enunciate the view that it is dissatisfied with its own statement of financial penalties in that particular case. What Postcomm said was:

> "The starting point element of Postcomm's policy is so difficult to apply in a rational and consistent manner in this case, that having had very serious regard to it, Postcomm does not accept that, having concluded that it is appropriate to impose a financial penalty, it must abandon this decision because of the difficulties in applying the starting point element of this policy."

Then at para.27 at 5.24 one finds an extract from the Postcomm final decision where Postcomm essentially repeats the view that it expressed at an interlocutory stage. It is not going to apply its policy because it thinks the result in that particular case did not make sense.

Paragraph 28 then tells you what the parties' positions were on the appeal to the High Court. One is told that the fundamental point made by Royal Mail was that Postcomm has not had regard to its policy but has applied a new policy because it could not apply the

existing one. Then one sees Postcomm's answer was that it was only required to have regard to the policy, not to apply it come what may.

At 30 the Court then looks at a number of cases concerning guidance. I draw the Tribunal's attention in particular to para.32 where Collins J. considers the decision of the Court of Appeal in the *Toys and Games* appeals, the paragraph in *Argos Ltd v. OFT*. He looks at that. Then at para.34 one sees the submissions of Mr. Beloff QC for Royal Mail. Rather than read that out, perhaps I could just invite the Tribunal to read that paragraph.

THE CHAIRMAN: We will read that now. (Pause) Yes.

MR. PERETZ: Then one can jump over the submissions of Mr. Stephen Morris QC for Postcomm because at para.38 Collins J. concludes:

> "Having regard to the statutory provisions, I am persuaded by Mr. Beloff's submissions [that this Tribunal has just read in para.34] are correct. There is a need for something exceptional to justify failure to follow the policy in the circumstances of this case. Since the limitation to benefit or burden [which is the statement policy in issue here] was itself decided after consultation and was on its face reasonable, discovery that it does not achieve in what Postcomm ought to have realised were not likely to be unusual circumstances the desired result is not a good reason to fail to follow it. The remedy is to revise it."

As I said, we say the force of that reasoning is even stronger here where one has the extra check of the Secretary of State's approval for the policy.

As I said, this discussion of the guidance is a preface for two submissions on year of turnover and on the MDT. I am going to start with the year of turnover. Let us have a look at what the OFT's penalty guidance has had to say about year of turnover of the years. If one starts with the Director General of Fair Trading (as he then was), his 2000 guidance, that is at tab 13 of the Notice of Appeal bundle p.168 of the pagination. This is the 2000 guidance. One sees there Step 1 – starting point. Before we just read what it says, just standing back for a moment, there are essentially three competing interpretations of what is meant by the key phrase here which is "last financial year", which is in para.2.3 about five lines down. It turns into "last business year" in the next item, but no-one suggests that that is of any importance.

There are three competing interpretations of that phrase potentially. One is that it means the last year before the decision. The OFT suggest on a couple of occasions that that is a natural reading of that, but it is common ground really that that is not what it meant. It is common ground that in relation to this guidance in 2000 and the following years, the OFT

did not interpret last year of turnover as meaning the last year before the decision; it interpreted it in a wholly different way.

MR. BEARD: I am sorry, just so that Mr. Peretz is not under any illusion, that ordinary language interpretation is not common ground.

THE CHAIRMAN: Thank you, Mr. Beard.

MR. PERETZ: It is certainly contrary to what the OFT actually did in relation to the period between 2000 and 2004. I do not need to take the Tribunal to them, but there are a number of OFT decisions in that period, in particular the *Replica Football Kit* case which I think at least one member of the Tribunal will know very well, where the OFT set relevant turnover by reference to the year before the infringement and not the year before the decision. That is what that OFT actually did in that period.

MR. BEARD: There is no issue there.

MR. PERETZ: That is one potential interpretation. The second interpretation, which is ours, is that it means the last year before the infringement and it requires pre-infringement turnover. A third interpretation, which I think is what the OFT is really putting forward, is that it does not mean either of those things; what it really means is whatever year of turnover is determined by reference to the maximum cap order, the penalties order 2000 as then, and later amended in 2004, which set the overall cap by reference to 10 per cent of worldwide turnover. That is the mast to which the OFT is now nailing its colours. So three possible interpretations.

What one sees in relation to this 2000 guidance is, if one looks at the right hand column, is a footnote 6, and it says:

> "In this guidance the expression 'turnover' is used in two separate contexts: 'relevant turnover' used to calculate the starting point and 's.36(8) turnover' (calculated in accordance with the Competition Act 1998 Determination of Turnover for Penalties Order) ..."

So the OFT is there at pains in this footnote to draw a distinction between turnover in the context of the Turnover for Penalties Order and relevant turnover used in step 1. There is nothing to suggest here that the two concepts are supposed to run hand in hand. In fact, an indication that the OFT route regards these concepts as completely separate and one should not read the year for one for the year of turnover for the other. They should be approached separately says the OFT.

If one takes this page out of the bundle, the next document I want to take the Tribunal to a document, which I am afraid we have finally located after submitting the skeleton argument

in this case, which is the OFT's Consultation Draft on the 2004 guidance. It is not on the OFT's website now, we had a bit of trouble tracing it but we have now found it. That should be at tab 30 to the notice of appeal, if it has gone in at the right place. That should have internal numbering. Can I take the Tribunal to p.7, and if one looks at para.2.6, and if one compares the first sentence there with the second sentence of old 2.3 in the 2000 Guidance one does not find anything that has changed apart from the change in terminology from "financial" to "business" year, which I think everyone accepts is a change without any significance, at least in the present context.

MR. BEARD: Again not.

MR. PERETZ: It has not been explained what the difference may be and I wait with interest to hear what Mr. Beard has to say about that.

If one asks oneself, just looking at this provision, is there anything here to highlight the OFT's view that there is going to be a change in the way in which the step one turnover was going to be calculated, the only answer has to be that there is nothing here which highlights any such thing.

THE CHAIRMAN: This is the draft on which consultation was based?

MR. PERETZ: That is correct, this is the draft of what then turned into the final 2004 guidance. This is what was put out to the ----

THE CHAIRMAN: For consultation?

MR. PERETZ: For consultation, yes.

THE CHAIRMAN: A post-consultation document would reflect consultation, hopefully.

MR. PERETZ: Exactly. The reason I have taken the Tribunal to this is that there is a suggestion in the OFT's skeleton argument that at some point the OFT highlighted at the consultation stage the effect of this change. Now we got the consultation draft, frankly we have struggled to find anywhere in this draft any such highlighting, it is simply not highlighted. What one does find at para.2.15 of this draft is a passage at step 5, so this is the final stage where the OFT corrects whatever penalty it has calculated in order to reflect the maximum cap order. What one finds there, if one goes over to the top of p.11 is that the business year on which worldwide turnover must, as far as possible, be calculated is the one preceding the date on which the decision of OFT is taken, or the one immediately preceding it. That is an explanation of what the 2004 order was going to say, or had said, about the maximum cap provisions.

That is at para.2.15, and it is clearly in connection with step 5, not with step 1.

THE CHAIRMAN: Can we just read the rest of 2.15. (After a pause) Yes.

MR. PERETZ: Another reference one finds is at p.3 of the Consultation Draft, footnote 1. This is reference to the – I think must be forthcoming at that stage – order, because the SI number is left unfilled in in the brackets at the end of footnote 10. Footnote 10 tells you, in relation to para.1.10 that the financial penalty may not exceed the maximum penalty calculated in accordance with turnover. That is again about step 5 and the maximum turnover.

Of course, the context in which all this is set is that the previous guidance had been at pains to distinguish between turnover at stage one, relevant turnover in the relevant market, and overall turnover at step 5 when the final cap is being applied. It is at pains to distinguish the two.

One also has a situation where the Commission has consistently distinguished between the two in its approach and of course the reason why the 2004 Order was put in place was to reflect the terms of Regulation 1 of 2003, which imposes a maximum cap on exactly the same basis. It was thought undesirable to have a different maximum penalty in the UK than at European level.

The Commission had always, in relation to the starting point, started off with looking at turnover in the relevant market at the time of the infringement, even though the provision in relation to turnover related to the last business year before the decision. That is the context in which any objective reader, looking at this document, would have seen all of this. There is simply nothing to suggest that what the OFT ----

THE CHAIRMAN: I am confused, Mr. Peretz, help me, what effect on all this does the long sentence at the top of p.11 have, the last part of 2.15, which seems to define the "last business year" quite clearly?

MR. PERETZ: The business year on the basis of which worldwide turnover is determined. At step 1 was not looking at worldwide turnover, one is looking at turnover in the relevant market, "must, as far as possible, be the one" – this is, we say, clearly referring to the step 5 calculation of "last business year".

THE CHAIRMAN: I understand that, but are you saying that the step 1 calculation is based on a different year from the step 5 calculation?

MR. PERETZ: Yes, there is nothing surprising ----

THE CHAIRMAN: What is the logic for that, if there is any?

MR. PERETZ: The logic is this: the reason why there is, at the end of the day, an ultimate cap on penalty calculated by reference essentially to current worldwide turnover is to prevent a situation where a fine is likely to cripple an undertaking in relation to its current business.

That obviously involves an assessment in relation to the last turnover one has got, which is going to be the last business year before the decision.

THE CHAIRMAN: Thank you.

MR. PERETZ: The reason why – and I will come to this – at step 1 one looks at the year before the infringement is that that is far more likely to be relevant to the seriousness of the infringement at the time that it was committed.

THE CHAIRMAN: Thank you.

MR. PERETZ: There is simply, we say, nothing in the Consultation Draft to support the OFT's contention that "last business year" means "as determined by the maximum cap order". In fact, if you look at paras.2.5 and 2.8, which we have just looked at, but if we could look at 2.5, which is on p.7:

> "It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point …"

Then 2.8 deals with the situation, as here, where you have several undertakings in the same infringement:

> "… an assessment of the appropriate starting point will be carried out … in order to take account of the real impact the infringing activity …"

So the OFT is here pointing one in the direction of the idea that the starting point at step 1 reflects seriousness of the infringement. I understand that Mr. Unterhalter SC on Monday said that seriousness is inevitably a backward looking exercise. This is a second hand report; I may not have got the words right. If that is what he said, then we agree. Seriousness is bound to be a backward looking exercise; it is bound to reflect the situation at the time that the infringement took place and not the situation several years later.

THE CHAIRMAN: To go back to my earlier question, Mr. Peretz, given that the OFT has defined the last business year at stage 5 in para.2.15 of this document, if there are to be two separate definitions for last business year, two different purposes, it is surprising that they have not spelt that out, is it not?

MR. PERETZ: It is not surprising at all, because that reflected (a) the background, the fact that the OFT had taken relevant turnover in the year preceding infringement; (b) the approach adopted by the Commission which, in the context of modernisation, one might have assumed as a starting point; and (c) it reflects the underlying logic of the situation. If you are dealing with seriousness and harm, then one expects that to be done by reference to the position as it stood.

THE CHAIRMAN: You are missing my point, Mr. Peretz. What I am suggesting is that it is surprising that if there are two different years for two different purposes in a document approved by the Secretary of State and sent out for consultation, and each of them could be defined as the last business year but a different year, that they do not say so.

MR. PERETZ: Well, if it was intended to have a common definition of last business year, that could have been done in a number of ways. Most obviously the definition which does not turn up until step 5 might have been put in step 1 to have made the position absolutely clear, there might have been a common definition in a glossary, and there might have been a common footnote.

THE CHAIRMAN: Why does it have, then, "relevant business year" and "last business year", for example? This is guidance; it is not a statute. I am puzzled by the linguistic difficulty this raises, if they really meant there are two "last business years".

MR. PERETZ: I put it this way: you are defining a term which is supposed to be interpreted in common in different situations, it is rather odd to wait for the second time it occurs and the second context to give the definition. One would expect the definition to turn up the first time it was used if one intended it to be used that way. I accept that is a slightly linguistic point, but I think you are asking me a linguistic question.

I do not need to take the Tribunal to the final guidance, but exactly the same points apply to the guidance, and the reference for the Tribunal's note is para.3.3.4 and 3.3.5 of my skeleton.

I will not take the Tribunal to this document, at tab 31, but it seems to us that the Secretary of State at any rate did not see that the consequence of the change in the maximum cap order was to involve any change in the OFT's general fining policy in this regard. What one has at tab 31 is a document prepared by the Department of Trade & Industry in 2004. First of all, one has an explanatory memorandum to the OFT's rules order, but the document I am really looking at is a few pages in. I am afraid the pages are not numbered, but it is "Regulatory Impact Assessment". That is an overall assessment of the steps that the government were then taking to give effect to Council Regulation 1 of 2003. I am afraid I will have to do this by paragraph numbering because there is no page numbering. If one goes to para.2.13 Maximum Financial Penalties, the point is first made in the first two sentences that of course financial penalties only impact on businesses that infringe. But then the third sentence:

"Changes to the maximum penalty have a limited impact on overall fines since the 'relevant market' affected by the infringement will remain a key element in OFT's calculations."

What one sees there is that the DTI's view appears to have been that the change in the maximum would not affect overall fines. That, not to put it too highly, rather indicates that the DTI did not expect the change in the maximum cap provision to have any impact on the way in which the OFT approached its own calculation of penalty and of the cap.

THE CHAIRMAN: What is this document?

MR. PERETZ: I think it is laid before Parliament. If we go to the front – it is a fairly routine requirement now of proposed legislation that there is a regulatory impact assessment. The explanatory memorandum one sees right at the front shows it was laid before Parliament by Command of Her Majesty.

THE CHAIRMAN: This is a document to be viewed with the explanatory memorandum?

MR. PERETZ: Yes, so it was laid before Parliament.

THE CHAIRMAN: I understand.

MR. PERETZ: I took the Tribunal to the passage in the draft consultation which shows this. For the Tribunal's note, para.2.5 of the 2004 guidance, what the OFT says about the way in which one approaches the step 1 starting point is that it is designed to reflect seriousness or impact of infringement. One finds that at 2.5 of the current guidance. In fact, it is confirmed in the decision itself. If one takes the Notice of Appeal bundle tab 7, the relevant abstract from the decision, at 58 (1647 of the decision pagination) para.VI.90 one here sees what the OFT's response is to arguments put to it. If one just flicks up the page you see that the arguments being put here are precisely arguments about what the correct year of turnover is. The OFT's response to those arguments is that by restricting step 1 of the penalty calculations to the relevant market the OFT is ensuring there is a correlation between the penalty and the harm. That is what the OFT thinks it is doing in its decision, the correlation between the penalty and the harm.

The problem with that is that it is simply utterly implausible to suppose that harm or impact are in any way reflected by turnover in the markets concerned, many years after the event. In fact, a random number of years after the event, because it all will depend on when the OFT finally gets round to taking its decision. That is a bizarre assertion.

In my skeleton at 3.8 I put forward an entirely realistic example of that. So you have a two undertaking market, two undertakers: A and B. At the year of the infringement A is much bigger than B. A has 80 per cent of the market; B has 20 per cent. Some years later the

OFT finds out about an infringement between them and decides to impose a penalty. However, by that stage the market has changed. B is now a much bigger undertaking and it has 80 per cent of the market; A has got 20 per cent of the market. What the OFT's methodology means is that B gets fined four times as much as A, even though at the time of the infringement B was four times smaller than A. That is very odd.

It is even odder when you realise that markets go up and down, particularly when there are slightly arbitrarily defined markets, as in this case so the size will vary over years and probably in a rather random way. They can certainly get bigger or get smaller.

If you set a penalty by reference to the most recent size of the market, that may have no correlation whatsoever with the size of the market as it was many years ago at the time the infringement actually happened. It is simply bizarre, and certainly cannot reflect harm, for the penalty to be assessed in that way.

That point was made in our skeleton and the OFT has tried to come up with a number of answers to it. Frankly, none of them is plausible but I will run through them. The first OFT argument is that you can adjust the percentage of turnover at stage 1 to reflect that sort of situation. There are two responses to that. One is that the OFT have not tried to do it in this case, so it is a somewhat academic point. Secondly, simply as a matter of arithmetic you cannot adjust the turnover calculation so as to deal with the sort of problem I have just outlined.

I will not trouble the Tribunal with it now, but if you look at footnote 10 to para.3.9.2 of my skeleton you will see arithmetically that it is simply not possible to adjust so as to deal with the sort of example I have given the Tribunal in the A and B case, it cannot be done.

The second point made by the OFT is that turnover at the time of the decision may reflect the gains made from the infringement. The word "may" is there, which speaks for itself. Quite apart from the fact that the OFT have not actually made any finding in this case that there were any gains, we have to remember that we are talking about turnover up to eight years after an infringement took place. It also has to be remembered that which year is chosen will depend on how quickly the OFT gets its act together and ups and downs in the investigatory process. There is simply no basis for believing that the gains obtained by the infringement will somehow magically be crystallised in whatever year the OFT ends up choosing as the appropriate turnover year, the year before the decision it takes. There is simply no reason to suppose that that would happen at all.

The third argument put forward by the OFT is that turnover in the year before the infringement may not reflect the impact or harm. There is a certain force to that. Of course

that may be right, but what one can say with some confidence is that turnover in the year before the infringement is much more likely to reflect the market power and size of the market as it stood at the time of the infringement, and therefore is much more likely to correlate to the impact of harm that the infringement caused than turnover some random and large number of years after the event. There is a certain theoretical force to the point but it is not of real practical importance.

THE CHAIRMAN: I will tell you something I am troubled by, Mr. Peretz, which you might like to deal with at some point today. If we were looking at a decision made in 2010 and the last year before the decision was therefore 2009, on the evidence we have heard in the last two or three days, performance of these companies was very much diminished in 2009 as compared with, say, 2003 or 2004. I can kind of hear in my mind exactly the opposite argument being made to meet the lower threshold, this cutting one's cloth.

MR. PERETZ: If I may say so, one can see that point. But what is the legal force of it? Of course, in any appeal before the Competition Appeal Tribunal the appellants are going to take points that are in their interests, and they are not going to take points that are not in their interests. That is just how the system works. But that is not an argument for ignoring the points made by appellants. Of course it is in the commercial interests of our clients to make the point, otherwise we would not be running it, but that does not affect the legal force of the point that we are trying to make.

I do not have Renew's 2009 figures to hand, so I do not know what the impact of that would have been on Renew, but it is completely legally irrelevant. The Tribunal has to deal with the arguments that are put to it. It may have had a completely different cast of appellants if it had been a different year. What the point does show, though, is that it is a nice illustration of quite what oddities the OFT's pre-decision turnover approach leads to, because everything depends on how quickly the OFT tends to move. If it is right as an overall picture that the turnover of these companies was a lot lower in 2009, then the fines would have been a lot lower in 2009 than they were. That reflects nothing to do with the seriousness of the harm or the impact of the infringement; it is simply a reflection of a recession that occurred eight years later.

Another argument put forward by the OFT is that basing the calculation on pre-decision turnover reflects the current scale and so is an advantage for the purposes of deterrent. The problem with that is it simply ignores the point that we are talking about turnover "in the relevant market", not worldwide turnover. To go back to my A and B example where A and B swap places from being four times larger to four times smaller, it may well be that

because they have various activities in other markets, A and B are much the same size in terms of overall size at the time. That still does not affect the point that B's size is four times higher than A's, even though at the time it was four times smaller.

The truth is that focusing on pre-decision worldwide turnover makes great sense when you are looking at the ability of an undertaking to pay the fine now, which is why the maximum cap threshold is calculated on that basis, but it does not make sense if one is looking at the harm or impact of the infringement.

The final argument put forward by the OFT is that the focus on this point ignores the fact that this is one stage of the calculation and one needs to look at the whole picture. But that ignores the fact, if I may say so, that it is the relevant turnover figure that serves as the basis for the entire subsequent calculation. Leaving aside the minimum deterrence threshold (I will come to that later) every other step is conditioned by the starting point total at step 1. One is talking about adjustments of 5 per cent or 10 per cent either way for cooperation, involvement of directors and that sort of thing, and then in some very extreme cases an adjustment because the fine just began to look ridiculous in terms of the impact on worldwide turnover where there is a 4.5 per cent cap, and in some cases the OFT decided that there was real hardship and adjusted the penalty accordingly. Apart from those marginal cases, the penalty is in the end a mechanical calculation based on the step 1 figure. So the step 1 figure is critically important. Nothing in the subsequent methodology corrects that.

The OFT says at 20(a) of its skeleton that the penalty guidance should be intended to be and should be read and understood on its own terms. We agree; they are perfectly entitled to stand on that ground, as one looks at the guidance that is what it means, certainly, if one looks at the guidance with any modicum of common sense and understanding of what is meant by harm and impact.

The OFT finally says that it could have done better in drafting its guidance but the Tribunal should treat Renew's appeal as special pleading. I think that is effectively the point that you have made, sir. Of course, undertakings make points which are in their interests to do so, but we are perfectly entitled to do that and the points that we make have to be taken on their merits.

Therefore, we submit that the penalties imposed on Renew and Allenbuild should be replaced with penalties based on the pre-infringement turnovers. The calculation, for the convenience of the Tribunal, is at tab 15 of the Notice of Appeal. That sets out the consequences.

I now turn to the minimum deterrence threshold. The fundamental point here is again the importance of the guidance in the statutory scheme. I do not need to go over all that again. The essential point is that Parliament set out what is supposed to happen when the OFT decides that a policy needs to change. It should consult on a change of guidance and get the Secretary of State to approve it. In the meantime, the OFT can depart from the guidance only if there is something unusual or exceptional, to use the words of Collins J. in the Royal Mail case.

The OFT's case on this appears to be three-fold. The OFT's first point is that the minimum deterrence threshold does not involve any departure from the guidance. As to that, we say as follows. First, it is obvious and not disputed that the idea of the minimum deterrence threshold appears nowhere in the guidance. It is simply not there. Secondly, the effects of applying the minimum deterrence threshold, which is based on worldwide turnover at stage 3, is that you might as well throw away all the calculations that have been done at stage 1 and stage 2. The minimum deterrence threshold simply decouples the penalty that is being fixed from what is, under the guidance, the starting point. The starting point ceases to have any impact whatsoever on the penalty imposed for that infringement. It is replaced by a figure calculated on a basis which is nowhere to be found in the guidance.

Step 3, which is what the OFT relies on, of course does contemplate "adjustment" for the purposes of deterrent. That is right. But what is being discussed there is an adjustment, and also an adjustment on a "case by case basis". It is not a wholesale replacement of the entire basis of the penalty. So we say that the minimum deterrence threshold is clearly a departure from the guidance. I might be right, I might be wrong. There might be good arguments in principle to be had for it. The OFT may well take that view. If it takes that view, what it should do is it should amend its guidance and get the Secretary of State to approve it and have public debate and consultation about what the implications of the minimum deterrence threshold are. Because the OFT has gone ahead without changing its guidance, there has been no consultation and no chance for the Secretary of State to intervene.

As to the second point made by the OFT, it is that it has applied the minimum deterrence threshold in a case specific way. The problem with that is firstly that it is simply impossible to see that there is anything unusual or exceptional (to use Collins J.'s words) in the present case that justifies this departure from the guidance.

May I take the Tribunal to the paragraph where the OFT explains why it felt that the MDT was appropriate in this case, the passage in the decision. Tab 7 internal page number 86.

The key passage is just under "Minimum Deterrence Threshold" at para.VI.209. The OFT starts off by identifying that:

> "For some Parties, the financial penalty calculated at the end of step 2 of the calculation represents a relatively low proportion of the undertaking's 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 the 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 infringements and the participant's total turnover."

So that is what the OFT says justifies the imposition of the MDT in this case. But it is not just foreseeable but blindingly obvious that if you apply a relevant turnover based approach, the consequence is that companies with a relatively small part of their turnover in that market will receive a penalty which is fairly low in terms of proportion of total turnover. It is completely foreseeable, it is not exceptional, and it is not unusual. The OFT must have appreciated, when it prepared its guidance, that that would be effectively adopting relevant turnover as a starting point. If one applies the reasoning of Collins J. in *Royal Mail* one sees that it is simply hopeless as a justification for imposing a different policy in this particular case.

Indeed, the fact that there is nothing unusual or exceptional lies behind the OFT's decision to impose an MDT in this case is pretty well demonstrated by its consistent use of the MDT since 2005 in other cases. An example of a published case where the OFT proceeded is the recent *Construction Recruitment* decision. That decision had nothing in common with this case apart from the word "construction". It is a case that concerns the recruitment industry; it is a case that concerns fee fixing; it is a case that concerns a collective boycott. It is quite different in fact and circumstances from the present case. The only element that it has in common is, just as in the present case, there are some rather large companies with a relatively small percentage of their turnover in that market. But that simply shows that the situation we are dealing with is not exceptional, it is not unusual. In fact, and the OFT will correct us, we are not aware of any penalty case recently apart from maybe some trivial examples where the OFT has not used the MDT. It has become pretty systematic.

The third argument relied on by the OFT is that this Tribunal (different composition) is said to have approved the OFT's use of the MDT in the *Makers* case. The key point about the

*Makers* case is that the figure that was produced on the basis of the step 1 calculation for *Makers* was only £6,500. That is a pretty trivial amount of money. In fact, it is almost a derisory amount of money. One can well see that in that case both the OFT and the Tribunal would have thought that if that was the penalty applied to an infringement of a somewhat similar kind, to put it bluntly, various people might fall around laughing. It is almost in parking fine territory.

In the present case, though, and concentrating on Renew, the penalty imposed on Renew after step 1 and 2 was over £1.5 million for infringement 39. That is, on anyone's view, a substantial amount of money. It is of the same order as penalties imposed in the past by the OFT for very serious price fixing infringements such as the *Replica Football* case. I think All Sports in that case had a penalty of around £1.5 million for price fixing.

One has to bear that in mind when reading *Makers. Makers* simply cannot be read as a rubber stamp for the routine application of MDT in every single case where the OFT takes the view that applying the guidance will produce a penalty which is a bit too low because undertakings have a wide presence in other markets.

We therefore submit that the use of the MDT in this case is wholly inappropriate and unjustified and the penalty imposed on Renew should be adjusted so as to remove the MDT element.

The final point I want to make concerns the penalty imposed for infringement 39. This was an infringement committed by Bullock, Renew's ex-subsidiary. This is about the decision to address the penalty in that case both to Bullock and to Renew, and to calculate that penalty by reference to the turnover of both Bullock and Renew as they stood in 2008.

The first point we make about that is that by taking that approach the OFT breached the principle of equal treatment. We make a number of points about that in our skeleton. The point I concentrate on today, for time reasons, is the different treatment of Renew and Strata Homes Ltd.

It is common ground that Strata Homes Limited and Renew are both former 100 per cent shareholders of subsidiaries that infringed the prohibitions in the present case. Both were, at the time, part of the same undertakings but they subsequently sold that subsidiary. Strata Homes is not an addressee of the decision and no penalty has been imposed upon it. That is despite the fact, as I think is undisputed, that Strata Homes has noted in its annual reports that it maintains close links with is ex-subsidiary, and has publicly stated that it would pay any penalty imposed on its ex-subsidiary. So there is a clear difference in treatment between Renew on the one hand and *Strata Homes* on the other – and, it happens, Renew

and quite a lot of other companies on the one hand and *Strata Homes* on the other, but that can make no difference if one is looking at a case of equal treatment. Treating a lot of companies badly is no better than treating just one company badly.

The guiding principle here is the Court of Appeal's judgment in the *Toys and Games* case which is in the authorities bundle at volume 4 tab 54. Again, I am afraid this has no page numbering so I will have to do it by paragraphs. Could the Tribunal go to para.232, the Tribunal here sees the argument that the Court of Appeal goes on to consider:

> "Argos and Littlewoods took a distinct point on penalty, arising from the fact that the OFT remitted the whole of the penalty of £15.59 million which it would otherwise have imposed on Hasbro, and did so under the leniency regime."

Then one goes on to see that there were complaints that that involved infringement of the principle of non discrimination because a correct application of the regime could not have permitted a reduction of more than 50 per cent. That is the case that was being put and that the Court of Appeal is dealing with.

May I then take the Tribunal to para.277 where the Court of Appeal analyses how to decide whether there has been unequal treatment. At 277 the Court of Appeal quotes the Tribunal saying that the Tribunal should interfere only if there is manifest injustice. At 278 the Court of Appeal disagrees with that. I just invite the Tribunal to read the whole passage. (Pause)

I also invite the Tribunal to read para.280, which is a passage that we rely on. (Pause)

THE CHAIRMAN: As I understand it, what the OFT are saying here, is first of all, that Renew are not the only company treated in this way; that there are three other examples. Secondly, that it was a mistake?

MR. PERETZ: Yes.

THE CHAIRMAN: If there was a mistake that should not have been made, but was made, where does the injustice lie? Do not the interests of justice require that one should assume that the mistake should not have been made and penalise accordingly?

MR. PERETZ: What one has here is a situation where there is unequal treatment, different treatment – unjustified because it is accepted that there is no justification for different treatment between Strata Homes on the one hand and Renew on the other. I think I have dealt with the point that there were a number of companies that make the same complaint.

THE CHAIRMAN: Just a very simple example comes to mind. The car in front of me is not stopped by the police officer with the gun, even though it is going faster than my car, but my car is stopped. Can I claim that I have received unequal treatment and therefore should not be fined because the car in front of me was not stopped?

MR. PERETZ: That, if I may say so, puts the finger on what is likely to be the qualification to this statement. I will explain what that is. There is clearly a potential tension between the principle that undertakings, companies, people should be treated equally, and the principle of legality which people should have to meet their legal obligations. Your example is a pretty vivid one on that. If I am speeding and I am liable for a fine, I am liable for that fine and in fact I have to pay that fine.

Another example which one could give is tax cases. There are several cases in which a tax payer tries to appeal against an assessment issued to him by the Inland Revenue on the basis that some other tax payer was wrongly not assessed for tax. The courts have had very little problem disposing of that because the point made is: yes, there has been unequal treatment, but that is the tension in that case, what Euro lawyers call the principle of legality. Since the law says this tax is due, and that is a legal obligation, you cannot get out of your legal obligation by pointing to illegal treatment of somebody else, because that itself is a breach of the law. You are having to pay what Parliament says was due.

That is why I think there needs to be a little bit of qualification of what the Court of Appeal was saying. Of course, the Court of Appeal was not dealing with that situation, so it is unsurprising that they do not deal with it. I readily accept that where there is a principle of legality in play, then that is in tension with the principle of equal treatment and may, in some cases, displace it.

The principle of legality is not in issue here. That is because the OFT has a discretion as to what it can do. There is nothing unlawful about the OFT not fining Strata Homes. There would be nothing unlawful about the OFT not imposing a penalty on Renew. The OFT has a discretion. I think in the *Tokai Carbon* case at volume 7, tab 91, para.279 the Court of First Instance makes the point that in relation to the Commission, the Commission has a power to impose a penalty or a fine in that case on the parent. That is a discretion. There is nothing unlawful about a decision not to.

Similarly with the OFT (I may be wrong, and I will be corrected) I think there is some point either in the defence or one of the OFT documents that makes the point that it has a discretion. Of course in relation to *Makers* the OFT decided not to exercise its discretion to impose a penalty on the ultimate parent company which was Killers. That is a perfectly legitimate exercise of the OFT's discretion. So the difference between your case, Sir, and the case we are dealing with here is there is no breach of the principle of legality. If Renew does not have a penalty imposed upon it in relation to Bullock, that is something the OFT

could always have done. There is nothing unlawful or wrong in principle about that situation.

The key question really is whether it matters that the failure to impose a penalty on Strata was a result of a mistake. We say it simply was not. I perfectly accept that in the *Makers* case the majority of the Tribunal drew a distinction between mistakes – in that case an arithmetical mistake - and methodological legal errors. It said that all that happened was an arithmetical mistake. The undertakings wishing to compare themselves with that undertaking rely on the principle of equal treatment. We respectfully adopt the view of Mr. Blair QC who was the minority of the Tribunal in that case that there are serious problems with the approach of the majority.

The problems are, first, that nothing in the Court of Appeal judgment (the Court of Appeal of course is binding on this Tribunal) to suggest that one has to enquire as to whether the unjustified difference in treatment was a mistake of fact, a mistake of law, a misunderstanding of the guidance or whatever. There is simply no indication there that it mattered.

Secondly, of course, a distinction between different types of mistake gives rise to a number of difficulties. First, it may be potentially unfair because it may not be apparent from the decision what happened, so appellants may not know why there has been a difference in treatment before they appeal. That is unsatisfactory. Also, there may be a call for an inquiry which creates extra work and effort on behalf of all those concerned to try to find out what has actually happened. Finally, the distinctions between methodological and legal errors and other types of error are pretty subtle. I am sure, sir, you are well familiar with the trouble and difficulties that one gets into when one is trying to distinguish between mistakes of fact and mistakes of law. It is very treacherous territory to get into. Perhaps most importantly, it is hard to see why it matters as far as Renew is concerned whether the reason why the OFT failed to penalise Strata and decided to penalise Renew is due to oversight by the OFT, or because the OFT (to take a completely fanciful example) thought that the law was different in relation to companies whose name began with an R from whose name began with an S. The reason for the difference of treatment simply should not matter. The outcome is the same, the sense of unfairness is the same. I will add the potential for impact on distortion of competition as a result of the application of different penalties, is the same. We repeat and adopt the points made very cogently, if I may say so, by Michael Blair QC in the minority view in *Makers*. So for that reason the penalty on Renew in relation to Bullock's infringement 39 to be set aside.

The final point I want to make, as a separate matter, in relation to this area is that the decision to assess the penalty on Renew by reference to the joint turnover of Renew and Bullock in 2008 – three years after their separation, which (there is no dispute) was entirely complete bona fide separation – is distinctly peculiar. We explain that in paragraphs 12.8 and following of our skeleton.

What has happened is the penalty on Renew has been fixed by reference to the turnover of what is now, and has been for some considerable time, a wholly unrelated company. I would make exactly the same point if I were standing here appearing for Bullock. Bullock's penalty has been set by reference to turnover to Renew, which is an entirely unrelated company. In fact, the consequence is particularly bizarre in relation to Renew because since the separation, Renew has expanded, has bought a number of other companies. In the skeleton we make the point that about 57 per cent of its current turnover is attributable to activities carried on by companies which were completely unrelated to Renew at the time of the infringement. It is pretty odd, when one looks at Renew's position. It is bizarre when one looks at Bullock's position.

At the end of the day the problem here – it probably goes back to the overall point that I have been making – comes down to the OFT's methodology. It is because it has chosen to fix penalty for an infringement that occurred almost ten years ago by reference to worldwide turnover eight years later. Unsurprisingly, in the meantime the position of the company that is concerned has changed. All sorts of things have happened: companies have split, broken up, acquired other companies and so on. The OFT tried to justify all this in the name of the need to deter Renew. Renew is not accused of anything but owning the infringing company, and it is hard to see how Renew needs to be deterred to the extent that it is. The fact that Renew is having to pay a penalty based on a combined current worldwide turnover figure that includes the turnover of a company which it had nothing to do with for years is, putting it shortly, a particularly silly result of a silly approach. The Tribunal should set it aside and replace it with a penalty calculated in a way which is consistent with the OFT's guidance as approved by the Secretary of State. That is the sum of my submissions.

THE CHAIRMAN: Thank you very much, Mr. Peretz. Shall we have a break? Let us have a break until just after ten to.

MR. PERETZ: If it assists the Tribunal, I am going to be somewhat shorter this afternoon because I have covered the grounds.

THE CHAIRMAN: Mr. Peretz, it does not matter.

(Short break)

THE CHAIRMAN: Mr. Beard, Mr. Woolfe?

MR. BEARD: Chairman, members of the Tribunal, the first argument raised against the Office by Mr. Peretz and Renew is that we got our guidance wrong. If we did, we accept the penalty would need to be considered. Mr. Peretz has emphasised that the OFT is bound to follow its guidance and we should only depart from it in exceptional circumstances. As has been made clear in previous hearings the Office does consider that it should follow its guidance and should give good reason for departing from it if it does so. Indeed, the OFT has emphasised that the Tribunal should not conclude that penalties when the guidance has been properly followed. Adopting fair principles and fair process results in just penalties. There are various attempts by appellants to suggest that we should modify our approach under the guidance or introduce additional parameters which are unjustified and partial and unreliable should be rejected. It is, of course, important to note, however, that the guidance is not a mathematical formula and that there is a series of decisions that need to be taken within the framework of that guidance.

The key dispute, however, is in relation to the meaning of he guidance. Renew's contention is that the phrase "last business year", when used in para.2.7 of the guidance, means the "business year preceding the date of the infringement". That is simply wrong. Mr. Peretz did not actually take you to the guidance. It is to be found at volume 11, tab 135. This is the current guidance promulgated in 2004 after the consultation that Mr. Peretz referred to. It starts off with a general introduction in section 1. No doubt the Tribunal has already referred to this, but given its importance, it is worth a re-read as to how it is structured. If ones moves on to section 2 that sets out the steps for determining the level of a penalty. Section 3 is to do with leniency, which is not material to today's appeal. Then one sees under section "Step 1 – Starting point", and of course, as has already been emphasised, the starting point under step 1 is a combination of two things, the assessment of a percentage of relevant turnover and the identification of the relevant turnover to which that percentage is going to be applied, and that is made clear in 2.3, 2.4, etc.

Then one works way down to 2.7, which is the key paragraph which says:

> "The **relevant turnover** is the turnover of the undertaking in the relevant product market and relevant geographic market …"

You see the "Market definition" guidance –

> "… affected by the infringement in the undertaking's last business year."

That is the phrase that Mr. Peretz says refers to the year before infringement. One only needs to take the ordinary meaning of the words. If I ask a company to give me its turnover for the last business year, the natural answer is for it to provide the figures for the most recently completed business year.

The guidance relates to the OFT's decision making on penalty. So the natural meaning of the term "last business year" is the most recent business year at the time the decision is taken, because it is then that the guidance is actually being applied. So the ordinary language of para.2.7 suggests that we are talking about the most recent completed business year at the time of the decision, and that really is the end of this matter.

There are further supporting arguments. Secondly, there is a further very clear indication reinforcing this interpretation which you, sir, Mr. Chairman, have already identified. The term "last business year" is used in two places in the guidance – para.2.7 and para.2.17. Paragraph 2.17 is on p.10 of the guidance, and it is true it is to do with step 5, but it is there that the term "last business year" is used in the third line. It is described clearly: The business year, of which worldwide turnover – which of course is what we are talking about in step 5, because we are talking about the maximum penalty:

> "… is determined will be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum."

The maximum being 10 per cent of that worldwide turnover, and it is relevantly footnoted at footnote 21, it is to the turnover order as amended. In the turnover, as amended, which one finds in volume 1 of the authorities, which is tab 8, which is what one needs to see for these purposes, you will see at para.2(3):

> "The turnover of an undertaking for the purposes of section 36(8) [of the Competition Act 1998] is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it."

What we have is a situation where a term, "the last business year" is used twice in the guidance, and on one occasion it is very clearly defined, and defined by reference to relevant statutory material. Of course, there is a very basic principle of statutory interpretation that where the same term is used in statutory material on more than one occasion, it is not to be taken to have different meanings in different places, unless there are very, very clear indications why not. We have not produced **Bennion**, or any authority for

this fundamental proposition, and we accept that this guidance is not a statute. This proposition is a general and fundamental principle, one that governs the language more generally, and it certainly applies to the guidance. When we look at the term "last business year" in para.2.17, the scope of the term is as clear as day, and it is the ordinary language meaning, but it is supported by the statutory phraseology in the amendment to the turnover order.

THE CHAIRMAN: I am just looking at the explanatory note at the end, the last sentence, which says the same.

MR. BEARD: It is a phraseology that one will find in most of this material, it is the phraseology used in the consultation documents, and so on.

What we have as a situation is that not only is the appellant trying to undermine the ordinary language meaning, but it is also trying to have the same term meaning different things in the same document where there is no specific wording suggesting that that is the case. Those are the sorts of arguments that really just do not pass a straight face test. There is no good reason to suggest that "last business year" in 2.7 means anything different from the usage and term of the meaning in 2.17.

Apart from those absolutely robust arguments there are further good reasons why the same meaning should be attributed to the phrase. To read the phrase in any way in any other way would mean two different calculations of turnover would be required in assessing financial penalty under the guidance, and it is clearly reasonable and sensible that the measure of turnover adopted for the purposes of step 1 is consistent with the measure of turnover adopted for the purposes of step 5, not least because the starting point adopted necessarily then falls within the range of the turnover order.

In addition, while steps 1 and 2 of the penalty assessment are focused on developing a measure that reflects the seriousness of the infringement and duration, they may well generate figures that provide that sufficient specific and general deterrents, so that deterrence adjustment is required at step 3. It is clearly reasonable and appropriate when one is considering the policy to ensure deterrent effect that the measure of turnover used is calibrated to the size of the undertaking at the time the penalty is imposed, rather than its historic size. Thus, again, this reinforces the need for consistency in the meaning.

Fourthly, although Mr. Peretz protests that no one could read the text in any other way than that which he suggests, this is precisely the approach that has been adopted consistently by the OFT since 2004. Thus the approach in all of the other roofing and construction cases was this approach. There were three appeals in relation to those matters. It would be

remarkable if no potential appellant since 2004 could have benefited materially from the approach that he suggests and yet no one until now has taken the point. Obviously the better conclusion is that, in fact, those reading the guidance adopted the principles above and read it as it should be read.

THE CHAIRMAN: I do not know if this could be done, but it might be of interest, because I know that I and my two colleagues are concerned about this "last business year" issue, but presumably as a result of the consultation there were some responses which were analysed and collated. I wonder if there was any evidence of anyone saying during the consultation period that they were in any way confused by the term "last business year" in the consultation draft that we saw earlier.

MR. BEARD: I will take instructions. It is not something that I am likely to be able to deal with over the short adjournment.

THE CHAIRMAN: No, but it may be instructive.

MR. BEARD: There is one thing that might be relevant, sir, just in passing in this context.

Although it is raised in other cases and not heavily emphasised by Mr. Peretz, it is quite right that the amendment to the turnover order and the consultation carried out was in relation to modification of arrangements pertaining to the operation of the Competition Act and the role of the OFT more generally in relation to what was referred to as the "modernisation regime", Regulation 1 of 2003, where there is a decentralisation of the application of what was Articles 81 and 82, so that, rather than the European Commission having full control, the authorities of Member States could enforce these matters more fully and more completely than had previously been the case.

One of the things that was noted was, of course, that the arrangements being put in place here ensured that there was a consistency in maximum penalty because that was the way that the Commission approached matters.

It is worth bearing in mind that the Commission does have an arrangement under the current guidance whereby the maximum penalty that it can impose is set by reference to the year of turnover, which is the most recent year, the year prior to decision, but it does use in its methodology, which is slightly different from that of the OFT, at an earlier stage the ability to focus on an earlier period of turnover. It might be worth turning this up for reference. It is in volume 12 at tab 171.

THE CHAIRMAN: This was presumably explicit?

MR. BEARD: Precisely my point, you anticipate the submission.

THE CHAIRMAN: That makes a change. Tab what?

MR. BEARD: It is volume 12. First of all, it is worth noting that this set of guidelines was promulgated in 2006, so they were some time after the modernisation regime was brought into force. I think it was highlighted in previous cases. In fact, the European Commission and the European institutions since 1998 had applied the guidelines that are found at tab 167, which were very different from the schemes of penalty arrangements that are now operating. Just dealing with the 2006 material, if one turns on two pages to para.32, what you have is the legal maximum being defined. If one then goes back to para.13, which is under the sub-heading "Basic amount of the fine", it is akin to the starting point mechanism, but it is different from the way the OFT deals with it. What you will see there is a specific separate articulation of the considerations on turnover that the Commission may take into account. (After a pause) So here you have a situation where, in order to have the possibility of differential turnovers being used at different parts of the calculation structure that the Commission has adopted, you have very specific wording referring to that in para.13. It is worth bearing in mind of course that the definition in para.13 is different from that Mr. Peretz refers to and contends for, which is just the last business year prior to the infringement.

THE CHAIRMAN: That is the last full business year of participation, is it not?

MR. BEARD: It is the participation point. It is a slightly different point of reference. Under the 2000 order, it was the last financial year prior to the end of the infringement. It may be that the two things would end up being similar, but the language is undoubtedly different. The point is a simple one, however: in order to get a situation where, within a scheme of guidance, you use different turnovers you really need to spell it out clearly.

Just in passing, Mr. Peretz made an assertion that the Commission – I may have misunderstood him, but on this side we understood him to be saying that the Commission had always used pre-infringement turnover as the basis for the methodology of it carrying out its penalty assessments. We do not believe that is correct because prior to 2006 you had a very different scheme of assessment criteria which are set out at tab 167. The Tribunal may recall, because it was referred to in an earlier case, that actually what happened there was that you had to slot an infringement into one of three categories, minor infringements, serious infringements and very serious infringements. It may be that in some cases pre-infringement turnover was used, but we are not aware that there was not a consistent practice to that effect.

MR. PERETZ: If I can assist the Tribunal, I was referring actually to a further set of guidelines, which I have just checked are not actually in the authorities bundle, which was pre the 1998

ones, and my recollection is, and we can double-check that over the adjournment, is that those pre-1998 guidelines were, in fact, based on relevant turnover. I entirely agree that the guidelines in force between 1998 and 2006 ----

MR. BEARD: I am grateful to my learned friend. It may be that there is no real issue. I was just concerned that the Tribunal should not be under illusion that there was a consistent practice.

THE CHAIRMAN: The 1998 EU Guidelines are consistent with what you are saying, are they not?

MR. BEARD: They are consistent, but I do not rely on them. They are so very different in the way that they approach this matter from the way that the OFT has done so right from 2000. So you had a situation from 2000 onwards where the OFT had a five step process that it was adopting, albeit using "the last financial year prior to the end of the infringement", because that was the old turnover order, but a five step process akin to the one used now, whereas the Commission was using a wholly different methodology as set out in the 1998 guidelines. So there are differences in the way that these schemes operate. In a way, the Commission has moved towards the methodology of the Office, albeit that there are distinctions and one of them is that it does specifically refer to using different measures of turnover.

THE CHAIRMAN: Yes.

MR. BEARD: Simply to amplify the point that, Mr. Chairman, you made earlier, that one needs specific language in order to be able to deal with these things.

The principal reason why Renew has sought to raise an argument that actually this term "last business year", which we say is very clear, means financial year before infringement or business year before the infringement is because in the guidance that operated from 2000, in the light of the turnover order, the term "last financial year" was used to apply to the last full financial year before the end of the infringement. There is no dispute about that. That is the way that the OFT proceeded both in relation to step 1 and step 5. It goes without saying that there has been a slight shift in the terminology from "last financial year" to "last business year". We are not suggesting that that produces some vast different effect in terms of the change in language, but it does highlight that it is not just the same term used in one set of guidance and then in the next.

Secondly, the interpretation of those words was in a different context, and it does not alter in any way the interpretation of the phrase "last business year" now. Similar words used in two different contexts may connote entirely different things.

As I have already said, thirdly, the 2000 penalty guidance was applied by the OFT at a time when the original version of the turnover order, the unamended version, which is found at tab 7 of bundle 1, was in force. If one turns to p.2 of 6, one can see under Article 3:

> "The turnover of an undertaking for the purposes of section 36(8) is:
>
> (1) the applicable turnover for the business year preceding the date when the infringement ended …"

So those were the operative words and that the approach that was applied to the interpretation of "last financial year" both in step 1 and in step 5 in the 2000 guidance. So it is very different from the original version of the Turnover Order, the situation we are now, where the maximum penalty which the OFT may impose is limited by reference to the turnover of an undertaking in the year preceding the OFT's infringement decisions.

Fourthly, as has been noted in the defence at para.60, there has been no change of policy by the OFT in relation to interpretation. It has consistently interpreted the words in step 1 as meaning the same thing as the language used in step 5. That is not to say that it is somehow resiling from the ordinary language meaning. Mr. Peretz tried to set out three interpretations. We stand very strongly on ordinary language and consistency as being key determinants of how you interpret this, but we do note that the criticism that the OFT has somehow flip-flopped in its approach is not correct, it has approached this on a consistent basis.

Fifthly, Renew has relied on one particular footnote in the 2000 guidance, footnote 6, that Mr. Peretz took you to. It is not part of the current penalty guidance. Indeed, that footnote only points out that the turnover used to calculate the starting point is restricted to turnover in a relevant product and geographic market, whereas the turnover specified by the statutory instrument under s.36(8), and used to apply a cap at step 5, is not so restricted, so it is not defining things in the way that he would like them clarified and defined for his argument in any event. Certainly the footnote does not exclude the point that it may be logical and desirable to use a year of turnover at step 1 which is consistent with a year of turnover at step 5, and therefore using the same turnover throughout.

Sixthly, turning to the consultative material that Mr. Peretz relies upon, first of all, he refers to the consultation report that he says that they have managed to dig out. It is, just for your notes, worth noting that the consultation document is actually found in volume 11, tab 134 of the authorities bundle, so it was not particularly well hidden by us.

The second document that Mr. Peretz referred to, which he referred to as an "explanatory memorandum", I was not quite clear whether Mr. Peretz was suggesting that that document

was an explanatory memorandum in relation to the amended Turnover Order. Without trying to suggest precisely what aids to interpretation of guidance one can bring to bear from other documents, because this is not *Pepper v. Hart* type material, it is worth noting that this explanatory memorandum that has been submitted is an explanatory memorandum prepared by the Department of Trade laid before Parliament. It is to do with the Competition Act 1998 Office of Fair Trading Rules Order 2004. It is tab 31 in the Renew bundle, it was the two added documents. If one looks at the title as to what this explanatory memorandum is, is not in relation to the amendment of the Turnover Order, it is the OFT's Rules. It is recognised that the changes to the OFT's Rules were made as part of a suite of changes that were required in the light of modernisation, and that the amendment to the Turnover Order was also carried out in the light of advent of modernisation. If one notes para.4.2 on the first page it says:

> "The 1998 Act has recently been amended by the Competition Act 1998 and Other Enactments (Amendment) Regulation … (' the Amendment Regulations') …"

That is the amendment to the Turnover Order. So that has already been done by the time this explanatory memorandum is promulgated. Therefore, the idea that this is a source of assistance in the interpretation of the Turnover Order is a little difficult to understand. Mr. Peretz took you to para.2.13 where he says that this is not highlighting the changes in the Turnover Order. That may well be so. Given the circumstances, that is wholly unsurprising. The fact that it says that the relevant market assessment will remain a key element in the OFT's calculations, again does not tell you anything about what the term "last business year" was intended to mean. It is quite right that when one uses "relevant turnover" in these circumstances one is focusing on an aspect, a metric, for the assessment of a broad sense of seriousness and harm by reason of an infringement.

That does not assist, and neither does the consultation document. It is quite right that the consultation document does not talk about last business year, save in almost identical terms to the guidance, because it is a draft that was put out for consultation. We will of course check responses, as has been requested, but it does not assist Mr. Peretz one iota. Even if it is an admissible aid to interpretation, precisely the same arguments would be made about the consultation paper as are made about the guidance itself.

THE CHAIRMAN: Of course we are then left with the later question of whose last business year – the Bullock point.

MR. BEARD: I will come on to that. It is not so much Bullock, it is whether or not Renew's last business year should be included with Bullock's, not whether or not Bullock.

THE CHAIRMAN: We will park that until you get to it.

MR. BEARD: There is no challenge there, the answer is pretty straightforward, there is no challenge to the fact that it is parent and subsidiary, it is part of an undertaking. There is actually no challenge to the idea that Renew can be an addressee in those circumstances. If Renew is to be an addressee in those circumstances, there is no reason why one should be adopting a different methodology in relation to it. The fact that it sold Bullock in the interim does not change the basic sense and consistency of approach that is entirely appropriate to these turnover assessments, but I will come on to it.

THE CHAIRMAN: Let us park that for the moment.

MR. BEARD: Seven, adding the reference to the Secretary of State as the approver of the guidance adds nothing to any of the interpretative points.

Eight, nothing to suggest calculation of the starting point at step 1 of the penalty must be based on turnover in the year prior to infringement rather than the year prior to decision. First of all, that would override the plain language arguments that have already been put forward but it is just a plain strange argument if you consider it in the context of these sorts of cover pricing infringements. To be arguing that turnover in the year before the infringement, which by its very nature is not going to have been affected by the infringing conduct, is, by its nature, a better measure of turnover for the step 1 assessment if an aspect of seriousness is to be considered. In any event, the step 1 process uses relevant turnover linked to a percentage as a measure of seriousness. It is not a precise metric, it has never been suggested as such. In particular, where you are looking at an object infringement, as you are doing here, you are not making an assessment of impact, it is a broad measure. The idea that if step 1 is intended to capture some measure of seriousness by reference to a relevant market, it must, therefore, be turnover in the year before infringement simply does not stack up.

As to the fact that turnover changes over time, the OFT accepts that. It recognises that turnover is not a perfect measure, but that is because it is not intended to be. We recognise that variations in turnover may mean that figures used are some period after the infringements, but of course fluctuations in turnover can occur before the infringement occurs as well. So Mr. Peretz's alternative interpretation would suffer with these difficulties. Mr. Peretz says, "It would be much nicer if the OFT got on with these things and there was not a big lapse of time between the infringement and the final outturn decision". It is worth pausing on a couple of points there. First of all, we find out about infringements and then we get on with carrying out our preparation, our investigation. That

investigation can be very substantial, as it was in this case. It takes a long time. Secondly, in the course of the investigation, we are not necessarily just finding infringements just at the point of the start of the investigation, we may be picking up historic infringements. There is nothing that is improper about a situation where one assesses these matters in a consistent and fair way by using a consistent measure of turnover.

Finally, it is right that you have to look at the penalty process in the round. Making comparisons of the position after step 1 and identifying particular comparators, as Mr. Peretz sought to do, certainly in relation to hypothetical comparators, is not of assistance. If other material considerations, such as adjustments for deterrents or capping mechanisms would operate to change the comparative outturn penalties.

Sir, that takes us to the next of his arguments which relates to MDT, unless, Mr. Chairman, you wish me to deal with the Bullock point first?

THE CHAIRMAN: No, do it in your own way.

MR. BEARD: I am simply following the ----

THE CHAIRMAN: Yes, it is easier if you follow the same sequence.

MR. BEARD: MDT is a matter that has been set out and considered in some detail in the defence at paras.99 to 116, and in our skeleton at paras.50 to 44, and it is common ground that the OFT adopted a systematic policy of applying the MDT in relation to all the undertakings covered by the decision. It has been consistently applied by the OFT in this and indeed in other collusive tendering cases, not just that which appealed in *Makers*.

The OFT does not accept that its policy is in any way inconsistent with the penalty guidance. Mr. Peretz seems to try to draw a distinction between the meaning of the term of the term "adjustment" and the system that was put in place to adjust penalties by reference to the MDT. This is just a distinction cannot be sustained. If you have only got one infringement involving one undertaking you make an adjustment only in relation to it. If you have got a multitude of undertakings with a multitude of infringements, but they have a range of common features, in those circumstances, in order properly to discharge your policy of ensuring specific and general deterrence, make adjustments, but you do take into account the principles of equal treatment and consistency that Mr. Peretz prays in aid in relation to the other limbs of his argument. If we started putting in place *ad hoc* arrangements for notional measures of deterrents in respect of particular undertakings we would be castigated on the basis that we were not acting fairly. So the idea that an adjustment that in particular ensures general deterrence because you are sending a signal out to other undertakings that if they engage in this sort of activity they will be severely

penalised, the idea that somehow that systematic approach is not an adjustment and therefore falls outside the guidance is simply not using English as the language to read the guidance with.

Unless, Mr. Chairman, you want me to go back to the particular terms of the guidance, it is perhaps just worth noting for your records that the relevant paragraphs are 2.11 and 2.12 and the fact that it says the assessment of the need to adjust a penalty will be made on a case by case basis for each individual infringing undertaking does not mean that the OFT can ignore the broader principles of public law that must apply to it – in other words, principles of equal treatment.

As to the idea that the MDT is now the only way in which the OFT will proceed in relation to considerations of deterrents that is just an unfounded submission. It should not be assumed that MDT or indeed an MDT at this level will be the manner in which the OFT ensures deterrence. The question is whether it was within the scope of the guidance for the OFT to do this, was this a fair way of it ensuring the policy objectives of general and specific deterrence here in this decision. The OFT considers that this particular case is similar to those in which it has applied an MDT previously and it has used as a benchmark the way in which MDT has operated in other collusive tendering cases, and we think, therefore, that a similar level of MDT is appropriate. I have cited the paragraphs of the defence, particularly 99 to 107, where the account is set out.

In Renew's skeleton it characterises the OFT's approach, and Mr. Peretz has repeated this, the MDT effectively wiping the slate clean in relation to these matters. That is just wrong. This will of course be one of other components of the penalty setting strategy that will in the end set the ceiling of he penalty, but it is not right to say the MDT wipes the slate clean. If you are a case, as we have seen in a number of these appeals already, where you have a significant relevant turnover, in many cases you will not have an application or enhancement by reference to the MDT, indeed those parties are coming round and saying, "Well, actually, we should be down at the level of MDT". So the idea that the MDT is the driver in all cases and wipes the slate clean is wrong. As I have already adverted to, if the step 1 and 2 penalty figure is sufficient to ensure specific and general deterrence then MDT is not going to be necessary, it is a minimum deterrent threshold, it is not wiping the slate clean.

The idea that there is any difficulty with the case of *Makers* or that *Makers* is being treated as a rubber stamp is quite wrong. There is no rubber stamp being applied. *Makers* is not the universal way in which the OFT must, in all cases, apply a deterrence consideration.

The suggestion that the fine in *Makers* was effectively a parking fine, Mr. Peretz must park in rather more expensive places than I go to, but nonetheless his low penalty was necessary of an uplift because otherwise people would laugh. That is what deterrence is all about. The key thing was, how far was it reasonable, sensible and proportionate and rational to raise that penalty to what level and there the methodology used raised the penalty to a point where it hurt, people did not laugh about the penalty in *Makers*. They thought this was a serious matter and that is precisely what the OFT wants to achieve and that methodology is rational, fair and appropriate here. If you commit infringements of competition law you must accept that you are going to feel the pain of a significant penalty and it will act as a deterrent to you and to others contemplating similar activity.

Other points in relation to the MDT are dealt with in the skeleton argument, and unless I can assist particularly in relation to those matters, I will not traverse any further points in relation to MDT.

THE CHAIRMAN: No, thank you.

MR. BEARD: I will move then to the position in relation to Bullock. The first argument in relation to Bullock, the principal argument, is that Renew, as the parent of Bullock and Allenbuild, was included as an addressee in the decision but it should not have been included as an addressee in respect of Bullock. Renew does not dispute that addressing a penalty to a parent of a subsidiary which committed an infringement is wrong. That is perfectly sound in principle, it is a function of the way that competition law operates in recognising single economic undertakings, which can be constituted by parents and subsidiaries. Instead the argument is simply that the OFT's treatment of Renew is discriminatory because if differs from the approach taken by the OFT in particular in relation to Strata Homes.

It is worth enforcing that the OFT has in the decision systematically addressed penalties to parent companies as well as their subsidiaries. There are more than 50 cases where liability was imposed on both parents and subsidiaries in an undertaking, a proper and reasonable approach. The fact that that approach was not adopted in *Makers* is neither here nor there. It is worth noting that in *Makers* the penalty was imposed on the relevant UK parent, not the overall worldwide parent, but that makes no difference in relation to this matter, it is a lawfully adopted approach that has been followed by the OFT.

When one comes to look at the distinction that Renew tries to draw here in the face of a multitude of parties – indeed, possibly the majority of infringements being directed to parents and subsidiaries – what Renew says is that there is a difference because Renew has

sold Bullock since the infringement. But it is still the case that at the time of the infringement Renew and Bullock were part of the same undertaking, and it is still right that, as a matter of law, Renew can be the addressee of the penalty because they were the same undertaking at that time. Indeed, we do not understand that to be contested.

The approach of a fine to Renew as a former parent is the same approach that was adopted in relation to three other cases, Crest, Pearce Holroyd and JJ McGinley. It was not the approach that was taken in relation to Strata. So four groups were treated in the same way as, Mr. Chairman, you recognised earlier, one was not. Why was that? There is no doubt, there is no contention, it was an oversight on the part of the OFT. It was a mistake. It was not that there was a good reason for treating Strata Homes differently, we made a mistake. The fact that in one case there was different treatment of a comparable situation does not mean that there was unlawful or unjust discrimination. Renew says you can have discrimination against more than one person. True enough, but there was not actually discrimination, we did not treat one company differently by reason of any particular characteristic, it was simply a mistake. So Renew is really saying, one person was treated differently, not for a reason but because of the principle of equal treatment, even though it was not a systematic application of policy or methodology, and you must say that in these circumstances its penalty must be ratcheted downwards, Renew should be removed from equation.

Where does this ratcheting downwards effect if Mr. Peretz is right about his approach to the principle of equal treatment? Let us assume there was a mistake in the starting point percentage, what I think traders refer to as a "fat finger error", where you put the wrong number into a spreadsheet. Let us say that one of the 103 parties, instead of it being a 5 per cent starting point, 3 per cent was fed through. Is Mr. Peretz really saying that that error means that all of the 102 other undertakings must all now be treated as having a starting point at 3 per cent? Is that really the principle of equality at work? We say it is not, there is no authority that the principle of equality requires such variations to be made when a mistake has occurred. The principles of equality and non-discrimination are intended to protect people from systematic disadvantage which is unjustified. They are not a means by which the lowest common denominator comes to be the operative standard in any case.

THE CHAIRMAN: In a discriminatory situation what you are saying really is that there has to a cognitive process in relation to all the relevant parties, and a mistake is not a cognitive process. That is what it amounts to.

MR. BEARD: Yes, one can cut it either that way or say there is no injustice, which is the way that, Mr. Chairman, you put it in a question to Mr. Peretz earlier.

THE CHAIRMAN: I think real complaint here, and we may be back into skinning cats which we discussed before, a phrase I rather regret as a cat lover, but I think, in a sense, what Mr. Peretz is saying really is that it just produces a hugely unfair result, as he would say.

MR. BEARD: That is a very different argument, because there we are into a different world of, well, you could have a big sniff, if you breathe in deeply, this smells wrongs and because it smells wrong you should do something about it. Let us ignore the fact that we have set up a reasonable process, we have adopted reasonable principles, we have thought about the principles of consistency and equality that we have worked through this penalty process. If you have a sniff, it does not smell right and therefore you should do something about it. That is a very different argument from saying, as a matter of law Renew should not be here, and that is how Mr. Peretz is putting this. As a matter of law he is wrong. Renew can and should be there. The fact that Strata Homes was missed out is no justification for ratcheting downwards. The reliance that Mr. Peretz places on *Argos* does not assist him. What he does is he tries to move from *Argos* does not assist him. What he does is he tries to move from *Argos*, which was a very different situation which related to a party which had been subject to detailed investigation, *Hasbro*, because if one recalls what was going on in that case was what was referred to as a "hub and spokes" cartel or concerted practice, where you have vendors of toys, Littlewoods and Argos, who were alleged to be communicating through Hasbro, the toy manufacturer, and that that was an ossifying price competition between the retailers because of the communications and the exhortations that one retailer was making to Hasbro, that it should put pressure to maintain retail prices elsewhere. So the hub was Hasbro, at the end of the spokes were Argos and Littlewoods, and what was being said was, Hasbro got too much of a leniency discount there, because actually it was the ringleader. It was the hub but it was also the leader, and therefore it should not have got 100 per cent immunity, it should only have got 50 per cent. In those circumstances, after all this investigation, the OFT made a wrong call in relation to its leniency application. That is a vastly different situation from the one that we are dealing with here. The Court of Appeal recognised that. I will just give you the references, in particular 250, 253 to 254, it recognised that it was a very, very different situation where a detailed investigation had been undertaken and the Court of Appeal at 260 made it clear that the argument could only succeed because Argos and Littlewoods were able to rely on the OFT's findings as to Hasbro's conduct. What it is important to bear in mind is that, of course, not only was this a

very, very different situation where a specific application of policy had been made which was considered unlawful, but of course what the outturn of the Court of Appeal's decision was was not that there should be any variation. So, strictly speaking, this analysis is at least *obiter*.

In any event, all of this is somewhat beside the point because in *Makers* at para.138 onwards there is a detailed analysis not only of *Argos*, but of the underlying case law from the European Community Courts, the Union Courts now, dealing with how these sorts of errors, mistakes, differentiations, should be dealt with, and the majority reasoned through, in particular at paras.164 to 167, setting out extremely clearly why it is that in the light of the relevant case law the fact that in that case an error on turnover had been made in relation to another party did not mean that *Makers* could get the benefit of that. It did not accept that there should be a rounding down. It was no part of the principle of equality or non-discrimination.

Mr. Chairman, you have put the "everyone's speeding: I got caught; that's not terribly fair" example to Mr. Peretz (I paraphrase slightly). Mr. Peretz tried to deflect the analysis of that by conjuring the tension between the principles of equality and the principles of legality. In doing so he emphasised the fact that the OFT has a discretion as to how it fines. We recognise that the guidance that we are required to follow does give us discretion – a margin of appreciation is the phrase that has been used repeatedly in relation to how it is applied.

THE CHAIRMAN: Just as a police officer might decide to target young men in sports cars!

MR. BEARD: You anticipate me. And the tax man might the people with the bling and the yachts!

THE CHAIRMAN: I would not know about that! I leave that to the competition lawyers!

MR. BEARD: We do our very best.

THE CHAIRMAN: Some certainly do.

MR. BEARD: These are discretions. There is a discretion there. The key issue is had there been a lawful imposition of penalty in relation to Renew? Yes, there had, because of the concept of an undertaking. That is not challenged. That is the principle of legality that is in tension, in Mr. Peretz's world with the principle of equality. Actually, that case law that considers those matters were considered by the majority in *Makers*, and the correct conclusion was reached. So in those circumstances, *Argos* does not assist, *Makers* majority provides the answer. The alternative conclusion, which was the outturn of the dissenting judgment, would result in quite ridiculous conclusions and clearly unfair and unjust conclusions as to

how regulators should operate and modify a situation if there were difficulties, errors made in relation to the carrying out of an investigation.

It is worth bearing in mind: this is a massive investigation, as you know from having to lug the decision around. The decision itself is an enormous beast. The decisions sets out the scale of the investigation and how it actually had to be narrowed down in order to make it feasible. The possibility of a mistake occurring in those circumstances and then being used to unravel potentially vast numbers of the other decision is quite a wrong conclusion.

That, then, takes me to the subsequent submission that is made that: even if it is right that Renew should be included, even if my legal arguments are all failing, nonetheless it feels a bit wrong that a parent should be included. Well, of course parents do not like this. Parent companies say: it was not really our fault. That is not competition law. Competition law says if you are a parent of a subsidiary committing an infringement you are responsible as part of that economic undertaking. You run the risk, if you do not manage your subsidiaries in such a way as to avoid these risks, and you remain liable. So the idea that there should be variations and there should be modifications because you are a parent company is simply not borne out.

Of course companies grow, they change in size, they shrink, they grow by acquisition, they shrink by selling, they grow organically. There is a whole range of dynamics that can cause a change in size of companies and their turnover. But the fact that Mr. Peretz adverts to, that the company in question has grown by acquisition and therefore has a larger turnover which is susceptible to the fair and consistent approach that was adopted for the penalty guidance is neither here nor there. When one steps back and looks at the policy approach that the OFT is legitimately pursuing, looking at step one in relation to impact but also the deterrence, the idea that you should ignore the fact that a company has grown its turnover in considering those specific and general deterrents is just not consistent with that policy. The deterrence aspect of that policy is key. The company, as it is now, needs to feel some sort of pain. If it has grown substantially, that means that the financial penalty is going to have to be larger in order for that pain to be felt. How it comes to be larger is beside the point. I leave to one side quite how it would be ever that the OFT could start engaging in these comparative exercises about what was and was not growth that should or should not be taken account of in relation to the turnover. So though tempting, this notion that one can smell justice on the face of a penalty and make some sort of adjustment, in fact when one goes back to the methodology and the policies that underpin it, there is no basis for Mr.

Peretz's submission that in any event Renew should get a bit less. That is not the right approach.

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

THE CHAIRMAN: Thank you. Mr. Peretz.

MR. PERETZ: I am conscious of time, so I will try to brief. In relation to the point of construction of the guidance, one could take the construction of the 2004 guidance in two ways. One can take the linguistic approach and one can stand back a bit and look at the overall context. In relation to the linguistic point, I simply repeat the points that I made earlier. It is very odd for a definition of a term at step 5, a term which is defined in relation to step 5, to be governing in relation to the use of a term rather earlier in the document. There are a number of ways of addressing this, but one would expect, if the term was going to be consistently used, that it would be defined either the first time that it appears, or defined by reference to a footnote or glossary. If a term is used and then used at a later occasion, and then defined in relation to that later occasion, to put it at its lowest one would not automatically as a matter of language assume that the definition applicable to the second occasion was necessarily to be applicable to the point at which the word was first used.

One has to stand back and just look at the logic of all this, and the background to all this. The background to all of this is that you had had a situation where exactly the same term in the 2000 guidance had been interpreted in effect as meaning that pre-infringement turnover was to be used. That was the context that people had become familiar with. You have a background of a Commission practice of using pre-infringement or last year of infringement turnover rather than turnover before the decision was taken in relation to the equivalent to step 1, despite the fact that at all times, both under the old regulation 17 and the new regulation in 2004, turnover cap has been calculated by reference to the turnover in the year before the decision for obvious reasons that I mentioned earlier. The purpose was to stop undertakings going bust as a result of penalties imposed on them. So you have that background, you have Commission practice, you have the OFT's practice. You have to look at what was happening against that background.

Sir, you asked a very good question in relation to what the reaction of consultees was. Obviously, we do not know; we do not have access to the documents and the OFT will look at it. I hesitate to speculate, but it may well be that one finds that there is no mention at all of this point anywhere in the responses to consultation. The natural explanation of that is that nobody thought any changes were being made and the interpretation was the one that I am proposing. The reason why I suggest that is actually the more natural one is again one

has to stand back and look at where all this fits in. There is simply no logical basis in terms of seriousness and harm – the sorts of things that the OFT relies on when it is explaining how it goes about looking at the step 1 calculation, what the step 1 calculation is supposed to be about – for assuming that they are in any way represented by turnover in the relevant market years after the event.

That is not meant to be a criticism of the OFT that the decisions it takes are often some time after the event. We all know the constraints the OFT is under. But that is indeed what happened.

THE CHAIRMAN: If the company takes part in an infringement, one assumes there might be some benefit from the infringement. If there is to be a penalty for the infringement, logically that should take into account a year of turnover (if we are looking at turnover) in which there was some benefit. Equally logically, that year is going to be the year after the infringement rather than the year of infringement or perhaps the year of infringement. It is certainly not going to be the year before infringement.

MR. PERETZ: Obviously, one is dealing with rough and ready rules here. Obviously there are going to be exceptions, and of course guidance admits a certain amount of exceptions anyway. I think what one can say with a certain amount of confidence is that turnover in the year before the infringement – which is going to be no more than a year away from the infringement by definition – is likely to be rather more reflective of, for example, the market power of the company at such time as the infringement took place than turnover many years later.

One of the ways of looking at this, if you are dealing with a sort of classic cartel, the impact of the participation of a particular company, the degree to which the participation of that company was important or essential to the operation of the cartel is likely to be related to its overall size. Cartels will not work if the big players are not in there. So the participation of the big players is crucial. It makes perfect sense, as a starting point, to assume that the seriousness of an undertaking whose turnover in the relevant market is twice that of another undertaking is probably twice as great. Also, but again as a rough and ready approximation, if you have a classic price fixing cartel, the effect of which is the price is 10 per cent above competitive levels, then the gain of an undertaking whose turnover is twice as much as another undertaking is likely to be twice as much, because it will have sold twice as much product and got twice as much benefit.

Of course all these are rough and ready. Of course there is the wrinkle that you are taking the year before the infringement or the year of the infringement, but on a rough and ready

rule of thumb basis, it makes a certain amount of sense to look at the year before the infringement. There might be an argument to say the year during the infringement, although I would say the year of the infringement was better. But certainly, the year before the infringement is much more likely to be a good guide to the relative seriousness of the undertaking's participation, their relative power in the market, and the position many years later.

Another thing which is of importance is that the market may well have changed. Markets that we were all worrying about several years ago have simply vanished because the goods are no longer sold and no longer important. And markets that we never imagined ten years go or were hardly there, have suddenly become very important. So the seriousness of the infringement is going to be linked to the size of the market as well. Again, that is a reason for trying to be as close as possible to the infringement rather than years later.

Part of construing any document, and particularly a document such as the guidance which is not a statute, is to apply a certain amount of common sense. What would a reasonable competition lawyer, the sort of people who are likely to have been consulted; what would a reasonable Secretary of State advised by experts have thought all of this meant, applying a certain amount of common sense.

Our case is that quite apart from linguistic niceties, the common sense reading of it was that when the OFT said "last business year" it mean the year before the infringement.

THE CHAIRMAN: OK.

MR. PERETZ: Mr. Beard pointed out that in 2004 the Commission's guidance at that stage was not based on turnover in a relevant market because the Commission's 1998-2006 practice was to start off with the lump sum. That is of course right, but there are two points I would add to that. First, the pre-1998 practice had been to take turnover in the last year of the infringement as the starting point for the equivalent of the step 1 calculation. We do not have the Commission guidelines on the file, but if the Tribunal looks at the *Boël* case at 74, which is a case in 1995, so it is pre-1998 guidelines, one can see that that was the Commission's approach.

Secondly, even under the 1998-2006 guidelines, though in theory as a sort of starting point the Commission was starting off with this lump sum of €20 million for such and such an infringement, in practice what was happening was when the Commission was looking at cartels for a number of applicants, it would sort the participants into groups. It would do that by reference to the last full year of turnover in the relevant market. I think there is a

footnote which deals with sorting of undertakings into groups to reflect relevant power. The Commission was doing that by reference to turnover in the relevant year.

I have been trying to find an authority in the bundles, but I cannot at the moment lay my hands on one where it is clear that that is what was happening. I can tell the Tribunal, and I can produce it if necessary, I was involved in a case recently in the Court of First Instance where we were arguing about precisely that case and that was the Commission's practice at the time.

So competition lawyers approaching all of this would have started from a background where the starting point with which one was familiar from the European context in looking at turnover in the relevant market is turnover around the time of the infringement. I think that is part of the context in which one has to see this document.

Finally, on the DTI document, the explanatory memorandum, I may have slightly confused the Tribunal on the context in which I got this document. The explanatory memorandum is not itself important. The explanatory memorandum attaches a regulatory impact assessment, and that is the document I am relying on. The regulatory impact assessment was what it sets out as the DTI's assessment of what the modernisation package meant. It is, we say, significant that when it came to discuss the impact that the whole modernisation had on actual penalties, the DTI's essential point (and we have looked at the passage) was; we do not think it is going to make any difference because you have to dissociate the turnover cap from what the OFT actually does in terms of penalty.

The reason why that is relevant is because the Secretary of State had to approve this. It is slightly difficult some years later to work out exactly what the Secretary of State meant. We do not want to put this too highly, but this document produced by the DTI and laid before Parliament is at least an indication that that is the view that the Secretary of State and his officials took at that time. We therefore say that it is helpful.

Finally, as to the point that Mr. Beard made to the effect that turnover before the decision is more likely to reflect deterrence, the problem he has is that when the OFT's guidance talks about stage 1 it does not at that stage talk about deterrence. So stage 1 calculation is not about deterrence, it is about an assessment of seriousness and harm.

The second problem he has with that is that deterrence is presumably related to the overall size of the undertaking and not to the presence of the undertaking in the particular relevant market. This is a point Mr. Beard made forcefully about Renew in a different context. So it is quite hard to see why turnover in the relevant market some years later has any necessary

connection, even on a rule of thumb basis, to the deterrent impact of the fine on the undertaking.

Minimum deterrence threshold. Mr. Beard says that I have misread the word "adjustment" at stage 3. We have not misread the word adjustment. Adjustment means an adjustment. If the OFT had contemplated replacement, one would have more sympathy with the MDT argument. If the stage 3 guidance had said: if we do not like the stage 1 and 2 calculation because it produces a fine that looks a bit low we will replace it by one calculated on a wholly different basis, Mr. Beard would be home and dry. It does not say that. It says adjustment. The effect of the MDT in relation to the infringement that it penalises is that the whole basis of the calculation changes. Instead of the calculation ultimately being determined by turnover in the relevant market (which step 1 says should be the starting point) it is determined by something else; it is determined by worldwide turnover. So it is not an adjustment; it is a replacement by a wholly different calculation. There are all sorts of things that might be adjustments – multipliers – *Replica Football Kit* where various multipliers were applied. But it is not a replacement by a wholly different basis of calculation.

In relation to Mr. Beard's points about equal treatment, Mr. Beard took you to *Makers* and said that the majority have a careful analysis of the European case law and founded itself on that. The Tribunal has noted para.163 that the majority of the Tribunal expressly said: "We consider that none of the cases cited to us is precisely in point." So it accepted that the situation it was dealing with was not one where there was authority.

THE CHAIRMAN: Is this not a matter of common sense, Mr. Peretz? If cases A-E are treated on an equal basis with equal treatment but in relation to case F there is no cognitive process, then really you have to ignore case F in determining whether there has been equal treatment. If, on the other hand, cases A-F are all the subject of a cognitive process and the decision is quite different on case F, then you have an equal treatment point.

MR. PERETZ: There are a number of problems, if I may say so, sir. The first is of course one has to have an inquiry as to whether there has been a cognitive process. That is quite difficult for an appellant wondering whether to appeal a decision to work out.

THE CHAIRMAN: Given you are dealing with the OFT, but you were too polite to add! That was a joke!

MR. PERETZ: I am not going to comment!

MR. BEARD: I shall desist!

MR. PERETZ: Secondly, from the point of view of the applicant, I think Mr. Beard more or less in a way conceded that from the point of view of the applicant it is not much comfort to be told that it is the result of a slip in the keyboard as opposed to some sort of gross mistake like assuming that companies whose names began with R should be treated differently from companies whose names began with S. The consequence on the market is that their competitors are being treated differently and that is unsatisfactory and obviously potentially distortive of competition.

THE CHAIRMAN: Different treatment and equal treatment may be quite different concepts.

MR. PERETZ: We rely on the points made by the minority in *Makers* and on what the Court of Appeal say. The question is whether there is an unjustified difference of treatment.

THE CHAIRMAN: You might want to come back to this this afternoon. Your very experienced instructing solicitor, I think, may have something to say to you about this from his body language!

MR. PERETZ: I am appearing for a different appellant for whom this particular point does not arise.

THE CHAIRMAN: You can come back.

MR. PERETZ: I am grateful for that, if I have anything further to say I will. What is interesting about it, and I will refer again to the way in which the majority approached this in *Makers* in their analysis of the case law, is (a) they were saying there is no case which is precisely in point; and (b) at para.162 they really made the point that I was trying to make about cases where there is a tension between the principle of legality and the principle of equal treatment, and the cases where there is not. They make the point (I am not sure whether there it is the majority or the whole Tribunal, it may be the whole Tribunal because the minority says he disagrees with para.163 and not with 162) that there are cases like *JFE Engineering* where the Court of First Instance did find that there had been a mistake. I am afraid I cannot remember the nature of the mistake in that case. The discussion in that case was: what does one do when one finds difference of treatment, given that the party that has been treated more favourably is almost inevitably not before the court. That is the position we are in here. Unsurprisingly, Strata Homes is not here, so the Tribunal does not have a discretion to increase its penalty. The only thing one can do to level the playing field is to reduce the penalty on those whose penalties have been put up.

In the *Hoek Loo*s case, which is the other case that the Tribunal looked at, which appears on one level to go the other way, because there the court of first instance refused to make the adjustment, actually what happened there is really an example of the legality point. The

complainant in *Hoek Loos* complained that, I think it is a company called *Harger Gas* had had its penalty reduced right at the end and it said that was unfair. But the reason why the penalty of the other company was reduced was because the maximum cap fit! It is slightly unsurprising that the Court of First Instance said you cannot really complain about that. The fact is that the maximum cap is a legal requirement, it bit on the other player, it did not bite on you and you cannot complain about that. So *Hoek Loos* is another illustration of the principle. What qualifies as the principle of equal treatment is the principle of legality.

Here it is accepted that the OFT has a discretion. It is not like a tax case where your tax liabilities are determined by what the tax law says and you cannot complain if you are asked to pay it. The amount of penalty that you, as a parent undertaking, pay is affected by whether the OFT decides to or decides not to exercise its discretion to impose a penalty on you. The OFT in principle acts entirely lawfully if it decides, as in the *Keller* case, not to do so, or only to do so to a limited extent, or in Renew's case it decides to do so.

The OFT could perfectly lawfully have said: we do not think it is appropriate to treat Renew in this way, having realised the mistake it made in a parallel and equivalent case. There is nothing wrong with that result, there is no tension with the principle of legality.

As I said, sir, the problem with the cognitive argument suggestions are that it bites all the sorts of difficulties that the minority identified: investigation, trying to work out, and in the end a somewhat unprincipled difference between cases where there happens to have been a cognitive error and there happens to be a gross mistake.

Sir, that is my reply.

THE CHAIRMAN: Thank you very much. We will resume at 2.15 if we may. That will give us time.

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