IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1131/1/1/09

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) ROBERT WOODHEAD (HOLDINGS) LIMITED
(2) ROBERT WOODHEAD LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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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: Sir, I am now appearing for Robert Woodhead (Holdings) Limited and Robert Woodhead Limited. As this morning, the Office of Fair Trading is represented by Mr. Beard and Mr. Woolfe. As you know, sir, Woodhead's grounds of appeal and skeleton argument adopt and repeat the submissions of Renew in relation to the year of turnover issue. Fortunately, that does not mean that I have to repeat what I said this morning about that issue.

That is subject to just one minor point arising, which is the position of the Commission in relation to its practice of choice of year of turnover. The position, in a nutshell, is this. Before 1998 the Commission's practice (certainly up until 1998) had been to take as a starting point of the methodology it tended to use the turnover in the relevant market either at the time of the infringements, or the closing year of the infringements. An example of that is a case we are going to come to in any event later. It is a case called *Boël v Commission* at tab 74 in volume 5 of the authorities bundle, which is a 1989 case. I do not know if the Tribunal wants to go to it or not, but the short point is that there you have an infringement that lasted between 1980 and 1985, (and we will come to the relevant paragraph later in a different context), the choice of reference year was 1985, so it was the last year of the infringement. The decision, as one can tell from the case number because of course the appeal was the same time as the decision, was 1989, some years later. That is the Commission's pre-1998 practice. We are all agreed as to what the post-2006 practice is because it is all in the 2006 guidelines.

Between 1998 and 2006 the position is a bit more complicated, and that is because under the 1998 guidance (as I have said this morning) the Commission proceeded by taking a lump sum of so many million Euros as a starting point. If one reads the guidance, that is what emerges from it.

What actually happened in the period 1998-2006 is that the Commission, in cartel cases, tended to differentiate undertakings, when there were a number of cartels, into different groups. It had a higher starting point for undertakings in one group than it did for another. The basis upon which it assigned undertakings to different groups fluctuated a bit in the period after 1998, but by 2004 (which is where we are looking at) the practice had pretty well settled down. The Commission started by looking at relevant turnover in the market at the date of the infringement. The case that I referred to, that I don't have in front of me, was the *Industrial Threads* cartel decision which was taken in September 2005 (from memory). We will send a copy of that to the Tribunal. I know about that because I was involved in

the appeal against that decision. In that case, it is pretty clear when one sees the decision, what the Commission was doing. It assigned the undertakings to various groups by reference to relevant turnover and infringement. That reflects practice that had built up over the previous few years.

What one can say is that in 2004 a competition lawyer reading the OFT's guidance and the consultation document would have come from a background where it was fairly settled. The way the Commission went about things was to look at relevant turnover in the relevant market at about the time of the infringement. The short point one can make is given what the OFT now says the guidance meant involved, on any view, a departure from what the Commission has been doing since 2006, was in fact doing in practice in the period before 2006 and had definitely been doing before 1998 in terms of choice of reference year, one would have expected that to be highlighted to the competition law community as a distinct difference from what the Commission was doing. Of course, it is somewhat odd that the OFT should take a rather different approach from the Commission here. One rather struggles to find any reason why they appear to be different, particularly in the context of the modernisation regime the general purpose of which was to try to harmonise the approach to these things rather than create differences. That finishes off the year of turnover point.

I now turn to the particular situation of Robert Woodhead. I have called both companies together "Woodhead" for convenience. There are again three infringements, three separate tenders. As it happened, Woodhead was unsuccessful in relation to all these tenders. No compensation payments. Woodhead received cover pricing in all of the cases. This is not a case where it gave a cover price.

Woodhead is an SME in the jargon, a small/medium sized enterprise, a small company. It is a local construction firm based in Newark in the centre of the East Midlands. That is unfortunate for Woodhead, and I say it is unfortunate for Woodhead because as a result, all its turnover in the relevant product market falls within the relevant geographic market defined by the OFT, namely the East Midlands. Newark is right in the centre of that. Had Woodhead had the foresight to locate itself in Buxton or Derby, at the edges of the East Midlands, where a lot of its turnover would have been outside the East Midlands, it would have been treated rather less harshly.

The infringements are summarised in paragraph 8 in the Notice of Appeal and I do not really need to go to those. For the Tribunal's note the penalty calculation is at tab 6 of the

Notice of Appeal. Woodhead is not an MDT case, so the MDT point that I was arguing this morning in relation to Renew does not apply to Woodhead.

Apart from the points I was just making about year of turnover, there is a further aspect of Woodhead's position which conveniently allows me to develop the year of turnover point in a particular way of applicability to Woodhead. It goes on to a rather wider point that I am going to make. That is what I call the "spike point" if OFT's choice of year happens to fall in a year which is rather untypically spiked in turnover.

The OFT's approach that is adopted means that where turnover goes up and down from year to year the amount of the penalty that you will actually pay, the crucial input that goes into what Mr. Thompson in a different skeleton calls the OFT's "fining machine", the input into the fining machine critically depends on exactly when the OFT gets round to taking its decision, which was never anything that was in Woodhead's hands and, to some extent, not in the OFT's hands either.

If the OFT is blown off course, a crucial member of its team resigns, or there is a judicial review that slows things up, the consequences (because turnover then falls in a different year) can be quite radically different penalties as far as undertakings whose turnover is quite variable is concerned. Of course, in the construction industry, particularly in a small company like Woodhead which occasionally wins quite large contracts, turnover can vary quite a lot from year to year, particularly when you start breaking it down into particular sectors as the OFT has done.

If you go to paragraph 47 page 14 of our Notice of Appeal you can see the effect of this as far as Woodhead is concerned. These figures are, I think, (and Mr. Beard will stand up if I am wrong) correct. We understand that none of the particulars here are in dispute. In fact, I understand that the figures were in front of the OFT in one way or another at the time it took its decision. Again, Mr. Beard will correct me if I am wrong. What you have is the 2006, 2007, 2008, 2009 figures. One can see, if one looks at the left hand column, if the OFT had taken in 2006 the consequence in penalty in the right hand column in the right hand is just over £300,000. Similarly in 2007 and 2008. Because the OFT took its decision in 2009, the penalty after steps 1 and 2 is almost twice as high as in the previous years. That is because of the way that various contracts and projects panned out. Woodhead's turnover in the relevant sectors in that year was rather higher than it had been in the previous years.

It is not in dispute that that is not taken into account at all in the OFT's decision. In fact, I am told that the reason for the high figure in public housing, which is one of the sectors, is that there was a particularly large project in public housing in that year.

The first point one can make about that is it is an aspect of showing that the pre-decision turnover approach is misguided because it risks fixing penalty by relation to an untypical year which is far removed from the time of the infringement, many years later. To put it another way, I think at one point the OFT tried to defend its approach in terms of crystallising gain obtained from the infringement. Somehow the later the year the pre-decision turnover was likely to incorporate any gain. If that is right, the OFT's suggestion must be somehow that Woodhead's gain in 2009 is twice what it would have been in 2008. That is bizarre.

In any event, even if the OFT gets away with the year of turnover approach as a matter of principle, it should have stood back and looked at the consequences of that approach in Woodhead's case. It should not have adopted blinkers and simply looked only at the 2008 figure and not at the previous years' figures that it had.

What the OFT says in response to that (reference footnote 31 to paragraph 61 of the defence) is essentially that it had to put blinkers on because to take the blinkers off would have contravened the principle of equal treatment. But it is fairly trite that the principle of equal treatment does not require you to put blinkers on. Unsurprisingly, we say: you take the blinkers off and you look at all the relevant circumstances in the round.

A number of very skilled advocates in these appeals have made that point in all sorts of different ways. That is the essence of the points just made, by me and by a lot of other people. The fact is that Woodhead is simply not in the same position as an undertaking that routinely turned over £11 million a year in the affected sectors instead of just on a one-off occasion in 2008, having a relevant turnover of £11 million. The OFT should have taken a rather wider view.

THE CHAIRMAN: Just remind us how this spike was drawn to the attention of the OFT.

MR. PERETZ: What I have been told is that the OFT had the relevant figures, but I cannot remember off the top of my head whether we made a submission on that. Yes we did. I am told that the point was made. I was not involved in the case at that time. I am told by those who were that that is the position.

If one accepts some of the OFT's logic in defence of its approach, then why did it not look at the 2006 and 2007 figures? If it is right that an infringement causes a gain which is likely to be reflected over time, then the 2006/2007 figures are of equal relevance to the 2008

figures. Similarly, if the pre-decision turnover approach is defended on the basis that it will reflect far more gains from infringement, then equally the 2005, 2006, 2007 figures are going to be quite as relevant as 2008 figures. So we simply do not understand why the OFT says that it could only look at one year's figures.

That is particularly so and in another context you will see that there is a discussion about this in the skeleton arguments, when the OFT came to look at, for example, hardship, the OFT did stand back and take a three year approach. So it did not just go for one year's figures. It sensibly took the view that you had to look at a performance of an undertaking over time.

The other response of the OFT to this line of appeal, apart from the invocation of the principle of equal treatment, has been that by running this line of attack we are focusing too much on steps 1 and 2 and ignoring other later steps in the calculation. The problem with that argument is that the OFT simply has not done anything to correct the distortions caused by the choice of an untypical year. If one looks at the scheme of calculation, leaving out the MDT cases, the starting point is based on turnover in a particular year, and only that year. At step 3 nothing happens so there is no MDT. At step 4 there are a few adjustments up and down to reflect directors' involvement, cooperation and so on. Then the machine has churned out the penalty. The OFT simply does not do anything else to correct the results in virtually all cases. In very marginal cases, right at the extremes where one suspects the OFT has realised that the approach that is adopted has produced extremely odd results, an attempt was made round the edges to clip back a bit. So you have the overall cap on fine that nobody is going to be made to pay more than 4.5 per cent of worldwide turnover and that is applied to a few undertakings. You have provision for undertakings with hardship and that sort of thing.

So one gets the sense that the OFT realised that its method could produce very problematic results, but apart from a bit of fiddling round the margins in a few cases it has not stood back, looked at the results produced by its fining machine and tried to work out, in the context of particular undertakings, whether the result makes sense. A phrase used by Mr. Swift QC and Ms. Smith in their skeleton argument (and they will probably develop before you on Friday) is that the OFT simply did not stop and conduct a sense check to see whether the outcome of its fining machine made sense in the overall context. Certainly (I think it is beyond dispute) nothing was done to deal with the spike point.

In the skeleton arguments there is discussion of two relevant cases in the Community Courts: *Boël* in the CFI and *Fiskeby* in the ECJ. We have already had a look at *Boël*, but if

we go back to that case at tab 74 the relevant passage is at page 911 of the report numbering and paragraph 133. I would invite the Tribunal to read that. (Pause)

I do not think the OFT really disputes this. What one sees there is the Court of First Instance looked at the position and it said the Commission should have taken into account the fact that for *Boël* the choice of 1985 as a reference here had a particularly disparate impact on it because its turnover in the relevant market at that time was high compared with other undertakings. The CFI says that the Commission should have accepted that, and its failure to do so called for a reduction in penalty. *Fiskeby* is broadly to the same effect. Obviously, there are certain differences to procedural context, but that is what the community courts are saying.

Of course, it is not always true that one has to look at a number of years' turnover. There are clearly cases where it is entirely appropriate just to take one year and ignore any minor differences there may be across years. In a situation like this one where there is quite a difference for a small company between 2008 and the previous years' figures, the OFT should have stopped and conducted a sense check. It is not part of the OFT's case that it ever did that.

THE CHAIRMAN: Your contention is that in this case, because it was drawn to the attention of the OFT that there was a spike, they should have been prepared to look either at a different year, or at an average of years?

MR. PERETZ: Yes, they could have done either of those. It could either have taken an average – taking a different year might not have been the right thing to do. Probably the right thing to do would have been to take an average. One accepts that there may be a rather rough and ready element in this. One was not expecting absolute numerical precision. They should simply have looked at it, said does this make sense, and knocked it down either by taking an average or in some other rough and ready method and made a reduction accordingly.

The point does not actually depend on what the OFT happened to know, of course, because this Tribunal has unlimited jurisdiction. In fact, the OFT did know and so I can put it as a criticism of the OFT that it did know and did not take it into account. Of course, it is entirely open to this Tribunal to say, even if for some reason we had not told the OFT about it, when confronted with the figures that this is a fair point and we are going to reduce the penalty on Woodhead accordingly.

THE CHAIRMAN: Just looking at the OFT for the moment, had the OFT, say, applied the total turnover in the three relevant sectors for 2008, which was not much more than a third of the equivalent figure for 2009. To what extent would that have permitted other undertakings to

complain that they had not had equal treatment because, in the case of Robert Woodhead the OFT had allowed the company to choose a year?

MR. PERETZ: That is one reason why I was slightly hesitant about saying that the right thing to do would have been to choose a year. One can see that it is not the right approach for an undertaking to be given the opportunity to choose their best year out of several. But my response to the rather broader point is that I think you are making is simply that if other undertakings were in an equivalent situation they too could have (perhaps did, we do not know) draw that to the attention of the OFT. If the point is good for Woodhead, it would be good for those other undertakings too. I am not arguing that Woodhead should be treated any more favourably than anybody else in a similar situation. I simply do not see that there is any equal treatment issue here. It may be, I do not know, that Woodhead was the only undertaking that spotted the point and made it to the OFT. That may be a criticism of the advisers of those other companies, I simply do not know.

Taking the point now more broadly, we have put the appeal on the basis that the overall treatment of Woodhead has been unfair and discriminatory in a number of respects, and we make it clear what we mean by that in our skeleton argument which makes what we call the central point. What has happened here is that the OFT's fining machine has had a disproportionate effect on Woodhead because of where it is and also the choice of year of turnover. To put it bluntly, Woodhead was in the wrong place and the turnover was at the wrong time. As a result, it has had particularly harsh treatment. It had turnover that was particularly high in 2008 and because it was based in Newark and was a small company, all its turnover was in the region chosen by the OFT as the relevant geographic market. It has drawn a series of short straws as far as the OFT's methodology is concerned. The result is that Woodhead finds itself, when you look at the penalty by reference to overall turnover, in the top bracket. From recollection, there are 69 other companies in a lower bracket in those terms, and only 27 above Woodhead.

That is a direct and inevitable consequence of two things. The first is that the inputs that the OFT puts into its fining machine are turnover achieved in somewhat arbitrarily defined product markets, somewhat arbitrarily defined geographic markets, an arbitrary number of years after the infringement. I made this point this morning. The choice of base simply does not produce a result which correlates with harm or seriousness or deterrence or anything else. It is simply decoupled from an assessment of harm because it does not look at the position of the undertaking on the relevant market at the time of the infringement. And it is decoupled from an assessment of deterrence because it does not look at the overall

size of the undertaking and leads companies like Woodhead, which have a disproportionately high proportion of their turnover in the relevant market, to unduly harsh treatment.

I cannot, at this point, resist quoting what the OFT says about these points at paragraph 42 of its skeleton in Woodhead. What it says is:

> "… the OFT does not argue that there is a necessary correlation between the seriousness of the infringements and Woodhead's turnover in the year prior to the Decision; [we agree with that, but add there is no reason to suppose there is any correlation at all] it does however, contend that applying a percentage starting point to recent rather than historic turnover, ensured that there would be a broad correlation between the seriousness of the infringements and the impact of the penalties imposed upon Woodhead."

I tell the Tribunal that I struggled rather hard with this rather Delphic utterance, but I simply cannot work out what it means. I rather wait with interest for Mr. Beard to tell me in plain English what on earth the OFT is trying to say here.

The first problem so far as Woodhead is concerned is that the input put into the fining machine results in Woodhead's unduly harsh treatment. The second problem is that within the fining machine, once the fining machine fires up and gets going it produces its calculations and out comes a number at the other end. Another simile used for this process is the "Procrustean bed", which simile struck not just me but other advocates with a Classical background perhaps. It simply treats everybody the same without regard to the relevant differences between them. Numbers put in, machine churns away and out come numbers at the other end which are simply then not subject to any form of sense check.

So the end result, as we pointed out at paragraph 5.9 of our skeleton and paragraph 39 of our Notice of Appeal, is that Woodhead has to pay fines that, judged by reference to a number of criteria including percentage of its total turnover, by reference to its profitability, by reference to its asset based, are much higher than other undertakings. What is particularly striking is that the result is that Woodhead is having to pay fines a percentage of its total turnover which are much higher than imposed on other undertakings that were involved in compensation payments, which the OFT rightly regards as far more serious. The comparison we make there is with Baggaley.

In our skeleton we make a number of comparisons with other companies on a whole range of different bases to show that if you cut the cake in a number of ways, Woodhead appears to have been fairly harshly treated. I also accept and entirely adopt the point made by Mr.

Thompson in his skeleton for North Midland paragraph 56 that as far as Woodhead is concerned what one ends up with is a penalty of several hundred thousands pounds, and that is a range which Mr. Thompson points out is, in the criminal context, regarded as appropriate for serious health and safety offences resulting in death. For a small company involved in three one-off infringements, each of which essentially consisted of receiving an ill-advised fax, not only killed no-one but cannot be shown even to have hurt anyone even financially, this is grotesque.

The OFT in its skeleton has been rude about a number of the ways in which we show that Woodhead has been harshly treated in comparison with others. Relatively few of those comparisons have been disputed on the facts. Of course, a single comparison against a particular measure of financial strength does not, on its own, show very much. But what we are trying to do – and one has to be a bit selective, otherwise the exercise goes on to fill the Royal Albert Hall – is look at a number of ways in which Woodhead have drawn the short straw and been treated harshly compared to others. It is all an inevitable consequence of the peculiar methodology adopted by the OFT.

At one point in its skeleton the OFT accuses us of asking a silly question and getting a silly answer. Our response to that is if you use a silly methodology you get a silly result.

What should the Tribunal do about it? The Tribunal is plainly not in a position to come up with a fresh methodology of its own. What we suggest is that the Tribunal exercise the jurisdiction that the Court of Appeal says it has at paragraph 231 of *Toys and Games* which we quote in full at paragraph 5.18 of our skeleton.

In essence, when a Tribunal takes the view that the penalty imposed is well above that needed for deterrence (and it is relevant to bear in mind at that point that the OFT thinks that 0.75 per cent of worldwide turnover is enough to satisfy the need for deterrence) and generally too high, the CAT should step in with its own broad assessment of a fair penalty. That is what we ask it to do in this case. Those are my submissions.

THE CHAIRMAN: I was just looking at the starting point. Do you have anything to say about the starting point? One of the things that has struck us in looking at these cases we have heard is that the 5 per cent starting point, and in relation to infringement 78 the 7 per cent starting point, seem to be accepted.

MR. PERETZ: Of the assessment of seriousness?

THE CHAIRMAN: Yes.

MR. PERETZ: We are not taking as a point the 5 per cent as such. The problem is the 5 per cent as applied to a rather daft figure, and that produces a result that is disproportionate.

THE CHAIRMAN: Of course, if a lower percentage had been applied to the same figure, there would have been a different result.

MR. PERETZ: Yes. I find it difficult to conceptualise quite how this would have been done, but if the OFT had produced its calculation and stood back and said: well, this looks rather high, let us go back and change the percentage up and down a bit so as to produce a result that looks rather more just, then that might have been a way of dealing with the situation. I am not sure it is the most obvious way of dealing with it, but it might have been a way of dealing with it.

THE CHAIRMAN: We are faced with a differing approach in differing cases from differing groups of lawyers, which is perfectly normal and no complaint about it. But in some cases the starting point is being questioned. The reason I raise it with you, Mr. Peretz, is you said at the beginning of your submissions this afternoon that they did not obtain any of the tenders?

MR. PERETZ: Yes.

THE CHAIRMAN: There is, as far as we are aware, no evidence of any advantage gained from cover pricing in relation to Woodhead, and we are aware, on the evidence we have heard in a number of cases, that it was a practice that was followed by quite a number of firms. Five per cent – 7 per cent more strikingly so – is at a particular point in a scale of 0-10 in terms of seriousness.

MR. PERETZ: We are not putting this as a challenge to the 5 per cent figure. It is an element of the assessment which the Tribunal has to make, whether the penalty is just too high (words used by the Court of Appeal). I do not put it as a self standing point that the 5 per cent figure is wrong. What I do say is that when one stands back and looks at the fact that Woodhead is having to pay a penalty of many hundreds of thousands of pounds, it is an element in the assessment. The background points about the infringement are part of that mix.

THE CHAIRMAN: I said in infringement 78 it was 7 per cent, that was because I had a misprint in one of the documents in front of me. It is 5 per cent.

MR. PERETZ: I hesitated.

THE CHAIRMAN: That is why I started to raise it, because I was puzzled by that, but even so, what you are saying is that even if we were of the view that the OFT had got it right in terms of its starting point for all the other issues you were not contesting the 5 per cent, as you are not, nevertheless we can come to the conclusion that although they have got everything else right, the figure of £411,000 is just too high and we have to correct it?

MR. PERETZ: Yes.

THE CHAIRMAN: On the grounds that it is just too high, even if they have got everything else right?

MR. PERETZ: Yes.

THE CHAIRMAN: It is not very satisfactory.

MR. PERETZ: I am not going to lie awake at night and worry about it, because I do not think it is a likely conclusion, but in that unlikely situation I suppose it is what I am saying.

THE CHAIRMAN: Right. Thank you very much. Mr. Beard. I should say that we have a navigation table from this morning's case that was handed to us. It has a bit of Miss Bacon's mark over it, but maybe she learned about this from you.

MR. BEARD: Oh dear! I do not think Miss Bacon is to be blamed for that one. We did have another navigation table for now, if that is of assistance. We do not know quite what you mean by the signature of Miss Bacon.

THE CHAIRMAN: It might be a house style. (Handed)

MR. BEARD: As I say, they flow on from the tables that were at the back of the consolidated defence. Sadly it does not vary with different versions of skeletons.

Before I turn to deal with last business year, just to pick up on Mr. Peretz wonderful example of fining practice in the Commission since perhaps the early 1970s, there is a degree of concern that actually that is not an accurate approach and assessment of what was going on in Commission fining practice prior to 1998.

One learned commentator, Mr. Van Bael, in 1995 wrote in the European Competition Law Review (ECLR) Vol 4 page 237:

> "The fining procedure before the Commission resembled a lottery with random figures simply magically appearing at the end of a decision."

There was no guidance prior to 1998. All there was was regulation 17/62 and Article 15/2 thereof, which placed a cap on the maximum penalty that could be imposed. As has been referred to before, this was at a time when strange notions of units of accounting were used. So:

> "The Commission may, by decision, impose on undertakings or association of undertakings, fines from a thousand to a million units of accounting, or in excess thereof, but not exceeding 10 per cent of the turnover in the preceding business year of each of the undertakings participating in the infringement."

So that was the only constraint. One of the systematic complaints about the way that the Commission operated through the 70s, 80s and 90s was that that operated, even subject to

the constraints of the court building up jurisprudence about reasons having to be given to some degree, as meaning that there was a great looseness in the way that the Commission dealt with matters and which figures it used and when. In the circumstances, this Tribunal really should not take as given the idea that there was a systematic approach to using a year of turnover prior to the infringement, or the year most immediately prior to the culmination of an infringement if it was a long running infringement, as being the consistent and unimpeached basis on which it was applied in many cases.

I will come on to *Boël* itself, but I think that the footprints in *Boël* do suggest that 1985 was the business year of turnover. It is right that the infringement ended at the end of 1995. Of course, it goes without saying that if you were taking last business year, or your last financial year, prior to the culmination of an infringement, it would not actually be 1985 ordinarily that you would take in those circumstances. It would be the 1984/1985 period. So that sort of systematic approach does appear to have been absent.

Then we move to the situation under the 1998 guidelines which are in the bundle, the first Commission guidelines that were in place. You have this vastly different structure to which Mr. Peretz has already referred whereby you identify in broad term where someone fell in one of three categories and Mr. Peretz is right that then relevant market turnover might have been used and the periods used could be those preceding infringement decisions. But to suggest that that was definitely the way that it was always applied I think would go too far in those circumstances. Evidence from the Bar as to the opinion that would be brought to bear on any interpretation by the notional objective competition lawyer (if such a thing exists) is a piece of evidence that this Tribunal should be extremely slow to accept.

With those points made – because they are only in relation to the Commission approach and are therefore to some extent a side issue – I turn briefly to the last business year. Given the way that Mr. Peretz has dealt with this there is little for the OFT to add in relation to how the guidance is to be interpreted. Those points were made this morning. I dealt with Mr. Peretz's arguments then.

The only point that I cannot resist making and goes to the second set of arguments concerned with Woodhead, is of course that Mr. Peretz laboured the fact that the guidance was binding, and the guidance had to be properly applied, and at step 1 he urged this Tribunal that there was no other interpretation of that guidance but that the year of turnover prior to infringement was the one that should be used at step 1. His case this afternoon is that some sort of aggregated system should be used at step 1. He goes on and has an additional submission that you should think about these things at the end of the process in

the round, but his preliminary submission was that you could take these matters into account and actually the OFT had been illegitimately applying blinkers in this regard. Of course, those two submissions are completely incompatible. We say he is wrong about the interpretation of step 1 and that it is not the year of turnover prior to infringement. We say the interpretation is clear. But we do say that it is a year, and that is what "last business year" clearly does mean. It means a year in the terms of the guidance. We do accept that we should apply that. Therefore, his idea is that we should be adopting alternative years, a blend of years, a mix of years, however he wants to put it. As, Mr. Chairman, you suggested, the difficulties or alluded to the potential difficulties of working out how you pick these things, particularly when you are talking about a large cohort of undertakings, as you do in this decision, what mechanism you pick and how you do it fairly at that step is a separate issue entirely. Nonetheless, that blended approach does not fit at all with the language of the guidance.

I turn to the points about Woodhead having an unduly high penalty because it achieved a very high turnover in the year prior to the decision. The OFT's decision to apply the same approach to Woodhead as it did to other undertakings was to ensure that there was consistency. The idea that this amounts to a breach of the principle of equal treatment is quite remarkable. Of course, Mr. Peretz says that the method adopted by the OFT was "mechanistic" or "Procrustean". Mechanistic is wrong. For reasons that have been adumbrated in previous hearings, the OFT considered whether there were relevant differences to be taken into account when it came to consider each of the steps, and decided that, subject to certain alterations, such as MDT and the penalty capping mechanism, there was not good reason to treat these cases differently.

As for Procrustean, whilst it is an elegant piece of classical criticism, it is just worth remembering what happened with Procrustes. He was a terribly hospitable chap. He kept a house by the roadside where he offered hospitality to passing strangers who were invited for a pleasant meal and a night's rest in his remarkable unique bed. Procrustes described it as having the unique property that its length exactly matched whomsoever lay upon it. What Procrustes did not volunteer to the passing travellers was the method by which his one size fits all was achieved. As soon as the guests lay down Procrustes went to work on him, stretching him on the rack if he was too short for the bed or hacking off his legs if he was too long, one way or another the guest was fitted to the bed.

Of course, that is not the case here. The OFT takes measurements. It takes recent measurements of the company and then, using its guidance process, builds the penalty bed

for the appellant to lie in. The measurement it uses is actually the total size of the company, the turnover, the height of the guest in Procrustean terms. What more considerate host could there be, that we tailor the size of the bed to the most recent measurements of height of the guest who is passing by.

So the criticism that we are Procrustean is just plain wrong. The OFT methodology had the effect of calibrating the effect of the fine on the undertaking according to the scale of its presence on the relevant market and, in broad terms, its scale prior to the decision. That is a reasonable approach for the OFT to adopt.

The OFT freely acknowledges that step 1 of its methodology considered in isolation was, insufficient to take account of all relevant differences between different undertakings. Indeed, if the OFT considered that a simple one step methodology was sufficient to do so, it could apply it. It would apply it, it would make the whole process a lot simpler. The OFT considers, however, that the full five step methodology which it is required to have regard to and as consulted on, as set out in the penalty guidance and as applied with the relevant discretion to the various steps, is a sufficient way of dealing with these matters.

So in so far as Woodhead's point is simply that its penalty was higher than it would have been had the OFT applied the same percentage to Woodhead's turnover in the year prior to infringement, the OFT acknowledges that such an approach has the effect of imposing larger fines in absolute terms on undertakings that have increased their turnover, as compared with those that have decreased turnover. Where an undertaking is larger, a larger fine is necessary to have the same effect on it in proportion to its ability to pay.

I understand that yesterday Mr. Robertson QC suggested that all parties, or at least appellants, were made worse off by using the year before decision turnover methodology. That is not correct. I understand from the Office that there are a number of circumstances where earlier turnover, if you had used the turnover in the year prior to infringement, would indeed have been higher than the relevant turnover and total turnover that was applied in the decision itself.

So it goes to the point that there are all sorts of variations and some people are winners and some people are losers where you use a consistent approach. We accept that, but it is consistent with our policy objectives that this methodology is used. The step 1 process focusing on seriousness, using a consistent method of identifying the relevant turnover to which the calibrated scale, which is not challenged, the setting of that scale, is applied, and in addition the final turnover maximum being by reference to turnover prior to decision is important in ensuring that deterrence as a policy is also being met.

THE CHAIRMAN: I understand Mr. Peretz to be saying that in this case it was so obvious that Woodhead's legs dangled far over the edge of the bed, taking that particular year of turnover, that the OFT should have considered it to produce a more, shall we call it, Procrustean solution.

MR. BEARD: It is a strange road to having your legs lopped off ----

THE CHAIRMAN: I think we have flogged this metaphor to death.

MR. BEARD: I do not if the Tribunal actually has the full copy of the defence with the attached annexes anywhere.

THE CHAIRMAN: Yes, we do.

MR. BEARD: It might be worth pausing here. Although Mr. Peretz seeks to criticise the Office for its use of the capping mechanism, and indeed the financial hardship mechanism as being wholly inadequate, actually what those mechanisms did was ensure that there was a broad band within which all the penalties fell by reference to a percentage of global turnover. The annexe I was going to take the Tribunal to was annex B. The tables in the back of the defence look something like this.

THE CHAIRMAN: Just pass one up and we will share it.

MR. PERETZ: I have got a helpful DLA A5 reduction, which I am afraid does cause a bit of eyestrain.

THE CHAIRMAN: That is very helpful. Can you just tell me where Woodheads in the otherwise illegible writing. I have got it underneath Robinson, above Richardson Projects. It is a percentage of what?

MR. BEARD: What this is is a percentage of total turnover, and you will see that each of the companies in question, or the undertakings in question, what you have is a left hand bar which is the penalty calculation after step 3 after adjustments, and the penalty at step 3 before the capping mechanism.

THE CHAIRMAN: It does not make any difference in this case.

MR. BEARD: No, it does not make any difference in this case. The point I am making here is that what one can see from this is overall a number of spikes. Those spikes only relate to the penalty after step 3 before the capping mechanism. So the effect of the capping mechanism was to draw those spikes down. What you get is a situation whereby all of the penalties fall within a broad similar spectrum. That illustrated perhaps clearly there if one turns on to annex C.

THE CHAIRMAN: It is just over 2 per cent of what?

MR. BEARD: That is global turnover.

THE CHAIRMAN: Of global turnover in the year chosen?

MR. BEARD: Yes, it is measured against the absolute maximum. If one turns on to annex C, what we have here is the pre-leniency or FTO discount penalty. This the penalties when the capping mechanism has been applied and adjustments, for instance, for director involvement, increasing a penalty, co-operation, reducing a penalty. What one can see there is about 20 down, again between Robinson and Richardson is Robert Woodhead. Mr. Peretz is saying that the outturns that come in Robert Woodhead's case is an outflier, this is extreme because of the way in which we have calculated this. As is evident from this, the outturn in the Robert Woodhead case is not an outflier at all. It falls well within the broad scope of overall percentage of global turnover that was the outturn penalty in a number of these cases.

THE CHAIRMAN: This is 2 per entire plus a little bit of the global turnover for that year, for the chosen year?

MR. BEARD: Yes.

THE CHAIRMAN: If another year was chosen it might be a higher percentage of a lower turnover.

MR. BEARD: It may well be.

THE CHAIRMAN: So it might be less net money.

MR. BEARD: It might be less net money, that is obviously true, but if one is looking at this by trying to identify the metric, one can see at the top of annex C the statutory fine cap at 10 per cent. Do you see the red line?

THE CHAIRMAN: Yes.

MR. BEARD: That is the statutory fine cap, and the penalties attributed are all well below that. The relevant comparator, if you are doing any sort of broad comparison, it must at that point, at the time when you are considering outturn penalties, be on that basis. Although Mr. Peretz says you can smell the injustice of using a particular year because the absolute level comes out higher than would otherwise be the case if you used a different year of turnover or a different blended year of turnover, those are not relevant comparators.

MR. PROSSER: What this does not show is the relevant market. As in the SME the relevant market being the regional market, they are all in the regional market, whereas a larger company, it is only a smaller part of their total turnover, is it not? Do you get the point I am trying to make?

MR. BEARD: It depends. It depends on the diversification. It is not necessarily the scale of the company. If you had a company that specialised in major construction work in London, for

example, then the geographical market would not mean that that company was somehow being dealt with differently. It is a question of the diversification, both across geographic and product markets, that is absolutely right.

MR. PROSSER: Yes, but a lot of the smaller companies, their geographic market has become their total market, has it not? In other words, if you take something like Kier, which is a national company, a company like Woodheads is a regional company and it is their whole market. These charts that you are showing us do not bring that out, do they?

MR. BEARD: No, these are the outturn, the later stage analysis, to show when you are considering the exercise in the round what are the sort of penalties you are getting out at the end of the whole process. That seems to be the only sensible way you can do it. You cannot begin to carry out comparisons at part stages when mechanisms of adjustment will be brought to bear at later stages. So whilst it may be possible to produce those figures, they do not provide any sort of indication of the methodology that might indicate a sensible comparison by any manner of means at all.

It should be noted that this is prior to leniency and FTO discounts as well. There is an argument that you should actually be looking at these things with the leniency and FTO discounts included as well, but we have not done that. It is merely for illustrative purposes to show how it works.

Just going back to the relevant market point, the relevant market is not some sort of abstract construct that is just randomly picked. As has been noted in previous submissions, although Mr. Peretz likes to refer to it as "arbitrary", it is nothing of the sort. Whilst the Office is permitted by reference to the relevant case law not to go into all the full detail of a full market analysis, actually if one looks at p.288 through to 338 of the decision – so a substantial chunk of the decision – it is reasoning through why, for economic purposes, the market definitions that have been adopted are the relevant turnover criteria. No one disputes that when you are talking about relevant turnover at step 1 you are talking about relevant market turnover. Those are the turnovers to be adopted.

I think, as was pointed out in one of the cases on Monday, there is a degree of selective blindness here in the sense that the market definition was drawn more narrowly, which generally will assist companies, because where a cautious approach to market definition is defined, it is likely that overall they are going to have less turnover in it. It is true that if you are a small company that has a very localised business and all of your turnover is captured in that relevant market it is going to mean that the adjustment at step 3 for deterrence is unlikely to be necessary in your sort of case. That does not render improper or

wrong the analysis that you are carrying out by reference to a sensible economic concept at step 1 using a parameter of percentage that is not challenged at step 1.

So the idea that this is somehow discriminatory in relation to SMEs is quite wrong. Mr. Peretz says, "We were in the wrong place at the wrong time and if we had been located in Buxton and therefore trading across two geographical areas the outcome would have been different, we would have had a lower relevant market turnover". If we had some eggs we could have some eggs and bacon if we had some bacon. The situation here is that if the infringements had been committed in different areas, if you had been based in a different place and therefore your infringements picked up turnover in different geographical areas, actually you would be potentially worse off, depending on where that turnover was located. You cannot assume that everything else remains equal and you merely relocate yourself to a different place. It depends on where the infringements occurred, which geographic markets they were in, which product markets they were in and how the relevant turnover was then calculated.

It is also worth bearing in mind in this argument relating to some sort of discrimination against SMEs that the MDT mechanism was a way of ensuring that where you had a diversified company that happened to have low turnover in a particular market that had been cautiously drawn, in those circumstances there was an uplift in its penalty to ensure that there was sufficient deterrence. The fact that the MDT moves penalties up in relation to those larger diversified companies does not mean that penalties established at step 1 and step 2 by reference to the rational approach to relevant market definition and the adoption of a penalty should somehow be moved down. It is a minimum deterrence threshold. In those circumstances, the fact that some of these cases throw up higher outturn penalties as a percentage of total turnover than others is neither here nor there. The fact that certain years, if they are used as the purpose of turnover, give higher outturn penalties than others is neither here nor there, particularly in circumstances where the guidance clearly says that you should be using that year before decision in order to capture the relevant turnover for step 1 and the total turnover that is used subsequently in step 5 and in relation to the adjustments.

THE CHAIRMAN: Supposing you are right in your step by step analysis, but the Tribunal comes to the conclusion to adopt Mr. Peretz's, shall I call it, last throw, and let us say that in rough figures 1.6 per cent of global turnover is just too much, what conclusion should we reach?

MR. BEARD: The interim conclusion I imagine you will reach is that it will be extremely difficult to write a judgment that is reasoned as to the basis for dialling the outturn penalty

that has been achieved, through the OFT's process, downwards, because if you cannot identify a flaw in the process it is very difficult to see on what possible basis this Tribunal says, "Never mind, we have got these policy considerations, the OFT has applied them, it has applied its guidance, we accept it should apply its guidance, its discretion was exercised reasonably, but nonetheless we just feel it is a bit too high".

THE CHAIRMAN: I thought you might give a helpful answer like that, Mr. Beard!

MR. BEARD: I am sorry, I struggle to be of assistance because it is clearly, in the OFT's view, the wrong approach to this analysis.

The other matters that Mr. Peretz prays in aid of the approach that says that you could introduce a variation, apart from saying that our capping mechanism is inadequate, whereas, as I have shown in relation to those graphs, the capping mechanism was doing precisely the sort of thing that Mr. Peretz says the OFT should always have in the back of its mind. If there are real outfliers you should look again and see whether or not an adjustment should be made, and we did.

Then he also holds against us the hardship approach. He held it against us in two ways. One is he says that shows that we can offer a degree of flexibility in how we set penalties and where the justice lies. Without wanting to repeat the jurisprudence that is set out in *Sepia Logistics*, as is very clear, the approach to financial hardship submissions is that it is a high threshold to get over and it is not a matter that should just be fed back willy-nilly into the way in which the process of the OFT in setting penalties was adopted.

Furthermore, he says the financial hardship assessment was a multi-year assessment and that means you should be able take into account multi-year turnover, multi-year whatever else. No, if one recalls, the multi-year aspect of the financial hardship thresholds that were used as guidelines by the OFT in assessing whether or not any reduction for financial hardship should be given, the first of those was whether or not the penalty exceeded 150 per cent of profit. What was thought of then was that given that you will have three years to pay because that is one of the discretions the OFT relatively readily exercises in relation to penalties, what you would then be looking at would be 50 per cent of your current profit being payable each year. To suggest that that is talking about some aggregated analysis of turnover or profit or any other financial measure that should be fed back into the process is again a non-sequitur and it does not assist him to criticise the OFT for showing a degree of flexibility in these regards. It indicates the OFT did direct its mind to whether or not there were special circumstances, but decided that, given the guidance instruction process, the particular points being made were insufficient.

It is worth noting, just for your notes, paragraph of the decision VI-89. There were various parties, and although Robert Woodhead is not referred to, we can check the extent to which they made specific submissions, but there all sorts of representations saying, "This year is wrong, this year is too high, another year would have been better". Those submissions were often saying that 2007 was too high, not 2008. Contrary to the impression that we may have taken from Mr. Peretz that it would be good if the OFT could have done this decision more quickly, ironically, a number of these submissions suggested that it would actually be better if they had done it a little more slowly because turnover was going to decline in the coming year, and therefore if the OFT held off and used a later year of turnover that would actually be a better and fairer measure. Rhetorically, how on earth is the OFT supposed to make a call as to which year is used for which party in those circumstances.

Then to deal the case of *Boël*, the first point to make in relation to *Boël* is the point that I have already adverted to, that trying to read from *Boël* a detailed approach to fining policy in the Commission, and therefore treating the comments made by the court in criticising the Commission as authority for any analysis of how the guidance should be applied in this case, or indeed in relation to any of these cases under the decision, we say is an ambitious one in the extreme.

Boël itself is at tab 74 of bundle 5. This was a case involving one appellant in relation to a multi-handed cartel in relation to welded steel mesh. In fact, a number of the parties appealed but they were dealt with in separate judgments. We have actually tried to have to look to see whether or not the relevant turnover used was 1985 in any of the cases apart from *Boël*, just to get a feel for whether or not Mr. Peretz's submission in relation to this is right. So far as we could see from the judgments of the court there was no indication. When one digs out the actual decision, although we have not provided a copy, it is merely because it is quite impossible to work out what years of turnover were used from the decision itself. It very much fits into the pattern which Mr. Van Bael described as being a "magical emergence of figures in relation to penalty". It was against that background that the appeal was brought by Boël. The relevant section that Mr. Peretz relies upon really begins at II-908, bottom left hand corner page numbering:

> "At the hearing, the applicant claimed, first, that seen as a percentage of its turnover (3%), the fine imposed on it seemed disproportionate …"

As compared to other undertakings fined, in particular it compared itself against *BStG* - I am sorry, I have forgotten which of the particular infringers that is an abbreviation for. Be that as it may, BStG 3.15 per cent, 3.6 per cent in the case of Tréfilunion, because they had

fulfilled an influential role in the agreements, whereas that aggravating factor could not be applied to Boël:

> "Furthermore, the Commission failed to take account of the fact that it does not belong to a powerful economic entity, being an independent, unsubsidized family undertaking."

So what was being done here was consideration of a very broad sort of grouping that had been undertaken by the Commission in the period where there was no fining guidance, but the Commission was attaching broad penalty percentages to people by reason of whether they were powerful economic entities, less powerful, not powerful, and the extent to which they were aggravating their infringement because of the extent to which they played an influential role in the particular case.

The findings of the court are at para.128 onwards, and the first finding at para.128 is a slightly odd finding that says it is not right to say that Boël has been treated with greater severity than BStG and ----

THE CHAIRMAN: It is Baustahlgewebe, it is a German company.

MR. BEARD: I thought it was French, thank you very much.

THE CHAIRMAN: You were thinking of your watering holes on the Boulevard St. Germain, Mr. Beard!

MR. BEARD: It was actually Saint Gobain that I was thinking of, that it was going to be one of those grand commodity producers, but it is not glass here, it is welded steel mesh.

Nonetheless, it was not treated with any great severity so the aggravating influential effect analysis, which was appealed against was rejected, and that left the question of whether or not it had been rightly categorised as a "powerful economic entity". The court went on to say, if this is the way the Commission is going about it, then we look at the features that are being considered here and we decide that actually, as is set out in 131:

> "Boël does not belong to a powerful economic entity any more than Sotralentz or ILRO …"

In other words, there were other similar undertakings that had been differently categorised by the Commission in these different bands and Boël did not fall within it.

It is right that the cartel in question, or different aspects of the cartel, did run from 1980 to 1985, although different bits of the cartel did not, particularly in relation to the French market. It only ran from 1981 to 1982 and then separately from 1983 to 1984. There is clearly some sort of very, very rough and ready approach going on.

The termination of the cartel, as I have said, was in November 1985, or was treated as such, because that is when the Commission investigation approach began. What was concluded in paras.132 and 133 on which Mr. Peretz relied is that the conclusion that Boël is not really part of the powerful undertaking analysis, means that the 3 per cent of its turnover in welded steel mesh for 1985 was too high because that is how the categorisation turned out for it.

Then, as regards the choice of 1985 for the reference year for determination in the applicant's turnover, it should be noted that the applicant asserts, without having been contradicted by the Commission, that that was the year in which its deliveries of welded steel mesh were highest, whereas for most of the other producers it was in the year in which their deliveries were lowest, and consequently the choice of year, which was not disclosed until after the adoption of the decision, which again reinforces the magic numbers phenomenon here, merely exacerbated the disproportionate nature of the fine imposed on the applicant. The figure of 3 per cent of the 1985 turnover resulted in a more substantial fine for the applicant than that imposed on the other producers. So it is not saying it could not use the 1985 figures, or that it had to use the 1985 figures, or it had to use figures at any particular time. What it is saying is, "You, Commission, made an error of categorisation and you exacerbated it by using the highest level of turnover in the period that was considered that the time".

That does not tell you anything about whether or not this guidance should somehow be *ad hoc* modified in relation to particular turnover which particular undertakings come along and say, "This year it is rather high for us", it certainly, in the context of a decision making process with no guidance attached, does not provide you with any such authority, and nor was the General Court, or the CFI, as it was then was, seeking to make such a statement in 133.

So *Boël* takes Mr. Peretz nowhere in this regard. The court was specifically refusing to give any special significance to any particular year.

We are then left with the sense that the penalty is somehow broadly disproportionate. These are matters which I have already traversed to some degree. Woodhead has contended there is no reason to suppose that the seriousness of the infringements correlate to the turnover figure chosen by the OFT. Mr. Peretz was troubled by the extent to which the OFT talks about the fact that there is not a necessary correlation between the seriousness of the infringements and Woodhead's turnover in the year prior to the decision, but the OFT does contend that applying a percentage starting point to recent rather than historic turnovers

ensured there was some broad correlation between the seriousness of infringements and the impact of penalties upon Woodhead. If it assists all that is being said there, as I understand it, is merely that by using relevant turnover what you are doing is using some sort of broad measure that, when linked to the percentage assessment of seriousness, you get a starting point that has some sort of broad correlation to the infringement – no more and no less than that.

The second argument is that the OFT has assessed a level of penalty which it considers the minimum necessary to ensure deterrence, any penalty in excess of that is disproportionate to the need for deterrence. This is just a reiteration of everything should be dialled down to the MDT, the MDT becomes the focal point. This morning there was a criticism that the MDT wiped the slate clean. That was not right. Now the argument is effectively that the MDT should wipe the slate clean. That is also not right. In those circumstances you have got a situation where the two appeals that are being heard illustrate how the different components of the different stages of the penalty process can have different impacts, and there is nothing wrong with that. One should not be a total trump on the other. It depends on all the circumstances of each case. I have already dealt with the submissions that suggest that a cap of 4.5 per cent of total turnover is somehow to be used against the OFT. As I have indicated, it is somewhat strange to argue that if the methodology overall lacked a particular step it would be unfair, but when that step is taken, albeit not as Mr. Peretz would like it, the process is not fair nonetheless.

Woodhead seek to bend the fact that the OFT has carefully considered whether the penalty would threaten the viability of the undertaking to support its contention that the penalty is disproportionate. That is just a reiteration of the financial hardship argument with which I have already dealt.

The various sorts of comparisons with other undertakings that Woodhead seeks to draw, to Mr. Peretz's credit he said you have to be selective because if you started to draw out all the different sorts of comparators you could fill the Albert Hall. One is somehow reminded of all the holes that were calculated in the Beatles' song. What you have is a situation where there may be an infinite number of permutations of comparisons that can be drawn. Indeed, the creativity of lawyers in coming forward to the Office and making suggestions as to why a case is special, whether or not it is because it is in a narrow market, because it is a small company, because it has remarkable turnover in one year and not the next year, because it has grown by acquisition rather than organic growth, because it has shrunk, because it has sold a company – the list is endless as to the various different permutations of what makes

someone special and why it is that the outturn penalty is unjust. It is not right that the OFT ignored all these matters. They considered whether or not any of them constituted a basis for diverging from the decisions it had taken along the course of the penalty process it had undertaken. In relation to those particular factors it decided not, those were legitimate, proper and far decisions.

In the circumstances, the selected alternative comparisons are not illuminating, and certainly the comparisons with Kier and Stainforth are not illuminating. The comparisons with JH Hallam are not only illuminating in the skeleton, but they are plainly wrong, and wrong comparators, apples and pears are compared. Comparison is drawn in the skeleton between the ration of JH Hallam's penalty to its assets, which was 56 per cent. Those were its net assets, and if you remember from the appeal on Monday afternoon, it was actually a 50 per cent reduction for hardship in that case. There was not any in relation to Woodhead, it did not get close to those ratios. The ratio of 57 per cent that Woodhead refers to in its skeleton is based on gross penalty not net penalty. Of course the hardship criteria were used only in relation to net penalty after any reductions that had been put in place. Of course, that is a logical way of dealing with these things because those assessment guidelines were only being used in relation to financial viability. You only assess viability when you are looking at the outturn. In the circumstances, those comparators do not assist, and of course there is not any appeal against the rejection of any financial hardship submissions *per se* in this case.

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

THE CHAIRMAN: Thank you, Mr. Beard. Yes, Mr. Peretz?

MR. PERETZ: I have just a few points. Mr. Beard complained that, on the one hand, we were submitting that the OFT was bound by guidance; on the other hand, we were saying that it should have departed from it. That is not the case. As the Tribunal and the Court of Appeal have emphasised, guidance is guidance. It has to make allowance for circumstances.

Collins J. in *Royal Mail* recognises that circumstances are exceptional and unusual. We entirely accept that the guidance is based on one year's calculation. In the typical case, most undertakings, most situations, have a similar turnover year on year, or within one or two year's margins. If you are in a situation where there is a spike that is an unusual situation and it justifies a departure from the guidance. The OFT is perfectly entitled to depart from its guidance in a situation where it gives proper reasons for doing so and a situation is exceptional.

I do not want to labour the Proscrustean metaphor any further, but to put it very bluntly ----

THE CHAIRMAN: No, please do not.

MR. PERETZ: I am just going to say this because I cannot resist it: Mr. Beard said that the OFT tried to correlate bed length to the height of the undertaking, it has not done that, it is correlated it to shoe size. It simply used a measurement, turnover in relevant markets, many years after the infringement that just has no correlation to anything useful at all. Mr. Beard tried to explain again – I am afraid I did not get a full note of it – orally exactly what it was the OFT was saying about turnover in the relevant market in 2008, what correlation that had with anything. I am afraid I still do not understand it. At the end of the day, the relevant considerations here, the potentially relevant considerations, are either deterrence in which case it is impossible to see why turnover just in the relevant market and not overall turnover has any relevance to anything; or it is about seriousness of the infringements which must be looked at at the time of the infringements, and it is impossible to see how turnover many, many years after the event has any relationship to that. That is, at the end of the day, the OFT's problem, and I simply have not heard an answer to that which carries any weight at all.

Mr. Beard accused me of saying that Woodhead was an "outlier". I think the word "outlier" has not passed my lips. I am not saying that it was an outlier. What I did say, and the OFT can check this, I do not think it is in dispute, is that, out of 100 odd companies, around 69 in terms of percentage, in terms of percentage of total turnover were lower than Woodhead and about 27 higher. That is how I put it. I do not think there is any dispute between us as to how that has happened, the reason for that is that Woodhead is a small company whose turnover is perhaps located in the middle of what the OFT have chosen to be the relevant geographical market, and, as a result, a very high percentage of its turnover has gone into the OFT's fining machine, whereas for other companies that is not true because they have more dispersed turnovers.

Mr. Beard made the point that some of those will then have had the MDT. That is true for some of them, but not for all of them. I do not know whether a company happens to fall within this category or not, but it is certainly a possibility. If an undertaking had a penalty as a percentage of its overall turnover of 0.76 per cent the MDT would not have been applied to it, yet it has been treated in terms of a percentage of total turnover much more generously than it would where the percentage is much higher than 0.76 per cent. That is the root of the problem that Woodhead has in this case.

Unless you have any further questions those are my submissions.

THE CHAIRMAN: No, thank you very much, Mr. Peretz.

Thank you for your conciseness and keeping to time, both of you, and I wish you a good evening and a non-Procrustean bed, especially one made to measure for your learned friend Mr. Vajda perhaps!

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