IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1132/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 June 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THOMAS VALE HOLDINGS LIMITED
(2) THOMAS VALE CONSTRUCTION PLC Appellants

- v -

THE OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Miss B. Adkin, (Partner, of Wragge & Co) appeared for the Appellants.

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

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THE PRESIDENT: Miss Adkins?

MISS ADKINS: Good afternoon. In this case I appear for the appellants, Thomas Vale Holdings Ltd and Thomas Vale Construction PLC, whom I shall refer to collectively as "Thomas Vale". Mr. Unterhalter appears for the Office of Fair Tribunal.

I am conscious that this Tribunal has already heard argument over the last two and a half days in relation to this case as it applies to other appellants. That being so I will endeavour to focus on those parts of Thomas Vale's arguments which I believe the Tribunal will not have heard or where Thomas Vale differs from the general argument, and if you obviously disagree with me please move me on by all means.

Suffice it to say, these oral submissions are to supplement our written submissions on which we still rely, and I am going to follow the order of argument as set out in our notice of appeal. I am also relying upon my colleague, Sam Batton, to prod me if I run out of time.

May I briefly remind you of our five grounds of appeal as follows: ground 1, which is our general sweep all ground. The OFT's disregard for fairness and proportionality in imposing a penalty on Thomas Vale. Ground 2, the selection of an inappropriate year for calculation of relevant turnover for Step 1 of the penalty calculation. Ground 3, the wrongful inclusion of framework and negotiated contracts in the relevant market for the calculation of Step 1 of the penalty. Ground 4, imposition of the so-called minimum deterrence threshold by the OFT in a discriminatory and excessive fashion. Ground 5, the OFT's failure to consider the lack of awareness of cover pricing *simpliciter* as a mitigating factor.

Starting first with Thomas Vale, I refuse to allow Mr. Sharpe to have the last word on Thomas Vale, and suffice it to say that Thomas Vale is a long established West Midlands construction company, whose head office is in Stourport and it has satellite offices in Stoke, Aston and Wolverhampton, so it is very much a local, West Midlands based construction company. At the time of the investigation significantly it also had offices in the East Midlands, Leicester and in Reading.

Relevant to this appeal and, indeed, the reason why Thomas Vale is appealing is the transformation that Thomas Vale has undergone in the past 10 years. From a company that focused on traditional, "lowest price wins" construction contracts in 2000 with a turnover of £48 million and profits before tax of £242,000, to a turnover in the year ending 2008 of £216 million and profits before tax of £2 million. This reinvention has been achieved by its migration from the performance of traditional construction services purchased under "lowest price wins" tenders, by engaging in the new style framework or partnership contracts, to the extent where they now account for 80 per cent of their turnover. To get

there, in the years 2003 to 2008 Thomas Vale invested some £7.5 million in its operations in transforming those operations to be able to perform those contracts.

What I briefly want to do now is, first, to focus on the nature of cover pricing. It is our submission that, yes, it is the case that cover pricing is an object infringement, but on the spectrum of what constitutes a hardcore infringement it is at the lower end. There are no two ways about it, cover pricing is a funny animal, and when we first started interviewing Thomas Vale personnel my reaction was one of incredulity as to how it operated, it is utterly counter intuitive if you are colluding to try and turn work away; whether the companies are large or small it does largely follow very similar conventions.

First, people do not seem to have focused on the fact it is invariably carried out by estimators. This is significant. Estimators are curious creatures, a little bit like patent attorneys of the construction world, they are largely introverted, detailed and meticulous. They are not gregarious, they are not front of house, they are not client facing or engaged in strategic or commercial decisions, they are technicians. They are absolutely the last types of people you would expect to have engaged in collusive practices. They are a thousand miles away from the cliché of people jetting off to Switzerland under false names to swap password protected Excel spreadsheets. Where cover pricing is not carried out by estimators that would take place in smaller companies where they did not have specialist estimators, management would carry out their own estimations.

There was very much an honour system between estimators in carrying out cover pricing, they did not have to know one another, they simply helped each other out as a matter of professional courtesy, and how it took place was almost Masonic in is rituals. It went by a certain prescribed format: “Can you assist me?” and in the main a cover would be taken by telephone. Estimators very really met up to discuss a cover. [Confidential]. That is why proof would have been very, very difficult for the OFT. Estimators do not record when they give a cover, there is simply no interest in keeping a record, there is no monitoring, there is no punishment mechanism – none of the usual hallmarks of a cartel. At the risk of being accused of being ageist, it also occurred with estimators of a “certain age”. Younger estimators were uncomfortable with the practice, and certainly it is Thomas Vale’s understanding that this was another indicia that it was withering on the vine.

Cover prices were not sought as a matter of course, it involves turning down work, and in a very tight difficult market with difficult margins, where often people just bought the work to keep the customer going through a business. The whole idea was to try and win work. So the decision also to turn down this work was always made internally, it was made

unilaterally. It was only after the decision was made not to go for the work for a particular tender that then contact would be made with a competitor.

The general mechanics of taking cover would be left with the estimator. There was no plan. Any contact was *ad hoc*, estimators did not hold themselves out as inviting other estimators to request cover.

Lastly, by contrast to other normal cartel activities cover pricing in its simple form did not lead to spill over collusion. Thomas Vale is a prime example of this. 750 instances of cover pricing were the subject of the leniency agreement, but despite our very best endeavours to find it there was no other evidence of collusion. There were simple, though very straight, boundaries between the actual cover pricing activities and in its ordinary form it did not spill over into other collusive activities.

This brings me on to ground 1 – the OFT's disregard for fairness and proportionality in imposing a penalty on Thomas Vale. We say that the fine is excessive and disproportionate, and we demonstrate that by reference to the fact that the OFT had other possibilities available to it, other possibilities in its armoury of powers to eradicate this practice.

Thomas Vale was subject to a dawn raid on 24th January 2006 in both its Stourport and its East Midland, Leicestershire office. This was the third wave of dawn raids. How this happened is rather like a pebble in a pond, the first pebble was dropped when the OFT investigated the Queen's Medical Centre in Nottingham where it appears that very, very serious collusion was taking place, and then there was a wave of leniency applications that gradually broadened out the investigation. We think the net closed in – to put it crudely – on Thomas Vale because it had an office in Leicester and that brought the OFT to raid the office in Leicester but also the West Midlands' office.

The day following that dawn raid we put down a marker, and we perfected it on 12th April. That was a long time between putting down a marker and perfecting it. The reason is that although Thomas Vale kept telling us there was no other collusive activity we were looking for far more. We had every interest in trying to find something to assist the OFT basically in order to be able to obtain leniency plus, and try and reduce down the extent of exposure of Thomas Vale from, first, a reputational perspective, which is actually the bigger concern, and secondly from the perspective of possible fines. [Confidential]. We were looking very, very hard for a narrative, a pattern, a closed class of customers, something very hard core to offer to the OFT. All that I can say is that we have been a bitter disappointment to the OFT. All we have been able to come up with was instance after instance after instance

of ad hoc cover pricing, and t his is really how this case has grown. The OFT did not wake up and say "Let us go after cover pricing, they were looking for much bigger pray, they were looking for corruption, they were looking for kick backs, they were looking for compensation payments, and cover pricing is a very, very core and unsexy relation in that line up.

We say what is fundamentally wrong with this case is once it appreciated what it had on its hands, that this practice was, in their words: "endemic and widespread" it should have stopped, taken stock, paused for breath and considered what it should have been doing as a responsible regulator in combination with the sector and other Government bodies to eradicate the practice, and there are already ample examples of where the OFT has considered other alternatives, and in the interests of time I will not ask you to turn up this particular example, but I will refer you to vol. 11, tab 145, where there was a settlement agreement between the Office of Fair Trading and independent schools, and in the circumstances of that particular case there was a hard core cartel in the sense of exchange of future fee increases and on an ongoing basis updating each other as their budgets progressed and in those circumstances it was involving very much a large sector, 50 schools, and in those circumstances the Commission settled, token fines were imposed upon the school of approximately £10,000 each and a trust fund was created for the poor of the Parish.

Contrast what has happened to the construction sector.

Other examples in construction, in Holland you have a general amnesty. To give you an example, codes of conduct have been agreed in sectors, at the moment we have the Grocery Supply Code of Practice, again another solution to solve situations where markets are not working perfectly.

The tragedy of all of this from a regulatory perspective is that the OFT has done nothing to address the inefficiencies in the market, or to remove the incentives to collude, which it could have done and we say it should have done instead of imposing fines. We say that a modern regulator, rather than behaving as an avenging angel and invoking the need to exact retribution from the sector, it should have taken what we said would have been a far more progressive and inclusive approach that a responsible regulator should take, which is that of education and communication with the sector.

Thomas Vale is not trying to avoid its responsibilities in this respect, it simply would have liked to have had the opportunity to have resumed those responsibilities without the Sword of Damocles of a life threatening fine hanging over its head or cataclysmic damage to its reputation.

The real problem in this case is that the OFT failed to appreciate or it simply did not suit it to hear that the sector at the time had a blind spot that cover pricing was a hard core activity. Our written submissions refer to the fact that the OFT missed that opportunity in the roofing decision to educate the sector when it issued that decision in March 2004.

The example of what happened to Thomas Vale I suspect was repeated in construction company after construction company throughout the UK. We were instructed as solicitors on the dawn raid at 11 o'clock that day. I had a very, very calm finance director calling me "Just to let you know we have some lovely gentlemen from the OFT here. They have been here for two hours but it's not a problem, I'm just letting you know. They're looking for bid rigging, we're not engaged in anything like that, but just to let you k now." I said: "I think we need to come", "Oh, no, don't bother." I had a panic stricken call half an hour later "I can't believe this, they say they've found something, please can you come." We arrive and there is panic, consternation. I am having their ethics' policy thrust in my face as I had all afternoon, saying: "This is ridiculous, we don't do it, we absolutely are a clean company, we have an ethics policy. We will dismiss anybody who engages in these types of practices." It culminated that evening on a conference call to the Chairman in America that this must be the work of a prankster, it must be a phone call, like a bomb scare to the OFT, and that is why this is all happening. There was a huge education process that was necessary, but what the OFT failed to grasp is it was a bit like a dog whistle, the OFT needed to communicate with the sector, using the terminology of the sector. It needed to use the words "cover pricing". When you say "bid rigging" to a construction person, they think of bid rigging in the lay person's sense of the word of cynical bid swapping in the normal mainstream meaning of the word and not cover pricing. We say that is basically one of the reasons why the Commission at this stage has acted excessively by going straight to a heavy duty investigation and heavy duty penalty.

Moving on to ground 2, selection of an inappropriate year for the relevant turnover for Step 1 of the penalty calculation. In the interest of time can I refer you to our written submissions on this?

THE PRESIDENT: Yes.

MISS ADKINS: In our notice of appeal paras. 8.1 to 8.7, which are pp.14 to 15, and I do not intend to read from that, I just want to make one practical point on that, simply to say that in adopting the turnover of the year of the decision itself as a base point for Step 1, in circumstances where there are years between the actual breach itself, and the decision – the first breach was 2000, then it was 2002 and 2004 – there is an increasing length of time, and

so there is an uncoupling between the breach itself and the measure of its seriousness. We say that is wrong and that the nexus between the two is lost. The inadequacy of this de-coupling we say is amply demonstrated in the case of Thomas Vale. As I noted earlier, in the year 2000 the global turnover of Thomas Vale was £48 million, in 2002 it was £71 million. In 2004 it was £122 million and in 2008 it was £216. We say that is a huge differential between the two and also in terms of the market dynamics, what happened in the market, in between those times again would be huge. This, we say, leads in itself to what I would term the law of unintended consequences. We say in markets such as this with tight margins, local markets, frailty in survival, where the OFT is able to impose fines at the level it does, which can, as in the case of Thomas Vale, wipe out a year's profits in a good year, that in itself can create a distortive effect.

Arguably, it can be justified to a degree where it relates to the market in which the collusion took place and when it took place, but the more the years go past the more there is that decoupling, and the more there is a distortive effect by actual regulatory intervention itself., For the last point on that particular issue I would ask you to look at the practice under EU law. We say it is not adequate for the OFT to say that EU law does not traverse into the area of penalties, it is up to the UK to pursue what eccentricities it desires. I do say in this particular area that if the UK is going to depart from EU practice we need some satisfactory reason why there should be this uncoupling.

Moving on to ground 3 concerning the wrongful inclusion of framework and negotiated contracts in the relevant market, Step 1. We say that no matter what market definition the OFT choose to adopt to penalise incidents of cover pricing, we say it should not have included framework or negotiated contracts. There is a lot of loose terminology around all these expressions so framework or partnering contracts are very much the same thing, and negotiated contracts – you will see that terminology used interchangeably.

Can I direct you to one authority, which perhaps is the high watermark of a description of market definition in the cartels context, is the *Argos* case at vol 4, tab.54. If I could ask you to look at para. 170 of the judgment:

> "On the other hand, the OFT and in turn the Tribunal do have to be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement."

Then I ask you to look at para. 173, which is a long paragraph, but worthy of looking at:

> "As a matter of principle, we agree with what the Tribunal said about the correct approach for the OFT to the question of relevant product market. There is

> inevitably an arbitrary element in the calculation in the sense they described. Inevitably also, in the absence of a formal market analysis, the market as ascertained may be other than that which would be established, in a Chapter II case, by the formal analysis which would have been carried out in such a case. The purpose of the identification of the relevant product market in relation to penalty is quite different, and it is not necessary or appropriate to be so exact as when ascertaining a market for the purpose of seeing whether an undertaking has a dominant position in a relevant market before deciding whether that position, if it exists has been abused. Thus, as it seems to us, the reason why it is not necessary at any rate in a Chapter I case involving price-fixing, to conduct a formal market analysis is the same as the reason why the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement rather than by a relatively exact application of principles that will be relevant for a formal analysis, such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or services which were the direct subject of the price-fixing arrangement or other anti-competitive practice."

That works, in our submission, in your standard cartel where the collusion will be around a focal product, for example, copper tubes, lead piping, carbide, graphites etc. where it will be relatively simple to identify the subjects of the collusive practices, and where something probably simple would have happened to that bundle of products that would have been increased in prices by 6 per cent, for example and where it would also be relatively simple to demonstrate there may be knock-on effects to other products if the basic cartel artificially increased prices with a respective bundle of products (a) you may be able to demonstrate an artificial increase in prices to bundle of products (b) .

Here, we would say, that standard analysis does not apply in the complexity of this particular case, in the complexity of the services in point. To the OFT's credit they did go for a more complex economic analysis rather than, putting it crudely, what could actually amount to a bit of a "finger in the wind" test of the *Argos* decision. Can I ask you to look at the decision, II.1602 on p.289. There, the OFT said:

> "The process of defining the relevant market starts with the focal product that is the subject of the investigation. In this case, this is the supply of building works for a particular construction project (the 'Focal Product'). Market definition

> establishes the closet substitutes to the Focal Product. Such products are usually the most immediate competitive constraints on the behaviour of the undertaking controlling the Focal Product. When identifying the closest substitute products, it is necessary to consider both demand side substitution, that is, how customers of the Focal Product would respond to a small but significant increase in its price, and supply side substitution, that is, how potential producers of the Focal Product would respond to a similar increase in its price."

Then the Office of Fair Trading went on to exclude on that basis the PP markets at 1680.

THE PRESIDENT: Partner agreements, is it 1690.

MISS ADKINS: 1680 and the Office of Fair Trading relied on two other types of contract, design and build contracts and two stage bids to establish that in non-conventional tendering work, as they said, you could have cover pricing and therefore it dismissed our submissions that negotiated contracts, or framework contracts should not be within the ambit of the relevant markets. On the basis of 1673 – method of procurement:

"The OFT has considered the extent to which non-traditional methods of procurement (which include negotiated, framework, partnered and two stage bids) might be in separate product markets from traditional methods of procurement …"

So basically the OFT said you cannot divide the markets by reference to procurement methods. We said that is not what we are saying, we are saying that if somebody is engaged in the lowest price wins tender markets they cannot easily substitute on to a much more complex, much more difficult market for partnering, because traditional tendering is all about lowest price wins. There is no consideration for quality, it is very, very simple, it is almost crude in how the tendering is carried out, it is simply the local authority, for example, will say: "How much for an annex to this school?" "How much for a police station?" and it will request 16 tenders to that effect. Contrast partnering, framework or negotiated contracts. There is not actually a contract on the table, there is not a project ----

THE PRESIDENT: How would cover pricing work in relation to such things ----

MISS ADKINS: It cannot, there is no price, there is no project offered. Basically what the procuring entity is looking to do is appoint people of a certain quality for, at some point in the future, draw down contracts, and also in those circumstances they will not be saying: "Go ahead and build us a police station, how much does that cost?" Even at that stage if price is not on the table, in those circumstances the price on the table will be overheads – "How much due on your overheads?" "What is the profit margin you are going to take on, when we do contracts with you. At that stage the construction company will be working

from very, very early on in partnership with the architects. When the architects bring the plans together the construction company will say: "Actually, we suggest you use this type of brick, because if you use this method you will make £X savings", so it is very much provision of a service to the procuring entity.

THE PRESIDENT: If all the hundreds of examples of cover pricing that were unearthed presumably someone would know whether any of them related to anything other than the ordinary standard price bids.

MISS ADKINS: Out of all the hundreds and hundreds of instances, and I am happy to be corrected on this, there is not one single instance to our knowledge of a framework, or a partnering, or a negotiated contract that has been the subject of cover pricing, because it is an impossibility. Procurement is made on the basis of appointment of an individual to a particular relationship and the big draw downs as projects come through.

THE PRESIDENT: So you say as the infringement cannot take place in relation to that segment of the market ----

MISS ADKINS: Yes.

THE PRESIDENT: -- therefore that segment of the market should be excluded from the ----

MISS ADKINS: Absolutely, and I can understand this, the argument in certain circumstances, oh yes, but you had the benefit in market (a) therefore that has percolated and affected the market in market (b) and we say there is no link, any link is fanciful and it should not be permitted to have any artificial link. We gave a lot of evidence to the OFT and for your records you will find it in file 1 of our notice of appeal, pp. 77 to 125 and pp. 127 to 157, and we gave an awful lot of evidence to the OFT demonstrating just how long and how difficult it is actually to get yourself into the market for the provision of tendering and partnering contracts. As I said earlier, it involved investment over many, man6y years, engagement in Government projects, education of customers to start procuring on this basis, because it is a totally different procuring process; it is a totally different service that you are actually buying and so people need you to be educated, it involved the managing director and many, many trips to Japan to understand Japanese Kaizen techniques, visits to the US to understand automotive techniques, all to bring back to the construction sector, engagement in Government pilot projects to understand how there could be capital savings, and we say in the circumstances utterly, utterly a different market from the "dinosaur" market quite frankly, on which cover pricing took place.

PROFESSOR BAIN: Are you saying really for the purpose of their investigation the OFT were not entitled to define the relevant markets in the way they did, and I looked at the RBB

report, and I looked in vain to see an unambiguous statement that the OFT had got it wrong. I thought it was all rather carefully etched, which surprised me because I thought that the way the OFT did it, while there is not always a single, right way of doing these things, I thought it fell well within their margin of appreciation of the argument there, so I think what you seem to be saying is that somewhere or other the normal definition of relevant market is not apt to this particular situation. Is that right?

MISS ADKINS: My difficulty is that there is not a normal definition of "relevant market". You have the standard economic test that you would carry out in the context of a merger investigation or in the context of a Chapter II investigation and then you have this much looser definition that you find in cartel cases, which I can understand should apply in certain circumstances - in much simpler circumstances than these. But, we say there is no interest for the OFT to actually pull in this market, to expand the market to include what we say is a very, very discrete market.

PROFESSOR BAIN: Are you really saying that somehow or other there should have been an even finer division of markets? I mean, if you take the whole of the construction market, and put infrastructure on one side, and then you have got the rest, and divide it into fifteen different product markets – forget about the geographic division for the moment – then the fifteen are supposed to comprise the whole of what is left. What you are really saying is that within that, you should have gone to even further division and split it between tender contracts and negotiated and framework contracts.

MISS ADKINS: Yes - simply because it was artificial to have them there in the first place. Cover pricing did not happen on those markets.

PROFESSOR BAIN: Yes. I understand the point that you are making - that cover prices did not happen there. I am just trying to look at it from the practical point of view of defining markets. I find it a little difficult to do that. I mean, I am not saying that the considerations you are raising are not relevant as to what the amount of the penalty should be. It may be that the penalty should generally be lower if 90 percent of the business of this market is negotiated in the contract. That might be the case. But, I am not sure I fully understand why they should have gone yet farther and (assuming that this happens at all of the sub-markets) that would have made thirty markets, and with eight regions it would have made 240 markets. That is really quite a lot.

MISS ADKINS: Yes. From a practical perspective I do not think it would have been that difficult because of this supply side substitutability difficulty. You actually have a pretty closed class of people who are active in the frame negotiated market.

PROFESSOR BAIN: Yes. But, in terms of the tendered market, you can substitute from framework into tendered even if the reverse is not possible, can you not?

MISS ADKINS: You can substitute if you are ----

PROFESSOR BAIN: If you are in the framework market you can rather easily go into the tendered market. Supply side substitution works in that direction.

MISS ADKINS: Yes, but it does not work in the other direction.

PROFESSOR BAIN: I think that is one of the reasons why there is quite a good case for keeping them together.

MISS ADKINS: In your view. Obviously we would say the opposite.

If I may move on to Ground 4, which concerns imposition of the minimum deterrence threshold by the Office of Fair Trading in a discriminatory and excessive fashion? If I may direct you to what the OFT says in its decision at IV.230, p.1679. There, the Office of Fair Trading says,

> "Provided its methodology is properly explained, the OFT has a margin of appreciation in assessing the appropriate penalty level for achieving deterrence in any particular case; this is an area requiring judgment. The OFT considers that in applying an MDT by reference to a percentage of total turnover is within its margin of appreciation and that, given the range of parties involved in the case, this is appropriate so as to ensure that in each case the penalty properly reflects the size of the particular undertaking in question. The OFT has also considered whether there are other individual circumstances that should be taken into account in assessing the need for a penalty adjustment at Step 3 to achieve deterrence but (save to distinguish between those infringements involving compensation payments) has concluded that it would not be appropriate to do so in this case".

It is our submission that it is quite unsatisfactory for the Office of Fair Trading to have this general margin of judgment in the context of imposing deterrence, in the context of imposing penalties - especially the great blind application of this percentage point of 0.75 taken from the earlier *Makers'* case. From a practical perspective, trying to apply this in a real world context, frequently you find that the regulators are acting now – as they call themselves, "the family of regulators" – and non-UK companies do consider compliance on a pan-European basis. They are assessing the risks amongst different countries. To try and explain the MDT to a non-UK lawyer is embarrassing because you can, in circumstances where you have a client – a non-UK client – being investigated by the OFT, of course they want to know: "Give us some indication as to what the fine is going to be", and there are

parallel investigations going on in Spain, Holland, and everywhere else. The numbers are being put together. Quite frankly, it is embarrassing to explain that, "In the UK you have got a choice. On a good day the OFT may decide to fine by reference to UK turnover, in which case you will find that we think it may be £1 million. On a bad day the OFT may decide to calculate the penalty by reference to your non-UK turnover, in which case it could be £14 million and more, and more, and more". We would say that that is simply inappropriate and unreasonable for the OFT to have that margin of discretion. There needs to be some coherent analytical basis upon which you have this extra strut line put on in Step 3.

We agree you need something. It is our submission that the something should be, in the circumstances of this particular case, something which does account for the disparity in scale between competitors on the market who are going to be subject to heavy penalties. Again, Thomas Vale is a paradigm example. There needs to be some sophisticated form of calibration to take account of the different scales and the different fortitude of companies on the market to withstand a very heavy duty fine. I will give you an example. Say, for example, Thomas Vale, in a local market, has a turnover of £100 million. Worst case scenario - 10 per cent fine imposed upon it. It takes a hit for a penalty of £10 million. It competes with one of the nationals who also, in that market, has a turnover of £100 million but it has also got deep, deep pockets. It has a global turnover of, say, £1 billion but it is still subject to the same penalty of 10 per cent. So, Thomas Vale will suffer an enormous competitive disadvantage in the market. So, too, will the large national player. The knock-back in terms of its market activities with Thomas Vale will be far more difficult for Thomas Vale than, say, for one of the national players.

So, we say, yes, some calibration is necessary with the MDT, but it should not be this blind one-size fits all – 0.75 per cent. We also say in terms of that calibration that there should be more sophistication used by the OFT in considering the individual circumstances of the companies in question and in the case of Thomas Vale, as may be the case with some other market players. They heavily rely upon sub-contractors. A lot of what Thomas Vale does is really project management - it is not about building. So, turnover, in Thomas Vale's case is actually churned. These figures go through their books, but their profit cost is not put on to them. So, the turnover of Thomas Vale is actually disproportionate to its actual market strength. In those circumstances we are not saying abandon the turnover test, but we are saying that some appreciation needs to be given to the respective financial strengths of companies on the market when setting a penalty. In those circumstances the minimum

deterrence threshold was simply too crude, too excessive an instrument to have used in the circumstances of this case.

THE PRESIDENT: Have you got a calibration method in mind?

MISS ADKINS: No. I can refer back to Ground 1. We say that in the circumstances of this case, where the OFT never was going to get it right, with the best will in the world, the best attempts to be fair and reasonable it always was going to end up with unfairnesses all around the place, and in the circumstances of this case it should have gone for notional fines because there was always going to be what we call the "law of unintended consequences" It was always going to distort something, somewhere and end up with an unfair result - especially given the frailty of this particular market. Notional fines plus education would have been appropriate. It was premature for the OFT to have adopted fines of this nature given the fact that the realisation was only just slowly dawning on the sector about the status of cover pricing.

PROFESSOR BAIN: You did say, did you not, that the level of fines - let us say the 5 per cent or the equivalent through the MDT - was too high for companies with the profits and turnover below the operating margins of companies like Thomas Vale. I take the general point. I do wonder if in fact Thomas Vale is so different from some of the other companies that we have been looking at - different perhaps from the generality of the construction companies that have been involved in this investigation – that indeed you have any evidence that you could give us to show that it did fall towards – there must be a spectrum within it and whether Thomas Vale fell very much towards one end of the spectrum. We have, for example, had Kier in front of us who have a very high operating margin. They seemed to me probably to have a business model that was not terribly different. But, it may be that yours is more extreme than theirs. I do not know. It would be helpful to us if we had something a little more concrete to go on rather than the statement that you are different.

MISS ADKINS: Yes. It is the case that we are not as extreme an example as Kier. That is absolutely the case. So, we are not actually saying that this was six years' profit margin. We are saying it is a single year's profit margin which has been taken, and in the circumstances of this particular market, especially given that this turnover has actually been derived from a new innovative service, we say it is excessive.

PROFESSOR BAIN: If you are taking an unfortunate experience in a particular year, that is more a financial hardship argument, is it not, than a sort of general argument about the level of fining?

MISS ADKINS: It is not a financial hardship argument. It is fair to say that we are not on the Kier end of that equation. But, the fact that somebody has been treated very unjustly does not mean that we have not been treated unjustly. We say notwithstanding that, it is still unreasonable and excessive in the circumstances of this case that a fine of this nature should be imposed. It is no justification that someone is much worse off than you, we would say.

PROFESSOR BAIN: I was not trying to suggest that. I was really just trying to see where you fell within the range of the construction cases that have been dealt with here. Really what you are saying is that you towards one end, but you are not at the extreme.

MISS ADKINS: Yes.

PROFESSOR BAIN: Thank you.

MISS ADKINS: I have Ground 5 outstanding, but I do not actually think that I will trouble the Tribunal with argument on that point, simply as I think you have already heard ample submissions from us on what we call the absolute blind spot on cover pricing.

Unless you have any further questions, those are my submissions.

THE PRESIDENT: Thank you very much.

(Short break)

MR. UNTERHALTER: Sir, if I may, I will address the arguments that have been put to you in the sequence in which they were offered.

Let me begin then firstly with the general argument that is offered to suggest that there has been a disregard for fairness. There are peculiarities about cover pricing as it exists in these industries. This warranted a very different kind of response and not, as I think it was implied, the heavy-handed approach which was adopted by way of this investigation and the penalties that have flowed from it. There was, frankly, an illuminating account that was given of the Masonic rights that are practised in relation to cover pricing - an unforgettable one for that. But, the question is: Where does that explanation take the argument? In our sub it seems to go in two directions. One is to suggest that it was so pervasive that for that reason it had become a norm in the industry, and the only way of properly rooting out that entrenched practice was by a more inclusive - I think 'progressive' was suggested - and certainly less punitive mechanism of rooting out this kind of practice. We would submit that that may be a judgment of this appellant as to how correctly to utilise the competences and powers that are enjoyed by the OFT. But, there is a perfectly reasoned and reasonable response which is of a different kind and was the one which was taken in this regard, which was to say that a rooted endemic practice, which apparently existed at a certain level in the industry among persons and employees of a certain age (it seems) and practised in

conditions where, perhaps by implication, there was not the ordinary kind of managerial supervision that might have taken place over these telephone calls and gentlemen's agreements and *ad hoc* arrangements which we heard described.

The question is, "Well, how do you best deal with that sort of practice?" Given the very characteristics that are described we would submit that it was a perfectly proper, lawful and not unfair or disproportionate response to say, "This is unlawful. It is endemic, entrenched, practised widely, and covertly", and for those reasons the only way in which one can seriously get eradication of the practice, because, seemingly, the roofing decisions were insufficient for that purpose though they were widely publicised, is that a much more punitive regime was required. So, whilst there are, of course, always regulatory options that are available, there can be no suggestion that taking the route that was taken was in any sense unlawful - it was a perfectly lawful, competent course of action to take - but even insofar as one was able to assess options, is there any error that is made in adopting this approach to what his the rooted practice that has been identified?

So, it does not, in our assessment of the matter, give rise to any error that was made because what is the error that is identified? Not an error of law, clearly, because it falls squarely within the competence of the OFT to take the action that they have taken. Therefore, because other measures could have been taken (which seems to be the burden of the argument), the question is, "Well, why does this give rise to some attenuation of the penalties that were due?" There is no consequence of the kind that follows. If, as has been described, the practice has these characteristics, and clearly to root it out through punitive actions is a perfectly proper approach and one that was indicated, given the pervasive nature of the conduct, we would submit that there can be no fault found in taking the action that was taken. Those who have engaged in it, and have had to learn through the infringements that have been found and the consequences by way of fining that has occurred, will now put in place – as we understand has occurred – the proper measures to ensure that these rituals are now eradicated. We are told that that is in fact the likely consequence of the actions that have been taken. So, it is having the exact and desired result.

We would also not accept what seemed to be, for all its colourfulness, the apparent benign description of these practices as being essentially very far-removed from other kinds of cartel behaviour, but certainly something which is to be comprehended on the basis that it was simply *ad hoc* gentlemen's agreements and simply did not have any clear carry-over to other forms of cartel behaviour. We have previously had occasion to discuss some of the attributes of these practices, but at their heart, and as we heard, even the account that was

offered by my learned friend, it is perfectly clear that what is happening here is that independent conduct is being replaced by co-ordination in this form, and it is intended to be done to achieve particular results. The critical point is that we cannot know what would happen in circumstances where this kind of co-ordination did not take place - how the unilateral actions that would then have followed from different bidders might have in fact given rise to rather different results that would have had price-related effects. So, it would all depend upon not the bland statement and claim that there would have been independent action that would have had no relevant difference to what in fact happened because the real question is to know if the practice had not been engaged in, then what bid would have been made. As I have indicated previously, the risks attendant upon making bids of that kind without the knowledge and comfort of a cover is, of course, a very different kind of outcome, and because it involves a deception practised upon the customer, who would certainly not run a tender arrangement on the basis that the bids were the result of this kind of co-ordination, that, too, would allow for different arrangements and probably including very different invitations to different parties to participate in these tender bids with potentially very different, or somewhat different pricing outcomes. So, it is not, in our conception, just that there is a deception involved. It is not just that it is aimed only at the question of securing credibility for the future. In the relevant counter-factuals as to what would be likely to result, we cannot say. But, it is a much more robust principle of competition that it is independent action without the comfort of cover that is likely to yield the kind of competitive outcomes and market-based outcomes that we would seek to secure in these circumstances.

On the first leg, we say that the assessment of seriousness is not correct. More particularly, it does not found a proper ground for any change or remediation to the penalty because there is no legal error and there is no consideration of fairness which would suggest that this regulator should have taken a more lenient path when the kinds of practices are of the sort that they were. But, even if they were of a lesser order of seriousness, these are infractions under the Act. They are permissibly subject to sanction in the form that they were. That is a perfectly permissible choice that the OFT had to make, and in making it it was entitled to go to the full length of what was permissible in relation to these infringements. So, in our submission what this ultimately seems to come down to is a claim that because they were endemic and Masonic in the ways described, for some reason that warrants a lesser penalty. In our submission that simply does not follow. It does not follow because it was rooted in the way that it was that for that reason it should not suffer a significant sanction. In fact,

probably the reverse argument arises, which is that the more endemic it is, the more necessary it is to send out the right message that this is serious, it warrants remedial action, and there are consequences that flow from engaging in this kind of conduct, particularly because one of the curiosities of the approach that is taken is that as rooted and endemic as it is, there is now a suggestion that everyone has suddenly learned that the scales have fallen from their eyes, and suddenly no-one is engaging in the habits of many years past. Suddenly they are all forgotten. It is a hope. We would like to think it is that way, but the more likely imperative that will come from management is, "See the consequences that this has for the company". That is likely to be the more reliable reminder of why it is that these practices should not be engaged in and should not have been engaged in when they were. Those are our submissions as to Ground 1.

If I can then proceed to the relevant turnover question, and perhaps just give you our essential submissions on this matter? The interpretation that we say is correct in respect of the guidance is one that flows from the particular statutory hierarchy under which the guidance comes into being. For that purpose one has to examine the provisions of the Competition Act and, in particular, the requirements that the setting of the amount of the penalty must be done by reference to the guidance and is in respect of a maximum which is dictated by the provisions of s.36(8). So, if I could perhaps refer you to those provisions, which I know are well-known to you?

> "No penalty fixed by the OFT under this section may exceed 10 per cent of the turnover of the undertaking determined in accordance with such provisions as may be specified in an order made by the Secretary of State".

So, the hierarchy commences with a statutory injunction as to the cap which is determined in accordance with the turnover order. The guidance which is required, and is obligatory for the OFT to follow, is itself an incident of the statutory framework.

The turnover order, as you will have seen from the skeletons, has made a determination upon the 2004 amendment being effected which has determined how that turnover will be understood so that it is now, in terms, clear that that maximum, by reference to s.36(8) is the date on which the Decision of the OFT is taken. So, the turnover of an undertaking for the purposes of s.36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken. The determination that is made pursuant to the statutory requirement is the year prior to the Decision.

PROFESSOR BAIN: That refers specifically to the cap?

MR. UNTERHALTER: It does

PROFESSOR BAIN: The issue is whether you extend that ----

MR. UNTERHALTER: I am coming to that question. So, the issue is then the guidance is then produced pursuant to the change that has occurred in the turnover over. There one sees the language that is reflected in respect of Step 1 at 2.7. There it speaks about the relevant turnover.

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

Now, there are two fundamental arguments as a matter of interpretation as to how one situates that concept against the relevant statutory background which I have just described. The first is simply the plain meaning of 'last business year'. The most natural interpretation of that is the most recent business year of the undertaking.

However, the second consideration is that since one is determining these turnover thresholds within a hierarchy which is ultimately capped by reference to a statutory maximum which is determined quite specifically as to the year that is relevant for that purpose. It makes consistent sense to understand the earlier stages of the determination in light of the ultimate cap that is to be determined. That is, indeed, how the OFT has always interpreted this language.

Sir, if I could just complete the submission. Prior to the amendment that language, which was then referring to 'financial year' rather than 'business year', was again consistently interpreted with the provisions of the then turnover order which referred to the year prior to infringement. So, there has always been a consistent view as to how the term is properly to be interpreted, situated within the scheme of the guidance as it related to the turnover order and the hierarchy within which that arises under the scheme of legislation.

PROFESSOR BAIN: Is there potentially a similar scheme in the EU legislation where my understanding is that at Step 1 they go back towards, broadly, the time of the infringement whereas they have a similar, as I understand it, statutory cap related to the much more recent turnover for the overall penalty. So, they have interpreted it differently. I am not saying that you necessarily have to follow it, but what I am saying is that it does seem to me that in other jurisdictions people have taken a different view about the way that this ought to operate.

MR. UNTERHALTER: The EU does have a different approach to what would be the equivalent of the Step 1 calculation under different statutory language. The consequence is that the regime that is applicable in the UK is within its own statutory framework, and it is

distinctive because of the features that I have described. However, it is true that for the purposes of Step 1 - but, interestingly, in the EU, not for the purposes of Step 3 - there is a disjuncture between the date of infringement versus the date of decision-making where at least under European law the reference to deterrence is generally by reference to the date of decision because it is said that that is relevant for the purposes of affecting proper deterrence.

So, it is a different regime, as it were. It has some distinctive features. There is no requirement that one must read the one over to the other; certainly it is not a guidance as to necessary interpretation under the distinctive scheme that exists in the UK.

PROFESSOR BAIN: But are you telling us really that the OFT has no choice in the way it decides on the turnover at Step 1, or are you simply saying that this, in your view, was the natural interpretation of the hierarchy that it would be open to people to take a different view?

MR. UNTERHALTER: In our submission there has to be a correct interpretation of what these provisions mean. So, it may be arguable that because the guidance is the OFT's guidance it has some authorial sovereignty over what it means, but having determined what it means it cannot, as it were, keep changing the meaning of an instrument which parties must be able to rely upon as having a meaning. Therefore, we do not submit that one can simply chop and change the meaning depending on what we want it to be as between two interpretations. We say that it has a meaning - I have given an interpretation as to what we say that meaning is - and that is how we have always applied it. So, as soon as the 2004 guidance became applicable, that is now we applied it to the cases that then came up for consideration.

PROFESSOR BAIN: That interpretation is being challenged, of course, in these cases. Have there been earlier cases where the interpretation has been challenged so that there might be some higher authority about the interpretation or has it simply not been challenged up until now?

MR. UNTERHALTER: We pray that in aid of our case where we say in earlier cases, under the post-2004 regime, it was not thought to be challenged. But, there is no authority which gives a dispositive interpretation which would assist the Tribunal in its deliberations.

PROFESSOR BAIN: Clearly, the Tribunal or any other body looking at this can only look at the grounds of appeal in front of them. So, there has not been challenge. Nobody has actually considered it at a higher level yet.

MR. UNTERHALTER: We cannot offer you a dispositive interpretation that would be of assistance, but we therefore put our interpretation to you as the manner in which we have

interpreted it, and we respectfully suggest that it is both a coherent interpretation and a correct interpretation and to the extent that there is a discretion that exists to determine the interpretation not to keep changing it, but to determine it, the guidance having been produced, we have made that determination and we stand by the determination which has been made.

PROFESSOR BAIN: Thank you.

MR. UNTERHALTER: There is also the substantive point, apart from the question of interpretation that is raised by our learned friend, to say that one reason substantively to engage in the interpretation that is favoured by the appellant is to say that that would give a better basis for situating the infringement in the market at the relevant time.

There are a number of things to say about that. The first is that given the nature of these infringements - which is that they were of very short duration and the like - there is not the same temporal nexus perhaps that might otherwise arise in cases of this kind.

However, the more significant point is that when one is determining Step 1/Step 2 seriousness that can, in many circumstances, bearing in mind that this guidance is intended to be general, have to serve two purposes - seriousness and deterrence - because it may be that not(?) enough work is done at Steps 1 and 2 to serve deterrence and impress upon the undertaking concerned the seriousness of the conduct that has been engaged in for the nature of the infringement. For that reason we would say, and submit, that the more natural location, assuming one was determining this as a matter of what would be the better interpretation without regard to the statutory scheme, but simply abstractly, we would submit that the better year to choose would be the year prior to decision because that gives a much closer relationship to the undertaking as it is constituted. The impact will be felt upon that entity which must be cognisant of the seriousness and be cognisant of what is required by way of deterrence. For those reasons also we would submit that if there is a choice to be made, that is where the choice should be made.

PROFESSOR BAIN: Can I just ask you about that? It seems to me to cut across the logic of the guidance. The logic of guidance as I see it - and you will correct me if I am wrong - is that Step 1 is determined fundamentally with the harm that is done by the infringement. It is a serious infringement. It is in a market of a particular size. You will work out the harm that has been done in relation to the size of the market then.

As I understood the guidance you then come to Step 3 and you say, “Well, does the penalty that we have calculated at Step 1 achieve also the objectives that we would like to achieve?” Then you go to Step 3 and you may adjust it as you have done with the MDT in this case.

But, that does not mean that Step 1 is concerned with deterrence. In fact, if you look at your own Footnote 10 (at p.15 of the defence) you do seem to be saying there that it is not really about deterrence at Step 1. It is really about harm. In terms of having a sort of clean-cut, logical structure that makes a lot of sense. So, I am having some difficulty with your suggestion now that Step 1 has to take account of deterrence when you have within the guidance the means of dealing with deterrence at Step 3.

MR. UNTERHALTER: We accept that the work that is principally being done at Step 1 is an engagement with the question of seriousness and harm, however, our submission is that it can also do the work of deterrence.

PROFESSOR BAIN: There is a difference between 'It may also be sufficient' which I absolutely accept and that that is part of its task. It falls to Step 1 to deal with deterrence. It may deal with it. If it does deal with it, then you do not have to do anything else. But, you have the option of doing something else if that is not sufficient. You determine Step 1 on the basis, as I understand it, of considerations other than deterrence.

MR. UNTERHALTER: In our submission one need not approach this in quite such a black and white way - which is to say that you will only need to do more at Step 3 if you have not done enough by way of the work at Steps 1 and 2. So, one does not have to have, as it were, this methodological separation, perhaps, as was suggested. There may be circumstances, as I indicate, where it will suffice. Therefore, there are two dimensions to it. It is seriousness, and, we submit, even in respect of the dimension of seriousness it is something which must be borne upon the undertaking as constituted prior to the Decision because it will have a bearing for that firm upon how serious it is. But, that consideration aside, if the work of deterrence can be done at Steps 1 and 2 - and it may be then that is still part of the work that is being achieved at Steps 1 and 2. It need not be clinically separated. That would be a substantive reason for reading it in the way that we do.

We do not need to go to these justifications, as it were. The key point is that a proper interpretation of the structure flows from the statutory scheme.

PROFESSOR BAIN: If those on the other side were to win the day on that argument, there would then be the issue of what you were trying to do at Step 1.

MR. UNTERHALTER: It would not, in our submission, alter the statutory scheme. As to the arguments of legal interpretation in an ideal world how would one best try and arrange the scheme of Steps? It is simply a question of a supplementary way of looking at whether the answer arrived at from a legal perspective has sense in the scheme of steps that follow.

PROFESSOR BAIN: I am trying not to pre-judge the argument about legal interpretation and simply say, "Were the legal interpretation to be different from the one that the OFT promotes at the moment, then the issue would arise of whether or not you should be including a deterrence element in this, or whether you should be going to an earlier year for this".

MR. UNTERHALTER: Yes. I accept that.

If I might then proceed to the third ground, the ground which perhaps founds a significant part of what the appellant has to say - which is to distinguish between the price-related tender arrangements (which have been the subject of cover pricing) and framework agreements?

Reference has been made to the sections of the Decision where this was dealt with at Part 2, p.1680. Perhaps I should begin firstly with what is the scope of the OFT's powers in respect of market definition in the first place? Our learned friend helpfully read from the provisions of the *Argos* case. Perhaps it would be useful to go back to that in Bundle 4, Tab 54. The relevant passages are those that have been referred to from paras. 170 to 173. However, the key aspect of the reasoning here is that in fact there is a very wide discretion that exists in respect of how one frames markets for this purpose for defining relevant markets, and that it is not intended that it should be the same kind of analysis that might be used in an abuse of dominance case or the like. So, it is a very broad assessment. The consequence of the broad assessment is that it allows for quite considerable variability as to how one might approach the matter. That is the issue of principle which is accepted at para. 173. As a matter of principle we agree with what the Tribunal said about the correct approach for the OFT to the question of relevant product market as summarised in para. 171 above. There one reads that

> "The Tribunal held at para. 111 in the judgment on penalty on Football Shirts that no formal analysis was necessary in order to decide on the relevant product market for penalty purposes in a Chapter I prohibition case".

So, what this authority stands for is not that this was simply the right approach to relevant markets in this case, but the policy position that can be taken, and the judgments that can be made are broad brush market definitions. That is the scheme that has been approved in this case.

So, contrary to what our learned friend has suggested, it is not that a definition of a particular kind may have been good for that case - and perhaps the OFT improved on its position in relation to the particular practices that were relevant for this case, but that

something more could and should have been done. The legal proposition is that a very wide power exists to approach this matter and there is no error that results from taking a particular view because it is this kind of rather broad assessment.

So, the issue that then arises is, "Well, is there any fault that is attributable to the OFT in having framed the markets in the way that it has?" On that score I think it would be fair to say that the OFT devoted an enormous amount of attention to this issue and derived very narrow, relevant markets on what would, I think, ordinarily be thought of as a much more strict economic test of substitutability of the kind one would encounter elsewhere, and hence derived these very narrow market definitions both as to product and as to geography. We submit that there is no fault at all to be attributed to the OFT for having done that. It was a perfectly permissible approach to take to the matter. It did not have to do so. The logic, though, of the argument that is presented to you is to say "Ah! But, it did not go far enough. In fact there should have been [as we understand the logic of this argument] a yet further reduction of the market definition to something that excluded framework agreements". Indeed, given the particularity of some of these framework agreements, by the sounds of it one might have got to a very granular and very minute market definition if the logic of that were to progress in the way that was suggested, which is that there is a choice that a customer is making as to the particular form of tender or framework arrangement that it is going to put up to the market, and then that constitutes a market unto itself. That would be the logical result of that kind of analysis.

We submit that there is absolutely no warrant to take that view, and that the detailed analysis that was offered on this score is not just a perfectly acceptable approach, given the scheme of the powers enjoyed, but is a perfectly sensible view as to markets and how they might be defined.

There is a very lengthy treatment of the matter, but one sees that ultimately the conclusion, which is to be found at p.329, para. II.1727, is very much linked to very narrow relevant product markets and then a variety of geographical markets that are also fairly narrowly framed. We submit that it would have been perfectly competent for the OFT to have said, "Well, this is all construction related activity in the UK. That is the market". That would have been consistent with *Argos* and the proposition that had been taken there. It did not do so because it took a view that it was correct to adopt a substitutability standard in a more formal way than would ordinarily be done. But, it may, as we have considered on another occasion, have had some consequences for how much work had to be done by way of MDT. However, that is a very different consideration. The question is simply, "Was there any

reason to criticise this market definition?" Here we say there was none and that is so for the reasons given.

But, even if one applies the standard of a substitutability test as was utilised by the OFT in this case, again, we see no ground whatsoever for criticism because the question of substitutability and the correct definition of the product does not seem to be determined by reference to the contracting mechanism by which the service is actually procured. If one is seeking construction work it may be that there are different methods that are available for ensuring that one gets procurement. One can use different methods. But, that is an election that will be made by the customer in any particular case. But, the product that is yielded up is defined not by reference to the means by which the procurement takes place. We would say that that should be so irrespective of the differences that arise which are differences of choice.

It has already been remarked upon by Professor Bain that insofar as one is looking at supply side substitutability there would be little difficulty in a firm that provided framework arrangements moving to simple tender arrangements. But, it appears - at least in the case of this appellant - that there was in any event a move from tender pricing arrangements to framework agreements. Now, how long it takes to do that, and so on, no doubt could be the subject of anxious consideration. But, broadly speaking, using the test in Argos, there seems little to complain about that there is two-way traffic between these two types of procurement even if one was going to determine markets by reference to style of procurement rather than the product yielded up through the form of procurement that is utilised.

It is therefore our submission that there is very little that is impeachable in any way about the approach that was taken, and particularly so in the light of the broad definitions that exist as to the powers by which relevant markets are determined. So for those reasons we would submit that here too there is no reason to suggest that an error was made.

We would also submit, and here I can simply direct you to the Public Contracts Directive, which is a European Directive as to how one defines Framework Agreements – I do not say we need to use this dispositively for any purpose but it is just indicative of what we actually mean by a Framework Agreement, and that is an agreement with suppliers, the purpose of which is to establish the terms governing contracts to be awarded in a given period in particular with regard to price and quantity.

If the question, as I understand it to be in these Framework Agreements, is that ultimately a decision is made as to who is going to be taken on for the purposes of these Framework

arrangements, some consideration is given to price, certainly as that definition would indicate price does not fall out of the picture and therefore who makes themselves available for a Framework Agreement and under what terms could indeed be the subject of manipulation by way of a cover price. There does not seem to be anything in principle which would suggest that in making yourself available for a Framework Agreement there could not be co-ordination over the offerings that you would make for this purpose and its price at some level is always going to be a matter of some significance for the purposes of who is taken on within the scheme of a Framework Agreement. So no doubt the modalities are different, and no doubt it may give rise to different imperatives for those who engage in this form of contracting, but since price lies at the heart of those things in commercial contracts of this kind it is hard to see why, as a matter of principle, cover pricing is somehow excluded from consideration.

THE PRESIDENT: You deal with this at some length at p.313 onwards apparently, some of these arguments, and allege there that four of the infringements did involve non-traditional methods of procurement?

MR. UNTERHALTER: Yes.

THE PRESIDENT: Two stage bids, and design and build contracts.

MR. UNTERHALTER: It is not clear, and that is what we were seeking some instructions on as to whether that formally would fall within our learned friend's definition of a "Framework Agreement, there appeared to be some non-conventional forms of agreement which are two stage agreements which may not technically be the same as a Framework Agreement, so I do not want it to be thought that is necessarily the same thing as a Framework Agreement, but these gradations of agreements and types of agreements, all of which simply indicate that that is not the indicative way of going about market definition. It cannot depend upon the particular modalities of these agreements, which can be specified for by the employer in different ways, but must go ultimately to the products that are sought to be procured, and if that is the real touchstone – and we do submit that it is so – then that must really end this debate.

It is also not clear where this argument runs, because there is not in fact a challenge being made to relevant market definitions for the purposes of the way it was – as we understand it at any rate the challenge is not to say that we should have re-done our relevant market definitions. It seems to be a consideration that should be paid some regard to for the purposes of penalty, and we are not certain actually how that argument plays itself out

because either it is a frontal attack on the definitions of the markets because that affects relevant turnover, and that would then have a particular consequence, or it is not.

THE PRESIDENT: I had assumed it was a suggestion that this appellant's relevant turnover would be lower if you had excluded those.

MR. UNTERHALTER: Perhaps my learned friend will clarify that. It may be that that is the argument that is being made.

MISS ADKINS: Yes.

MR. UNTERHALTER: Then we shall not speculate any longer on that point. If it is this frontal attack, as it were on the relevant market definition, for the reasons we give we say it is not a good ground of objection and the definitions under the powers that we enjoy for this purpose are perfectly proper.

If I could then proceed to the final ground, which deals with MDT, and there seem to be in effect two arguments that were being offered on this score. The first is to say that under the discretion that exists for the purposes of ensuring that deterrence work is done by an MDT, or some other means, that the discretion is being too widely exercised because it allows for two very different outcomes. In some instances it could be UK turnover, in other instances it could be worldwide turnover, there is just too much variability as to the kind of outcome that could be achieved by way of MDT.

We submit, and certainly the things our learned friend was saying are matters we have submitted to the Tribunal on many occasions, that is to say that indeed we are not varying this standard, we do take a total turnover standard, that is what is applied for the purposes of MDT, and we do so for the very reason which has been identified, which is scale and size matters, and that is how we secure proportionality – I shall not repeat the many times that we have made that submission, but there is a further reason that we do so, which is that within the statutory scheme of arrangements which I have earlier described the statutory cap is now quite plainly done by way of reference to worldwide turnover, that is the statutory instrument, so if one is thinking within the scheme of statutory allowance, as it were, the universe within which penalties can take place, the scheme allows for worldwide turnover as the basis upon which the computation can take place. So that is where we are situated, but that does not mean that one must exercise it to the full extent possible, but it indicates the shape of the universe, as it were. Then the question is: where do you stand in that universe, and the OFT has sought to adopt a consistent standard which is to say "We will adopt an MDT in relation to a total turnover standard and that would eliminate some of the difficulties which were identified, which is to say if we happen to be disproportionately

based in a particular relevant market versus certain larger firms that have many overseas markets that they engage in and are much bigger, well this is how the MDT measures out these differences and ensures that there is consistent treatment as between parties. It is not that the MDT is inexplicable, and it is UK turnover one day and somebody else's turnover another. It is done in relation to the total turnover standard in respect of the undertaking that is concerned.

The second proposition that was advanced as to why some allowance should be made under this, is to say that there is significant churn, which is to say that these businesses are set up on the basis of subcontracting arrangements and the like so it is income in, income out and therefore it does not reflect the true economic size of the undertaking.

We would submit on this score that in the first place these amounts are reflected as turnover in books of account of the company. Now, they have made an election as to how to treat these amounts ----

THE PRESIDENT: You have to take account of real differences in the economic power, have you not ----

MR. UNTERHALTER: Yes.

THE PRESIDENT: -- regardless of how it is put through the books. The reality is that it is just turnover, turnover that comes in and out. You cannot blind yourself to that, can you?

MR. UNTERHALTER: Certainly, it is not a question that it is just a formalistic issue of turnover and do not look beyond that. The issue is though that there are some choices that are made in the presentation of accounts in this form, which is to say that turnover is a measure, generally speaking, of sales, and to the extent that sales in a market are a reflection of economic power that is where the connection arises, so they are reflected as sales, and that is why it is a turnover standard that is generally adopted.

We accept that the subcontracting arrangements may alter the margins that are available, and then we are getting into the profitability standard.

THE PRESIDENT: Not necessarily, it might just affect the percentage of turnover you take.

These are facts, are they not? If the economic strength of a company is the relevant factor a starting point may be its throughput but you would not ignore other factors which have a real bearing on the benchmark, or the touchstone that you are looking at, namely, economic power and size and so on.

MR. UNTERHALTER: Again, we are not submitting that one would simply formalistically just open the books and say: "That's that". But the ability to be awarded a contract and to cure all the arrangements that are necessary to discharge and perform that contract is what is

really being reflected in the turnover that is in your books, because it is not very different from many other undertakings that have to buy significant inputs in order to provide a service. It may be that you are doing a final assembly of many components brought in from all over the world, those inputs may be very substantial, but one does not then say: "Toyota is not a powerful company because it assembles components from many parts of the world." It is, and it is generally so by reference to its sales in the market and what it can command by way of those sales, and the principle is no different whether it be Thomas Vale or a motor assembly.

PROFESSOR BAIN: I am sure that is right, but there are nevertheless big differences between different industries. If you were a commodities futures broker you might, if you were lucky, earn 0.1 per cent in turnover. If you were a pharmaceutical company you would earn more than 15 per cent in turnover, and to apply the same basic standard penalty to these two companies has enormously different implications for the impact on their profitability. What we are finding difficult to see is how, if at all, the OFT takes differences of that kind into account. There will be greater homogeneity within the construction industry, but there may still be quite considerable differences amongst the 103 companies that you are dealing with as regards their business models. There may be quite a difference between subcontractors, like roofing contractors, and main contractors where there could be quite considerable differences in the margins.

MR. UNTERHALTER: There are really two problems there. There problem is comparability as between sectors which, as we have already sought to submit, could well be adjusted, one could have a different regime of an MDT if you are dealing with a very different sector like the pharmaceutical sector. Then there is the question of what adjustments, if any, should be made within the sector which I think is the force of the question that is being posed. At least as far as the OFT was concerned it could not see, at least on this dimension, that there were such radically different orders of difference that would warrant to be changed on the imposition of the MDT.

We have heard from this appellant that its business model was cast in a particular way, but there was no indication to the OFT that this was a systemically different consideration that needed to be built in by way of some special consideration and for that reason it applied a standard model.

PROFESSOR BAIN: Did the OFT actually look at the profit margins of the different companies in this sector?

MR. UNTERHALTER: I can take an instruction as to whether it actually did, Sir, because it looked at the question of whether it should adopt a profitability standard and it rejected it, and I am not certain, and I can take an instruction as to whether, notwithstanding the rejection of the profitability standard it nevertheless got some sense of profitability, but I could take an instruction on that issue. (After a pause): I am told that the OFT did look at profitability but only in those instances where an undertaking had made a hardship claim. In respect of every single hardship claim that was made it was carefully looked at and the profitability question was assessed.

PROFESSOR BAIN: But there was no attempt to look to see whether the companies had different business models that would lead generally to rather higher operating margins for some that were typical of others?

MR. UNTERHALTER: Not as I understand the position.

PROFESSOR BAIN: Thank you.

MR. UNTERHALTER: There was one point of clarification that I should make just in relation to the questions posed by Professor Bain concerning seriousness and deterrence at Step 1 and whether one should separate these out. To be clear although we have said that double work can be done at Step 1 we are saying that independent of that consideration there is equally the requirement that in respect of registering seriousness with the undertaking concerned in respect of these infringements, that should be done in relation to the size of the undertaking immediately prior to the decision. In other words, it is not just the question of deterrence. Quite apart from deterrence there is the question to impress upon the undertaking the seriousness of its conduct it should be the undertaking as constituted in the year prior to the decision and that is a consideration quite apart from the deterrence argument which we have developed.

THE PRESIDENT: That is Step 1?

MR. UNTERHALTER: That is Step 1.

THE PRESIDENT: It is interesting, it is not specifically mentioned in the factors that you do draw attention to in para. 2.5, is it? You refer to market shares, but the factors that are drawn attention to in 2.5 are very much factors relating to the context in which the infringement took place.

MR. UNTERHALTER: It is a number of factors including, and those are ones, the nature of the product, the structure of the undertaking, and that is so, it is not a dispositive list, and therefore at least one consideration is the determination of seriousness must fall upon the

undertaking as it is constituted at the time of the decision because it is a more adequate reflection of how seriously this should be taken.

Those are our submissions.

THE PRESIDENT: Thank you very much. Miss Adkins, are you ready?

MISS ADKINS: Yes, Sir. In relation to my learned friend's response on Ground 1, he was suggesting we should be looking for some error on the part of the Office of Fair Trading, and I suspect you may have been – I would not say quite *ad nauseam* but quite a few times – reminded of your general jurisdiction to review the reasoning of the Office of Fair Trading, and I would say it I in that context that we make those submissions. We are not saying that the OFT was wrong. Yes, it did have a margin of discretion and we say it exercised that margin of discretion in a way that has ended up in an iniquitous unfair result for Thomas Vale, which is what we are saying on that particular point.

With respect to collusion, cover pricing, I maintain what we said concerning cover pricing, what we call cover pricing *simpliciter* as it occurred instance after instance after instance as a result of this professional convention. We say to that there were 4,000 instances of cover pricing that the Office of Fair Trading unveiled out of that, and to stand against that there were only six instances of compensation payment. You would expect, if there were not clear boundaries between those two practices, and given the incentives that there were clearly on undertakings to try and find more collusion as a result of benefitting from leniency and leniency plus, you would have expected to have found far more instances of a division of boundaries between those two types of collusion.

In response to my learned friend's question on turnover and what year should you take turnover, vis-à-vis Step 1 where we have said you are losing the temporal nexus between the breach and the actual punishment, for want of a better word. That was dismissed simply by saying "cover pricing" was something that instantly happened and that is not relevant. We say that it absolutely is relevant because we accept that there is obviously a need to impress upon the recipient of a decision the seriousness of the consequences of breach of competition rules. But when it becomes so de-linked between the breach that took place in year 1 and then in year 10 the punishment is applied, we say in the circumstances of Thomas Vale you are dealing with a very different animal. There the sense of injustice and actual justice does arise. The first breach took place in the year 2000 and it is in 2008/09 by reference to that turnover that the penalty is set, and we say that that cannot be right nor sensible, nor a fair means of punishment.

THE PRESIDENT: It may be that I have forgotten, but do you distinguish at all, that point is made in relation to the basic fine?

MISS ADKINS: Yes, Step 1, and generally as well. We accept that there needs to be some form of deterrent and arguably it needs to be set by where the company is at the time, but when there has been such an evolution in terms of where the company stands at the time of the actual decision or as to when the breach occurred what has happened since, we say there is a danger of actually penalising the efficient undertaking, such as Thomas Vale actually "traded" their way out of trouble for want of a better world and moved very much away from the markets in which the original breach took place. Contrast somebody who says: "I am being investigated by the OFT in the year 2000, right, just cease these activities, pull the company out of that market, perhaps strip the assets out of the company and move on," which for these small, local markets dealing with SMEs it is a real possibility – PLCs may not be able to do it but in the context of these particular construction-type markets it is a real possibility. So one says: "Right we are being investigated by the OFT, this is very heavy duty, huge fines, life threatening fines, let us just strip down the company; let's give the shareholders some very good payments for a few years and run the company down, and the fine will be very different. You get somebody who carries on trading, carries on innovating, carries on producing more products, etc., is going to be penalised. As I said, there is such a huge disparity between what happened at the time and then the fine much, much further on down the road. You are dealing with very different markets, very different dynamics, different incentives, and we say that that leads to not only an unfair but an irrational result. We point again to what they do in European law, and we do not see that there is a proper justification for the OFT to want to depart from what is common practice in the rest of the EU unless there is some good rationale apart from "There must be some form of deterrence", we say that is not adequate.

Concerning market definition, we say three things about market definition and, even on the Office of Fair Trading's own very broad brush which we do not dispute in the context of cartels. There is necessarily what I would call perhaps a "non-economic" test for market definitions, but even on that very broad brush approach we repeat again cover pricing simply cannot take place on partnership and negotiated agreements, price is not on the table, irrespective of what the definition may be as a matter of Community law. How this contract works is requisition of a service by the appointing party. If cost is being discussed it is basically: "What is the cost pricing?" But there is nothing that can be the focal point for collusion as in cover pricing; it simply cannot necessarily occur. Then there is a stark

contrast in the OFT's own reasoning where it says in its own decision – just to take the note: II.1617, p.1391 the OFT finds there were no infrastructure projects among the alleged infringements, and hence infrastructure falls outside the scope of the investigation.

We say even on the OFT's own reasoning cover pricing cannot occur on Framework and negotiated contracts. Therefore, on a very, very simple commonsense approach, on the OFT's own commonsense approach it should be outwith the ambit of the market on that basis alone.

THE PRESIDENT: Sorry, just give me that reference again.

MISS ADKINS: Decision II.1617, p.1391.

THE PRESIDENT: 1391, are you sure? I do not think so because that would take you into IV.

MISS ADKINS: (After a pause): Page 294, sorry, the paragraph is II.1617. "Infrastructure falls outside the scope of this investigation ..." and the last sentence: "There were no infrastructure projects amongst the alleged infringements, and hence infrastructure falls outside the scope of this investigation."

THE PRESIDENT: So you say by parity of reasoning there were no Framework Agreements in the context and therefore they fall outside.

MISS ADKINS: It is an impossibility to have cover pricing on Framework contracts.

THE PRESIDENT: Regardless of the form of the contract, could those kinds of deals not be affected by the cover pricing practices in some way? Are they insulated from any possible indirect effects at that sector? Could the choice of procurement be affected by cover pricing? That is more of a rhetorical question, I am not really expecting an answer to that! (Laughter)

PROFESSOR BAIN: Could I ask another question on the same subject before you move on? Your criticism has much more force if the year of turnover is 2008 than it would have been if the year of turnover had been 2000.

MISS ADKINS: I am sorry?

PROFESSOR BAIN: Your criticism has much more force if the year being used is 2008 than it would have been if it had been 2000, because Framework and negotiated agreements have developed over that period. I would like to have some feel for what they were in the middle of the period. Have they grown very suddenly in the last six years very substantially, or was it something that really started early in the 2000s and built up really quite quickly?

MISS ADKINS: It has happened progressively. I think the turnover for 2000 for the Framework and negotiated contracts was 11 per cent and now it is 80 per cent.

PROFESSOR BAIN: And in 2004, just roughly.

MISS ADKINS: If I could just take instructions on that? (After a pause): 2004 was approximately 20 per cent, and it has built up incrementally; probably it has accelerated over the last couple of years I would say, but there has been an incremental increase.

PROFESSOR BAIN: So it has actually grown very rapidly during the period that this investigation was taking place, but not so rapidly during the period during which the infringements were taking place?

MISS ADKINS: Correct, because the acceleration started taking off in about 2004. Before that it was basically putting everything in place in terms of getting new terms of people in place, retraining etc. So that is the first argument. Cover pricing is not possible ergo it should be out of the market – a very simple argument. Also to repeat again, this is not about procurement methods, these are two entirely different purchases. With regard to "Lowest price wins" tender the person purchasing is purchasing the actual thing – they are buying a police station, they are buying a fire station, they are buying a school, whereas with a negotiated Framework Agreement, the purchaser is purchasing a service. They are purchasing a certain quality of person to work in conjunction with the rest of their team.

THE PRESIDENT: They call off in the future, do they not?

MISS ADKINS: Exactly.

THE PRESIDENT: They call them off as and when they require them depending on the nature of the agreement.

MISS ADKINS: Absolutely.

THE PRESIDENT: And they are bound to call off so much, or they are not really ----

MISS ADKINS: That is right, because at the time Birmingham City Council, for example, which is the largest client of Thomas Vale, when it has made the appointment of Thomas Vale and two others, it will not know what it will be doing and so it may or may not in the future wishing to purchase a school, but it will not have identified the school at that stage, or what the nature of that project will be, but it appoints Thomas Vale to that possibility on the basis that Thomas Vale meets certain quality criteria.

So even there it is not purchasing on price: (i) there is not the price on the table because there is no project, but (ii) it is looking for value for money, it is looking for a whole other series of KPIs (Key Performance Indicators) of quality, from a huge, huge variety of different purchasing decisions, all of which are very finely balanced and it is no longer about simply "Give me a price", an entirely different animal.

THE PRESIDENT: I cannot remember, is it included in the papers ----

MISS ADKINS: Yes.

THE PRESIDENT: -- as to what the turnover is affected by on this point of yours?

MISS ADKINS: We have not given you precise figures, I think we have given you very loose figures and in terms at the moment it is 80 per cent of turnover, that is as much as we have told you although we are very happy to supply you with more precise figures if that is what you would like.

MR. CLAYTON: I think the turnover figures would be very helpful in these sectors and the percentages as well, so the turnover and the percentages.

MISS ADKINS: We would be very happy to supply those, and we can obviously let you have them as they have evolved over the years.

MR. CLAYTON: That is what I meant, so basically it is going from 2000 to 2009.

MISS ADKINS: Yes.

THE PRESIDENT: These points were made to the OFT, presumably.

MISS ADKINS: Absolutely, very much so. In fact, that was what we very much majored on in the oral hearing and in response to the statement of objections and all of that is in the papers before you.

My last point on that particular issue as to market definition is also to point out, again in terms of discrimination by the OFT, it also excluded PPP (Private Public Partnership) contracts from the ambit of the market and I refer you to II.1693, p.319 of the OFT's decision, under the heading "Partnered Agreements, which we say is a bit of a misnomer it is confusing, PPP are not Partnering/Partnered Agreements, that is not what they refer to in the markets, they tend to be called "PPP contracts".

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

and we would say so too should framework and negotiated contracts fall outside that definition on the basis of lack of supply side substitution.

MR. CLAYTON Just to ask one further question on these contracts, if I may? You said the Birmingham City Council in this case would know what the price would be when they were talking to Thomas Vale, or whatever.

MISS ADKINS: Yes.

MR. CLAYTON: But how would they therefore know that they were getting value for money, that they were perhaps not being "ripped off"?

MISS ADKINS: "How do you operate?" "What is you cost base?" Often they ask people to construct a sample contract for example – "How do you manage?" So much of it is not about cost, it might be about ascertaining: "What is your cost base?" so that would be examined, so there would be a whole lot of other things that they are looking for in terms of KPIs, so it would very much "what is your cost base?" that would be the focus of what they are considering. Again, that is very much in the papers, we have shown very much what is looked for.

MR. CLAYTON: Indeed, so just to be clear, they would only look at one of these partners, they would not be talking to two or three partners and then getting a price from two or three.

MISS ADKINS: There is a sense of: "We have appointed you. You will do this project, you will do that project? Who is available, who has the resources?"

THE PRESIDENT: You will tender out, as I understand it, for the candidates for the Framework Agreement?

MISS ADKINS: Yes.

THE PRESIDENT: There will be a tendering process, but it will not necessarily, and you say "not primarily" be questions of prices for particular projects, it will be a whole range of services?

MISS ADKINS: Yes.

THE PRESIDENT: In a negotiated agreement you will choose the people to whom you want to talk, and then you will choose one of them with whom to negotiate the terms?

MISS ADKINS: That is right, and negotiating the terms will not be around price, it will be about can you perform this service and work with us, and usually on an open cost basis to assist us in producing this project because there will not be a price at the end of it, it is about "How can you work most efficiently with us and create value for money for us?" So again there will not be a price on the table.

MR. CLAYTON: But the actual contracts are placed by Thomas Vale in this case and so the invoicing, if you like, is done by Thomas Vale ----

MISS ADKINS: I would have to go and seek instruction on that.

MR. CLAYTON: -- rather than the Birmingham City Council which contract directly.

MISS ADKINS: If I can just seek instruction on that. (After a pause): Yes, Thomas Vale will do the subcontracting work because it will go through their books. I have just been instructed they are negotiated contracts, and Thomas Vale, once appointed to a negotiated contract it will work with the customer basically to work out the price with the customer together, so in terms of "What is this going to cost?" "How are we going to do this?" to work out

together the best solution – almost as a consultant, effectively to the customer. Again there is no price on the table that can be the focal point for collusion.

THE PRESIDENT: I cannot remember, do you distinguish between negotiated and framework in your 80 per cent?

MISS ADKINS: Those are put together, they are deemed to be the same thing on the basis that it is just a very, very different method of performing a service for a customer, it is a very different way of carrying out ----

THE PRESIDENT: I was just wondering if you had split the figures out, that was all.

MISS ADKINS: On MDTs, I simply want to make one point. I heard my learned friend saying "yes", there is a cap, there are no two ways about that. I would say, coming back to the deterrent effect and the law of unintended consequences, it is true there is a cap but again to come back to this idea there is actually competition for compliance resources, putting it crudely. So when actually you tell a client these are the possible fines you are subject to in the UK, for example, when you start to tell them: "Oh by the way, there is this strange thing, it is not in the Guidance, it is called the MDT, this eccentricity in UK law", it goes on the "too difficult" pile, because the reaction is: "This is ridiculous, that cannot happen" and, if anything, I would say it has the reverse effect of the deterrent effect. People put that on the "far too difficult pile", that is a nonsense, it must be absolutely the Wild West out in the UK vis-à-vis competition enforcement. It is embarrassing as a competition lawyer they think you are mad, and often they go for a second opinion on it because they do not believe it is actually true that this vague MDT point – you perform a rational analysis and then suddenly you get whacked by the MDT at the end of the analysis. We say as it has currently been applied in the context of this particular case vis-à-vis Thomas Vale it has also led to an iniquitous result.

Turnover, in the context of MDT and the profitability as against the turnover test: we are not saying the turnover test should be put to one side, but we are saying there should be some finesse, some calibration. In a way I am looking back to my earlier point, with Thomas Vale, as with other construction companies, I am sure you will find huge variations in profitability from year to year, which effectively also loops back to an earlier point, namely, unless you are taking a Step 1, the year of the event you are going to end up with an unjust result effectively, by reference to "When should this punishment start?" and we should say actually you really need to loop it back to the year of the offence, as opposed to much later on because you are going to end up with some very, very arbitrary results and

people would have extremely good years one year, other years they will have disastrous years.

THE PRESIDENT: You could have very different years. You are not arguing for a specific year, you want it to be close to the infringement. There are various possibilities, it could be the last year before the infringement, it could be the year in which the infringement fell, it could be the year when the infringement ended. You do not argue as between any of those, do you?

MISS ADKINS: No, that is right.

THE PRESIDENT: Equally they can produce very different results as between themselves.

MISS ADKINS: That is true. There is more of a sense of justice about it though, because there is some reasonable nexus between the actual breach and in a way if you had a bad year that year "Well, that is the consequence of having breached the rules in that year, that is how it is". But if you have, as Thomas Vale has done, carried on innovating, carried on trading, and then you get hit for having a very successful year, which is not the year in which you actually breached the law, which we say is unfair.

I do not want to run over time, but if I may pull a few strands together if I may? By way of wrapping up, I have two main observations. One, this case is unprecedented, there is no question about it, not only for its scale but also the nature of the practice which is censored, and also for the manner in which the OFT has imposed penalties in response to that scale. I would say that despite there is a lot of noise this case, the number of parties and the number of infringements I would submit this case is really about the forcing of a round peg in to a square hole, and that is why we are here.

In calculating what we and 23 others say is a manifestly unfair penalty with regard to the respective appellants, what the OFT has essentially done is to rely upon the fact the cover pricing *simpliciter* is an object infringement, and therefore after that it has essentially down tooled its analytical tools and produced a mathematical formula for the purposes of imposing a penalty. It is not engaged in a proper and forensic consideration of the specific circumstances of each individual addressee, let alone what we say is very important, especially in the context of this particular case, the effects of that fine. So while the OFT is to be lauded for its attempts to be fair it never was going to get it right. The quality in this case, as in "one size fits all", does not equate to equity. So we say that once the OFT adopted anything other than notional fines on the addressees of this decision it was in trouble, simply because, as you have been hearing for the last two and a half days the OFT

is required, as a matter of the application of fundamental principles of law, to set a penalty by reference to the harm that occurs on the markets in question.

So absent a proper and forensic consideration of the individual impacts of the breaches in question, which manifestly the OFT has not embarked upon, the penalties imposed are fatally flawed and that simple takes us to Step 1 of the fine calculation. Nor then can the OFT go on to claim that it does not have to get that aspect right. There is a sweep up provision of the deterrent effect, the MDT, but there again we say the OFT failed to consider the individual circumstances of the addressees and the effects that would occur on the market as a result of the imposition of that MDT.

We say this was an impossible task, and it also was not appropriate in the circumstances of the case for the OFT to impose the penalty that it did on Thomas Vale. We also say that this case is actually about the inappropriate exercise of public power. We are not simply saying for its own sake that it was unfair, but also to make the point that when the OFT intervenes in tough complex markets such as this it needs to do so by reference to clear, concise, well calibrated economic restraints or not at all.

Currently as the fine stands, Thomas Vale is effectively being penalised for the fact that has traded itself out of serious trouble, it is penalised for the fact that it took on board its responsibilities and has moved away from that particular market.

If you have any further questions I am obviously at your disposal. Thank you.

THE PRESIDENT: Thank you very much.

MR. UNTERHALTER: I am sorry, if I may detain you for one moment?

THE PRESIDENT: Yes.

MR. UNTERHALTER: Since something has been made of examples of these Framework Agreements, in particular the Birmingham Council that example was given, and claims made around the apparent irrelevance of price for those purposes we would ask if there could be some disclosure made of the score cards and the relevant contractual documentation in respect of an example of a Framework Agreement of that kind, so that we can examine the claim that is made about these agreements in terms of an actual agreement that is being referred to. It would be helpful for our purposes and perhaps for the Tribunal's as well.

THE PRESIDENT: Speaking for myself it would be helpful.

MISS ADKINS: The OFT have had them, but we can pull them out and let you have them again, it is no problem at all.

THE PRESIDENT: If they are not in the papers.

MISS ADKINS: I do not think they are before the Tribunal, but certainly we did give them. It is not a problem, we can get those to you.

THE PRESIDENT: Thank you both very much.

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