**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1133/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 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) SICON LIMITED**
**(2) JOHN SISK & SON LIMITED** — Appellants

- v -

**THE OFFICE OF FAIR TRADING** — Respondent

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# HEARING

## APPEARANCES

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Mayer Brown International) 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.

THE PRESIDENT: Good afternoon, Mr. Sharpe, it is nice to see you.

MR. SHARPE: Good afternoon. I appear for Sicon Limited, a company registered in Ireland, and its UK subsidiary, John Sisk & Son Limited, and I am going to call them together "Sisk". With me is Mr. Matthew Cook, he is here as Junior and timekeeper.

THE PRESIDENT: Oh yes.

MR. SHARPE: The respondent, the Office of Fair Trading is represented by Mr. Unterhalter and Mr. Bates. In the allotted time I am going to focus on three principal issues only. The fact that Sisk committed only a single infringement in relation to a single tender. However, the penalty methodology adopted by the OFT discriminated against parties which committed only one or two infringements since they could and did end up with the same or much higher penalty than parties that had committed tens or in some cases hundreds of infringements. In our submission that cannot be proportionate or just.

The second issue is that the OFT's decision to impose an MDT penalty by reference to worldwide turnover discriminated against Sisk which is an undertaking whose operations are primarily overseas, mainly in Ireland, and this fact alone increased Sisk's penalty by 350 per cent. The OFT has put forward no explanation, certainly no cogent explanation why such an increase was necessary in Sisk's case.

The third issue was the fact that the OFT's idiosyncratic approach to leniency reductions meant that in practice only those parties which had been subject to s.27 inspections, the dawn raids, which are likely to have been the more serious offenders, received the largest reductions, and as a party that had only committed a single infringement and was not, therefore, dawn raided, again this meant that Sisk was likely to receive, and did in fact receive a larger penalty than many more serious offenders who were favoured with a surprise visit.

I am not going to take you to any authorities, the one authority I am going to mention is the *Crest Nicholoson* case, but I would be very surprised indeed if that had not imposed itself on your memory. Secondly, I am at your disposal, but I certainly do not feel bound by the notion that if you have a question or you wish to intervene in the course of my submissions, I would positively welcome that, and you should feel no sense of restraint ----

THE PRESIDENT: No, we do not, none whatever! (Laughter)

MR. SHARPE: That was my impression as well nevertheless. We will go to the first issue, the question of whether Sisk was a singleton. Before the Fast Track discount, Sisk received a penalty of £8.25 million.

That penalty was in excess of 100 per cent of Sisk's total turnover in the relevant market , the office market, in the West Midlands in the year of the infringement, for your note that turnover was £[Confidential]. That is not in the decision, we provided it.

THE PRESIDENT: Just remind me what the year was, the infringement?

MR. SHARPE: 2003. That was also equivalent to [Confidential] per cent of Sisk's total turnover in the UK in the year of the infringement, 2003. For good measure that penalty also represented no less than [Confidential] years' worth of Sisk's profits from all of its UK business, taking it up to the most recent year, that is [Confidential] years' trading and risk for nought owing to one infringement. I am trying, in opening, to place this fine in absolute numbers in some sort of commercial context. We submit that on any basis it is a wholly disproportionate penalty for a single cover pricing infringement, particularly in circumstances in which the infringement involved only two out of the five bidders and consequently had absolutely no actual effect on competition or on the customer, there was plenty of residual competition among the other bidders to ensure that in the end nobody was harmed. In fairness, the Office do not allege that anybody was harmed. Their case, as you know, is solely based upon object, but for the record there was no possible effect either.

So the fine is plainly excessive and incorrect both when analysed on the basis of the individual steps that the OFT took in determining the level of the fine and also when we look at the overall number itself. When we look at this single versus multiple infringements, in the majority of investigations that the OFT carries out during any year it is considering a single infringement committed by a number of undertakings with the result that a similar penalty methodology can be applied to each undertaking to determine an appropriate penalty. In this investigation the OFT found that the vast majority of the undertakings investigated had what the OFT called a "settled practice" of anti-competitive behaviour – a term which is used to describe undertakings that had a minimum of three infringements, but in many cases covered undertakings which committed tens or hundreds of infringements, but the minimum of the settled practice was three.

The OFT found that Sisk committed a single infringement in relation to a single tender. This is a position it shared with only two other parties to the decision. Accordingly, Sisk had no settled practice of anti-competitive behaviour as the OFT itself defined it.

Sisk's complaint is very simple. The penalty methodology that the OFT adopted meant in practice that a party that committed one or two infringements could end up with a pre-leniency fine that was either the same or potentially, at least, much higher than the pre-

leniency fine received by a party that had committed hundreds of infringements. In our submission that is perverse and indefensible.

I will give a couple of examples just to make the point good. Sisk's total pre-leniency penalty for a single infringement was [Confidential] per cent of its UK turnover, and that is equivalent to 0.75 of its worldwide turnover, but a number of parties to the decision which had committed at least three and in many cases much more than three infringements, received total pre-leniency penalties of around 0.75 of their UK worldwide turnover. For example, Caddick 0.75 per cent, and ARG at 0.78 per cent.

Thomas Vale, which had committed over 750 infringements received a pre-leniency penalty of only 1 per cent of its UK turnover. Interclass which committed two rather than three infringements received a pre-leniency penalty of 2.66 of its UK turnover – a total pre-leniency penalty that was higher than that received by three-quarters of those undertakings that the OFT found to have what the OFT defined as a settled practice of anti-competitive behaviour.

The feature of the OFT's methodology, which was the principal cause of this issue and these results, and which therefore we must criticise was the OFT's decision to apply the same MDT, and only once per undertaking, regardless of whether that undertaking had committed one or 750 infringements. The MDT is significant because for many parties the bulk of their penalty was due to the application of the MDT, so in the case of Sisk out of its total pre-leniency penalty of over £8 million, 93 per cent was attributable to the application of the MDT.

For many parties the additional fines they received for their second and third infringements, which did not have the MDT applied were trivial. We set out some examples of this in our notice of appeal at annex A. I am not going to take you to that, but for your note. At the most extreme end Henry Boot received a penalty of only £4 for one of its infringements, less than one ten-thousandth of 1 per cent of its UK turnover. So it can readily be seen that, even though a party committed multiple infringements, and its total penalty could be almost entirely the product of the MDT.

In our submission it is obviously wrong for an undertaking that committed a single infringement to receive anything like the same level of penalty as an undertaking which the OFT held had a settled practice of infringement, and which, in many cases were serial offenders.

The OFT's answer to para.23 of its skeleton is that it wanted each party to receive what it called a big headline penalty in order to deter future infringements both by the undertaking in question and more generally.

We accept that deterrence is a relevant consideration in setting penalties. It is not, however, the only consideration. There is also the need for the penalty to reflect the seriousness of the party's conduct, any methodology which results in a party which committed multiple infringements getting a similar or lesser penalty to a party which committed a single infringement manifestly fails to strike a proper balance between seriousness and deterrence. Even looking at deterrence alone, it must be the case that there is a greater need to deter multiple repeated infringements than there is to deter the one-off infringer. Yes, of course, both are undesirable and need to be deterred, but on any reasonable view it is very clear that a settled pattern of conduct or serial neglect of the law needs greater deterrence than a single lapse into illegality.

In their skeleton at para. 23, the OFT seeks to suggest that it is inappropriate to apply a lower deterrence penalty for less serious behaviour since, and I am quoting:

> "The idea is that an undertaking contemplating an infringement should not violate the law at all, and not that it should be persuaded to move down the scale from multiple to isolated infringements".

Of course, there is no evidence at all that Sisk contemplated or deliberated over whether it should infringe the Competition Act so the remark could not justify escalating Sisk's penalty as the OFT did.

More importantly, in making this argument, the OFT ties itself in knots since the penalties in the decision were explicitly based on the obvious and obviously correct conclusion that deterrence requires larger penalties for more serious infringements. We see this from the OFT's reasoning in relation to the higher MDT for the compensatory payment cases, 1.05 against 0.75 per cent. So they have accepted the principle in relation to that.

Since the OFT's own reasoning shows that a greater level of deterrence is necessary for worse infringements, the OFT is forced to fall back on assertion repeatedly making the point that it considered that deterrence was adequately served by its approach.

Respectfully, it is not enough for the OFT to say to the Tribunal and to us, rather like an old fashioned parent to a child – "Because I said so", because that in effect is what their justification amounts to. It needs to be able to justify why deterrence was adequately served by an approach which meant that less serious behaviour could be punished to the same or

even greater extent than more serious behaviour, and they have manifestly failed to justify that.

Having failed to justify its position the OFT falls back on arguing that even if Sisk is right, this does not suggest that Sisk's penalty is too low. So, at para. 25 of their skeleton the OFT suggests that Sisk's complaint does not take it anywhere because it is not enough for Sisk to point to other undertakings whose infringement are -- The word they use here is 'arguably' -- arguably more frequent than its own, and to argue that they could have been subjected to more severe penalties. The word 'arguably' is interesting. There is no argument about it. Sisk had one infringement. That is in the decision itself. It is redundant. But, the consequence of Sisk's argument is not that other undertakings should have received higher penalties, but it is that Sisk received an excessive penalty.

Now, it must have been the OFT's conclusion that an MDT of 0.75 per cent was sufficient to deter undertakings which had a settled practice of infringements from infringing again, and other undertakings from committing multiple infringements in the future. If that is not the position my friend will no doubt explain why the OFT deliberately took a decision which set a penalty which would not deter the infringements committed by over 90 per cent of the parties to the decision.

Now, if the MDT at 0.75 per cent was indeed sufficient to deter a settled practice of multiple infringements it must surely follow, necessarily that it went beyond what was necessary to deter a single infringer like Sisk from infringing again, or other undertakings from committing single infringements whilst the notion of a settled practice which forms the basis of a standard penalty is redundant. On the basis that the MDT applied these to Sisk should have been much lower than 0.75 per cent Sisk does not suggest that there is a single right number. But, for example, the total MDT for undertakings committing two infringements should have been well below the MDT for multiple infringers, and the MDT for single infringement should have been lower still.

The OFT refers at para. 26 of its skeleton to the fact that without the MDT Sisk would have received a penalty of - and it is a rare word - 'only' £[Confidential]. It is rather an odd use of language because £[Confidential] is a very substantial sum indeed.

THE PRESIDENT: It is 'just £[Confidential]'. Your point is still probably a good one.

MR. SHARPE: 'Just', yes. Thank you. It is a very substantial sum indeed. I hesitate to say this, but it would pay for a Chief Executive at the Office of Fair Trading and a chairman, and there would still be change. But, in any event, this is an artificial comparison. Let us be clear. Sisk has never said that the OFT was wrong to apply an MDT or that no MDT

should be applied to it - merely that the OFT's own reasoning shows that the MDT actually applied to Sisk by the OFT was excessive.

Those are my submissions on the single infringement point.

Turning then to the issue of worldwide turnover, the other criticism that Sisk makes of the OFT's approach in relation to the MDT was the decision to apply the MDT percentage to worldwide turnover rather than UK turnover. That had a particularly significant effect on Sisk. Sisk is an Irish company with a limited UK business accounting for about [Confidential] per cent of its current total turnover whereas all of the other addressees of the decision, with the exception, I think, of Ballast Needham (who you will have heard this morning) are wholly or mainly UK businesses with the vast bulk of their turnover concentrated in the UK. As we tried to make clear in our skeleton argument at para. 36, Sisk does not challenge the fact that there will be circumstances in which it is appropriate for the OFT to take account of overseas turnover in calculating a penalty. Some obvious examples spring to mind: cross-border cartels, cross-border markets, and companies which have no, or minimal, trading in the UK at the time of the decision. The question, in our submission, is whether on the facts of this case deterrence required Sisk's penalty to be increased from £[Confidential] (applying an MDT of 0.75, applied to total UK turnover of £[Confidential], which you will find at para. 124 of the Notice of Appeal) -- whether the fine should be increased from what it would have been if we had confined it to the UK turnover of £[Confidential], increasing to £8.7 million based upon worldwide turnover. That is an uplift, as I mentioned earlier of 350 per cent. That was the effect of using worldwide as opposed to UK turnover.

Since the only reason for this increase was for deterrence, if this increase was more than was required to provide an appropriate degree of deterrence, then it was disproportionate and unlawful. The OFT, of course, seeks to argue that effectively it is immune from challenge since it was up to the OFT to decide what was required for deterrence.

Sisk does not base its case on the abstract question of what level of deterrence is appropriate, but on the fact that nearly all of the other undertakings to the decision were in practice fined on the basis of their UK turnover since they had no overseas turnover. The key question which the OFT therefore needed to ask itself, and did not ask, was why an MDT penalty, essentially based on UK turnover, for all these other undertakings provided appropriate specific and general deterrence whilst Sisk's penalty needed to be increased by a factor of 3.5 times to achieve the same result.

The OFT argues, of course, that since Sisk has foreign operations it has deeper pockets and therefore both Sisk and other multi-national companies need a larger penalty to make their board sit up and take notice, or (I think they put it somewhere) feel it in their wallets, as they describe it. So, anything less than sacrificing [Confidential] years' profits in the United Kingdom by implication would be a matter of indifference to the Irish board. With respect, that is just an insult to the intelligence of the Irish board. It is an extraordinary statement and ignores the fact that these are commercial entities. For a business, the only reason, wilfully or negligently, to engage in anti-competitive conduct is that there is some financial advantage arising from doing so, or from abstaining from taking the steps necessary to ensure compliance.

Since the potential financial benefits of a UK-based cartel are the same for a UK business, whether or not it has a foreign parent or foreign turnover, the benefits of a potential UK-based cartel are the same. Similarly the risk of detection is the same - whether it is a UK company or a foreign-based company. Therefore, if the potential penalty is the same, one based on UK turnover, there is no reason to think that a UK business with foreign operations and a foreign parent will, if it is aware of the possible illegality of its actions, evaluate the benefits and risks of anti-competitive behaviour any differently from the way a UK business would evaluate them. There is also no reason to think that a UK business with a foreign parent will evaluate the costs and benefits of a compliance programme any differently.

Therefore, if a penalty of 0.75 per cent of UK turnover is indeed sufficient to deter a UK-only business based upon the risks and rewards faced in the UK market, there is no reason to think that it is insufficient to deter the UK operations of a foreign group. That applies to both Sisk specifically and to other undertakings generally.

Now, at times the OFT appears to accept that the considerations of the UK business will be the same whether it has a foreign parent, or not. Yet, the Office argues - and I refer to para. 32 of its skeleton - that penalties need to be based on worldwide turnover to encourage top level overseas management to take competition law seriously. I have already alluded to the falsity of this argument. However, it fails for at least two other reasons. First, it ignores the fact that for a company like Sisk, which has operations in several European countries, the senior management will be aware that the group is exposed to the risk of competition law infringements and therefore fines in each country. Therefore, the lack of an effective compliance policy might result in infringements in different countries and fines in different countries.

So, if we simplify Sisk's operations to being just in the UK and Ireland, if Sisk faces penalties based on worldwide turnover in both countries, then it is potentially exposed to two MDT's based upon worldwide turnover and therefore twice the level of exposure as a percentage of total turnover of a solely UK-based, or solely Irish, business. That exposure increases for every additional jurisdiction to which Sisk does business. On the other hand, if penalties are based on national turnover, then Sisk's exposure is to the MDT in each country based upon national turnover, giving it the same exposure as a percentage of total turnover to a UK-only business. Therefore, by applying worldwide turnover to a national infringement the OFT's approach leads to an excessive penalty which cannot be justified by the need to provide the same level of deterrence to Sisk as UK-based businesses.

The second point implicit in the OFT's argument is based on, in our submission, an absurd and obviously incorrect and unsupported belief that multi-nationals are less interested in the profitability of national divisions than the owners of UK businesses. The reality is that multi-national businesses expect each national division to make profits in each national market and they therefore have the same incentive to encourage their UK operations to avoid fines based upon UK turnover than the owners of a UK-only business has. In sum, it is manifestly disproportionate to decide upon a penalty for a single infringement that eviscerates [Confidential] years' profits from Sisk's UK operations as the correct amount to catch the attention of the Sisk board in Dublin. There was therefore no logical justification on the facts of this case for the MDT to be applied to Sisk's worldwide turnover rather than just to its UK turnover.

Those are my submissions on the seemingly automatic use of worldwide turnover to calculate the penalty.

My final submissions relate to the issue of leniency. The factual background to this issue is not in dispute. The actual effect of the way the OFT chose to operate its leniency programme in this case was as follows: All parties which were granted leniency rather than the fast track offer received substantially lower fines. As we set out in our notice of appeal - Morgan Sindall, for example, was fined less than 2 per cent of the sum that it would have been fined if only the fast track offer had been available to it. But, in practice, the opportunity to exploit leniency and so obtain a substantial reduction in the penalty on the facts seems to have depended entirely upon whether or not the OFT carried out a dawn raid on that party. All leniency parties were dawn raided. All leniency parties received very low penalties. The message from the OFT's handling of this is: If you want a lower penalty, get dawn-raided. Those are the facts.

The reason why only those parties which were dawn-raided sought leniency is not difficult to find. While it was theoretically open to any party to apply for leniency only dawn-raided parties were aware that they were under investigation, forcing them to assess the importance of, and need for, leniency. In fact, it is likely that only dawn-raided parties were even aware of the true nature of the investigation since the OFT's somewhat misleading statements prior to their letter of 22nd March, 2007 referred to an investigation into bid rigging and collusive tendering. Those are familiar terms in competition law and they typically are associated with parties coming together collusively to raise prices. They have never in my researches hitherto been applied to the practice of cover pricing. For anybody who had read of dawn raids, had heard industry gossip as to what was taking place, would have, as Sisk did, immediately turned to its management and say: "I want you to check whether there has been any price fixing, collusion with our competitors to raise prices. These are not terms that would have allowed any party to realise that the true target of the investigation was indeed cover pricing. There was, therefore, in practice, no reason for a party that was not dawn raided to consider leniency.

Of course, as you well remember, by the time the true nature of the investigation was revealed to Sisk and to other parties by the letter of 22nd March 2007 with the accompanying press releases it was the first time that the nature of the investigation into cover pricing was spelt out and the fact that the OFT had itself defined bid-rigging and collusive tendering in terms of cover pricing, so the issue – at least at that stage – was much, much clearer than it had been before. You will also recall that was the point at which the gate on leniency was closed.

The upshot is a very perverse result. It is reasonable to assume that those undertakings which committed the largest number of infringements, or the most serious infringements, were in practice the most likely to be dawn raided. The OFT seems strangely reluctant to concede this rather obvious point, and I pay them the complement of assuming the OFT would hardly deploy its resources t o carry out dawn raids on small fry. They would go after those parties which the evidence showed had committed the greatest number of the worst infringements. At the very least, as you will recall, you need reasonable suspicion before a s.27 can be triggered at all. I would put it like this, at the very least they were looking for and had reasonable suspicion of a settled practice of infringement as they defined it.

The OFT has had repeated chances to demonstrate to the contrary that it deployed its resources in a random way in dawn raids, covering the less important of the infringers and

that, in my respectful submission, would have been in an inefficient way and unsurprisingly it has not sought to demonstrate what it did do, or rebut the assumption that I have made and on which I have proceeded. It follows that the worst offenders got off lightly, and Sisk with its single infringement, rather than a settled practice of infringement, is hit with a massive fine. In Sisk's respectful submission it is an unjustifiable and indefensible form of discrimination for leniency discounts to be given based upon whether you were a serious enough offender to warrant a dawn raid. The answer the OFT gives in its skeleton argument is essentially to deny that it is under any obligation not to discriminate in the way it offers leniency to parties.

The crux of the argument, as I understand it, is that the purpose of leniency is not to reduce penalties, and this is merely a by product of a process designed to make it easier for the OFT to carry out its functions of detecting anti-competitive behaviour. We, of course, recognise the force in that. The purpose of leniency is to assist the OFT in detecting anti-competitive behaviour. However, the inescapable fact is that the OFT has chosen to adopt an approach that provides very substantial benefits to parties that were prompted by the OFT to take advantage of the leniency procedure. In those circumstances there can be no question the OFT should not discriminate in the way in which it offers leniency, and here I would simply remind you of the judgment of Mr. Justice Cranston in Crest Nicholson, who concluded the OFT had breached the principle of equal treatment and fairness, and therefore there was a principle of equal treatment and fairness to be applied, albeit in that case to the Fast Track offer, but we see no conceptual distinction between Fast Track and leniency for these purposes.

As an aside, typically but not always, parties to a dawn raid are raided simultaneously, and would therefore have had equal awareness of the investigation and an equal chance of going for leniency. In those circumstances it makes sense to give a greater leniency discount in some cases on a discretionary basis up to 100 per cent, so the first applicant for leniency with reducing discounts thereafter. Since the OFT is trying to encourage parties to break ranks, creating the classic prisoners' dilemma situation, however, it makes no sense to reward a party for being quicker to seek leniency in circumstances in which they are only at the front of the race because none of the other parties know that they are in a race. Perhaps a simple example also shows the perversity of the OFT's position, is it really the position that it could lawfully offer leniency to companies whose names started with the letters A to M, but not companies whose names started with any other letters. It is obviously an absurd example, but it is of the same character as saying we would offer leniency in this situation

to parties who in effect were dawn raided. To add insult to injury then to offer the Fast Track procedure which, in nearly every case, produced a result which was materially less favourable to the applicant than those who received the benefits of leniency at 25 per cent. I do not think it is every case, I think the lowest leniency percentage was down to, I think, 35 per cent.

THE PRESIDENT: What should they have done, Mr. Sharpe? Just thinking aloud – what would have been the right thing to do? Assuming they wanted, as it were, to have a Fast Track offer, they had enough infringements and they did not want any more people coming forward with any new infringements, they just wanted people to admit what they ----

MR. SHARPE: They should have recognised the arbitrariness of a line being drawn between leniency and Fast Track offer.

THE PRESIDENT: And therefore use, in terms of the Fast Track offer, given up to the lowest range of leniency, or mid-range, or something of that sort?

MR. SHARPE: They could easily have applied the same criteria as they adopted in relation to leniency, whether they called it "leniency" or Fast Track offer. The fact is there is a great divide, and it is remarkable they did not quite believe it. Nobody who was not dawn raided had leniency – everyone who was dawn raided applied for it and got it. Why on earth should that be a sensible criterion for leniency?

THE PRESIDENT: The trouble is the Fast Track offer was devoted to individual infringements – "you admit liability completely on this infringement, and you get a discount".

MR. SHARPE: Yes.

THE PRESIDENT: So I suppose if they had extended the logic of leniency and given them – I do not know – 100 per cent obviously then there would be no point, so they would have had to have chosen somewhere along the line?

MR. SHARPE: Yes.

THE PRESIDENT: Is your point that they could have done that, but would have had to have been more generous than 25 per cent? You are not saying they would have to go up to 100 per cent?

MR. SHARPE: It should not have been based solely upon the accident of a dawn raid, that the existence of the leniency programme and the nature of the investigation should have been better publicised, that is one of the lessons I think the OFT should learn from this episode. There should have been greater opportunities for people who have not been dawn raided to be fully aware of what it is they should hold their hands up to. So that would have moved more and more people into the leniency camp. That, I think, would be the proper

counterfactual. If they had not done that – as they did not do – they should not have discriminated against everybody who, for one reason or another did not seek leniency because they were not dawn raided and were not aware of what was going on. What is clear in my submission, that 25 per cent leniency Fast Track was too low, and I acknowledge there are difficulties because with leniency it appears to have been tailored to the quality of the evidence that was produced, otherwise some people would not have got 100 per cent leniency, and others would have got more than 30 per cent, but it is very stark, even the worst leniency applicant got 10 points less and fined ----

THE PRESIDENT: 25 per cent.

MR. SHARPE: Yes, against 25 per cent. I am going to come on later – we are criticised for not saying "What do you think we should do?" and "What should be the penalty?" I am not going to come here with hard numbers for you, I think there is enough issues of principle to be established or parameters – "not more than X, not less than Y" – and it may well be that in relation to a single infringement, when there were no elements of concealment, and I will come on to that in a moment, where Sisk was as open as any leniency candidate in what it was able to tell the Office, it certainly should have received more than 25 per cent.

We are not here arguing that we should have received 100 per cent discount, that is not our case at all. We are not here arguing there should be no MDT. We are saying "Yes, we will take our penalty on the chin" as it were, "but it has to be a fair penalty." We think the process by which the Office of Fair Trading went about its calculation in relation to leniency was thoroughly misguided and mistakes were made, and respectfully it is for the Tribunal to put them right.

If I may round off the point on that, the OFT argue at para. 41 that their operation of leniency was not unfair since the fact that Sisk did not seek leniency simply reflects the practical situations of having been less well placed to assist the office at the time when it was still looking for assistance in establishing infringements. I do not think that is a sensible argument respectfully.

Let me put it in a series of negatives, and I hope not too unattractively. There is no basis to suggest that those parties which had not been dawn raided were not in a position to assist the OFT. The only difference was by virtue of the fact that they had not been dawn raided they were unaware that the Office required their help. If the Office's argument is that these companies were less well placed to assist it because they had committed fewer infringements, and therefore had less information to offer, then that is an extraordinary proposition, it would mean that the Office was rewarding parties for engaging in anti-

competitive behaviour – serious anti-competitive behaviour – which would be fundamentally contrary to the whole purpose of competition law.

They also suggest that there was no discrimination because the parties who applied for leniency, and therefore helped the OFT were not objectively in the same position as those parties which did not provide such assistance. On the contrary, there is not the slightest evidence to suggest that both those parties that were granted leniency and those and those parties which accepted the Fast Track offer gave the OFT anything less than all the assistance the OFT asked of them, and in the case of those parties which were not dawn raided they did so at the earliest point in time that it was, in practice, open to them to do so. This was only later than the leniency parties because they had not been dawn raided and the first they knew of the investigation against them was the letter of 22nd March 2007 which, among other things, told them that the time for leniency is over.

In my submission it is clear that the OFT's methodology did, in fact, discriminate against the least serious infringers, and those parties which had not been dawn raided. Moreover, there is no indication in the decision that the OFT gave any consideration at all to those factors. There is therefore no proper justification for the OFT's adoption of a leniency policy which was inherently discriminatory and resulted in Sisk receiving a much higher penalty than would otherwise have been the case.

A very final word on remedy. The OFT criticises Sisk along with all the other appellants for failing to set out what Sisk considers to be an appropriate penalty. Respectfully, that is not a legitimate criticism. Sisk does not and cannot suggest there is a single right answer on the level of penalty. There are, however, many wrong answers. What Sisk has done is to set out the mistakes that the OFT made which resulted in Sisk receiving an excessive penalty.

In terms of the corrections which should be made to the penalty to remove the mistakes made by the OFT let me make the following concluding comments. It is clear that due weight must be given to the absence of any settled practice of infringement within Sisk and the fact there is only one infringement to worry about. It is equally clear that the application of Sisk's overwhelming foreign turnover distorts the level of final penalty. Some awareness of the huge uplift caused by this should have been shown by the OFT. Finally, it ought to have been clear to the OFT that showing leniency to the worst offenders and imposing massive penalties on the least culpable of infringers was wrong-headed, unreasonable and disproportionate.

Now, where this leaves the Tribunal I cannot say with precision. But, it all points to a much lower penalty, one which reflects not only the correction of the OFT's errors, but also one which is proportionate to Sisk's infringement. Now, as you know, we are not keen to burden the Tribunal with the re-calculation of any penalty, and I am quite happy for the matter to be remitted to the OFT for consideration. In the end that is obviously a matter for you.

Unless there is anything further, those are my submissions.

PROFESSOR BAIN: Mr. Sharpe, I have a number of questions for you. The first is this: in your Notice of Appeal you spend quite a lot of space arguing that the infringement itself - simple cover pricing - is not nearly as serious as the infringement that there was on *Apex*. That is not something that you have not chosen to develop today. Do you still stand by what is in the Notice of Appeal on that?

MR. SHARPE: Yes.

PROFESSOR BAIN: You do.

MR. SHARPE: We do.

PROFESSOR BAIN: That argument, if it is good, applies equally to other companies with two or three infringements. Your single company argument is distinct really from that general argument.

MR. SHARPE: Yes.

PROFESSOR BAIN: That is fine. I want now to come to the single infringement and some of the implications that concern me a little about that.

According to the decision before silk was involved in this investigation at all, there were at least five suspect tenders, all of which would have been listed when the fast track offer was made. In the fast track offer were there five or more suspect tenders?

MR. SHARPE: (After a pause): My understanding is that the OFT dropped -- had no evidence to present.

PROFESSOR BAIN: In the fast track offer, at that point -- I mean, I know that they dropped them when they came to the decision, but in the fast track offer there were at least five suspect tenders - if the OFT did what they said in the decision.

MR. SHARPE: I presume so, yes.

PROFESSOR BAIN: In accepting the fast track offer did Sisk admit to participating in those tenders?

MR. SHARPE: (After a pause): My understanding, and my instructions, are that they did not admit that these were infringements. (After a pause): I am contradicted. I am sorry. They did.

PROFESSOR BAIN: Because when it came to the Statement of Objections (Annex 3 of your Notice of Appeal) there are two alleged infringements at that point, and the tenor of your response to the [Confidential] one implies that you accepted that there was an infringement there.

MR. SHARPE: I do not think that is entirely correct. My understanding - and I will take instructions - is that (1) the Office did not pursue it; and (2) there was no evidence that Sisk itself could generate to accept or reject it. So, the matter was dropped. There was no admission.

PROFESSOR BAIN: At the point of the fast track offer, in order to take advantage of the fast track offer across the board, you had to admit in writing that you had participated in these tenders.

MR. SHARPE: Yes. Correct.

PROFESSOR BAIN: That was still the case at the point of the Statement of Objections. Okay? Now, my understanding is that at any point Sisk is entitled to withdraw these admissions on a piecemeal basis - in other words, one tender by tender. That is part of the fast track deal as I understand it. Is that correct?

MR. SHARPE: It is correct.

PROFESSOR BAIN: It is correct. Has Sisk withdrawn these admissions?

MR. SHARPE: My understanding is that it did not withdraw those admissions.

PROFESSOR BAIN: It has not. So, the current situation ----

MR. SHARPE: With the greatest of respect, I think you are approaching this in the wrong way. These were candidate inquires that the OFT initiated. They were put into the fast track offer. They re-appeared in the Statement of Objections, like many anti-competitive allegations. They did not appear in the decision.

PROFESSOR BAIN: But you are asking us, Mr. Sharpe, to look at Thomas Vale, which is exactly three proven infringements. You point out that there were another 750 suspect tenders and you tell us that we should be taking account of that. Meanwhile, in the case of Sisk you say, “No, there was only one infringement”. I find a little bit of inconsistency between these two.

MR. SHARPE: The difference is illusory. There is no argument that Thomas -- Sorry. Thomas Vale has never questioned -- openly admitted its participation in the 750 infringements.

PROFESSOR BAIN: And you have not openly admitted in the fast track offer that you had participated ----

MR. SHARPE: No. One has got to understand the context in which this arises. I am not even sure that anybody of all the appellants, or indeed any of the others, withdrew anything. The practical reality is that the parties went, as a matter of convenience and pragmatism, and accepted what the OFT were putting forward at that time.

PROFESSOR BAIN: Yes. Obviously I have not seen the other cases, but in anything I have seen nobody else is saying, "There was only a single infringement. This was a one-off thing for us", which is the tenor of your argument. Whereas, if you have admitted that there were more, it seems to me to cast some doubt on the argument whether this was a one-off thing. I recognise that you have only one proven infringement. I am not departing from that. But, it is simply the context that I am trying to get clear. If there were in fact a number of infringements - which could be more than five for all I know -- All I know is that there must have been at least five if the OFT did put this in their decision, and I think you have confirmed that ----

MR. SHARPE: Let us go to the decision, shall we? Can I point out where we are in the decision?

PROFESSOR BAIN: I do not have the particular paragraph in front of me at the moment. Perhaps the OFT can say? It is where they are setting out the way in which they selected these.

MR. SHARPE: The distinction has to be made, first of all, between the decision itself and the statement of objections which lay out the OFT's case. Now, I am here appealing against the decision - and only the decision. I am asking you to look at the decision and the four corners of the decision only. The other matters to which you refer, refer to allegations made, explored, and dropped essentially by the Office of Fair Trading. It would have been open to them to have got their three infringements and gone ahead and argued there was ----

PROFESSOR BAIN: And I would have been reluctant to have raised this point, Mr. Sharpe, if you had not been saying to us that in the case of other companies we should look at the fact that there were a large number of infringements. All we have in the decision in any case is that there were a maximum of three infringements.

MR. SHARPE: There was a maximum of three infringements. We have in the decision itself information concerning the vast volume of other infringements, especially in relation to Thomas Vale, which Thomas Vale admitted. In relation to the infringements in which my client was engaged, in the end there was one decision, two issues were advanced, one was dropped through lack of evidence between the SO and the decision itself. As to the three

other ones, my instructions are that no party - whether the Office of Fair Trading or Sisk itself -- could generate any information about the allegations themselves.

Your point, with respect, has attraction only in relation to the fact that Sisk did not withdraw its acceptance in relation to the fast tracked offer.

PROFESSOR BAIN: Let me come to the second aspect of this. You are also arguing that you should have been entitled to apply for leniency. If you had applied for leniency would you not have been bound to assist the OFT, to provide evidence of the suspect tenders?

MR. SHARPE: Sir, there was not the faintest hint that Sisk did nothing other than dredge its records in relation to all the allegations that were made to it. No element of suppression.

The OFT do not allege this - and I hope they do not allege it in future.

PROFESSOR BAIN: No. No.

MR. SHARPE: Nor, respectfully, should you infer it.

PROFESSOR BAIN: I am not saying they have.

MR. SHARPE: So, the quality of co-operation of Sisk in relation to the fast track offer was every bit as good, in my submission, as it would have been if it had sought leniency - if it had known about it. So, indeed, the OFT make no complaint at all about Sisk's co-operation.

Indeed, we were given credit for it.

PROFESSOR BAIN: I am sorry. I was not trying to suggest that there had been anything of that kind. What it did seem to me was that having made admissions at the fast track stage, you are now arguing on the basis that there was only one single infringement. You made an admission voluntarily. Had you been eligible for leniency you could not have withdrawn that. Now, you say you have not actually withdrawn it, but that it has just gone away. If that is the case, then my concern will disappear. But, if I am wrong on that, and if in fact leniency would have precluded you from arguing that there was only one single case of this, then it seems to me that you have two grounds for your appeal -- More than two, but the two that are relevant -- You have the single infringement ground and you have the leniency ground. But, they would be alternatives. You might not be able to argue them both together. If in the context of seeking leniency you would have been unable to argue as if there was only one single suspect tender. I am sure my legal colleagues will advise me as to whether there is anything in this at all, but it did seem to me that there might conceivably be an inconsistency there. This is what I am trying to explore with you.

MR. SHARPE: Yes. Indeed. I do understand your position. There was obviously no question of leniency at the time.

PROFESSOR BAIN: Yes. I appreciate the actual situation. But, your argument that you should be given credit implies that you could have applied for leniency and carried out the conditions that went with it. I do not question that. The question to me is: if you had done that would you also be able to argue on the basis of a single infringement? I just wanted to point out that this is a concern that I have. I may be right or wrong.

MR. SHARPE: This is going back to the pre-history of our case. I will take instructions. I believe we have a brief adjournment. You will allow me perhaps a moment or two to deal with it. But, I will give you a quick answer, sir, which I suspect may well end up being the answer. All the parties - the Office of Fair Trading and Sisk - were aware of these allegations and they went as far as both sides could go to determine what actually happened. Both parties drew a blank. So, that was the end of it. The OFT went ahead with, I think, two, and in the end they dropped the other one for lack of evidence. That was the sequence of events. So, there is, respectfully, nothing sinister about this.

PROFESSOR BAIN: Can I ask you one other question on a wholly unrelated matter to this, and it may be that the information is confidential -- It would be interesting to me to have some idea of what proportion of Sisk's UK turnover is in the construction industry. I know you do railway maintenance and things of that sort too. That is not, I think, in the published information I have seen. I just want an order of magnitude. That is all. Is it 70 per cent or something like that? Is it 50 per cent?

MR. SHARPE: We can provide that. If it is confidential, may I give it to you on a piece of paper? We do not need to go into confidentiality rings on something like that. You are looking for which year? The year of the infringement or the year of the ----

PROFESSOR BAIN: No. It would be 2008 turnover. That is what is used for everything else.

MR. SHARPE: We have given you the total UK turnover of £[Confidential]-something million. What we need for that is a breakdown of how much is attributed to construction and how much is not.

PROFESSOR BAIN: I stress, I do not want to know that it was 73.571 per cent. I just want an order of magnitude.

MR. SHARPE: My impression is that it is the overwhelming majority of it.

PROFESSOR BAIN: I did wonder if the railway maintenance might be 10 per cent or more.

MR. SHARPE: I will come back to you, if we may.

THE PRESIDENT: Shall we take a ten minute break?

(Short break)

MR. SHARPE: May I briefly just respond to Professor Bain's two questions? First of all, the proportion of the Sisk Group's turnover in the United Kingdom represented by construction is [Confidential] per cent. The balance is broken down between rail and medical.

PROFESSOR BAIN: Thank you.

MR. SHARPE: In relation to the fast track question let me just deal with this in stages, but briefly, sir. First of all, there were six possible infringements - not five. These were put to Sisk on or about the fast track offer period. Sisk did its own investigations and came up with nothing. Sisk asked the OFT for what evidence it had in relation to these six allegations and the OFT refused to disgorge any further information concerning them. At that point Sisk was faced with the situation where it was offered a 25 per cent reduction off any penalty that might ultimately materialise in the decision. As it happened, four of those allegations simply dropped away.

Now, of course, as you rightly say, sir, it would have been open to Sisk to formerly withdraw its acceptance of its involvement in these matters. It must be said that the fast track offer acceptance was, in a sense, highly conditional in that it was understood - and I do not think this is in contention with the Office - that if further information did emerge, then Sisk would review its position. But, having accepted the fast track offer it was 25 per cent for each infringement. Now, as it happened, as you know, the Office decided not to proceed and had no evidence to proceed in relation to four. Then, by the time we get to SO the four have gone away and of the two that we know of one was dropped leaving the singleton. From that we say that there was simply no point formerly going back to register our position in relation to the four that were dropped at the time of the fast track offer acceptance. What purpose would have been served at that stage - because it was 25 per cent for each infringement. So, the company's liability would have been 25 per cent of nothing. So there is simply no point at all in re-opening the matter. In relation to the other infringement, that dropped by the board as well.

Professor Bain contrasted that with Thomas Vale. Thomas Vale made a leniency application which I recall expressly refers to twenty-five admitted infringements -- I am sorry. I am corrected - and rightly so. The leniency decision application brought in 750 admitted infringements and twenty-five of these are reported in the decision. We should not lose sight of the fact that many other companies - not in the context of leniency or fast track offers -- The Office have discovered and laid at their door dozens of infringements in addition to those which they put forward. This, in my submission, is in stark contrast to the situation in which with all the scrutiny at its command and powers at its command the

Office really, in the end, moved in relation to one and the other five simply dropped through lack of evidence. I hope sincerely that Sisk will not be criticised for not taking a formal step which would have no significance at all because it was not going to be penalised in relation to those infringements. There was really no need to withdraw anything.

PROFESSOR BAIN: Thank you for that explanation.

MR. SHARPE: Unless there is anything else, Sir?

THE PRESIDENT: No. Thank you very much, Mr. Sharpe?

MR. UNTERHALTER: Sir, the appellant raises an age old question, which is: If some party gets its just deserts but others do get something less than that, is there any discrimination that is entailed in consequence? In other words, if the appellant here has got exactly what it deserved, if others go unpunished for a variety of reasons, does that mean that some further reduction is due to the appellant? We submit that that is not the case. The question for the Tribunal is to determine whether this appellant received a penalty that was due to it, and it is not of assistance to inquire whether in some world Vale may have been for all 750 notwithstanding the leniency application and the like, there are many incidents to the manner in which matters are investigated and how they are ultimately pursued, none of which, we will submit, give rise to any disproportionality or any form of discrimination. Focussing then on the true question: is there some point that Sisk can raise as to why it did not receive its just deserts? Let us examine the three grounds on which they make that complaint.

The first of them, as we understand it, is to say there were addressees, and there were parties that engaged in, as it is described in a settled practice. There were three rather than one. Indeed, the debate that has just taken place between my learned friend and Professor Bain is all about the incidence of how you may or may not end up with simply one infringement or many; it depends on the twists and turns of an investigative process, and the process of pursuing the investigation.

The essential point that is made under the first ground, pursued by the appellant is to say that there were certainly those who admitted or were found to have committed infringements as to at least three practices, therefore that is a settled practice, and something more must be due to them than to Sisk or, put differently, something less must be due to Sisk if what they received was a sufficient penalty. Either way it is said to be an injustice that is done; it is a kind of discrimination. But one has to analyse and, indeed, the appellant does: what is the source of this discrimination? How does it come about? We are told it comes about effectively because of the operation of MDT and, in particular, the uplift that

was applied to Sisk in consequence of the application of MDT. So the argument develops: what should have happened was that multiple offenders should have been given multiple MDT penalties or, put in the other way, if the MDT sufficed for multiple infringements, then the MDT that was of application to Sisk should have been some fraction of that.

We submit that that contention is fundamentally flawed because it does not ask the essential question, and that question is: "What is MDT for?" "Why is MDT being applied at all?" The answer is it is being applied for deterrence purposes.

The question is not why it is that because you have offended more some greater deterrence, or some greater penalty is due for deterrence, because that, we would submit is simply a *non sequitur* . What the OFT determined was that it sufficed in this particular case that in order to ensure that deterrence was done that there would be the application of one MDT to the highest infringement by value, and that was their determination as to what was necessary to ensure that the work of deterrence was done, understanding, as has now been said frequently, that this is a forward looking consideration and is intended to apply as a set of incentives upon the firm or undertaking to which it is applied. So it is not at all clear why it is that a multiple infringer somehow needs to be deterred for the future than a single infringer – a "singleton" as my learned friend puts it – that does not follow at all. What is being inadequately comprehended in our respectful submission is that each of the infringements attracts a penalty which is due to that infringer for the purposes of, let me simplify, retribution, that is effectively the seriousness component and is dealt with at Steps 1 and 2, and the OFT was perfectly clear in its decision that there was no infringement that was going to go unpunished, and that is why there is a penalty applicable to each infringement, but the separate consideration, which is not a consideration arising from culpability, but is concerned with "how do we prevent the behaviour from occurring in the future?" that is what deterrence is concerned with. There, in the estimation of the OFT there was no warrant to do more than apply an MDT once, no matter whether the infringer had infringed once, twice or thrice. There was no cause to apply a greater measure of pain for deterrence purposes because once sufficed for the purposes of yielding the outcome, and as I have submitted to the Tribunal earlier in the week, deterrence is, on its face, a wholly consequentialist instrumentalist policy, it is about how you use an infringer for the purposes of effecting forward looking outcomes that are beneficial. So you would not gratuitously apply a greater measure of deterrence than is necessary, I think here there is common ground between the parties, and if it is correct, and it appears from the defence at paras. 130 to 131 that in the estimation of the Office it was sufficient to apply a measure of deterrence

to an infringer to effect the result that was required, then there is no evidence that is offered – empirical observations that seem intrinsically plausible – as to why it is that some greater repeated form of deterrence is required in order to effect the consequential result. It is for that reason that we have made the submission that the point of deterrence is not to get parties by reference to their past behaviour to do rather less of this, and that their propensity to be less of an infringer in the future is going to be meaningfully affected by the quantum of the fine that is appropriated for deterrence, the point is to have no further infraction at all.

THE PRESIDENT: I see that point in relation to the MDT. In relation to the retributive part of the penalty I was not entirely sure – you will probably tell us - as to whether Mr. Sharpe's point went to both, but insofar as it goes to the retributive part could it be said that there should be some for a singleton – if we adopt that phrase. In criminal terms if you have a second or a third offender you normally pile on a bit, whereas here there has not been that manifestation.

MR. UNTERHALTER: Two submissions on that score. First, in the dimension of retribution, that is to say in respect of the consideration of seriousness, Sisk got exactly what it deserved, which is to say it got a penalty that was directly related to the infringement that it had engaged upon. Had it been found to have participated in further infringements, it would have got incremental penalties, and the OFT is absolutely clear about that, no infringement will go unpunished, and there is no accumulation in that sense.

Indeed, interestingly, one of the arguments that was made in respect of MDT by certain parties is the exact opposite of what is being now offered by Sisk, which was to say: "If we are multiple offenders, then you should cumulate all our penalties and not add on anything for deterrence, because in fact we are suffering for each of our infringements at the Step 1 and 2 level, so is that not enough?" The OFT says, no, that is not enough, you get a penalty for each infringement in accordance with your deserts as to seriousness, over and above that something is due by way of deterrence, so in our submission Sisk got exactly what it deserved, and there was a policy of only pursuing three, but those who were liable for three infringements got a proportionate penalty and no discount is due. So put simply on the dimension of seriousness, retribution, everyone got what they deserved. As to deterrence, there was an application of a penalty necessary to secure the outcome that was required, and only one penalty was thought to be required.

If I could make very briefly a second submission in response to the question. Very frequently in criminal cases it is not so much that there are multiplications of penalties, but in fact that imprisonment is often given where there is concurrency, i.e. notwithstanding that

there are 100 acts of theft one prison sentence will serve for all. It would be an odd challenge for the thief who had committed but one infraction to say "My penalty should be reduced because the person who has committed 100 thefts and is getting one prison sentence and it wraps them all up in one penalty is not getting a sufficient penalty. It may be that the thief who engages in this as a past time is getting some discount for bulk, but be that as it may it is not an injustice to the criminal who commits a wrong and then is simply punished in accordance with his/her deserts. Essentially the argument is the same in respect of the claim that is now made by Sisk.

We submit that the reasoning of the OFT in the decision is perfectly sustainable, it explains why there was only one MDT and the reason for it and that nothing more was necessary in its view to effect deterrence, and therefore had it applied multiple deterrence punishments, or penalties, it would have been criticised for simply going further than was required. So we submit on the first ground there is no merit to the argument that is offered.

If I might then proceed to deal with the second basis upon which it is said that there was some discrimination that was done ----

THE PRESIDENT: The overseas point, the worldwide point.

MR. UNTERHALTER: The worldwide markets. We understand the point to be essentially this, that where there are undertakings which have largely a UK based turnover, if the MDT is applied to the UK turnover that sufficed. Why would it not similarly have sufficed for the purposes of effecting deterrence upon Sisk to apply it to Sisk's UK turnover because it would have no smaller effect than would be the case in respect of an undertaking which largely did its business in the UK and therefore why not use UK turnover as the appropriate benchmark and then simply apply it in that fashion.

We submit that there is nothing special about the concept of UK turnover for the purposes of determining why and how deterrence is going to work. It is not a question of whether the source of the turnover is generated in the UK. There are many variances as to whether that would or would not suffice as a basis for effecting proper deterrence. So, for example, one apprehends that there could well be circumstances in which if the criterion pressed upon you by Sisk were to be consistently applied an undertaking could have quite deliberately a very small UK turnover, precisely because it knew it was running competition risks by way of anti-competitive conduct and would then enjoy the consequence of this rule of UK turnover that it would escape proper punishment and penalty. Similarly, one can have a variety of circumstances in which a highly diversified undertaking would, in the sorts of

circumstances described, thereby be able to "game" the system effectively and give rise to quite perverse results and consequence.

So our essential submission is that it should not be the Tribunal's approach to say it is the source of the turnover that is somehow relevant to the application of a proper principle of deterrence. It is not where it is generated, it is what does it represent in the scheme of the firm's overall economic power? That is the real question, because we are not here making fine gradations as to how much can one ever determine as an absolute empirical certainty will be a sufficient measure of pain to induce senior management to take seriously anti-competitive infringements? Nobody knows what that figure is and if we did no doubt we would apply it. No one knows that answer. All that we do say as a rational and defensible policy is to say if a firm is large relative to the relevant turnover, and the infringements that apply on the relevant market, then the penalty should not be so small relative to its overall size that it can brush this aside. That is why, in our submission the neutral policy which says we consider deterrence in relation to size and economic power wherever it comes from is the relevant criteria and then you are treating undertakings in a like manner. You are not saying simply because a UK company happens to have most of its business in the UK it is going to be specially punished in relation to a firm that does not, that would give rise to an inequity by reference to a criterion that would not be meaningful for the purposes of doing the work of deterrence.

So if one is looking for a non-discriminatory criterion which is meaningfully related to the object of deterrence, then it should be neutral in the sense that it should be about something comprehensible like the relationship between the penalty and its consequence for the firm, which is ordinarily a question of its economic power and size, so it matters equally to the firms that have engaged in the infringement at the level of the incentives that are meant to work in the operation of a policy of deterrence. It is for that reason that we submit there would be much more arbitrary results that would flow from the adoption of a UK turnover standard than from what we would submit is a neutral standard, which simply engages with the principled issue of size and economic power as a relevant consideration in measuring up penalties to have the requisite effect at the right level in the company with the consequent benefits for deterrence. It is on that ground that we submit that there is no warrant to limit the turnover to UK turnover, there is nothing special about the UK turnover, it has no special attributes that do more work for the purposes of deterrence, and on that ground we would submit that the application of the total turnover standard is perfectly acceptable and I will not detain you, as I have on a number of occasions in the course of the last two days,

simply to go through the European cases that deal with this proposition, but essentially that is the criterion that is utilised on a total turnover standard, and reflecting the essential approach which is that economic power and size is the relevant criterion. I have already cited to you a number of those decisions, but perhaps I could just add one more to it, which is the *BASF* case in the General Court, it is in the authorities' binder at vol.7, tab 93, and particularly at paras. 234 to 236, there is a yet further account that is given as to why significant worldwide turnover is a reflection of size and economic power and is the relevant criterion in the application of a deterrence threshold for the purposes of ensuring that deterrence is done.

THE PRESIDENT: Do you want us to look at that now?

MR. UNTERHALTER: We could do so, but ----

THE PRESIDENT: We will see if Mr. Sharpe wants to respond on that.

MR. UNTERHALTER: Indeed. It is simply, in our submission, entirely consistent with a line of cases which I have already mentioned but perhaps for the sake of my learned friend I should just mention so that he knows what we have in mind, which is that there is the *Archer Daniels* decision, there is *Degussa*, there is *Tokai Carbon*, they are all cases in a line of authority which say essentially the same thing very much along the lines that I have suggested.

THE PRESIDENT: They say you must not place too much weight on one or the other, but you can take account of them, do they not? I am paraphrasing very generally. They do not say you should base it necessarily on worldwide turnover, but they say you may take account of that as well as turnover in the relevant market and in order to get a handle on the economic power, so they are factors in play. Could it be said that you placed undue weight upon MDT, one of those factors?

MR. UNTERHALTER: In our submission not at all. We do not read these cases on the basis that they are saying there is some rule that an adequate measure of deterrence might simply be yielded up by a consideration of relevant turnover, there seems to be a general sense of the relationship of size to overall turnover, total turnover. But the scheme of the Step methodology applied by the Office is entirely consistent with the possibility that relevant turnover alone may suffice, hence one only goes to MDT if, as a result of the application of Steps 1 and 2 ----

THE PRESIDENT: It does not reach your benchmark.

MR. UNTERHALTER: It does not reach the threshold of the 15 per cent. So it is not that relevant turnover could not, there are circumstances where it may, indeed, give a sufficient

level of deterrence and it is possible of course that one could adapt the MDT methodology in different kinds of industries for different purposes. In this instance what was found was that these were contracting and tendering procedures in the construction industry in these different relevant markets, but there was nothing particularly differentiated about the kinds of activities that were being engaged in. So this was thought, following the approach at any rate taken in the roofing cases, that this was a sensible way of proceeding. It is possible that other industries, other markets may present different factors that would require this methodology being adapted in certain ways, we would of course allow for that. There is nothing 'writ in stone' about this, but the essentials of the methodology we say are non-discriminatory and the use of the worldwide turnover standard does not render it discriminatory, intrinsically discriminatory, there is nothing about it to suggest that that is so, because if you happen to be a conglomerate that is operating in construction markets, across many markets you happen to be big and economically powerful and therefore you must suffer some deterrence in relation to your size. So put simply as far as Sisk is concerned its complaint is not that it is not big, nor that its activities are not engaged in the construction business. Its complaint is that it should simply be sequested within the UK market for the purposes of adopting a proper MDT. In our submission there is no reason why its size simply stops at the borders of this country for the purposes of deterrence.

MR. CLAYTON: On the point you made earlier on, Mr. Unterhalter, in this section MDT, was that if Sisk had a very small UK turnover it could be gaming the distance essentially to reduce its penalty, if it was found to be guilty of one of these infringements. But the whole point of Sisk, or any other business being in the UK market, or any national market, is to make money and you are almost saying that with any multi-national company it would be an incentive to reduce its exposure in markets which had effective competition regimes. One could almost see a position where your multi-national company, be it who it is, would retreat or reduce it is economic exposure in countries such as ours in this case, to reduce its potential penalty.

MR. UNTERHALTER: Perhaps I should make it clear firstly that I am not attributing to Sisk and the appellant that it has engaged in any kind of gaming at all. I was simply ----

MR. CLAYTON: No, I was taking your example.

MR. UNTERHALTER: Just to be clear, I was simply remarking that when one is considering the system as a whole what could it give rise to, so there is no attribution to Sisk at all in suggesting that it somehow reduced its operations in the UK, but the more important point is: would this give rise to certain problems whereby companies could reduce their

participation? There are one or two answers. The first is that if there were a scheme of circumvention they could do just what I have indicated which is to say limit their exposure precisely because of a rigid UK turnover principle that was being applied, it is possible – I am not suggesting it would invariably be the case – it is just as compromising to this view that is offered by the appellant that it would be an unintended consequence of applying this UK turnover principle that you would get, as it were, a gratuitous benefit because you happened to be relatively small, and then the turnover consideration stops at the borders of the UK even though on a like for like comparison for effecting deterrence more is required. Again, the relevant comparison would be a company that has small UK involvement against a company that has a large UK presence in the market. One company is going to get an MDT on its entire UK turnover, which is a very large number. The other company is a huge company but it gets a very, very small MDT, we would submit that no justice is served by that system, but more particularly no adequate deterrence would be effected which is what this is all about.

MR. CLAYTON: But on the basis of taking the worldwide turnover for the MDT you are effectively putting a very high penalty on the total company because of its small UK subsidiary which would tend to discourage multi-national companies who had devious intent as could be put of involving themselves in a market such as ours?

MR. UNTERHALTER: To the extent that they mean to come into the market to commit offences I think we should care very little about that consequence. It may then be desirable that is the case. But I think more particularly the fact that the company is large but its UK turnover is small does not, in our submission, mean that it is getting more than it deserves because the question is: "What does it deserve?" and when it comes to deterrence the principle of deterrence is that it must feel some pain in relation to its size. Now, either that principle is good or bad – we say it is good – if it is good then there is no reason not to take account of the size of Sisk as an undertaking, and the fact that it happens to have some UK turnover that is a much smaller fraction of the total does not go to how you need to deter a firm of that size. Perhaps, just seeking to explicate the policy behind that, which is that if a firm is large and has sufficient economic power the scope for its potential interventions in markets that would be of concern is all the greater in consequence, and that is part of the rationale which informs this notion of deterrent.

THE PRESIDENT: Just to pursue it for a moment, the way the rationale works out on occasion in this country is that it gets what it deserves on your case and then it gets a factor of several times in order to pursue the next objective of deterrence?

MR. UNTERHALTER: Yes, and then the question is, is that next factor disproportionate, and in our submission it is not because it is getting it directly in relation to its size which is no different from the size of others who proportionately have committed similar infractions. That is our submission in respect of the second proposition offered by the appellant.

If I might then turn to leniency. We listened carefully to what my learned friend had to say on this score, and it seems really to come to this, that there is warrant under a leniency programme to give every party an equal opportunity to co-operate at every stage of the process and be helpful and therefore get a consequential benefit from such helpfulness. In other words, the good here that has to be rationed fairly is the willingness to co-operate and it is discriminatory if you do not give everyone the same chance to co-operate at every point so that they can all take a benefit that would flow from such co-operation if they are willing to give it and if they are given the opportunity to give it. That, in broad structure, is what is being said.

We submit that the benefit of leniency is simply not an entitlement of that kind. There is no warrant to suggest that every single infringer, or potential infringer, must be given an opportunity to co-operate in that way, and if it does not there will be discrimination. That arises simply from an understanding of where leniency is located within a regulatory scheme of the kind that is warranted under the Competition Act. It is a feature of investigative powers. In other words, leniency and how one engages the investigative process is a means by which you choose to target your investigation in a particular way. You will offer inducements in various respects which seem to meaningfully progress your investigation at different stages. All of that is within the scheme of powers and discretion that exists for the investigator. It is not an entitlement that any party that is subject to investigation can insist upon that the investigation will be conducted in a particular way so as to potentially yield an equivalent benefit to all who are the subject of scrutiny.

Perhaps I could just illustrate it in a different context. In the context of the criminal law there are circumstances equivalent to leniency where the prosecution services will choose who to target' who they will see admissions from in exchange for reductions in what charges to be faced and, conceivably, what penalty will flow. All of these are discretions and incidents of a prosecutorial or investigative process, none of which are subject to rights claims that can be made by the subject of that investigation. That is the source of error, in our submission, that is made by Sisk in this case. If you are the subject of investigation you cannot insist that the investigation is going to be carried out in a particular way, that particular infringements will, or will not, be investigated. You cannot insist on that. You

cannot say, “But you must go after X to the full extent that all your resources would allow because otherwise there is an unfairness that is done to me”. That is simply not an incident of any right that is enjoyed.

THE PRESIDENT: I think Mr. Sharpe’s point is slightly different - that having done that (whatever you are entitled to do), if someone has not been given the same opportunity because of the way the investigative process has been carried out, but, as it were, are equally meritorious, or arguably, then that should be reflected in their penalty - in other words, there needs to be an equalisation process at some point.

MR. UNTERHALTER: In our submission there is no merit that is due to a party because it is willing to co-operate. That is a purely discretionary feature that figures in how the investigation is to be undertaken. Just practically in this case ----

THE PRESIDENT: It is the carrot, is it not?

MR. UNTERHALTER: Yes.

THE PRESIDENT: It is the administrative carrot. For administrative convenience you provide this opportunity for people and they come forward and you have to give them something in order to tempt them to come forward. That is in the public interest because they reveal things that you would not otherwise discover, and so on.

MR. UNTERHALTER: The question is then: Must every party, no matter what stage of the investigation, still be offered the carrot when there is very little, frankly - or much less - that can usefully be gained by extending the carrot and receiving information? This is effectively what happens with leniency and the process that was followed here, which is that as more parties come forward in a process of leniency and give more information and make more admissions, you get a sense of where you are going in the investigation. At a certain point - and that is explained in the decision - the Office considered that it had, effectively, enough to know where to then direct the investigation and how further to pursue it in a rational way. That led to Stage 2, which was the fast track offer and everything that came in its wake. But, those decisions as to, “Where have we got to in the investigation? Why do we believe that at this stage it is enough? We do not need more admissions. We think we have the information that we need”. Can somebody then come along and say, “But I think you do need more information, or even if you say you do not need information, I wish to give it to you and because I wish to give it to you, you must take the benefit I am offering you and I am entitled to some consequential reward because I am willing to do so at that stage. In our submission that can make no sense whatsoever because leniency is in the service of the investigation. It is a pragmatic intervention entirely intended for that

purpose and no other. It does not make Sisk less or more guilty; deserving of more recognition that it was willing to offer up information in a way that would have served for leniency purposes. It simply has no utility at that stage and nothing is due to it.

THE PRESIDENT: We are used to talking about leniency in the context of being cartels where everyone is in the same cartel. I think this was a point which Mr. Sharpe effectively made - where you know you are in it and if you are not the first one to blow the whistle, then hard luck. You do not get the immunity. Equally, if you do not go along very quickly and provide some very helpful information, you are not going to get a 50 or 60 per cent discount, whatever it is. One is tempted to think of this as some huge cartel - but, of course, it was not. It was a hundred (or whatever it was) individual cases. I forget how many infringements altogether there were now. It was a lot of smaller infringements by individuals, some of which were being investigated and some were not. Is there some force in the argument that, well, in that situation it is pretty unfair on people - particularly, arguably, in circumstances where the subsidiary who actually committed the infringement has long since disappeared and gone out of business and the parent is left scratching around. Well, the parent may not have at the top of its mind what was happening years ago to one of its subsidiaries. Then it finds itself, as it were, paying a whopping great fine and seeing people, who have arguably done a lot more of this sort of thing maybe, but who happen to be lucky enough to be dawn-raided and know about it much sooner, having this huge benefit. One can see the sort of inequity, superficially, of that situation.

MR. UNTERHALTER: Yes. In our submission one should not confuse the dynamics of the prisoner's dilemma, which is why leniency works with some claim for justice, because you were not, for whatever reason, first to come forward -- or, you were not able to come forward at the right time. The prisoner's dilemma notion, which is intrinsic in the cartel is that the instability of the cartel means that you never know who is going to cheat, and perhaps if you do not go and confess first, somebody else will and that instability is exploited for the purposes of the leniency process. That is true.

THE PRESIDENT: That works with a typical cartel.

MR. UNTERHALTER: It may be that the prisoner's dilemma incentives do not work with the same incentive force in these more diffuse situations that we find with cover pricing, but the point of it is that that distinction, in our submission, does not make a difference to whether something is due to you or not - in other words, that the opportunity may not be as obvious to you. Even in the classic prisoner's dilemma case - the straightforward cartel - it is the uncertainty that creates the ability to incentivise confession. Well, that uncertainty is

similarly the case in these information exchanges which give rise to cover pricing. It is clearly unlawful. These exchanges are very similar to circumstances where you know that your competitor is engaging - depending on whether you are giving or receiving the cover price - in unlawful behaviour. You are a recipient of that information. You are, as it were, a co-conspirator and the same uncertainty arises. So, if one is looking at it from the perspective of unlawfulness, you must know that this is unlawful and one way of dealing with this is to go forward and seek leniency. So, our learned friend's argument says, "Ah! But, some got advance notice simply by reason of being dawn-raided. That was some sort of gratuitous advantage that they had". It was not gratuitous at all. It was a perfectly proper application of an investigative process - a consequence of which was that those who got that notice could weigh up their options. We do not submit that there can be any discrimination that somehow the Office has got an obligation to give equality of information to all parties for the purposes of being able to use leniency. Leniency is not, in that sense, a public resource that is open to all in the sense that they must be given equal information about it. It is an investigative technique or device, used selectively and very deliberately so to progress the investigation. There are some who get advantages from that, but that is in service to the investigation - not in service to some general principle of non-discrimination. So, we would submit that that is what lies at the heart of the consideration that is relevant as far as this is concerned.

Perhaps I could just give you two references that may be of some assistance? The first is in the decision in Part 2, para. 1480 at p.260. There is an explanation of when the leniency process came to an end and why it came to an end. Effectively it was, "You have got enough".

THE PRESIDENT: "You have got enough now."

MR. UNTERHALTER: Yes. "Enough is enough" as it were. The second reference I did want to offer to you was in respect of the leniency policy which is in Volume 11 under Tab 137. If I could ask you to turn to para. 4.14 at p.24 of the document, what the policy reflects for all to see who would read it, when and in what circumstances leniency is available.

> "Type B immunity is discretionary in all circumstances. However, it will definitely cease to be available where the OFT considers that it has sufficient information to establish the existence of the Chapter 1 prohibition or breach of Article 81".

THE PRESIDENT: This is all envisaging one single cartel though, is it not? This is envisaging a cartel by cartel approach to it.

MR. UNTERHALTER: It may be. But, it could, with equal application, apply in circumstances where there is not a single cartel but there are many overlapping cartels. It does not seem to be particular to one kind of investigation.

THE PRESIDENT: No. But, it is just the feeling is that you are bending over backwards to treat everyone, as it were, very much the same - within the same structure. But, within that structure there are some privileged people who happen to have been dawn-raided in their cartel and who therefore have had an opportunity for leniency which in exactly similar and analogous cartels have not had that opportunity.

MR. UNTERHALTER: If I could put it this way perhaps: There is no privilege that is entailed in being dawn-raided in the sense that you thereby gain certain benefits or rights that others do not. Perhaps this is my more general point: It is an incident of investigation and in an investigative process an investigator can mark its own path through what it thinks are useful avenues for exploration. Now, an incident of that may be that a party learns something that it might not otherwise -- Putting aside dawn raids, let us assume an investigator simply 'phones up an undertaking and starts asking certain questions and alarm bells start to ring, and, next thing, there is a leniency application that is forthcoming. Is the notion that whatever benefit has accrued as a result of the first call must then go to the last party on the last day in the last occasion where something can still be done to offer an equivalent benefit?

THE PRESIDENT: Not if it is the same – I am really groping around to see why there might be a distinction. I do think it is to do with the fact that where it is one cartel, everyone is subject to the leniency rules and hard luck if you are too late, or whatever. Even if someone is dawn-raided -- Leave that on one side. Where you are lumping together a lot of different cases, and you are treating them deliberately on the whole purportedly the same way, but because of the way that the investigation has panned out some of them get an opportunity to reduce or remove their fines altogether, which is not available to the others for reasons which are obvious, does that cause any concern? If you were dealing with these cases, as it were, separately in different years, they would say: “Well, we did not have a dawn raid in your case. We were told by a whistleblower, or there could be a million and one reasons. The two cases are not comparable. But, where you are actually putting them all together and using the same structure, and you get very, very different results as a result of the way you have carried out the investigation - although it is rather paradoxical to think that someone is very lucky to have been dawn-raided, you do not normally think that you are lucky to have been dawn-raided -- As it turns out, that may be the case here.

MR. UNTERHALTER: It may be, but perhaps I could illustrate it. I am not certain whether this progresses the debate. Assuming again a line of inquiry is opened up with an undertaking that is a conglomerate and the investigation concerned vitamins, and the person starts talking and says, "Well, whilst you are on the 'phone, you have got us on vitamins, but, you know, you may be interested to learn that there is also steel, and breakfast cereals, and whatever there may be. Here is all the information. We are going to apply for leniency". Effectively, disconnected cartels are all implicated by a single party, either because it is participating across the range, or just happens to have the information for some reason. It would be a paradoxical result that parties to these other cartels could say, "But, you really had to come and knock on my door and give me the same opportunity because even though you had more than enough information and you really could then proceed without more, you had to offer me this benefit. My submission is that it is not an entitlement to equal treatment because this is just, as it were, an indirect -- it is an inducement. It is a bargain. It is a bargain that does not accrue by way of reducing the just desserts of this appellant. It is simply one of those incidents of an investigative process. It has the results which are brought to your attention by the appellant, but they do not give rise to discrimination. It is just an incident of investigative power.

Those are our submissions, save for one very last observation, which is that at the death of this the appellant says, "I raise all of these objections, but it is really for you to sort out what you will make of that and where to apply the right penalty, if you feel you can, and if you cannot, then just throw it all back to the OFT and let them sort it out". It is precisely because of the vagueness of the challenges that are made that it is very hard upon analysis to really see where it is that some real measurable discrimination is being suffered by this appellant that they come up at the end with this rather innominate notion of, "Do something here because it is just generally too much".

For reasons we have submitted previously, that is just not good enough. One has got to show where the failing is, with what consequence, and what the remedial result should be. That they cannot, we say, is indicative of the fact that the challenges are not good.

Those are our submissions.

THE PRESIDENT: Thank you very much. Mr. Sharpe?

MR. SHARPE: Sir, I hope to be very brief. I will pick up the last point first. There is nothing weak about saying to you that we cannot offer you a precise number of percentage. What we have done is erected an argument that goes to the singleton point. It goes to the inappropriateness of the worldwide turnover as the comparator and the extraordinary

discrimination manifest in the application of the leniency programme and the fine reduction programme generally. We are also, you will recall from our Notice of Appeal and skeleton argument, not happy with the degree of seriousness with which the OFT has categorised cover pricing. We think that a starting point of 5 per cent is really too high in relation to the nature of the offence. That is not something that I have dwelt on orally owing to the limitation of time. I say this, as it were, *in terrorem* - tomorrow morning I will be in front of you in relation to Bowmer and Kirkland, and I might have a little bit longer unless wiser counsel intrudes overnight and address you on those topics.

THE PRESIDENT: Something to look forward to.

MR. SHARPE: That, Sir, was said with great conviction. (Laughter) However, it is perfectly clear that we are looking here for a very, very substantially reduced fine. I was intrigued by my friend's submissions. There is so much with which we agree. I was waiting. First of all, he says that the fact that others got less than just desserts does not mean that Sisk was too harshly treated. Well, here is a challenge for him, as it were, *ex post*: which undertakings were treated too generously, who did not get their just desserts? He did not volunteer that answer. In truth, it forms no part of our case. We are not saying that anyone else should get a higher fine. I am only here to argue Sisk's corner, to say that it should get a lower fine. It is very simple. Sisk was fined too much.

Now, all we were looking for in any decision - and in today's argument - was some justification that a single offence - and we go back to that should generate such an enormous fine - enormous relative to other parties. He says, of course, that all other infringements - none of them went unpunished. If you have our bundle near to hand - and I think Professor Bain knows where I am going - and go to Annex A, it is absolutely true -- The logistics of this case are awe-inspiring, I have to say

THE PRESIDENT: So far, so good.

MR. SHARPE: Page 56 in our application at Annex A. I thought my friend would have something to say about this. There are only two points. Remember, no infringement has gone unpunished. Well, that is not quite true. The first three infringements are punished, but the fourth, fifth, and up to 750 go unpunished. Okay? So, first of all, we start from that truth, and it is a sort of minor omission. Secondly, let us have a look and see how the second and third infringements are punished owing to the Heath Robinson application of the OFT's procedure.

THE PRESIDENT: Sorry. It is the lateness of the day. I am lost. Where are we?

MR. SHARPE: Sorry. Take our appeal application. Go straight to p.56. My first point - which cannot be contested - is that all offences after no. 3 go unpunished. That is the settled course. Sisk creeps in with, I repeat, one infringement. Let us look at the second and third ones. One does not have to go very far to see - take ARG, a mere £739. An example I gave you in my opening oral submissions was Henry Boot. I think I said it was fined £4. I vastly exaggerated the penalty by 33 per cent. It is £3. It beggars belief that this could be seen as equal punishment. That is how the OFT have chosen to go about this. I am not saying for a moment that this is not a difficult matter. You are juggling one hundred or so penalty arrangements. But, I am here to argue that the way in which this was applied to Sisk was just bizarre - bizarre in itself and bizarre in comparison to others. I am not here to argue that anyone else should get a higher penalty. That is not my case. I do not care if it is anybody else's. But, I am saying that by comparison with Sisk, Sisk was hit from a very great height.

Of course, my friend remarked on deterrence. I made a point of submitting that the impact of this penalty on Sisk - the Group - was equivalent to [Confidential] years' profits of its UK activities - all the UK activities, [Confidential] per cent of which are in construction. I expected my friend to begin to say, "Well, it should be [Confidential] years as opposed to [Confidential], or [Confidential], or [Confidential], or as opposed to [Confidential], [Confidential] or [Confidential] years"; in short, to offer some justification as to how that number was arrived at. What we got was references to well-known case law about size and companies being a proxy for what you needed in order to deter them. I would have expected to see some careful examination - albeit in the context of a multi-party and complex case - that a given number of years' profitability - a figure that is chosen mechanically by reference to the turnover - resulted in a figure, stepping back, which was proportionate and just, having regard to all the circumstances. We have not seen it in the decision. We did not see it in the defence. We did not see it in the skeleton. Respectfully, we have not heard it today. They quite simply cannot get away with the notion, "We know what is good for you. We do not need to justify it, other than by reference to the application of a mechanical formula". That formula is solely there as a guide to move people towards a broad area which might be right as a maximum figure. Remember, we are talking of maxima here - 10 per cent - whereas in fact what we have here is a figure which we say, in our submission, is grossly inflated by reference to the nature of Sisk's infringement, its singleton infringement.

The point was made, of course, that you must not look at the infringement itself. This is forward-looking - looking at deterrence. We cannot calibrate the penalty required for deterrence by reference to the offence itself. That is a matter of seriousness. I made the point in submission. I expected in answer, "That is precisely what the Office have done in relation to the difference between compensation and ordinary cover pricing. One is plainly more important, more serious than the other". But, having accepted some distinction - an important and very expensive distinction between the two - they failed to see that some distinction should also be made for recidivism, for the capacity to repeat offence.

If we are going down the road of saying that large companies have the greater capacity to interfere with markets, that may be true. It may be true. But, if you are going to look at it in that way, then you are also going to have to look and see the record of the companies. Is this a serial offender? Is this a company that is well-known to the authorities? Does it actually need a whopping penalty because of its past behaviour - recidivism, or something like that? No inquiry was made of Sisk. It has an absolutely clean record - which in the construction industry is remarkable. However, they failed to do that. That failure is damning.

Similarly, for the overseas point, I think my friend may have misunderstood me. I did not say - and I quote his words, "There should be a rigid application to UK turnover". I thought I was quite clear. There will be situations in which worldwide turnover should be looked at: one of the, obviously, is if there is no UK turnover, for example, or a multi-party international cartel. I made those points. However, even the guidance starts with a presumption of 10 per cent of UK relevant market turnover. One has to look, it seems to me, for some good reason (1) to depart from that, but not a rigid adherence to it. And then, secondly, to assess the absolute level and the number that you arrive at by applying it. And the OFT have done everything except ask themselves whether that adjustment was necessary in the light of the need for deterrence. In other words there was, familiar, no justification. They have come to us to say, "Well, we know best, and that's it". And that reflects their basic submission, and the basic submission is they have such a margin of appreciation that none of us should question the exercise of that discretion – short, perhaps, of *Wednesbury* madness; and I think we can do better than that. That is my submissions in relation to worldwide turnover.

Finally, in relation to leniency, here my friend got very Hohfeldian. We are not actually saying there is an entitlement to leniency. And so some of his arguments really, the arrows do not fall anywhere near us. One can well see the arguments he poses, that there are

situations in which leniency is a matter for discretion. That is not our case. The case is, having embarked upon a leniency and fine reduction programme, that programme should be applied fairly and in a non-discriminatory way. Now, it is very far from being rocket science. It was good law before Mr Justice Cranston in *Crest Nicholson* and respectfully even better law since his judgment. In other words, they cannot walk away and say, "We have total discretion how we administer these programmes. It is true you have no entitlement to this, there is no legally enforceable right, but once you have established, well, I do not need to concede that for our purposes, but once you have established a programme it really must be administered fairly in a non-discriminatory way.

You will have heard me earlier pose what I thought was rather an absurd example, hoping my friend would rise and explain where I was wrong – that you only choose the companies where letters begin from A to M and ignore everybody else. Well, my friend did not answer that because the only answer to it is "Yes, we are entitled in the administration of a leniency programme, to do just that". And we say that is plainly absurd.

THE PRESIDENT: Mr Justice Cranston, he was just in with the -----

MR. SHARPE: Fast track.

THE PRESIDENT: Yes. Thank you. He was indeed.

MR. SHARPE: He was.

THE PRESIDENT: Yes.

MR. SHARPE: I see this, as it were generically, as a fine reduction programme. One based to generate more information, and the other one to wrap it up as quickly as possible bearing in mind the complexity and expense of the overall investigation.

Now, as the Tribunal has I think apprehended, I submitted earlier this is actually very different from the classic cartel situation, where leniency plays a very important role. And my friend was right. In that type of situation the uncertainty and dynamics of that relationship can engender fear, and fear tends to encourage people to go to the authorities, it is a very powerful and potent weapon for clandestine cartels. Whatever may be the morals behind this and the economics, this is a long way from naked price fixing in the classical cartel situation. This was the piecemeal incremental accretion of more information by the OFT. It came from one company to another to another to another. Not a situation where all the parties to a cartel were remotely aware of the folly of their actions, although they soon became aware of it.

Now, that said, it rather indicates that first of all, all the submissions about prisoner's dilemma are really inapt. There was not that element of worry in companies' minds. That

is the message, I think, from the decision. But equally it means that the situation should have been, the deficiency, the differences represented by this current situation, these have been remedied by the Office of Fair Trading, by some sort of, my friend submitted earlier, from greater openness about the nature of the inquiry they were engaged in and some greater clarity as to what was being investigated. And it is very difficult to think that parties such as Sisk, if they had had a much clearer idea of what they should have been looking for internally and the nature of the inquiry would not have come forward and been in a position to help the authorities. In the end, of course, they did. They did as much as any company did, and all they want is not to be discriminated against in the fine reduction programme. That is not tantamount to saying they demand, are knocking on the door and demanding leniency.

THE PRESIDENT: So, does your point depend upon them being – I just want to be quite clear about this, Mr Sharpe – are you saying they should have done something more by way of clarifying or information, that would have given you the opportunity, and you have suffered? Or are you saying that in any event, because of what happened, regardless of what they should have done, even if they were not under an obligation to do anything different at the time of the investigation by way of notifying or clarifying, they should have reflected your disadvantage in some way in the penalty?

MR. SHARPE: Not just Sisk's disadvantage.

THE PRESIDENT: Yes, I know. I know it is not just you.

MR. SHARPE: A case is not dependent upon a failure on the part of the OFT to be fairly open in the circumstances where they could have been open.

THE PRESIDENT: It is not dependent.

MR. SHARPE: It is not dependent. I make that as an observation. But a consequence of that fact was that companies such as Sisk were disabled from seeking leniency; and indeed the first my clients heard of the leniency programme was when they were told it had ceased to exist, or indeed the first they heard about the investigation as it was properly being conducted.

THE PRESIDENT: So, your point is not dependent on them being under an obligation to have done things differently.

MR. SHARPE: No.

THE PRESIDENT: You still make the point.

MR. SHARPE: Yes.

THE PRESIDENT: Even if they were perfectly entitled to go about it in the way that they did, they should still have reflected something in the fine.

MR. SHARPE: Yes. Recognising the situation as it happened at the time, they should have reflected the inability of companies to come forward -----

THE PRESIDENT: By way of mitigation or whatever you want to call it.

MR. SHARPE: – by way of mitigation, yes. And the lesson to be learnt, one hopes, for the next time, one hopes in another industry, that the OFT should not repeat the mistakes it made here and should actually be more open. But I put that forward as an observation rather than a submission.

THE PRESIDENT: I suppose they could have said, if they had been more open, they might have, their dawn raids might have been a waste of time, I mean, you know.

MR. SHARPE: It is very difficult to know what the situation would have been. I mean, it would have been easier if what emerged after the dawn raids by way of releases and indications to the industry had properly reflected what the OFT were seeking, and I made a submission on that earlier. Collusive tendering typically has a meaning. It is people getting together and rigging prices, sometimes as we know, it could be a criminal offence, obtaining a pecuniary advantage by deception. Now, nobody is pretending, nobody is defending cover pricing, but if you had been told to look for infringements of competition law within your organisation, and you are told it is bid rigging, inclusive tendering, that is what you are looking for.

What my friend earlier alluded to was the way this worked in practice, the way the OFT did it, probably unintentionally, I hope, whilst the only people who took advantage of leniency were people who had been favoured with a dawn raid; and there is perversity in that. These are the most serial important infringers and, in our submission, yet they have come away with fines which were trivial by comparison with Sisk's. Now, it is one thing to say "We are masters in our leniency programme" on the one hand, which we accept. It is quite another to say that the consequences of that situation should almost mechanically be applied to a point where a companies like Sisk who are not privy to any of that were fined really massive penalties in comparison with those that were. It is a very very odd perverse outcome, that the worst offenders get away with less penalties than those who ultimately were able to assist the office and come clean, and in respect to only one offence.

Now, unless I can assist you further, those were the matters on which I have responded to my friend.

THE PRESIDENT: Thank you very much, Mr Sharpe.

MR. SHARPE: Thank you, sir.

THE PRESIDENT: Thank you, Mr Unterhalter. So, we will see you both tomorrow, by the sound of it.

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