IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1134/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 July 2010

Before:

VIVIEN ROSE
(Chairman)
GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) G&J SEDDON LIMITED
(2) SEDDON GROUP LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Aidan Robertson QC (instructed by Watson Burton) appeared for the Appellants.

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

THE CHAIRMAN: Yes, Mr. Robertson?

MR. ROBERTSON: Madam Chairman, Members of the Tribunal I appear for the appellants, collectively "Seddon", in this appeal. The Office of Fair Trading is represented by my learned friends, Mr. David Unterhalter and Phillip Woolfe.

Can I first of all check housekeeping matters, that we have got everything in this appeal before us. You should have a bundle with Seddon's notice of appeal,

THE CHAIRMAN: Yes, we have the notice of appeal and then we have ----

MR. ROBERTSON: The OFT's penalty defence,

THE CHAIRMAN: -- arguments and ----

MR. ROBERTSON: The skeleton argument which was served with a second witness statement from Mr. Waddington dated 29th April and the OFT's skeleton in this appeal.

THE CHAIRMAN: Yes.

MR. ROBERTSON: Madam, just to confirm I do not think there are any issues of confidentiality which will require any part of this hearing to go into private.

I am going to divide my oral submissions, if I may, into five parts mirroring the order in which we have presented our submissions throughout this process, that is to say the impact of the penalty on Seddon, secondly, the Tribunal's jurisdiction, thirdly, the seriousness of the infringements, fourthly, we set out the flaws in the OFT's penalty calculation; and fifthly, mitigating factors.

Can I just check one matter? I appeared in four hearings last week in front of the Panel chaired by Lord Carlile. He indicated at the beginning of the first of those hearings – Hobson and Porter – that if there were additional points on which we wanted to make follow-up brief, succinct written observations arising out of the hearing that we would have permission to do that, if there are points because of the abbreviated time that we have for these hearings then that Tribunal said they would be receptive to short – and he emphasised "short" – further written submissions.

THE CHAIRMAN: Well let us see where we get to if there are any such things. I am aware we have the same *dramatis personae* at least in the front bench in the morning and the afternoon, I am not sure whether you have arranged your submissions ----

MR. ROBERTSON: I can confirm that this afternoon's submissions are not intended to duplicate this morning's and that goes also for the hearing I have tomorrow morning in front of this Tribunal. The point is there is the odd point that arises and which one needs to go back and do some further research. In fact, one of those points in relation to the MDT I will deal with in front of this Tribunal, I was not in a position to deal with it in front of the Tribunal last week when it arose, and I think that is what Lord Carlile was getting at.

THE CHAIRMAN: Yes.

MR. ROBERTSON: In that case if I may start with the first of my headings: “The Impact of the Penalty”. Just to outline who Seddon Group are, they are a family group of companies going back four generations to 1897. The construction arm – G&J Seddon, the second appellant, is the only company involved in the investigation. G&J Seddon accounts for about 40 percent of group turnover. That is explained in Mr. Waddington’s first witness statement at para. 12, p.4 of Tab 3 of the Notice of Appeal.

You will have seen in Mr. Waddington’s second witness statement, served with the skeleton argument that he referred to a restructuring of Seddon. The Seddon group has two construction businesses: one is G&J Seddon; the other one is J&S Seddon. They are in the process of being amalgamated into a company to be called Seddon Construction Ltd. That has not yet taken place. They are about half-way through the process. J&S Seddon is a construction firm which deals with smaller contracts than G&J. It is focused on local authority work. It accounts for about 20 percent of group turnover. So, G&J - 40 percent of group turnover; J&S not involved in the investigation, but part of the group - 20 percent of group turnover. For a fuller description of Seddon’s activities I refer you to the evidence given by G&J Seddon’s managing director, Mr. Jonathan Seddon to the OFT at the oral hearing. That is in the Notice of Appeal at Tab 2, pp.63 to 66. The group as a whole engages in a diverse range of activities unrelated to construction, such as servicing MOD vehicles, selling power tools, garden equipment, selling dumper trucks to the Middle East. The evidence on that was given by the group chairman, Rod Sellers to the OFT oral hearing (tab 2 of the Notice of Appeal, p.73).

We are a large employer in our area - 1800 group employees. The given to the OFT was that we have got about 650 employees in G&J Seddon. Unfortunately that has been reduced through rounds of redundancies and is now nearer 600. We are proud of our record of training apprentices in the industry. As we explained to the OFT at the oral hearing, some 15 to 20 per cent of the workforce at any one time are our apprentices. So, we really do invest in the future. That proportion has remained constant even though there have had to be redundancies because of the economic downturn. We are proud that our record in training in the industry, which is one of the best has been recognised by our training manager recently, it having been announced that he is to be awarded an MBE for his services to training in the construction industry.

As you will have seen from the oral hearing transcript, Seddon particularly prides itself on its contribution to its local community - activities such as building and underwriting the financing of three operating theatres at the Christie Hospital in Manchester, which is the leading cancer treatment centre in the north-west.

Seddon is a genuinely impressive company.

The OFT has fined us £1,516,646 for the three infringements in the Decision. The reason why that fine is so high is principally due to the minimum deterrence threshold. I will be dealing with that in more detail later. The fine is on any analysis severe. It represents more than the entire group pre-tax annual profit for 2008, which was the year taken by the OFT as the basis for penalty calculation. Of course, I would remind the Tribunal that fines are not paid out of pre-tax profits - they are paid out of post-tax profits. By contrast, as we have said in Notice of Appeal and in our skeleton argument, in two recent price fixing cases - *Sainsbury* in milk and cheese and *Imperial Tobacco* in tobacco products - the fines in those cases worked out at 5 per cent of those companies' pre-tax annual profits. Yet, those were much more serious infringements than ours. I cannot take you into the detail of the penalty calculation in either of those cases. In *Sainsbury* that fine was arrived at by an early resolution process. It was announced in a press release by the OFT in 2007. The OFT still has not adopted a final decision in that case. There have been subsequent developments. In the *Imperial Tobacco* case, as the Tribunal will know because it has now got the appeals, there are appeals against those fines. The decision, however, has not been published by the OFT in a non-confidential form. Although I acted for one of the leniency applicants I do not have access to a confidential version of the Decision. I gather one of the other appellants to this Tribunal - but I do not know if it is this Tribunal or one of the other panels - does have access to the confidential Decision and I think that is going to be the topic of some debate in that hearing which has not yet taken place. So, I say no more about that, other than to say that all we can do is stand back and look at the ultimate fine, and for *Sainsbury* and *Imperial Tobacco* it is 5 per cent pre-tax annual profits, but for us it is more than all of our pre-tax annual profits.

That to us seems to call out for an explanation but we have had none from the OFT. The OFT simply say in their skeleton that they do not think a comparison is relevant, and we just do not understand that.

The construction industry has been hit hard by the recession. Seddon's construction business is no exception. We have explained the current financial situation in

Mr. Waddington's witness evidence, and I have already referred to the fact that, as a result of the downturn, there have had to have been rounds of redundancies, very much we have to say contrary to the "Seddon ethos".

Having to pay a penalty of this scale will have a significant impact on Seddon, and that is dealt with by Mr. Waddington in his witness evidence, paras. 13 to 18 of his first statement, and paras. 2 to 9 of his second statement; I do not intend to devote time going to those paragraphs now, but invite the Tribunal to read those in due course.

Throughout this process Seddon has provided the OFT with complete co-operation. We accepted the Fast Track Offer, but we have had no option but to appeal because the OFT's penalty calculation methodology has ended up imposing on us what we regard as a disproportionate and unfair penalty.

You have our written submissions on that in writing, and I am not going to simply repeat those, I wish to concentrate on the principal substantive points of difference highlighted by the OFT's skeleton argument, and the hearings in which I have appeared so far. To the extent that I do not comment orally on submissions advanced in writing by the OFT or orally at the other hearings that is not to be interpreted as any acceptance of them.

Turning to the second of my headings: "The Tribunal's Jurisdiction". This is dealt with in our skeleton argument at paras. 7 to 25. We wish to say orally only this: your jurisdiction is a full appellate one, you are not inhibited in exercising that jurisdiction by anything that the OFT has done by way of penalty calculation and you are not bound to respect any so-called margin of appreciation which the OFT has purported to arrogate to ourselves.

In our submission the penalty calculation was riddled with flaws, hence the disproportionate outcome, and we look to the Tribunal to substitute its own assessment of what would be a fair and just outcome.

Turning to the third of my headings: "Seriousness of the Infringement", this is covered in our skeleton argument at paras. 26 to 39. I will say something about the seriousness because the OFT's skeleton, para. 15, the practice of cover pricing, seems to equate with the most serious infringements of competition law, but that is not the case. The OFT set a starting point for penalty calculation of 5 per cent to reflect seriousness, that is 5 per cent on a scale of 0 to 10 per cent, so it is essentially in the middle of the range of seriousness. That seems to us to reflect reality, it reflects what the Tribunal said in *Apex*, and it reflects what the Tribunal – on which you, madam, sat – said in *Makers*, there was a 5 per cent starting point in *Makers* as well.

In our written submissions we have invited the Tribunal to consider the justice of the penalties in the round in comparison with penalties imposed for serious infractions of criminal law, such as corporate manslaughter, breaches of Health & Safety legislation. This Panel of the Tribunal will be hearing the Sol appeal tomorrow afternoon, and Roger Thompson QC for the appellant in that case, will be addressing the Tribunal with the detailed submissions on the comparison with criminal fines. Indeed, to some extent we are riding on his coattails in this particular aspect of the case, and so I do not wish to say anything in detail about the comparison save this.

The OFT say that you cannot make a comparison, they say it is absolutely impossible to compare competition law with criminal law, it is incommensurable. We do not accept that. in practice, criminal courts are asked to impose fines in situations which are not comparable with that addressed by competition law, for example fines for insider dealing, other types of activities that can undermine the proper operation of a market. The reason why in criminal law you have a Sentencing Advisory Panel and now the Sentencing Guidelines Council is to ensure, so far as can be done, a degree of consistency in court imposed sanctions, and there is no reason why uniquely competition law sanctions should be incapable of comparison. Even if used as only the broadest of cross checks as to justice, the overall justice of the penalty, it is clear that even for the most serious criminal offences, such as corporate manslaughter, Seddon Group would not be facing a fine of £1.5 million, and this is not a case of extreme seriousness, this is a case where the seriousness is accepted by all to be at the midpoint of the scale of seriousness. It is 5 per cent case not a 10 per cent case.

MR. MATHER: Mr. Robertson, could I pick you up on those comparators for a second? Corporate manslaughter has had a rather problematic legal development, has it not? It has fairly recently arrived on the scene, even at current penalty levels, and there has been a lot of criticism that penalties for insider dealing have also been low in the UK compared with the United States, for example. Do you think in choosing those two examples you are choosing areas where the penalties are rather lower than across the spectrum of criminal justice?

MR. ROBERTSON: We have chosen those examples because those are the ones that appear to be at the highest level on the criminal justice, when it comes to fines on companies those were the most serious cases. There is first of all Mr. Thompson and then when I did the research, having seen what was in the sole notice of appeal I did the research. Those appear to us to be at the highest level and that is why we have taken them as an appropriate point of comparison and said that those are the highest scale of penalties the companies face in criminal law, and yet what we are faced with here is much higher than even the highest penalty you get in criminal law.

MR. MATHER: Just to try and get another cross check, health and safety, how does that figure in this scale?

MR. ROBERTSON: I think one of the examples that Mr. Thompson will take you to tomorrow afternoon, he sent me a link to the particular press release announcing the fine, is a recent example of a prosecution brought by the Office of Rail Regulation against Serco, FTSE 100 listed company that operates amongst other things the Docklands Light Railway. They were prosecuted in April for a breach of s.3 of Health and Safety at Work Act 1974 and essentially they were referred for failing to have a safe system of operation of the Docklands Light Railway. Essentially they were referred for failing to have a safe system of operation of the Docklands Light Railway. The prosecution arose out of the fact that someone had fallen on to the tracks at a station, it had been reported to the operator of the system, they had failed to spot that the person was still on the tracks, they did not stop the train, the person was killed.

Serco, in a most recent annual report for 2009 (the prosecution was April 2010) in transport their turnover is something of the order of £900 million, they were fined £460,000 plus costs. To give the precise figures, Serco's turnover in transport was £789 million, that is on a group turnover of £3.97 billion. Their pre-tax annual profit for 2009 as a group was £177 million and the press release from the ORR 13/10 dated 12th May 2010 records that a finding of guilty at Southwark Crown Court on 30th April, fined on 12th May £450,000 and ordered to pay £43,773 costs. This is a point on which, if Mr. Thompson does not hand it up tomorrow afternoon I might just supply a copy of the press release and underlying annual report to the Tribunal so that you have it on record. That is the position. That is a serious breach of Health & Safety At Work legislation, causing death. A much, much bigger entity than us and the fine is £450,000. You cannot draw exact parallels. We accept that. But, as an overall sense, it does not make sense to fine us £1.5 million for a practice which was engaged in across the industry as the OFT have found in their Decision. We are effectively being required to carry the can on behalf of, as it seems to us, the entire construction industry along with the other 102 addressees to the Decision.

So, it is, I accept, the broadest of cross-checks, but to argue that there is a different quality of justice - because at the end of the day, this Tribunal, if you accede to our submission that you should substitute a penalty that is fair and just, has to have regard to justice -- You cannot seriously argue that there is a different quality of justice for civil infringements to the Competition Act as compared to breaches of criminal law.

THE CHAIRMAN: There is a point that goes on from what Mr. Mather was saying, which is that the sort of level of maturity of the system - because, as we know, in the European sphere the fines that were imposed on companies for doing the same sorts of things as they now do were very small. We now look back on it and when I was acting for Tetrapak, when they were fined 70 million ecus, as it was then, for an abuse, everyone thought that was an extraordinarily large sum of money. Now, looking back it looks very small because as the system matures and as moral guidelines come out, each time they come out they sort of ratchet up what the fines are going to be. So, there may be a point about, "Well, yes, because corporate manslaughter is a sort of fairly new type of situation, maybe the fines there are on the low side, and maybe in future they will be wrapped up in the same way that we have seen anti-trust cartel infringement fines ramped up over the last twenty years, say.

MR. ROBERTSON: Actually in the *Serco* example, and the Health & Safety At Work Act 1974, there is no sense in which prosecutions under that legislation have only just begun to be brought. It has been well-prosecuted since its inception and it is, in our submission, a mature system. If one goes and has a look at the Health & Safety Commission website you will see the records of prosecutions and they are running into hundreds each year.

In terms of policy, should there be a change? Is there somehow an acceptance that the fines for breaches under the Health & Safety At Work Act are on the low side? There was a perception of that, but that then changed. That is really the point of the *Balfour Beatty* case, which Mr. Thompson will take you through tomorrow. There was a view that the fines were too low, and that was then re-visited at Court of Appeal level, and fines were increased. So, what we are dealing with in the latest case - the *Serco* case - is the revised approach to fining. I think that is dealt with in quite a lot of detail by Mr. Thompson in his pleadings in that case. But, it has also been set out in writing in our skeleton. So, the *Serco* case does not reflect an immature system - it reflects a mature consideration has been given as to what, in a modern approach, the correct level of penalty should be.

Turning now to the fourth of my headings, the flaws in the OFT's penalty calculation. We have dealt with this in detail in our skeleton at paras. 40 to 154. In the hearings so far the OFT has sought to defend its methodology. Essentially what we are doing is just trying to apply our guidance. We have explained in writing to the Tribunal why the methodology has led to unfair results. We say it has led to unfair results because there are flaws in the methodology.

If I can take you through what we say are the flaws following the order of our Notice of Appeal? Firstly, and most importantly for us in terms of the overall fine, the minimum deterrence threshold. Now, we do not, as the OFT implies at para. 21 of the OFT's skeleton, dispute that you may have an uplift for deterrence. We could not do that. I would be on a sticky wicket in doing that because we had precisely that debate in the *Makers* case. We do accept that the penalty would otherwise be nominal, by which we mean insufficient punishment and then an MDT uplift of some sort might be appropriate. But, we say that in this case there is no justification for imposing an uplift. Without the MDT uplift the penalty would have been £305,057. The £300,000 penalty would have been sufficient to punish and deter. What has happened is that the OFT has applied an MDT calculation according to a formula which pays no regard to the need for general deterrence or deterrence of the specific addressee of the fine. I think it is accepted by the OFT that general deterrence and specific deterrence are both objectors that have to be taken into account. That appears to be what is said at para. 105 in the penalty defence.

So, just to address those two issues first -- As regards general deterrence - in other words, deterring cover pricing, deterring construction firms infringing the 1998 Act, Seddon gave evidence through Mr. Waddington (G&J Seddon's commercial director) to the OFT at the oral hearing as to the lack of need for deterrence due to all the measures that had been taken in the industry to eradicate cover pricing. That is in the oral hearing transcript at Tab 2 of the Notice of Appeal, p.69. It is the case that as far as we can see the industry is now well aware - it has been front page news in all the trade press - that cover pricing is an infringement of the Act. As regards our specific position, our evidence is that as soon as we became aware that cover pricing was contrary to the 1998 Act back in 2004 we instituted immediately a compliance programme so that it would not happen again and to check that it has not happened again we have engaged external lawyers - not those instructing me now, but another firm - to carry out a compliance audit which gave us a clean bill of health. That was referred to in our oral hearing by Mr. Waddington at p.72 of that transcript, and Mr. Waddington has informed me this morning that they carried out a further compliance audit in April and May of this year by the same firm of solicitors and again received another clean bill of health.

THE CHAIRMAN: When you are talking about deterrence you have mentioned the factors about, "Well, everybody knows now that cover pricing is illegal and nobody is going to do that again", but is deterrence limited to the particular kind of infringement which is the subject of the fine, or is it a broader thing, "We will deter you from more general, or different kind of breaches of the competition provisions".

MR. ROBERTSON: Different types of collusion, I suppose. That is what is underlying cover pricing - communication with your competitors. All the evidence from all of my appellants - I am acting for eight of the appellants, and Seddon is no different in this regard, is that people in the industry knew that colluding was illegal and not to be done; and by that I mean colluding so that the contract is awarded to one particular contractor rather than another – what would be normally understood as "bid rigging". And, as you have seen in our evidence in this case and in other cases, part of the problem, you know, why is it that nobody spotted things or did not spot things sufficiently in time, despite the fact that the OFT had been doing the roofing cases in the West Midlands and so on. And part of the problem appears to be that all the press releases and publicity given to that referred to "collusion" and "bid rigging". The term "cover pricing" was never used, we have given you all the references to the press releases, was never used in any of the press releases, and so no-one picks up on it. Only one of my clients appears to have picked up on the fact that the OFT was going against cover pricing in the roofing cases, that was in the GAJ case which was heard by Lord Carlile last week. And the reason why he heard about it, he thinks, was his children go to school with the children of one of the directors of *Apex*. And just talking as, you know, parent to parent, discovered that *Apex* were appealing a fine to the Competition Appeal Tribunal. But for everyone else the publicity put out by the OFT did not use the term "cover pricing" and therefore nobody realised that cover pricing was viewed as a form of bid rigging.

So, when you look at other types of bid rigging collusion, the evidence everyone has given to the Tribunal and indeed to the OFT at oral hearing stage, and the response to the statement of objections is, "Yes, we knew that collusion and bid rigging in the strict sense, that was illegal, and we didn't engage in it. We just didn't appreciate that that also extended to cover pricing". And so, as soon as they did this, appreciate, that it extended to cover pricing, Seddon and indeed the others all took steps to immediately terminate it.

THE CHAIRMAN: Well, how would you, sort of in a nutshell, articulate the difference that your clients, and the others that you represent, saw between collusion and bid rigging on one hand, and cover pricing on the other hand?

MR. ROBERTSON: The nutshell is with cover pricing they were, it was just somebody ruling themselves out of the running, who did not want to bid for the contract anyway; and therefore the client was not being deprived of a competitor's bid because that company did not want to supply a competitive bid. They wanted to get themselves out of the problem that they would encounter if they returned the tender, because there was a widespread perception there is evidence of this, that if you returned the tender you would not be invited by that particular authority to tender again. So that is, in a nutshell, what the difference is.

THE CHAIRMAN: So, the difference is that with cover pricing the choice that the person is making is, “Well, either I will not put in a bid at all, or I will put in a high bid”.

MR. ROBERTSON: Yes.

THE CHAIRMAN: Whereas in, sort of, more “traditional bid rigging”, if I can call it that, the choice is, “Should I put in a competitive bid, or should I put in a high bid?”

MR. ROBERTSON: I think in traditional bid rigging or collusion is, “Shall I collude that we can fix it so that one of us gets the contract?” That is what it is, so, it is depriving the ultimate client of competitive bids.

THE CHAIRMAN: Yes, but in that situation what we are saying is, “Well, I will not compete hard for this contract because it has been decided that Buggins will get this contract, and I sort of go along with that because I hope then that in future I will get a clear run at a contract and Buggins will put in a higher bid than mine”.

MR. ROBERTSON: As it has been told to me, and of course we have not got any specific instances of “traditional”, as you described it, “bid rigging”, because I am told it did not happen. But I have been, it has been referred to me as distinguishing that type of traditional bid rigging is that the client gets an inflated price because they are deprived of competitive bids. If you want examples of this, they are set out in the investigations by other national competition authorities that the Europe Economics Report refers to in the Dutch cases, in the Italian cases, where the contractors collude so that in turn each one secures a contract at an inflated price. So there is no genuine competition at all. That is what I think is understood as traditional bid rigging or traditional collusion – “We are all in it together, we know that A will get it at an inflated price. Next time round B will get it at an inflated price”. Whereas in cover pricing, A, B, C, D and E, D gives a cover to E so E does not take part in the competitive process. So it does not submit a bid, but A, B, C and D still submit competitive bids. There is no collusion between A, B, C and D -----

THE CHAIRMAN: But then the difference between the two seems to depend on how many of the remaining bidders were not in receipt of a cover price, and that may vary. Amongst the many infringements that we are looking at some of them, in fact everybody other than the winning company, may have been a given a cover price; and some of them, as you say,

there might have been five or six bidders, only one of whom were given a cover price. I am not sure that the inflated price point can be -----
MR. ROBERTSON: The distinguishing feature is in traditional bid rigging, is there is collusion between A, B, C and D. They all know what the bids are that are going in.
THE CHAIRMAN: I see.
MR. ROBERTSON: And they have arranged it so that, you know, A will secure the first one, and so on; whereas in cover pricing -----
THE CHAIRMAN: It is a bilateral thing rather than a multilateral.
MR. ROBERTSON: It is just, it is D giving a cover to E. A, B and C know nothing about that. They do not know -----
THE CHAIRMAN: Even if they may be getting their own cover price from the winner.
MR. ROBERTSON: There may have been situations where out of, you know, the five examples I have given, more than one of them took a cover. And I have not done the exercise of working out how many of the infringements -----
THE CHAIRMAN: No. Right.
MR. ROBERTSON: -- if that was the case, it is not the case for our infringements. And it is not the case generally for the vast proportion of cases investigated by the OFT and dealt with in the decision. It is not the case that there is only one remaining competitive bid. They are only bilateral contacts. I think bilateral is probably the distinguishing feature. It is a bilateral contact, it is not the multilateral typical cartel.
THE CHAIRMAN: Yes.
MR. ROBERTSON: Getting together, everyone getting together and sorting out who gets which contract, and then getting it at a nice inflated price.
THE CHAIRMAN: Yes. Thank you.
MR. ROBERTSON: The one rider you add to this is, there are cases that the OFT investigated, where compensation payments were made. That is none of my clients. One of them has appealed to the Tribunal, that is *Bowmer & Kirkland*, and that appeal was heard last week by Mr Justice Barling's panel. There, there may have been something else going on, and that is why the OFT said 7 per cent starting point more serious than cover pricing.
So, that is why we say that, when you are looking at general deterrents, cover pricing was, as the OFT said in the decision, "an endemic practice". Collusion and bid rigging in the multilateral sense we have just been discussing, there is no indication at all that was taking place, subject to the isolated instances compensation payments, which may or may not have been multilateral. I do not know the details of those, but the Tribunal in *Bowmer &*

Kirkland has heard Mr. Sharpe QC, and in relation to that where he says in fact it was a fraud on his client. And it was not, I do not think it is just this multilateral, that is obviously for the Tribunal to decide.

So, yes, there was a practice of cover pricing; it needed to be stamped out; it has been stamped out; it just does not take place. Everyone in the industry, you know, it has been front page news of all the trade press, and the OFT has achieved their goal. So, you do not need to ratchet up the fines, we say, for general deterrence in the future. It is not a high priority.

Then, turning to the MDT, how it has been applied in this case. The OFT have applied a minimum deterrence threshold applying 0·75 per cent of total turnover of the entire group. And they have substituted that step three for one of the penalties, where none of the penalties reach the threshold. As to why 0·75 per cent, we referred the Tribunal to the exchange in *Bowmer & Kirkland* between the President of the Tribunal, Mr Justice Barling, and my learned friend Mr. Unterhalter. That is in the transcript of that case at p.9 from line 16 to p.32 of line 16. I do not intend to read that out.

THE CHAIRMAN: Well, it is 5 per cent of the 15 per cent.

MR. ROBERTSON: It is 5 per cent of 15 per cent, but we say it is clear there is no rationale for those figures other than for the fact that those were the figures used in the *Makers* case. They have taken, if you remember the *Makers* case?

THE CHAIRMAN: Yes, I know how they arrived at it.

MR. ROBERTSON: Yes.

THE CHAIRMAN: Yes. Go on.

MR. ROBERTSON: Now, our point, the comparison with *Makers* is that what the OFT seems to fail to realise, despite the fact we did point this out at the statement of objections stage, is that it has not carried out the same exercise as it did in the *Makers* case. The OFT has applied the MDT to total group turnover. It did not do that in *Makers*. In *Makers* the MDT was applied to the total turnover of the infringing company, Makers UK Limited, which was one subsidiary of the Keller Group Plc.

The OFT only looked at the infringing company, and the reason why it did that is set out in the Tribunal decision in *Makers*. The reference is para.133 of the Tribunal's judgment, authorities bundle 4, tab.57 at p.50. I do not think there is a need to turn it up. The 5 per cent step one calculation on turnover in the relevant area, you will remember it was car park surfacing in Acton, it was £330,000 turnover in the relevant product market in the relevant year, 5 per cent of that led to a fine of £6,500. National turnover in car park surfacing within Makers UK Limited was in excess of £8 million, so the Tribunal said, "Well £6,500 is insignificant. Therefore we will take the total Makers turnover, because Makers is the entity that carries the car park surfacing, it is about £70 million. We will say that 15 per cent of their total turnover should be treated as having been, as being the basis for a finding of infringement, and applying the 5 per cent starting point, that 15 per cent of their total turnover, that is how we get 0·75 per cent. That give a figure of £520,000, that was added to the £6,500 and that is how we get the total fine in that case".

Now, what they did not do was look elsewhere in the Keller Group. If they had looked elsewhere in the Keller Group, they would have found another subsidiary of the Keller Group operating in the UK, that is Keller Ground Engineering, and that subsidiary in the UK was responsible for 36 per cent of Keller turnover in the UK in 2004, and that figure can be found in the Keller Group Annual Report for 2004. It is on the Keller Group website, and it is at p.5. So there are two Keller Group subsidiaries in the UK – Makers, which is responsible for 64 per cent of turnover, and Keller Ground Engineering, which is responsible for 36 per cent of turnover.

THE CHAIRMAN: Of what turnover? Of UK turnover of the Keller Group?

MR. ROBERTSON: Of turnover of the Keller Group in the UK. They have got two subsidiaries. Makers has 64 per cent of the UK turnover, Keller Ground Engineering was 36 per cent. The OFT did not apply the MDT to Keller Group's total turnover in the UK. It only looked at the infringing company. And Keller Group also derived a lot of turnover internationally in that year, and continues to do so. And that is the point that is being run very hard in the *Kier* appeal heard last week by the President's Tribunal. Now, the OFT simply say, "Well, we only looked at Makers because that was the undertaking to which the decision was addressed". Well, it was the company to which the decision was addressed, for the decision records that Makers UK Limited is wholly owned ultimately by Keller Group Plc – the undertaking is Keller Group – it cannot seriously argue otherwise.

By not applying the fine, to total Keller Group PLC turnover. If the OFT had applied its total group turnover on the basis they have done here, the fine in *Makers* would have been, we think, £4.47 million.

THE CHAIRMAN: That would be all the international turnover.

MR. ROBERTSON: That is all the international turnover, that is correct. If they had extended it to UK turnover the ratio of turnover was 64 per cent to 36 per cent, so effectively the penalty would have been about 50 per cent higher.

The OFT has not given any explanation of why it has departed from this approach in *Makers*, and we say that is a breach of the principle of equal treatment because we are subject to worse treatment than was Makers, and we say that if you had applied the Makers' approach the OFT had properly understood the Makers' approach, and then just looked at G&J Seddon as the infringing entity, so rather than going to Seddon Group turnover, limiting the MDT to G&J Seddon's total turnover, then you would have got a much lower fine. G&J Seddon's total turnover in 2008 was roughly £112.5 million, you get that figure because the OFT asked for it. (see notice of appeal tab 2, p.118).

THE CHAIRMAN: Can I just check something? At the end of the oral hearing it is recorded that you said to the OFT that you accepted that they were not bound to follow the Makers' approach, but you were highlighting it would be a departure from the previous practice, is that still your stance, or have you hardened your stance a little in the appellate ----

MR. ROBERTSON: They could only depart from the previous Makers' approach if there was a rational basis for doing it, and all they have continued to say is "We just addressed the decision to Makers", but that is not a rational basis. That is our position.

THE CHAIRMAN: The other point that is striking is that the 15 per cent as I understand it, to which the 5 per cent is then applied, is on the basis that the relevant turnover, it turns out is a very small part of the overall business of the "entity" – to use a neutral term – so they are saying: "What would the situation be if the relevant turnover was, say, 15 per cent of the overall turnover and therefore you apply the seriousness percentage to that?" You were saying in your opening that G&J Seddon, who are in the construction business, account for 40 per cent of the group turnover. J&S Seddon, who are also in the building business ----

MR. ROBERTSON: They are also construction on a smaller scale.

THE CHAIRMAN: Yes – apply to 20 per cent, so if you looked at turnover in the construction business that is 60 per cent of the group's turnover, and if that had been considered the relevant market then there would be no need for MDT because you would not fall below the 15 per cent threshold, but it is because the markets are very narrowly defined here, which is to the benefit of the companies at Step 1 because you are applying the 5 per cent to a low turnover amount rather than a high turnover amount, so that is why you get a small figure at Step 1, but then because you have defined the relevant market narrowly you are likely t hen to find that that turnover is less than 15 per cent of the group turnover. But if you grossed up every market in which they are involved, the 15 per cent you would then get many more than "100 per cents" worth of business if you see what I mean, because that is how it has happened, is it not. But then, I suppose, in *Makers* it was also a narrow market definition that was then treated, because it was car park surfacing in Acton.

MR. ROBERTSON: In Acton, Northwest London. That is correct. My speaking note here says: "Finally, on MDT I would also ask the Tribunal to note Professor Bain's insightful comment in the Bowmer & Kirkland hearing at p.30 lines 15 to 16 that the problems with MDT arose because of the narrow approach to product and geographic market.

THE CHAIRMAN: Oh, well Professor Bain is always a step ahead of me! (Laughter)

MR. ROBERTSON: I am going to return to that when I reach my final heading as to what approach should the Tribunal adopt if it is minded to substitute its own penalty calculation, because I think that this is the problem with the narrow product and geographic market definitions, it railroads you on to a MDT, and then the MDT is being applied in a way which has been a read across from the *Makers'* case but actually is not a correct read across from the *Makers'* case.

THE CHAIRMAN: Yes, because although in opening you said that Seddon does all sorts of other things, selling garden furniture or equipment and things to the Middle East, you are not a company in fact where construction is a very small part of your business, you are primarily a construction company, you are just not primarily an education in East Midlands, or whatever.

MR. ROBERTSON: That is correct, 60 per cent of our group turnover is construction, the other 40 per cent is a diverse range of other activities.

THE CHAIRMAN: Yes.

MR. ROBERTSON: If you go down the narrow geographic market definition you are still under a fine of £300,000 which, on any analysis, just disregard the MDT you still have a fine there which is sufficient to punish and deter, you do not need to ratchet it up. That is all I want to say on the topic of MDT.

Some of these other topics I will be returning to, the remaining flaws in the calculation I will be returning to in front of this Tribunal either this afternoon for Interclass, or tomorrow for Tomlinson. The distinction between tendered and non-tendered work I will deal with that in detail in the Tomlinson appeal tomorrow, and will adopt the Tomlinson submissions if I may, because that seems a sensible way of dividing up time. You have seen what we have to say in writing, that essentially the OFT has excluded turnover from its calculation from certain types of construction work based only on the top of procurement, PFI and private partnerships. We say there is no logic in including turnover from things such as negotiated contracts or framework agreements, where cover pricing did not take place and in our submission there was no incentive for it to take place, that turnover could have been excluded entirely too, but there was not and we say there is no rational basis for refusing to exclude it, but I will deal with that submission in more detail, because there is more evidence of it essentially in the Tomlinson case.

Turning to the third of our flaws, the high turnover and low margins in the construction industry. The approach to fining by reference to turnover – just to be clear because last week the OFT were saying we were challenging turnover based fines. We are not and we never have, but you have to use turnover intelligently to come up with a just outcome.

In construction turnover is high, and one of the reasons why it is high is that a large proportion of the work is carried out by subcontractors. The evidence to the OFT and before this Tribunal is that in broad terms 60 to 80 per cent of work in the industry is carried out by subcontractors – in our case it is 60 per cent, we have a high proportion of direct labour force. For subcontractors the position is simply this, we invoice the client for the work carried out by the subcontractors, we receive payment and then we pay the subcontractors. It has to be accounted for as our turnover, and the OFT's penalty calculation defence they say that is a matter of choice. It is not, you are required to do it by accounting standards.

It is little more than money flowing through our books, it is not like buying a good, adding value and selling it on, and that is the reason why turnover is relatively high and therefore margins are relatively low. The OFT refers to low margins in this industry as not being exceptional. We cannot draw comparisons with the tobacco or milk and cheese cases because we do not have decisions in those cases. All we can say is that whatever the precise margins in those cases and in others, if you stand back the outcome in these circumstances appears to be out of all proportion. If you are going to use turnover intelligently you have to understand the large proportion of turnover is simply payments to subcontractors and is not an indication of our financial strength as such.

Fourthly, lack of effect on price, and I can take this quickly too, because it was dealt with in some detail in front of Lord Carlile last week in the Hobson and Porter and JH Hallam appeals, and I would invite the Tribunal in particular to look at the JH Hallam transcript, p.14 line 15 to p.15 line 16. The point is essentially this, the OFT said these are object infringements, we therefore do not have to have regard to effect or lack of it in the market when it comes to fixing a fine. We referred the Tribunal to the *T-Mobile* case in front of the Court of Justice in which the court said at para. 31 that in an object infringement case

> "… such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages."

And, as Lord Carlile pointed out to Mr. Beard, who was acting for the OFT in those cases, effect can be of relevance, there is a discretion to take effect into account, and our submission is that the OFT failed to appreciate that it had a discretion and therefore refused to exercise it. We say there is no evidence, no finding by the OFT in the decision that there was an effect on prices charged to clients.

THE CHAIRMAN: We take it into account if there is a finding that there is an effect, then that can be an aggravating factor, but it does not necessarily follow that because there is no finding of effect that is a mitigating factor. Is that right?

MR. ROBERTSON: It is certainly not an aggravating factor, it does not exist. Is it a mitigating factor? In our submission it is a relevant factor to be taken into account. The reason why people did this was for fear of being struck off tender lists. There is a lot of evidence in front of the OFT that many clients were aware that cover pricing took place and, indeed, there are individual instances in evidence given in oral hearings of people being rung up by clients saying: "We need to get a final tender so we have our four tenders to keep our local authority happy, please give us a cover." It happened because people thought it was benign and it was a cost saving device, because you did not have to spend money pricing up tenders. So we would say that it is a factor relevant to mitigation.

The next point is the three penalties. We were find two infringements in 2000 and one infringement in 2004. Matters have advanced since the OFT's penalty defence, as a result of last week's hearings. The position overall is that the OFT has imposed three penalties on Seddon, it did that for 88 addressees of the decision, 12 addressees of the decision received two penalties, three addressees of the decision received one penalty. The OFT gave us the impression in their penalty defence that they were seeking to use the number of penalties to correlate to the extent of infringing behaviour. Paragraph 252 of that defence says:

> "Where three infringements have been committed, a more serious penalty was imposed than if the undertaking had only committed one infringement. This is clearly sensible and proportionate."

We then submitted at hearings last week that in fact fining most people for three infringements did not make sense when some, like Thomas Vale, have admitted to 750 infringements. There was no sense in which this did relate to scale of infringement. To that, the OFT - and this particularly emerged in the Francis hearing in which Miss Bacon appeared for the OFT - the OFT's position now appears to be, "Look, because of the scale of the investigation we could not reach a conclusion as to the scale of infringement by any particular undertaking. We knew a lot about what leniency applicants had told us about our scale of infringement, but when it came to others we just could not carry on investigating. We had to draw a line under the investigation at some point". Miss Bacon said in the Francis case (p.13, lines 32 to 33),

> "The truth is that the OFT will never know how many infringements certain parties committed".

Then at p.14, lines 14 to 16,

> "There is simply not enough evidence and the OFT has not got the resources to make a comprehensive finding as to which parties are more culpable than others in this investigation and in these infringements".

If that is the case we submit that there is no justification for a double or treble penalty for some undertakings but not others. All must be assumed to be equally serious infringers of the Act. The OFT have said, in terms, that they cannot determine which are more culpable than others. So, by comparison with the three undertakings that received a single penalty, we have been treated three times more severely by having three penalties. The OFT has admitted it has not been able to make any distinction between the addressees as to the scale of infringement. If that is the case, then we should all only have received one penalty. I will come on, later on, to how we say the OFT probably should have dealt with this, and how the Tribunal might consider dealing with it. We say that that is a fairly clear breach of the principle of equal treatment. The OFT say they cannot distinguish on the scale of infringement - although s.252 of their defence suggests that was the justification, the three penalties as opposed to one penalty, or one might have two penalties - and if that is the case then you can only treat people equally by having a single infringement, a single penalty for each.

Quickly on to our other points, because these are dealt with in writing pretty comprehensively – and I have gone over my time – discrimination against small and medium-sized firms. We are based in Bolton. Most of our turnover is earned in the north-west. We have got infringements in this case in Yorkshire and Humberside. That is because we do occasionally venture slightly to the east of the Pennines, but not very far. We earn our turnover in two of the nine administrative regions in which the OFT has carved up England. By contrast, a national firm would earn its turnover in each of the nine regions. This geographic approach necessarily captures - or is liable to capture - all of our turnover.

For a national firm it will only capture one-ninth of their turnover. I think it is all tied up with the problem of the MDT which we were discussing earlier on.

We have also set out in writing that when you look at the overall level of the fines, we have been treated more severely than those that were involved in compensation payments. The OFT does not dispute our figures.

Finally on flaws, use of last business year turnover. We find ourselves being fined for three infringements - two in 2000, one in 2004 on the basis of an approach to starting turnover at Step 1 which had not been adopted at that time. The OFT changed its guidance at the end of 2004. Our infringements pre-date that. We say that we have an entitlement under Article 7 of the ECHR not to be subject to a retrospective increase in criminal penalties (see the *Uttley* case). The OFT could only have fined us, under s.38 of the Act, by regard to the guidance that was in place at that time. The OFT have referred in hearings last week to the *Archer Daniels Midland* case where they say this argument was run at European level and found not to inhibit the European Commission changing its approach to fining.

Our response to that is that that approach at European level is in the context of Article 15 of Regulation 17 (which is in the authorities bundle), which gives the Commission a complete discretion as to how to fix fines. It only says the Commission must have regard to gravity and duration. But, that is the extent of the constraint on their exercise of discretion. By comparison, s.38 says that the OFT must have regard to the Guidance. You will be aware of the Tribunal's case law - it is set out in the pleadings - as to what 'having regard to the Guidance' means.

We say that at the time these infringements were committed the OFT could not have departed from its Guidance as to what is the appropriate base year of turnover. The OFT's other response to this is, "Well, there could be winners and losers if we go back to the year of infringement approach to fining rather than to the last business year approach that we adopted". Two responses to that: firstly, it flies in the face of the evidence that turnover over the first ten years of this century increased year on year in broad terms, peaked in 2008 and then we have had the recession. So, 2008 was the peak year of turnover. That is a general. But, specifically, the OFT asked for turnover figures broken down by product and geographic markets going back to 2000. They asked for that when they sent out the Statement of Objections. All of my clients - and Seddon are no exception - supplied that information. You can see it in our Notice of Appeal at Tab 2, pp.55 to 56.

So, the OFT have the figures in front of them. They are figures that they required to be certified by auditors. We went through that analysis. We thought they were going to go back and depart from their guidance on this point. We thought that is why they were engaging on the exercise. So, the OFT is in a position to do the sums and to tell you whether the figures, as a whole, are higher or lower. As far as I can see from the Notice of Appeal, sixteen out of the twenty-five appellants are running this point. So, they obviously think it is in their interest. So, it would be in my client's interest.

Dealing finally with what we say are the factors that the Tribunal should take into account - this is the last of my headings - in their skeleton at para. 13 the OFT say complain that Seddon - indeed, in common with all appellants - has failed to set out what an appropriate level of penalty should be. We have not gone through the entire exercise, but we have pointed out the flaws that could be corrected, as we did in the oral hearing before the OFT. So, if there were a change from using all construction turnover to single stage turnover -- and the MDT were not applied, we would not be appealing. So, we did suggest that what they should do.

For this Tribunal it seems to us that the Tribunal could simply recognise that the MDT is inherently flawed - not least because of the narrow product and geographic market definitions. The multiple penalty approach is plainly discriminatory when, certainly as regards Seddon, 15 per cent of the addressees received lower penalties -- received single or double penalties and not treble penalties. As a matter of law we submit that you cannot depart form the original Guidance for our infringements because it had not changed at the time the infringements were engaged in.

What can the Tribunal do? It seems to us that the Tribunal could just simply substitute a penalty based as a flat rate percentage of single stage construction turnover at an appropriate date - perhaps the date of the most recent infringement. That is basically departing from product and geographic market definition and just looking at it on construction turnover and recognising that all the appellants are what they are - construction firms. But, do not go up the group. You do not need to do that.

Those, in very broad terms, seem to us to be an approach that would arrive at a much more sensible penalty, and using as a cross-check the comparison with fines in other contexts as a broad cross-check as to overall justice.

Madam, unless I can assist you further, those are our submissions.

MISS HEWITT: Can I just check something? So, what you are suggesting is a flat rate percentage. You are not suggesting a figure to us at this stage on single stage construction turnover for G&J in the year 2008. I think I wrote down £112.5 million as the figure.

MR. ROBERTSON: We are not suggesting that. We are not suggesting 2008. It has got to be the year before the date of infringement. If you are going to take the most recent infringement, that was in 2004. So, it is the year before that. The turnover figures are in the Notice of Appeal because they were supplied to the OFT. That, in essence, is what we are submitting.

MISS HEWITT: That is your calibration.

MR. ROBERTSON: The reason why we are saying a flat rate percentage -- You would obviously need to adjust that for those involved in compensation payments if you take the view that that is more serious. But, if you say you would adjust with a different -- a higher percentage for those involved in payments -- This way you iron out essentially all the problems that arise because of the product/geographic market definition.

Another alternative that we would submit to you is, for us, to just strike out the MDT. That leaves us with a fine of £300,000. That involves rather less re-working. But, for us, we would accept that as a just fine.

MISS HEWITT: Despite the fact that you agree with the concept of the MDT.

MR. ROBERTSON: We would agree with the concept of the MDT where it is needed, where the fine would otherwise be insufficient to punish and deter. £300,000 is still a whacking great fine and is still sufficient to punish and deter. That is how you would do it, we say, giving less fines. It is the MDT that really causes us all the problems. Without that we would not have appealed.

THE CHAIRMAN: Thank you very much, Mr. Robertson. Mr. Unterhalter, I think we will go straight ahead. I know in this court the morning break has rather been more honoured in the breach than in the observance. If you can go straight on?

MR. UNTERHALTER: Thank you, madam Chair.

The submissions which have been made to you illustrate the two extremes that are being pressed, by which justice, it is said, must be achieved. On the one hand you are being asked to measure up a penalty regime for the purposes of the infringements of this case which will bring into complete equi-poise the fining methodologies applicable under the Competition Act and bring it into alignment with the universe of criminal penalties and the particular imperatives for justice in quite diverse fields of criminal application. Yet, you are also being asked to make a judgment, as you heard at the end of my learned friend’s address, which is to say, “£300,000 is enough”. Why exactly is it enough? This appears to be the level at which this appellant would be willing to pay. You have, therefore, the two ambitions that fight within the scheme of the address that has been made to you. Some principle of complete justice where every fining regime across a universe will come into complete equilibrium. Secondly, some intuitive concept of justice to say, "I can look at a fine and by gazing at it intently, determine its justice one way or another". It is between complete irrationality - which is, "I look at the fine and I know it for what it is" - and a vastly over-ambitious scheme of rationality which would be able to measure up all the many different factors that go into fining in very diverse fields of application. We submit that neither of those should tempt you because this is a particular regime within a particular scheme of guidance that has sought to be worked out for very particular reasons and unless there are singular failings that are identified as to the scheme of the guidance or its application there is no warrant to intervene and certainly nothing to be tempted by these extremes.

If I could deal firstly with the question of your jurisdiction, because it appears both from the skeleton that the appellant has offered and also from my learned friend's address this morning it is suggested that the concept of a margin of appreciation simply is of no application in relation to your jurisdiction for the purpose of making a determination of what is required by way of a penalty. We would submit that that is not correct and it is not correct, not least because *Argos*, and it is not necessary to turn up the relevant paragraphs, approved the approach of the Tribunal in *Napp* and *Napp* itself indicated that the notion of a margin is relevant and, indeed, in numerous decisions that the Tribunal has taken, including on matters such as financial hardship and the like there has been an ongoing recognition that because at various points in the guidance there is a requirement for judgment and unless that judgment is completely out of kilter with what would be any sensible application of the guidance, there is a guidance that is warranted. So we would make this submission, the Guidance, as we have submitted elsewhere and before this Tribunal, has a particular meaning and must be objectively determined.

Thereafter, there are questions of how to apply the Guidance. In respect of those questions of application there are issues as to what is the error that has been committed. Here the challenges that are made do not seem to be challenges as to the principles of the Guidance. It is not disputed that MDT or something by way of recognition of deterrence is warranted, there is no challenge to the notion of a starting point at 5 per cent. So it seems that the attack that is being made here is all about species of application of the Guidance to this particular case and by comparison with other cases that have been decided within these proceedings.

There, one is in different terrain, because here we are concerned with issues of judgment, and it is a question of trying to identify clearly what the error is, and we would submit that in those circumstances there is a margin and you would necessarily have to determine whether that margin has been breached, because the kind of decision that is rendered simply cannot stand by reason of the injustice, the failure to derive a proportional penalty through a careful application of the Guidance. Those are our submissions, it seems a matter of fairly clear law that the margin remains even though your jurisdiction is a full one in respect of the appeal.

If I might then move to the question of seriousness, and some of the points that have been made as to where it is said that there was some failure properly to assess the seriousness in this case.

Again, as we read our learned friend's skeleton, there is no cavilling on his part or on his client's part with the notion that this sort of infringement by way of cover pricing warrants a 5 per cent starting point, that seems to be acceptable. What is said then is that the penalty that is ultimately derived, however, does give rise to injustice. One immediate question to ask is "What is bringing about the injustice?" It does not seem that the assessment at Step 1 as 5 per cent is what is producing this result, and therefore it must be some aspect of the MDT because it can only be the MDT and the uplift entailed by the MDT that is creating the problem. The MDT is concerned with deterrence, not with seriousness, therefore it is very hard to understand why there is a complaint logically about seriousness if there is a concession that the 5 per cent is an adequate reflection of seriousness under the methodology of relevant markets and relevant turnover at that step. Nevertheless, it is said that somehow there is a seriousness argument that is implicated and it appears to be a twofold consideration. The first of it then is that it is said that the fining regime is out of proportion with the kind of fines that are levied in a different setting that deals with health and safety issues and criminal manslaughter, and that if one sees the range of penalties generated in that field there is a very different order of fining that occurs.

I shall make some brief submissions on that score to you but we make our central submission around the proposition that there is not under this heading a proper identification as to where the OFT went wrong on its assessment of seriousness. I would respectfully draw your attention to the fact that there is a very, very full account that is given of about how seriousness should be considered in this case and certainly time does not permit of my traversing the many paragraphs that cover this question, but if I could very briefly ask you to turn to the decision and just give you some sense of where these matters are traversed, because in coming to the 5 per cent figure, which is not disputed by our learned friend, that is arrived at as a result of a very nuanced account of the nature of cover pricing, and where cover pricing stands in the spectrum of seriousness in relation to cartel behaviour.

THE CHAIRMAN: As I understood Mr. Robertson's submissions he was not challenging the 5 per cent and where the seriousness came in was in his submission that first of all people did not think they were doing anything wrong but now they know they were, and so there is no need for deterrence because everyone has stopped doing it. Then in answer to your challenge: "Why did you not realise that after *Apex* and the roofing contracting cases?" He said: "That was because in your press releases you said those are bid-rigging and collusion and nobody thought that this was the same kind of thing as that", and that is to counter that. As I understood it that is how the question of what the mischief is and is it as bad a mischief as bid-rigging? It was in their failure to draw the appropriate conclusions you would say from the *Apex* cases.

MR. UNTERHALTER: We are happy to deal with the objections at the level of the MDT if that is where it is said that the error arises, because we will explain why those objections are not warranted, but it seems there is something else going on in respect of the errors being relied upon, because if one starts from the proposition that the 5 per cent is entirely acceptable as a starting point, and Step 1 is good, then what is the role that is being played firstly by the arguments around the parallels with health and safety legislation and the like, because it does not seem that that is helpful or indeed takes or progresses the debate at all, although much time was spent on it. Then the notion is that somehow or another the seriousness that is reflected on an overarching basis is somehow too great relative to the specific features of cover pricing, because cover pricing is something of a lesser order than what might be considered conventional bid-rigging in the sense of what I think was referred to by my learned friend as the "multi-lateral position."

All of that, to mark the distinctions between cover pricing which was understood to be no part of an overall central design to determine the outcome of bids, but were by and large bilateral information sharing exercises, which led to certain conduct, all of those distinctions are very, very carefully marked out in the decision and the consequences of that kind of conduct, and the way in which it is differentiated from other species of bid-rigging is made plain.

It may be, therefore, that there is complete common ground on that score, but it should not, in our submission, be thought that these matters were not carefully traversed and they are extensively traversed – I will not take you to all the paragraphs but simply refer you to VI of the decision from paras. 102 more or less up to para.176 there is a detailed treatment of this issue, and the manner by which the final determination of 5 and 7 per cent is derived. Might I very briefly direct your attention to VI.138, p.1659 because there is always a risk in these considerations of seriousness, that the notion is developed that somehow or another this is not very serious conduct, and nothing could be further from the truth. What is set out in respect of the starting point is the distortion of competition that arises by engaging in bid rigging has been confirmed by the Tribunal to be a contravention of Chapter 1, and then there are what might be called the *Apex* factors that are set out. Those factors make it very clear that far from this relatively benign view that is sought to be propagated by this appellant and indeed others, there is a very serious consequence of a systemic kind that gives rise to the distortion of competition and it is not simply, as is sometimes suggested I think hereto by this appellant that it is just a matter of cover pricing for the purposes of sustaining credibility as a tenderer for the future, the truth about this practice is that involves deception, and complicity in deception, because it is perfectly plain that the party that has sought to procure tenders does not know the true position. If it did know the true position, as is often required to be asserted on tenders that are submitted it would not allow these parties to tender and, indeed, in all likelihood it would lead to them being banished from future tender processes by reason of their deception. The other economic feature of this kind of practice is that were these bids to be done unilaterally there is a risk that a party takes, even if it notionally does not want to put in a competitive bid, and it is identified in the decision and it works in this way. If it does not have knowledge of where the other bids are coming it might bid either too low, in which event it might get the work even though it intended not to, or it might bid too high in which event it is not seen as a credible tenderer and both of those risks are the risks that are attendant upon unilateral conduct. Whereas once you are in the know you can actually put in your bid and you deceive the party that has sought the bids in a way that is distorting of competition, and this has a systemic ongoing effect to the dynamic efficiencies of tender markets which affect large amounts of the construction industry where these kinds of bidding arrangements are central to the way in which efficient pricing takes place. We would submit at 5 per cent the OFT in its decision was acting under a principle of restraint, if anything, especially in the light of the roofing cases and I shall come to the treatment of that matter in a moment. If I might, in a moment, just make one or two submissions in respect of the criminal parallel that is offered. It is the stance of the OFT that these matters are incommensurable. Why do we say that? We do not say it simply as a matter of assertion. The fact is that if one has regard to the *Balfour Beatty* case which is one of the authorities that is referred to extensively, and no doubt we will have a further opportunity to debate this matter, the indications are very clear in that case, and in the criminal guidelines that have now been published that one is really considering an entirely different kind of problem for the purposes of generating a proper fining regime. Among the key variables that are relevant to determining these matters are issues around foreseeability and negligence as a variable for the purposes of determining proper penalties. There is a concern therefore around what sorts of compensation might be payable as a matter of civil liability versus the issue in respect of criminal liability and how that regime is going to operate within the health and safety realm. It is very clear that the guidelines themselves speak about generating guidelines that are particular to this field because, as with every particular field, it creates its own form of liability and it creates its own scheme of incentives for the purposes of trying to secure compliance.

Now, there is simply no read-over from the way in which parties are situated for the purposes of compliance with health and safety - that is to say, how do they routinely go about the business of checking on the safety of railways, for example? Did they, or did they not, take account of the information that they received? What was the scheme of their negligence and how might they be incentivised properly to discharge those functions? That is against a scheme of competition legislation which deals with a completely different framework.

Might I just indicate one of the key variables which is so different? In the context of cartel enforcement we are dealing with a problem of undertakings which can rationally be incentivised to engage in this conduct. It is not irrational conduct. There are circumstances in which it is perfectly rational to engage in cartel behaviour to profit maximise. Therefore, when one is thinking about the scheme within which one will incentivise compliance it is not the same thing as trying to ensure that companies are not negligent in the way in which they manage health and safety of the railways because cartel behaviour is something which can rationally make sense for firms to engage in in order to profit maximise in certain circumstances. It is a continuing and ongoing temptation to firms and they need to be reminded and continually reminded that they must not engage in this kind of conduct. Therefore, if one thinks about this field, it is a wholly distinctive field and it is one that requires distinctive treatment because of the undertakings that engage in it and the kinds of incentive structures that are necessary to secure compliance.

MR. MATHER: Just picking up on that point -- In, let us say, railways, for example, it presumably would be rational for a company to cut costs. It may carry that too far. But, that would not be irrational. Is there a big difference in kind between the two types of behaviour, both of which need to be deterred?

MR. UNTERHALTER: One accepts that there may be different ways in which parties may seek to cut corners, as it were. But, it is not really the same scheme at all because in the case of health and safety it is really about a unilateral decision as to, "How are you going to discharge this contract? What level of care are you going to exercise yourself as an undertaking in properly discharging your duties?"

The cartel situation is a very different one because it depends upon collaborative, co-ordinated behaviour. The incentives are collective incentives. Therefore, in order to ensure that you have the right incentive structure you need collectively to ensure that many parties who could otherwise come together to co-ordinate do not. So, the co-ordination problem is very different. The coverage is, hence, very different. That is why deterrence plays a very different role because it is not simply trying to dis-incentivise unilateral conduct - you are trying to prevent the coalescence of collaborative conduct and the formation of different kinds of collaboration. There are, therefore, distinctive regimes.

But, the most important - and perhaps the simplest - point that really deals with all of this in one submission is that parliament has made its determination on this score. It has said that there is a cap in respect of the fining regime, and it is 10 percent of total turnover. So, if one conceives of what is the worst possible infringement of competition law in the most aggravated of circumstances, there is an appropriate lawful penalty at 10 per cent of total turnover. That is the outer limits of what can be done. There is a case in which that would be the right penalty.

So, everything else are gradations of difference from that maximum. That is what parliament has decided. So, in its own conception of the regime applicable and properly applicable to this field of commercial and economic behaviour, that is what it has decided. In other fields it can choose differently. There may well be something to be said for the fact that historically the regime of health and safety has been too lenient and needs, as madam chair was saying, to catch up, as it were. But, that is for parliament and others to decide in that field of application of penalties and fining regimes. We know there is an incrementalism about this, but there is simply no warrant for a read-across in the way that is sought to be done by the appellant in this case.

If I might then proceed to deal with what are then said to be the flaws in the methodology? This must be where the work has to come from. In other words, it has to be that it is in MDT that the problem arises. Again, here, we do not understand our learned friend to be saying that there is anything conceptually problematic about an uplift; nor that there is something that is due by way of general and specific deterrence. Therefore, the conceptual features of the MDT do not seem, on the face of it, to be problematic. What appears to be, again, at issue here is the notion that the application of MDT in this case has, in the conception of the appellant, led to too high a penalty. It is said around £300,000 would be enough. That is, as we would put it, on the intuitive side of the argument which it is impossible to grapple with. What can one say? It would just be a call to irrationality and would lead to vast numbers of appeals beyond the many that we already have to deal with because that is all that can be said about it.

The question then is: Well, where has something gone wrong as far as this is concerned. It was said "Well, as to both general and specific deterrence there was too much that was being imposed simply because less was needed". Why was less needed? Well, it is now said that as to general deterrence, much has been done to eradicate cover pricing; that the industry has now learnt something which apparently they were ignorant of, which is that cover pricing, because it was not identified as bid rigging, was a problem, and they now understand it is a problem and across the industry they are now taking steps to no longer engage in cover pricing.

Might we make these submissions as far as that is concerned: in the first place, general deterrence is an instrumentalist policy. It is concerned to use those who have infringed in particular ways to be an example to all of those for the future who would think about engaging in unlawful behaviour not in respect of only cover pricing, but generally not to do so. So, it is not about cover pricing specifically. It is not even about cartel behaviour. It is about reminding all that infringements of the Act will carry significant penalty. So, general deterrence is always at work across a broad canvass - not in accordance with, "Is cover pricing now no longer going to be as much of a problem for the future as it apparently was in the past?" It is just simply a misconception of what general deterrence is intended to do.

The second proposition is that it is hard to understand how this industry really went in this rather schizophrenic fashion from total ignorance, or near total ignorance, about what was wrong with cover pricing to, now, the conversion that they understand it is completely wrong and they will not do it again.

This process has born in upon everybody the seriousness of cover pricing and the requirements of deterrence are that proper penalties by way of deterrence need to be applied to continue to remind everybody that this is the case. It is not a matter of ignorance has turned to knowledge and therefore compliance. What is required by way of deterrence is that there are significant adverse consequences that flow and it has to be a continuing reminder because that is what the nature of these incentives are. As I indicated, cover pricing, which was pervasive, seemingly, is a continuing temptation because it can make sense, and because these things are done secretly and without scrutiny there is an ongoing temptation which must be dealt with, and proper deterrence requires that it should be so.

We would refer you to the European Economics Report. Because there is confidentiality around it, might I simply refer you for your consideration to p.35 and Figure 4.10, which simply indicates that contrary to what has been said by our learned friend there is actually, at least on this survey, a high recognition that cover pricing was illegal? One sees that depicted in Figure 4.10 under the fourth bar chart that is reflected at that figure.

THE CHAIRMAN: I know there was some dispute before about disclosure of this. Has that been resolved now?

MR. ROBERTSON: Madam, if I can assist? The Europe Economics Report was published at the beginning of June. There is nothing in it which is said to be confidential. It is available on the OFT's website. Prior to publication the OFT had maintained that it was confidential - and hence the confidential submissions. But, there is no confidentiality now.

Secondly, while I am on my feet, I am slightly taken aback by my learned friend making submissions on it. It has been the OFT's consistent position throughout that the Europe Economics Report is not relevant to their decision. That is why they refused to disclose it to us - the first stage of it. Why we had to pursue a Freedom of Information Act request to get it -- It was provided to us under conditions of confidentiality, but subject to the proviso that the OFT does not regard this as relevant because we did not rely upon it in the Decision. I do not understand why my learned friend is now making submissions on it.

MR. UNTERHALTER: As to the confidentiality, plainly it is a matter one can freely speak about. I regret that when the shoe pinches the report is what it is. The fact is that it is true we did not rely upon it for the purposes of the Decision, but it has been relied upon by our learned friend. One of the things that this report says is that in fact there was a high level of recognition that this was an illegal practice. So, take it for what it is worth. That is what the report says. The matter, however, is dealt with in the Decision from VI.44 to VI.46 where, again, the question is raised. I will not take you to all the matters that are there reflected, but, effectively, the OFT considered the argument and it simply does not accept that there was no recognition by parties as to these practices and their illegality. It is a matter of common-sense, in fact. These are parties that know that when they are presenting bids they are representing to the tenderee that these are the result of unilateral conduct. You are either complicit if you give a cover price, or you directly deceive if you take a cover price when you make your bid. So, the notion that the entire construction sector is made up of parties that do not understand a deception when it is so perfectly apparent from the nature of the practice itself is a very strange submission to make, and it seems not to be empirically borne out on the Europe economics view.

If might then just come to the question of specific deterrence, because this is said to be where the second order level of problem arises. It is said here that there has been a very full compliance programme that has taken place, and that flows from what has been disclosed in these cases, but the roofing case were not understood for what they were because no one mentioned the magic words "cover pricing" in relation to that.

As to specific deterrents, of course compliance is laudable, it is to be expected, recognition is given for it for it by way of a penalty reduction, but it is not the case that compliance and even properly audited compliance programmes can do the work of specific deterrents. These programmes help no doubt, but at the level of conduct where parties, for various reasons are engaged in the details of negotiations there are temptations that arise. This is the submission we have already made which is that this is not irrational aberrant conduct, it forms a constant temptation in relation to the manner in which contracts are formed in tender situations, and specific deterrence is required, so that this firm knows, not just as a matter of the compliance programmes it is putting into place, but will know for ever more that it suffered a penalty that hurt and did compromise its position as to the enjoyment dividends and the like for its investors, because if it engages in this again these will be the consequences. Therefore, we say, compliance does not suffice.

May I though move to what possibly is the part of the argument that is made as to deterrent, which is to say that Makers does not stand for any adoption or recognition by the Tribunal of the MDT and that case must simply be understood as a case that is related to a particular problem that arose by reason of the difference between the relevant market turnover and the turnover generated by Makers UK.

We would make these submissions as far as *Makers* is concerned, and perhaps I could ask y you to turn up *Makers* which is in vol.4, tab 57. It is clear from this case that the addressee was Makers and not the entire Keller Group, and that appeared from para. 10 of the decision, where in the last sentence it is said: "The ultimate holding company of Makers is the Keller Group PLC". So there was a determination as to who the addressee was, and the undertaking for the purposes of this particular inquiry. But it is not the case, as far as we can discern, from the decision itself, that there was any distinction that was drawn in this case between the turnover attributable to Makers, the addressee, for the purposes of the application of MDT and any subset of its turnover. It is suggested by our learned friend in his skeleton that the ultimate penalty was only generated on a subset of Makers' overall turnover. We cannot discern that from the decision at all. What is clear is that because there was again, rather like this case, a small relevant market that was identified it generated a very small figure for Step 1, consequently there was need for an uplift and it was that uplift that was the subject matter for consideration in this case.

Could I ask the Tribunal then just to consider what is said in *Makers* from para. 121 onwards? The difficulty in this case was that the OFT had not sufficiently articulated how it had done the MDT work, and it was required to indicate how that was done, how the calculation was made. That was then set out at para. 123 very much along the lines of what we are now considering here, and the calculation that was done is reflected at para. 128.

> "The decision did not provide any explanation as to how the figure of £520,000 was arrived at for the uplift at Step 3."

That was then provided. The key point is that at para. 132 it is said:

> "The MDT depended on comparing the undertaking's turnover in the relevant market (used in the calculation of the starting figure at Step 1) with the undertaking's total turnover. The OFT considers that if the undertaking's turnover in the relevant market is less than 15 per cent of its total turnover, then the figure arrived at by Step 1 will not act as a sufficient deterrent."

And then the calculation is done. If one then goes to para. 134 it says:

> "We therefore reject Makers' assertion that the uplift of £520,000 imposed at Step 3 of the calculation of its penalty was arbitrary or unjustified. The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance."

So there are the following things to be said: the Guidance does not itself at Step 3 mention MDT. The MDT methodology was utilised in *Makers*. It is specifically considered and approved by the Tribunal as a methodology, and the comparison between the relevant turnover in the narrow relevant market, versus a total turnover standard is then worked out in the case and is approved as an application of that methodology. In our submission *Makers is not* at all about some quirk of differences of order between relevant turnover and total turnover, it is a systemic feature of these kinds of cases which sometimes turn on the fact that relevant turnover is a small number depending on how you define the market, and consequently it was said in these circumstances where that does not at Step 1 do enough work by way of deterrence you can use the MDT, that is the finding in *Makers*.

So our submission is that *Makers* is a very powerful endorsement of the methodology and finds no fault with the fact that because a small turnover figure is generated at Step 1, something quite considerably more is required by way of doing the work of deterrence on a total turnover standard by way of the undertaking to which the matter is addressed. All that can be said then about this case is that nobody knows what would have happened had the case been addressed to Keller, and on the particular facts of that case that is true – we do not know. But, and this is in our submission what is important about *Makers*, the principle that underlies this uplift and the methodology underpinning it which was approved in *Makers* is not based on some arbitrary notion, it is based upon the following conception, which is that when you are seeking to do the work of deterrence, the economic power and size of an undertaking relative to others matters because a small fine relative to the overall size of the undertaking is not going to do enough work for deterrence and so some of my learned friend's clients in other contexts, where they have a disproportionately large amount of their turnover represented in relevant markets that have been identified had complained that they are being far too stringently dealt with, and hence the OFT has applied 4.5 cut off point in order to ensure that there is not an escalation for small undertakings which are much represented in these highly localised markets which were identified. But it does not help at all then in that context to say that relative size to the amount of the fine does not matter. It matters enormously, and why does it matter? Not on some crude theory of proportionality but on a particular theory of deterrence which is that you must address the fine proportionate to the economic power of the entity so as to properly incentivise those who manage that entity to take proper steps to ensure that across that group for the future there will not be recidivism. If you impose small fines on large undertakings they will be considered trivial and the proper incentives will not apply. If one then says £300,000 is good enough in the circumstance, it is not proportionate to the overall size, therefore it is not whether one is simply concerned with construction or other activities, it is a question of how big is this entity over the range of markets in which it operates and, in our submission, this is the essential feature, what is the risk that attaches that such an entity of this size could engage in anti-competitive behaviour, because it is centrally managed and those who manage the undertaking must get the message, and the message is received in relation to the economic size of the undertaking. It therefore does two pieces of work, (i) it provides the right incentive given the size, and (ii) it is proportional because it ensures that commensurately smaller undertakings are not disproportionately burdened in relation to the size of fine that they receive and that is the work that is being done in MDT by reference to a total turnover standard. Therefore, both as a matter of what *Makers* stands for by way of authority and also by way of the principle that underpins it we submit there is a proper principle at work and no warrant for any departure.

May I very briefly deal with the last three or four dimensions that are offered, and I will be brief?

The first deals with this question of high and low margins, and the proposition that is offered that says that subcontracting consists of a significant part of the work that this appellant does and therefore one has to take that into account. There are two rather different propositions that are being made here. The first is that intrinsically there is some special regard that needs to be paid to low margin industries. We submit that insofar as one is going to make comparisons to other industries that is an enormously complicated task and does not seem to yield very clear results for the purposes of a consistent regime of penalty, because the loan margins themselves are simply an indication of the relationship between price and variable cost, they are not telling you anything meaningful about the fixed costs that you have to put into that industry in order to engage in the exercise. So it is true that there are some industries that have higher margins facially, for example pharmaceutical companies, but the question is how much R&D work do you have to do? What are your capital commitments to try and yield those margins in relation to the risks you are taking on extensive capital versus engaging in construction? You are just not comparing the same things and therefore once you enter this debate there is simply very little useful way in which one can engage in sensible comparisons between low and high margins across different sectors.

Then if I might squarely deal with the question of subcontractors, in our submission – as my learned friend correctly says – the work that is done by subcontractors is accounted as turnover and necessarily so, but the fact that one procures subcontractors to do some part of the contract is really conceptually no different at all from the fact that any firm has a range of inputs that it buys in to which it then does something for the production of an output as to which a price is charged, there is no difference between procuring a subcontractor to do the electrical works, and a motor assembler buying an engine from another company and putting it in a car. There is always a relationship between inputs and outputs, and subcontracting marks no significant distinction. You could say of Toyota's accounts, "Well, the buying of the engines is just an in-out item in its balance sheet". And therefore you could try and reduce further the size of Toyota to something very modest by saying, "Well, in fact all that it really does is it assembles everyone else's components and therefore Toyota is really a very small company in fact". Most, I think, would think that a strange submission to make.

THE CHAIRMAN: Yes, it is also, I mean, Toyota is manufacturing, but when you get to imposing fines on companies which are in a different part of the distribution chain, you know, a retailer buys in the product and sells it on; but I do not think it has ever been suggested that the cost of the product bought in should be deducted from the turnover figures -----

MR. UNTERHALTER: Indeed not.

THE CHAIRMAN: – when you are assessing whether Sainsbury's, which is just a company that has been mentioned today, what their turnover is for the purposes of -----

MR. UNTERHALTER: Yes, it would be to move from a turnover standard to a gross profit standard, because you would now be computing costs and sales as a deduction for the purposes of determining turnover, and there is no warrant for that. And as a matter of economic theory, firms determine at which stage of the production process they wish to engage for the purposes, because it depends where they are most efficiently situated, and no-one has suggested that those choices are ways of, should be taken into account for the purposes of making penalty determination, so in our submission there is nothing to be said for this submission.

The next proposition that is raised is to say that, because there are some undertakings that received three penalties for three infringements, two for two, one for one, against a backdrop of very great activity in the sector by way of cover pricing, not all of which has necessarily been discovered or could be uncovered, and therefore it is said only one penalty should be applied because, against the potential universe of infringements it is somewhat arbitrary to choose three. We submit there is one very simple question here: was this appellant done any injustice, because it was found and has admitted to three violations of the Competition Act and has received three penalties for what it did wrong. The fact that there may have been others that committed more who received leniency and therefore did not get as big a fine as they would have had they not got leniency, simply goes to the question of the leniency policy, which is not under attack by this appellant and should not be for any reason at all.

To the uninvestigated universe of potential infringements which could have occurred in this industry which the OFT simply does not have the resources to go and find one by one by one, essentially the argument that is made is to say, “You can never do justice until the last stone has been unturned and you are sure that you have uncovered the last infringement in respect of this practice, because only then can you measure up the infringements of this appellant against the infringements of everyone else”. Well, that has never been a principle of justice. It has never been said in criminal justice that because the prosecution services choose to drop charges against certain accused, or allow in sentencing certain sentences to run concurrently, that the person who does not benefit from cumulation is somehow done an injustice. These are matters of practicality, as has been submitted elsewhere, and as long as you are only punished for what you admit to have done wrong, that is three punishments for three infringements, no injustice has been done to you at all. That more justice in a perfect world could have been done to others who have infringed and have gone without punishment because the infringements have not come to light, is the standard of justice for another world, not this one. We submit that there is simply nothing to be said that any arbitrariness is visited upon this appellant on this score.

And then, if I might, lastly, just pick up the last couple of points that were made, concentrating mainly on this question of the last business year, the law, as far as we understand it, is very very clear. There are clear limits to the way in which retrospectivity arguments can operate in respect of guidance, and it really operates in two ways. The first is that, as *Uttley* has made clear, as long as you are not fined in excess of the maximum amount that you could have been fined, which was 10 per cent based on a turnover figure in respect of the year of infringement, which was the maximum penalty that prevailed at the time of these infringements, then that is the only protection you enjoy in respect of retrospectivity, nothing more.

My learned friend is correct that in fact the turnover figures pre-2008, 2004, were sought from the addressees, and that was precisely to ensure that that 10 per cent of turnover at the date of infringement was not exceeded, and so you will see in the tables for each of the parties, that there is a calculation for the percentage of the year prior to May 2004, and in no instance does it go remotely over that maximum; indeed one sees that they are very small percentages of that maximum amount. That is the law.

As far as the European cases are concerned, it is not a question that the cases such as *Archer Daniels* and *Dansk*, which are authorities we have submitted to you before, are simply about the scope of the Commission's discretion and consequently that there is no legitimate expectation that arises in relation to that discretion. Those are cases that say in terms, "A party has no expectation that a regime of guidance that is applicable to the exercise of a power, whether it is applicable in a loose sense or whether it is applicable as a matter of obligation, that no legitimate expectation can arise that that regime in its totality will continue to be of application if the guidance changes, even if the infringements occurred at an earlier stage. That is what the authority stands for. Therefore in our submission it is simply not correct that these authorities are somehow limited to the way in which the guidance operated upon the discretion, it deals with the fact that as a matter of expectation you have to expect that guidance is only guidance; it is susceptible of change; and if it is changed following whatever lawful requirements there are to effect that change, you must expect to be subject to the new guidance in respect of historic infringements, subject only to the *Uttley* principle on retrospectivity as to maximise it.

THE CHAIRMAN: My recollection was that this question about the foreseeability of the change is something that comes from the Strasbourg court's case law on Article 7.

MR. UNTERHALTER: Yes. Yes, so, it goes to what would constitute an Article 7 infringement, and these species of changes do not give rise to any challenge of that kind. So, in our submission that is simply not warranted.

And then we come finally to the end point of this, which is to say, "Well, given all of these factors, what should be applied?" And it is said, "Well, just a crude percentage of turnover should be applied". Now, the problem is not at starting point. It is not at step one. It is said to infect aspects at step three and the portion of the MDT that we have examined. We say there are no errors that arise. It would not ever be warranted, even if you should disagree with any part of the submissions that we make as to the various attacks that have been made on MDT to simply wipe away MDT. The most that you would ever do, with respect, would be to say, "In respect of the error identified on that aspect of the application of MDT, we think a different conclusion is warranted". But, as was pointed out in the *Argos* case, that does not mean that there is any reversal of the penalty, because even if you were to identify an error of some kind in respect of one or other attribute of MDT, it does not mean that the overall penalty is wrong, because it may be that it makes an immaterial difference in your assessment to the ultimate penalty through an overall application of MDT and the other steps that are made. The key in our submission is simply that this is a multi-stage process of which you have to identify where the error is and whether that error makes any appreciable difference to the overall penalty generated through the accretion of steps that provide the penalty at the end of the day. And therefore the notion that one would just have this reversion back to some crude percentage of turnover figure would, we submit, be not just retrograde but simply irrational in relation to the kinds of errors that are being pointed to here.

Our last submission is that my learned friend led various evidence from the bar as to the constitution of the Keller Group and what their financial statements say if you read them on the web, and that there is some UK subsidiary that now exists that was not comprehended in *Makers*, these are not matters properly dealt with from the bar. We would simply ask that the record reflects what can and cannot be considered. Those are our submissions.

MR. MATHER: Just one point, if I might. Mr Robertson referred specifically to the penalties in the *Sainsbury* and *Imperial Tobacco* cases, I wondered if you wanted to respond to those.

MR. UNTERHALTER: We have little to add to what has been said to other Tribunals on this score, which is that these attempts to read across between industries and the like are very very difficult to do, and there seems to be no warrant to do so. Until one has examined the particularities of those cases and the particular structure of those markets and how the penalty problem presented itself, for example in relation to how relevant markets were defined and what the uplift was that was necessary, these crude comparisons which simply say, “X amount of turnover”, or “Y amount of profit was represented by the fine” is not telling you anything helpful about how the methodology step by step was utilised to generate the fine, and whether overall there are real points for comparison between these cases, because it is the total methodology, so it is relative not just to one aspect or one crude indicator of difference, but how the entire build up was done; and our submission is there is nothing useful to be gained from that comparison, because all that it does is it seeks to say, “Well, how much of the profits of those large companies were wiped out relative to this appellant?” And that is simply not telling you anything useful about “How did you arrive at that figure and for what reasons?” Until one does that comparison, there is very little of use to be had from this. Those our submissions.

MISS HEWITT: I am not sure if I missed it, but do you want to say anything about framework agreements, and the suggestion that they should be -----

MR. UNTERHALTER: I have left that over only because I understood that – we have a great deal to say on that score – but I understood that my learned friend was going to tackle that when Tomlinson's appeal came, and if I might just, given time, it might be a more useful occasion to debate those questions, if that would be convenient to the Tribunal.

THE CHAIRMAN: Yes, I think that was what Mr Robertson said, yes. Just on this final point about rolling back and knocking out the MDT which Mr Robertson says is one way that we could approach this, there is a difference between looking at the figure that you get at the end of step two, and saying "Well, we do not think that that is enough to be a deterrent here and therefore we want to devise a method by which we increase it by some logical rational amount, and here is a way that we can do it and that is as reasonable a way as others". There are other ways, but that is how we choose to do it; and how we choose to do it is to say, "Well, what would the fine have been if the relevant turnover had been 15 per cent of the total?" It is slightly different to say, "Well, in deciding whether we think that the fine we get to at step two is a sufficient deterrent, we say would the fine be bigger if the relevant turnover was 15 per cent of the total turnover, and because the fine is actually smaller than that, we therefore conclude that the fine at step two is not a sufficient deterrent and we ought to then increase it to the step three post method sum".

Now, which of those would you say is how the OFT has gone about these cases?

MR. UNTERHALTER: Well, in our submission it is the first. What it has done is it has generated a figure at steps one and two. It has looked at that figure and said, "Well, does that seem big enough?" Now, it is true that its normative comparator is the 15 per cent of total turnover which is simply intended to be a way of computing size - in other words, it is a way of looking roughly at how to get to the size of the entity. All that you are really working out there is what is the ratio between relevant turnover and total turnover. So, you really just seeing how much impact this makes on the overall size, and it is using 15 per cent as a guide to that computation.

Now, it is possible, of course, in other cases that one could use a different marker of size, but we do not understand there to be anyone who says 15 percent as a general guide to impact by reference to size - that there is something intrinsically wrong. It is a marker.

THE CHAIRMAN: No, but I think there is a feeling in some of the cases that there was not that step that -- there was not that standing back and looking at the Step 2 amount to see whether it was a sufficient deterrent in order then to decide whether something more needed to be done. What happened was simply that you moved to Step 3, worked out what that would be, and if it was more than you got at Step 2, then you said, "Well, that indicates that Step 2 is not a sufficient deterrent. Therefore we are going to the Step 3 amount". I do not want to press you to it now because of the time, but it would help me if you could point places in the Decision which indicate that there was that standing back moment at the end of Step 1/Step 2 in which you did look at whether any further deterrent was needed and, if so, then -- I understand, "We have got this methodology. Because of *Makers* it was approved. Therefore that is what people would expect and therefore that was fine. We are not going to re-invent the wheel by thinking up a dozen different ways of doing it". But, whether there was that consideration at the end of Step 2 as to whether anything more was needed in the particular cases. I hope I have expressed that clearly.

MR. UNTERHALTER: Indeed, madam. We will certainly point you to where one sees reasoning as far as this is concerned. But, just a very quick response because I am mindful of the time -- The stepping -back point is usually thought to be at the end rather than at stages in the cycle. The question really is: Once you have generated a turnover figure for the purposes of Step 1, how is one going to determine whether it is enough? Enough as against what? Because, as we have sought to indicate, it is really enough relevant to the economic power of this entity which is the crucial determinant of deterrence, one is then looking at ratios of turnover for the purposes of coming to that conclusion. That is the logic that underpins this approach. Otherwise, in our submission, you end up with the "£300,000 is enough". Why is it enough? "Well, it is enough because it is enough".

THE CHAIRMAN: It is a question of whether the other factors that Mr. Robertson looked at, which was, "Well, goodness! Look, everyone is now sitting up and taking notice about this, and we have now all got these audited compliance programmes". It is whether those factors are at all relevant to the question of whether there is any need for further deterrence once you have got to Step 2. You have made your submissions on that: "Well, it is all very well them saying that now, but this is a constant temptation and we know from experience in anti-trust cases that companies do slide back into wrong ways if there is no financial punch behind infringement. Anyway, let us leave it there for now.

Mr. Robertson, one thing that I meant to ask you about, but I forgot, was where you are on your financial hardship point. Is there a financial hardship point in your notice of appeal, or not?

MR. ROBERTSON: There is not that specific point in this case. There is obviously the financial impact of the penalty which was the first matter on which I addressed the Tribunal. I have eight points of genuine reply as opposed to further debating of the issues. We do, of course, have two more hearings in which many of the issues are still open. But, to deal with the points of genuine reply --

Firstly, seriousness. My learned friend asked, "Where did the OFT go wrong?" Where it went wrong was the outcome because the outcome was a fine which was more than our total group pre-tax profit for 2008. We just say that that is off the end of the scale. It is plainly disproportionately high, and that is why we make the comparison with the *Sainsbury* and *Imperial* cases. My learned friend says, "Well, you cannot compare the fining methodology". The only reason this Tribunal is not in a position to compare the fining methodology between this case and the *Tobacco* case is that the OFT have not yet published a non-confidential version of the Decision; nor have they offered it to the Tribunal on normal confidentiality terms. It is perfectly open to the OFT to disclose their methodology in *Tobacco*. We can do it on a confidentiality ring basis. They can explain their reasoning to the Tribunal. They have chosen not to do so.

The second point of reply comes down to seriousness and a comparison with health and safety cases. This is just to address the question that Mr. Mather posed, which is whether we are dealing with an up-to-date approach in health and safety cases. It is dealt with in our skeleton argument at para. 37. The Sentencing Guidelines Council's definitive guideline was published in February 2010 - so, earlier this year. That is the one that will have been used in the Serco case. The guideline was issued after they had received a price from the Sentencing Advisory Panel in October 2009. You will see that is referred to in the footnote of that skeleton. So, the position is now an up-to-date position. You will see there that the advisory panel says, "Take a turnover -based approach, but have regard to profits to avoid doing injustice". That is why we say it is a broad cross-check.

The third point of reply is my learned friend relying upon the Europe Economics Report as saying that people in the industry knew cover pricing was wrong. That is not what is said in the Decision. If you look in the Decision you will see the OFT referring to textbooks and teaching the practice of cover pricing. We referred the Tribunal to a further textbook. One of the co-authors is Professor Hughes who is a co-author of the Europe Economics Report. The OFT dismiss him as grossly ill-informed, but they also appear to regard him as an expert they would like to instruct. The fact of the matter is that this practice was taught in textbooks. We have even given examples of a textbook going back to 1929, re-printing articles in the Architect's Journal. That is how ingrained this practice was. There is evidence in other cases of people being taught it on quantity surveyors' courses, being taught it at night school, being taught it on courses at Leeds Metropolitan University in one case. It was understood to be a standard practice. Nobody highlighted its illegality. Even authors of textbooks, even experts instructed by the OFT.

The fourth point - specific deterrence. Without the MDT, the ultimate penalty, accepting everything about the OFT's calculation, would have been 20 per cent of our pre-tax annual profit at group level. My learned friend describes that as trivial. It is not. By comparison, it is four times higher than the penalties on *Sainsbury* and *Imperial Tobacco*.

The fifth point. My learned friend says that in other cases I am somehow giving support to the MDT by referring to it when I am pointing out that my clients have received penalties well in excess of multiples of the MDT. I am using the MDT in those cases - and Hallam is the best example which was heard last week - as a point of comparison on the OFT's methodology. To be clear, it is no acceptance of the OFT's methodology. As to the 4.5 per cent cut-off point, it is not an issue in this case. It is an issue in the JH Hallam case and Lord Carlile has heard our submissions on that point.

The sixth point. The point about turnover - sub-contractor turnover being no more than an input just as a nice bit of engine machinery or a satnav might be an input to a final car. For someone who is in the process of buying a car at the moment, I suspect the margins on items like satnavs is probably pretty high. But, the key point is not to compare margins - it is to make it clear that my submission was that you have to use turnover intelligently if you are going to use it as a basis for fining, as we do in this jurisdiction. Therefore you need to understand what turnover represents. My learned friend has just said that turnover indicates economic power. I am afraid sub-contractor turnover does not. It indicates payments to sub-contractors.

MR. MATHER: If you are dealing with an industry where, in the good times, margins are 1 to 3 per cent - that is in good times - and you think the minimum fine is 0.75 per cent of turnover - that is, the MDT - then 0.75 per cent of a 1 per cent margin is three-quarters of your profit - 75 per cent - as compared to the 5 per cent in Sainsbury and Tobacco. So, you were just asking that turnover in this industry be understood for what it is and what it indicates and why high turnover is not necessarily to be equated with high economic power.

MR ROBERTSON: The seventh point of reply is to deal with multiple infringements. It was the OFT, in para. 252 of their defence, that sought to justify multiple infringements as being proportionate to the scale of infringement. The point we are making is that it is not. The OFT is under a duty to treat undertakings under investigation in accordance with principles of fairness and equal treatment, to choose to fine some one fine and others three, with no basis for making that distinction other than administrative convenience cannot be right.

My eighth and final point of reply, which is the last business year approach, my learned friend submits that the maximum penalty is 10 per cent. You have got our submissions in writing. That is not the maximum. It is the fine which could have been applied, reached at applying the Guidance then in force. The point that you raised about, “Well, is it reasonably foreseeable there could be a change in the Guidance?” -- Two of these infringements were committed in 2000. The original Guidance had only just been adopted. It was not foreseeable. It would immediately be a change. The third of the infringements in the Seddon case was in January 2004. The OFT did not publish consultation on the change in the Guidance until April 2004. So, we would submit that it was not foreseeable for the third infringement that there would be change in the guidance.

On the point of the Guidance, I would invite this Tribunal, as I invited Lord Carlile’s Tribunal, to look at the draft Guidance, to be found in the bundle of authorities, because the one thing you will not see in there is any explanation by the OFT as to reasons why they are changing the basis of choosing turnover on which to fine them. There are no reasons given. There is no big red hand saying, “Look, we are changing the Step 1 basis for these reasons”.

THE CHAIRMAN: You mean the relevant year is taken.

MR. ROBERTSON: We are departing from the European Commission’s approach because there is no statement of reasons at all. It is clear there is going to be a change. I am not saying that. But, it is equally clear that no reasons were given.

Madam, unless I can assist the Tribunal further, those are Seddon’s submissions.

THE CHAIRMAN: Thank you very much, Mr. Robertson.

We will be seeing you again at two o'clock. If I could ask you, please, to leave the courtroom quickly once we have risen so that the Registry can swap over the relevant papers that would be helpful. Thank you very much.