IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1138/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 July 2010

Before:

VIVIAN ROSE
(Chairman)

GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

APOLLO PROPERTY SERVICES GROUP LIMITED Appellants

- v -

THE OFFICE OF FAIR TRADING Respondent

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HEARING

APPEARANCES

Mr. Thomas de la Mare (instructed by Pinsent Masons LLP) appeared for the Appellants.

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

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THE CHAIRMAN: Yes, Mr. de la Mare?

MR. de la MARE: Madam, I appear on behalf of the appellant, Apollo, my learned friend, Mr. Unterhalter, and Miss Ford appear for the OFT.

Given the 50 minute guillotine, a sort of enhanced ECJ period of proceeding, I thought it would be helpful to set out at the outset how I intend to proceed. I am going to spend a minute or two – no more – on the facts, because I hope you have had a chance to assimilate those from your pre-reading. Then I want to look at the structure of the decision for about five minutes or so, and draw out some themes in relation to that.

Thirdly, I want to make some general remarks about the status in administrative law of guidelines, how they are to be interpreted, what discretion arises in conjunction with them, and to address the principle of fettering a discretion, and then lastly I want to go through the three grounds of appeal and I will spend approximately 20 minutes on ground 1, 10 minutes on ground 2, and five minutes on the wrap up ground 3.

Starting then with the facts, they are set out in our notice of appeal fairly fully, but essentially boil down to this: my client was found guilty of three infringements between 8th July 2003 and 9th September 2004. It was not a taker or giver of compensation payments, it simply provided cover and did not take a cover price. After 2004, and before the decision, Apollo grew very rapidly indeed by means of organic growth, the evidence is that between 31st March 2003 and 31st March 2008 it grew by about 220 per cent and that is substantially in excess of the rates of growth then prevalent in the construction industry even though that was, in general terms, growing. The evidence of Mr. Couch to this effect, that this is a very unusual and atypical rate of growth is effectively unchallenged.

In consequence of what I call "the decision approach" that is the calculation of turnover by reference to the turnover prevailing at the date of the decision, my client was fined in total £2.15 million and the calculation for that appears at para.VI.418 on p.1727 of the decision, under our rival infringement approach, which is to look at the turnover at the date of the infringement, that calculation would result in a fine of approximately £939,000. If you look at p.24 of tab 2 of the bundle, exhibit GC5 you see how that calculation, using the OFT's own methodology is set out with the revised turnover figures.

Can I ask you just to have a look at that, very briefly, we will go over it in some more detail in due course? Tab 1 should be the notice of appeal.

THE CHAIRMAN: I do not think we have a core bundle.

MR. de la MARE: Right, I assumed the bundle I was operating from was a core bundle.

THE CHAIRMAN: Well it may be but we do not have it.

MR. de la MARE: Do you have Mr. Couch's witness statement.

THE CHAIRMAN: We have the notice of appeal, and a witness statement, WS1.

MR. de la MARE: The witness statements are Gary Patrick Crouch, a large part of which is directed to explaining ----

THE CHAIRMAN: That is exhibit GC5, which is on p.24 of WS1.

MR. de la MARE: Correct. I am sorry, that is my confusion, madam, I apologise for that. I do not know if you have had an opportunity to look at this before, this particular table. It is quite an important table, it is the basis of our rival calculation.

The matters I would immediately invite your attention to are first of all the column, or rather row: "Total worldwide turnover," and you can see the figures for the applicable years, £96 million for the first year 03, and then £130 million for the two infringements in 04, leading to a Step 1 penalty of £8,000, £21,000 and £2,000 respectively. MDT is then applied to the largest of those penalties, £21,000 and then the remaining two figures using OFT's calculus are added back in and you reach a figure of £939,000.

THE CHAIRMAN: So there you are looking at the infringement, 199, you are using the 2005 year end, both at Step 1 and at Step 3, is that right?

MR. de la MARE: It is the 2004 year end at Step 1 and Step 3, it would be 2004 to 2005, you are quite right, madam, I am so sorry.

THE CHAIRMAN: Yes, the total ----

MR. de la MARE: The first infringement, 154 is 2004 year end.

THE CHAIRMAN: Yes, and so the total worldwide turnover there, the £130,437,000 is as at year end 31st March 2005 and also the relevant turnover is also as at ----

MR. de la MARE: Correct.

THE CHAIRMAN: And those figures are what has been – 5 per cent, and then the 0.75 is applied to those, yes.

MR. de la MARE: The relevant figures appear in other exhibits to Mr. Couch's witness statement, but that is the difference in the calculus so you can see immediately that the calculus does not generate proxies because it is using turnover from the relevant markets at the time that the infringement was occurring. In consequence there was no uplift using the 0.14 per cent proxy for a zero figure. Those are the facts, and we will come back to this chart because I want to compare it at a number of stages with the OFT's own table in the decision.

What then of the approach of the decision? The first point to make, and it is a fundamental one, is that the decision proceeds against what the OFT has identified as effectively being

representative samples of conduct engaging in the practices in question, the cover pricing and compensation payments. The OFT does not purport to target every single infringement because the object, as it makes quite clear in section II of the decision is to root out and deter what was then the general practice, and it does that by using sample infringements to show who is engaged in the cover pricing practices and then impose fines intended to deter future resort to such practices and that is made abundantly plain at II.1459 to 1478 of the decision.

The second point to make, and this really is perhaps the most important point of general structure, is that section VI of the decision is concerned to established a comprehensive and fixed fining framework such that within the two broad categories of case, and that is simple cover prices on the one hand, and compensation payers in the more serious category, the same steps are taken for everyone. There is a rigid system, and that rigidity is frequently justified by reference to the fact that the OFT says there is a need to act consistently.

We have prepared a table – and I will pass it up – that sets out the stages in this mathematical calculus contained in section VI of the decision. This table illustrates the particular ingredients of the calculus for each of the steps within the fining framework. For instance, the first four entries relate to Step 1, they identify how you target particular infringements, which relevant turnover years are to be taken, what to do if there are no relevant records for the relevant year, and what percentage to apply to the relevant market for the infringement involving no compensation payments or for an infringement involving compensation payments, so you had the same methodology applied throughout.

Crudely speaking, this methodology provides the detail behind which the various calculation tables that appear in the decision from VI.401 onwards appeared. I do not know if you have had a chance to look through the decision but there is a list of 103 of these calculus tables where this methodology is applied to reach the figures, and for each stage effectively therefore the OFT has proceeded as follows. It has set out a general justification for a proposed ingredient in it calculus. It has then gathered together and considered all the various and various general objections to that proposed general step, and they may be advanced on a general or case specific basis, and then in a relevant part of the decision it has compendiously answered those criticisms leading to a conclusion that its general methodology is justified.

Having defended its general methodology in that way, that methodology is mechanistically – and I use the word advisedly – "mechanistically" applied to all of the cases before it. The reason why they have adopted such a fixed approach is precisely this concern of

consistency. What the OFT has never done so far as I can see and there is absolutely no evidence of it in individual calculations, is given any individual consideration as to whether or not the individual numbers produced by that calculus or, indeed, the overall penalty that results from them, is in fact appropriate for the facts of that particular case.

Let me just take one example by way of illustration, the 0.14 per cent proxy used for those who have nil Step 1 and Step 2 penalties because of the fact that by the time of the decision they have no engagement in the relevant market in question.

The very fact that that proxy is necessary is a function itself of the use of the decision approach as opposed to the infringement approach, but having reached that 0.14 per cent figure, on the basis of a crude average – effectively they have looked at all of the infringements, and said the average value is 0.14 per cent and therefore we will apply it to nil values, that is applied to all cases in which nil values are thrown up by their methodology without exception, and if you are an 'anorak' like me you can do a word search of those 103 tables, and you will see from p.1273 onwards that there are 35 parties to whom this 0.14 per cent methodology is applied. This same boiler plate is used in each and every one of those cases to describe what has been going on. Take Apollo's case, party 7, by way of example VI p.419 says:

"In accordance with para. 6270 above, for the infringement where this party had nil relevant turnover in the last business year the OFT is applying a proxy percentage to this party's most recent total turnover figure in order to derive, and this is important, a penalty figure at the end of Step 1".

I emphasise the words "at the end of Step 1" because in fact it is applied at the end of Step 3 after MDT, so it does not even accurately reflect what has happened, and I will come back to that point in due course.

At no stage is there any consideration as to whether this 0.14 per cent proxy figure is appropriate for the facts of Apollo's case, even though – going back to Mr. Crouch's table – you can see what sort of level of engagement in the relevant market there was at the time of infringement. You can see that that would have generated on actual figures a penalty of approximately £8,000 as compared to £356,000. Now, even allowing for the fact that my client's business has increased by 220 per cent, that is a leap that is really impossible to justify.

THE CHAIRMAN: Just go over that again. Are you then comparing what the proportion of the total turnover was made up of the relevant turnover in the year of infringement and then --

MR. de la MARE: Certainly.

THE CHAIRMAN: Just tell me what the sum was that you just did then.

MR. de la MARE: The sum that I did just then is that you can take the £8,679 figure and say, "We know what relevant turnover there is relative to worldwide turnover". All we need to do, even if we are not minded to use turnover at the date of infringement, is to divide that figure of £8,679 by £96 million-odd and multiply it by the turnover at the date of infringement - that is, £220 million-odd.

THE CHAIRMAN: You mean at the date of decision?

MR. de la MARE: By the date of Decision, yes. I am sorry. Quite right. Just testing, madam.

THE CHAIRMAN: So, looking at Exhibit GC5 you are saying, "Okay. Actually if you look at the infringement year you see that in a year where the turnover was £96 million the relevant turnover was £173,574 and so Step 1 was £8,679.

MR. de la MARE: Yes.

THE CHAIRMAN: If, then, you decide you are going to take the year of decision, the turnover is then 220 per cent greater (whatever that is). You then say, well, assuming the relevant turnover that year is the same proportion as it was in the infringement year, that would give you a penalty after Step 1 of ----

MR. de la MARE: The calculus is about £28,000, I think. It is not actually in the table. This is a rival calculation.

THE CHAIRMAN: Yes. I understand that. I am just trying to work out what it is.

MR. de la MARE: The initial point to make is this: having settled on the proxy figure of 0.14 per cent there is no individual consideration given in each case where that proxy figure is applied to say, "Is that average figure actually a satisfactory way to deal with this case?" because the other materials before me show that in fact, in my client's case, the figure is much lower. There may be other cases where the relevant contribution in the relevant period is much greater.

THE CHAIRMAN: You mean £173,574 is much less than 0.14 per cent of £96 million.

MR. de la MARE: Exactly. So, there is absolutely no consideration given to how the application of that mechanistic general rule to the facts of the case actually resounds in terms of individual justice or tailoring to the facts of that particular case.

I do not go so far as to suggest that the calculus I have just given you is the only way that it can be done. It certainly seems to have a lot more by way of logic to commend it than the actual general average that was undertaken. But, the initial point is this: the OFT do not even address that question. They do not even address their minds to the appropriateness of the general calculation they have defended to the particular case in hand. You can make

exactly the same criticism in relation to any number of the stages in the general methodology. For instance, in relation to the use of decision-approached turnover in the calculation of Step 1 and Step 2 penalties, or the use of decision-approached turnover in relation to the calculus of MDT. At no stage do they go back and say, "Let us look at how our methodology applied to this case actually works and whether or not the cumulative assumptions that we made have generated a justifiable decision".

THE CHAIRMAN: In your Notice of Appeal you do not seem expressly to challenge the proxy.

MR. de la MARE: We do, madam. It works out that we challenge it in two ways. The first way that we challenge it is by reference to the use of turnover. The first way that the proxy therefore comes under fire is by reference to the fact that if you used the decision approach you have to use a proxy. If you use the infringement approach you do not, and you do not get into these artificial calculations.

The second way we challenge it is to say that when you look at the justification for the proxy-based approach, which is a deterrence-based justification, and look at how it actually works in this case, it leads to a double-counting because effectively you get a penalty imposed by reference to deterrence considerations later on in the calculus. In any event, it is a point which I think is satisfactorily covered by the global ground 3, which is the overall balance of the fine.

That is the point I wanted to make about the general structure of the Decision. There is a general process. It is defended in general terms, but there is no consideration about its application to individual cases.

That brings me on to my next topic, which is administrative law and guidelines. Guidelines are not anything novel to this Tribunal or this jurisdiction, they are intended to direct or channel how a public law body with discretion exercises that discretion so as to give those affected by the guidelines a modicum of certainty as to how they are going to be treated. It is obviously the case that this process of consultation, etc. underpinning the s.38 process is intended to do exactly that.

Now, given that they are standard instruments of both general public law and, indeed, of fining practice in general, in all kinds of criminal contexts, there is no reason why these guidelines should receive any special treatment. They should be treated just as administrative law treats any such guidelines in any context unless the statute tells you otherwise.

In that context there are three basic rules, I would suggest that are to be observed. First of all, a policy, or guidance, or guidelines must be given an objective and consistent meaning.

You get that from the *Raissi* and *Kennedy* cases which I put on our suggested pre-reading list. There has been debate about this, but it is now absolutely clear by a Court of Appeal authority that there is no test of what a decision-maker thought he was doing by the guidelines. You interpret them objectively to reach a single and consistent meaning - if only because of the demands of the principle of legitimate expectation. That is the first principle.

The second principle is that the rules against fettering apply in relation to guidelines because guidelines are meant to provide general structure. A decision-maker, nevertheless, has to give individual consideration to every case before it. It has to consider whether to apply the guidelines to the case in hand and, if not, what exception to make and why, and what the reasons for doing so are. It is therefore clear that in every case a decision-maker must consider making an exception from the guideline even if its objective meaning is X.

The third point - and this is clear form the *Martin* case - in a criminal context the courts are most reluctant to give any support to the notion that fines can be calculated by means of some kind of mathematical one size fits all model. Fining is a criminal jurisdiction in which it is particularly important that attention is given to the individual facts before the court. The Lord Chief Justice's remarks in *Martin* (again on the pre-reading list) make that tolerably clear.

It is against the backdrop of those principles that I have argued - obviously with some reluctance, that the language of the CAT, so gratefully embraced by the OFT to the effect that the OFT has a margin of appreciation in relation not only to the application of its own guidelines but in respect of its interpretation, is, with the very greatest of respect, something of an administrative law solecism. There is no margin of appreciation as to what the guidelines mean. They mean what they mean. They have an objective meaning. Of course, the OFT has a discretion to depart from its guidelines, but with that power comes responsibility. In each and every case they must consider exercising that discretion. They must consider whether or not it is appropriate to make an exception from the particular rules set out in the guidelines. The language of margin of appreciation, with the very greatest of respect, is not the appropriate language to use in this context. Administrative law talks about latitude - latitude appropriate to the relative expertise and the position, and responsibility of the court vis-à-vis the decision-maker. Margin of appreciation is redolent with the type of special deference paid by the European Court of Human Rights because of its international, as opposed to domestic, role.

It is no answer to these points, again with the very greatest of respect, to simply cite another CAT case - the *Achilles Paper* case, which I am sure was not cited for the sole reason that it is a decision of the learned Chair, but it certainly has that characteristic - when that case does not in any way engage with the arguments I have made. It did not have cited to it the relevant authorities that have been cited to this Tribunal. It did not involve any argument about interpretation of the guidelines. It did not involve any questions of fettering or mechanised application. It did not have a question of interpretation. It did not, effectively, involve the formulation of a policy being applied to a large group of cases.

So, my core submission is this: It is only if the OFT gets everything right, gets the application of its guidelines correct and correctly exercises its discretion to consider departing form its relevant guidelines that you get to the second stage in the *Argos* test. If it actually does not get all of that right, then the Tribunal has to make a decision of its own motion. If the OFT has not properly discharged its function, the role of the CAT at that stage is to apply the Guidance in such a way as it thinks fit or relevant to the facts before it, and also to apply an overall justice test of the kind required by *Argos*.

It is for that reason that any failings in applying its own guidelines can lead to automatic conclusions. If you reach the conclusion that the decision approach is the wrong approach and the right approach is the infringement approach, either because that is dictated by the guidelines properly construed, or it is the proper approach on the facts of this case - the OFT not having exercised its discretion to even consider that - then that is the approach that you should apply to generate the figures set out in my Notice of Appeal.

With that rather windy set-up, let me turn to the grounds. The first ground engages with its precise issue: What is the right approach? Is it the decision approach or the infringement approach? This subliminal question arises in three different ways. The first is in relation to ordinary Step 1 and 2 calculations. By 'ordinary' I mean where you do not have to engage in proxies. The second way it arises is when you do have to engage in proxies. The third way it arises is in relation to MDT - Step 3 of the Guidance. In my submission different considerations apply at those different stages because the steps in the Guidance are intended to achieve different objectives. Steps 1 and 2 are to engage the seriousness of the infringements. Step 3 is to engage deterrence. Those differing considerations may militate in favour of different approaches to relevant turnover.

The first stage is to construe the guidance objectively in line with the *Raissi* approach. In our skeleton argument we have set out a number of features which I would suggest compellingly illustrate why the Guidance objectively construed favours the infringement

approach. The first point, covered at para. 21.1 of the skeleton argument, is the language of s.27 of the Guidance itself. The Guidance, as you probably know, is to be found in Volume 11, Tab 135. Section 2.7 is at p.7.

> "The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market [and then these words] affected by the infringement in the undertaking's last business year".

The simple point is that 'affected by the infringement' suggests a causal link between the infringement and the impact on the relevant markets. It suggests an infringement approach. The OFT say, "No. No. No. Nothing about that is in any way suggestive of a temporal link". But, with the best will in the world that argument does not convince causation has embedded in it a temporal element, a temporal linkage. That is, in itself, strong evidence, we suggest, of the necessity to adopt the infringement approach.

Turn on to 2.13 of the Guidance. This is the passage dealing with what to do in the cases where there is a nil turnover under Steps 1 and 2. The Guidance states,

"In exceptional circumstances where the relevant turnover of an undertaking is zero, for example in a case …."

THE CHAIRMAN: Wait, please, just one minute. This seems to be a different document from the one we were looking at this morning.

MR. de la MARE: 135? I was initially confused by the fact that there was a draft at 134 with the final guidance at 135. I believe 135 is the final version.

THE CHAIRMAN: I am sorry, I was looking at the draft.

MR. de la MARE: I made the same mistake about five hours ago! 2.13:

> "In exceptional circumstances, where the relevant turnover is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step."

The consequence of adopting the infringement approach is that far from being exceptional, over one-third of the cases have involved the generation of proxies, precisely because the passage of time has led to a disconnect between relevant market activity at the time of infringement, and relevant market activity at the time of the accounting period chosen. That, in itself, I would suggest is a very strong pointer to the fact that what the guidance is really concerned about is conduct at the time of infringement. They adopt the infringement approach in almost all of those cases precisely because the party was trading on the market and engaging in these practices at the material time that there will be relevant turnover to

generate a relevant figure, much as in Mr. Crouch's witness statement, and his calculation, and you have no need for a proxy. I cannot go so far as to say that that will be the case in every case, particularly given the nature of cover pricing, because you can imagine a scenario in which somebody gives a cover for a tender in which they are unsuccessful and therefore has no turnover in the relevant market, but it is certainly going to be very unusual compared to the scenario that will arise if you use the decision approach, so that is the second pointer.

The third pointer is to compare and contrast the language in Step 5 as set out in para. 21.3 of my skeleton. What is notable is in relation to Step 5 the drafter of the Guidance goes out of their way to point out at 2.17 that the relevant business year to use is to be used in calculating the decision approach. One has to ask the question: "Why has it been felt necessary to do that in para.2.17 if that is the approach to be used throughout the document? The only answer the OFT has to this point is it is mere surplusage, it casts no light on the drafting intent, I would suggest a far more compelling construction is that the approach that had been used prior to the amendment of this guidance in consequence of the turnover order, namely, the infringement approach continues to be accepted to be the approach necessary at every stage until 2.17, but it is only at 2.17 in consequence of the turnover order the guidance spells out "You must use the infringement approach".

Fourthly, the language of clause 2.7 is pretty much identical to the language of the old 2000 Guidance at tab 132 and, in particular, at tab 2.3 on the second page. In those circumstances, given that there is consistent language, and on an accumulation of interpretation and application in relation to that language you would have thought that the drafter of this document if they had wanted to point out a change in policy, for that is undoubtedly what it was, would have done so in terms and said "Relevant turnover means the decision approach, and means it throughout this document", but they pointedly did not do that. So those are the construction points.

What then about principle? I would suggest that there is no readily discernible principle to identify why the decision approach is suitable for Steps 1 and 2, the calculation of seriousness or, indeed, for the calculation of proxies. It is hard to think of a logical reason why conduct becomes more serious in the light of intervening events. The mere fact that a company is taken over by another company thereby increasing group turnover, or acquires another business, or divests itself of another business has no logical bearing upon the conduct or the seriousness of the conduct in which they have engaged prior to those relevant events and, as such, you would have thought seriousness would have been directed to the

general impact of the conduct on the market at the time it took place. I accept these are infringements by object, and I accept that a nice calculation of damage is not required, but nevertheless, one looks for some form of logical connection and the only logical connection ascertainable is that between the size of the undertaking at the time of the infringement. The OFT has really very little by way of principle answer to that point. The closest they come to providing any reasoning is in para. 67 to 69 of the defence, which are in turn addressed at para. 24 of my skeleton, they say it is somehow good practice to link the turnover required at Step 1 and 2 to that required by the turnover order. But why, because they are logically different exercises. Why should that linkage be made and, indeed, they are addressing quite different considerations – seriousness is quite different from affordability. Affordability is plainly rooted in the present, in the way that seriousness is not.

The second argument they make is really, for want of a better word, essentially circular as I have explained in the skeleton, and I will not address that now but will by reply if maintained.

The third argument, that of practical difficulties – it is illusory, not least because my client supplied the relevant turnover figures for 2002, 2003, 2004, and there is no good reason to suppose that companies, which were under duties to keep accounting records for six years would not be able to supply the relevant records from the period in question. It rather has the whiff of an argument of administrative convenience disguised as an argument of principle. When you combine this with the next application of turnover, which is proxies, matters get harder, because applying a proxy to turnover five years later, in circumstances where the very choice of the later turnover figures has led to the nil figure, produces the sorts of wild swings that we have seen in the comparison between Mr. Crouch's figures and the figures that appear in the decision.

The decision approach generates a fine of £356,000, the infringement approach generates a fine of approximately £8,000. You look at the two rival calculations and ask yourself which is in line with actually what was happening in the market and, what is more, in line with the other levels of penalty at the Step 1 stages, and the answer is, I would suggest, glaringly obvious. £8,000 is very much of the same order of the other fines of £21,000 and £2,000; £356,000 under the OFT's calculation is many orders of magnitude greater than the fine for infringement 199. There does not seem to be any reason of principle why you should be applying a decision approach to a proxy when the proxy is meant to be modelling seriousness, so you would have thought the same arguments would apply in relation to

seriousness. What then about turnover at the date of MDT? I readily accept by the time you get to MDT you are dealing with a different subject, you are dealing with deterrence. Again, it is impossible to ascertain any principled linkage between deterrence and decision based turnover. Why is that? What are you trying to do with deterrence? You are trying to affect the mindset of a putative infringer who is engaging in a cynical calculation as to whether or not their conduct is worthwhile or not. What they want to know, your putative infringer, is what they are on the hook for at the time they may have engaged in the infringement in question. The fact that they have received a fine three years ago when they had a much lower turnover does not tell them that their fine, if they repeat an infringement, is going to be a third of the size. They are going to know that any fine for a repeated conduct is going to be based upon their current turnover. So if the undertaking is increased 10-fold between the relevant infringements – between the actual infringement and the putative future infringement, they are going to know that if they repeat that offence first of all their fine is going to start from a base ten times as large, and then they are going to get an uplift for being an repeat offender.

If, by contrast, you adopt the OFT's approach, look at it again through the lens of the putative offender, the putative offender is going to say: "Fine, it is not based on my turnover now, now I am at the point of infringement, it is going to be based upon what my turnover may be by the time that the OFT find out that I have been up to no good and punish me." Any number of things may have happened in that intervening period, they may know that they are on the point of selling part of their business with the result that their fine is going to be that much smaller. They may know that there is a potential merger, or a divestment or something of that kind, and that has no logical connection to the question of deterrence. What you want to be doing is speaking to the deterred party – at the moment they are about to infringe and therefore the only logical approach is the infringement approach, because it speaks to deterrent at the time of potential infringement, which is exactly what deterrence is about, so it is forward looking, the very fact that you are looking at the time of infringement of the future infringement makes it forward looking. The OFT's argument therefore, that somehow the decision approach is to be preferred because it is closer to the facts in the future is simply fallacious; it is a position of principle that should be adopted.

Then there is the question of consistency, and this boils down into two issues. First, has there been a change in policy between the 2000 and 2004 Guidelines or not? Well there plainly has been; however one dresses it up there is no getting around that, for the reasons explained in response to s.21 of the OFT's skeleton argument.

The second question is whether or not there is any justification. The undoubted conflict would be created, if you were to adopt the decision approach, between the UK Guidelines and the Commission's Guidelines, because it is no part of the OFT's case to contend that their decision approach is in line with the Commission's approach; it is not. The Commission's approach is plainly based upon infringement logic. The only answer the OFT can therefore muster is to say that s.60 does not bite in these circumstances, there is a relevant difference between Community law and our system. With the best will in the world, that argument is a little bit difficult to accept in circumstances where s.1.16 of the draft Guidance, which I think the point that the learned Chair was referring to this morning, made an express linkage to ----

THE CHAIRMAN: Well in fact 1.16 only appears in the -----

MR. de la MARE: It was in the draft.

THE CHAIRMAN: It does appear in the draft but as 1.15.

MR. de la MARE: Exactly. 1.16 of the final version, p.5:

> "In most cases the penalty imposed in respect of an infringement of an EC prohibition will be the same as the penalty imposed in respect of an infringement of a UK prohibition, …"

The Guidance goes out of its way to say: "We are going to provide for consistency of treatment, along with Community fines ----

THE CHAIRMAN: Ah, what you do not k now, Mr. de la Mare, is that we went round this loop this morning and let me put to you the answer that Mr. Unterhalter gave me when I made the same point, which is that -----

MR. de la MARE: Which is obviously a brilliant point!

THE CHAIRMAN: Obviously a brilliant point, but when it is talking about the fine to be imposed for a say in Article 81, now 101 infringement, it is talking about the fine to be imposed by the OFT if the OFT, under its new concurrent jurisdiction, finds both that there has been an infringement of the European prohibitions, and the domestic prohibitions, and that this is saying: "We will not charge you double". It is inherent then in what they say that they accept that when they impose a fine for breach of the treaty they are doing so in accordance with different calculations from how the European Commission would approach it.

MR. de la MARE: My approach to that, madam, would be "nice try". That problem is actually specifically addressed already in s.39(6) of the Act, which says that you shall not be fined twice for the same conduct, and that would, in any event, follow from the same principle,

the principle of non-concurrent jurisdiction. In any event it does not square with the language of s.1.16, because s.1.16 says in terms:

> "In most cases the penalty imposed in respect of an infringement of an EC prohibition will be the same as the penalty imposed in respect of an infringement for a UK prohibition."

And that question cannot arise other than by way of comparison. Perhaps I can make that point by taking you to s.39, which is in tab 4, p.68 of this excerpt from the Butterworths' guide, subsection 9:

> "If a penalty or fine has been imposed by a Commission or a court or other body in another Member State in respect of an agreement or conduct, the OFT or any Appeal Tribunal, the appropriate court must take that into account."

In effect there can be no double counting because to do so would be contrary to the principle of double criminalisation.

So Mr. Unterhalter's explanation simply cannot arise as a matter of Statute, so the language of the Guide should be given its natural reading, it is directed at the comparison between the types of fine that you might attain under the EC regime, under, let us say, Article 81, or 101 infringement, to the type of fine you will attain domestically under a similar infringement with a non-Community dimension for an infringement of a Chapter I obligation; it simply does not work.

What is more, there is absolutely nothing in s.60 that militates in favour of this argument that somehow there is a relevant difference. All we are talking about is guidelines in both instances. Section 60, if we can go back to the Statute, expressly requires both you and the OFT to have account to Commission Guidelines, s.60(3). "The court must have regard to any relevant decision or statement of the Commission." You have one set of non-rigid guidelines from which you have an administrative discretion to depart, another set of non-binding, non-rigid guidelines from the Commission and you have to reconcile the two where you can when you can, and in this case consistency therefore requires you to adopt the same approach to what is relevant turnover when applying the two instruments; there is simply no conflict.

The last point on this ground is fettering of discretion, because in our notice of appeal and in our skeleton argument we have forcefully made the point that there is simply no consideration as to whether on the facts of this case it is appropriate to depart from the decision approach if that is the appropriate approach under the guidance as properly construed. They have simply generically justified the decision and then applied it to all the

cases not taking into account relevant factors such as Apollo's massive increase in turnover. So that is ground 1. I see I am not doing brilliantly on time, madam, I will try and speed up as much as I can, there is a reasonable bit to cover.

Ground 2, here our complaint is really relatively straightforward. If step 2 penalties are cumulatively insufficient to achieve deterrence then there should be a top up, and that is the general methodology of the guidance. But what you should not do is effectively use MDT to rebase the starting point of the calculations. You effectively start off with Step 3 becoming Step 1 and then add in on top of that the fines for seriousness of Steps 1 and 2, and yet that is precisely the approach that the OFT adopts, and it is inconsistent with the logic of the decision. It is inconsistent most notably with the fact that NDT is applied only once, as it is, and as explained as VI.215 of the decision. The fact that it is applied only once can only be a reflection of the fact that these are sample infringements, and what the deterrence is attempting to attack by contra-distinctions to Step 1 and Step 2 penalties is the general practice, and you see that in terms in VI.195 to 196 and VI.230 to 231, where the OFT says in terms, in answer to the arguments of various parties that does not matter how many infringements you have committed, MDT is still a principle justified because this is about deterrence of this practice which you have engaged in and which we are dealing with on a consolidated basis, in other words, to take sample charges. Therefore, it is for that reason that the OFT's response to our argument under this head does not convince because their response is to say "You are making a mistake of treating these as one cumulative penalty when, in fact, there are three separate penalties, and all we are doing is applying MDT on one of them and therefore you have not addressed the relevant question." It is the OFT who has not addressed the relevant question, because if MDT is being applied only once and addressing deterrence only once, then it is very difficult to see that once the basic level has been topped up to the level necessary to achieve deterrence why a further add back in is required.

It becomes yet more incoherent when you look at proxies, because proxies are justified by reference to considerations of deterrence. Proxies are explained in para. VI.257 and the OFT says that they consider that the need for the deterrence applies broadly and effectively there is a need for every incident to be deterred.

There are two problems with this in consideration, and both of them lead to the solution being strikingly arbitrary. The first is to look at when the proxy is actually being applied and the second is to look at why the proxy is being applied, and the accumulation those matters lead to double punishment.

The "when" is a sequencing issue, effectively the proxy is applied at the end of the Step 3 calculus, so it is applied after MDT has been applied to the larger of the two fines that do not have proxies, in this case in relation to infringement 199. So Step 1 and 2 there are two infringements, one higher than the other, 199 higher, one with a zero. You apply MDT ----

THE CHAIRMAN: Sorry, I just want to have in front of me that table with the columns.

MR. de la MARE: Yes, it is at VI.418 of the decision, p.1727. So you can see "Penalties after Step 1", Infringement 154 – zero, Infringement 199, £9,353, Infringement 203, £127. MDT is then applied to infringement 199, to take that up to £1.9 million, and then after MDT has been applied the proxy is applied to the zero penalty to generate a figure of £356,000 which is then added back in on top of MDT.

If there were any logic about this process you would have expected the proxy stage to be completed at the end of Step 1 and 2 before you came to MDT and, indeed, if you look at the text at the bottom which I mentioned beforehand, you see that that is what the OFT is saying that it has done, it is saying: "This is the proxy in order to derive a penalty figure at the end of Step 1". But they have not done that, because if they had done that logically that £356,000 figure, would be the figure to which MDT would apply because it would be the highest penalty.

THE CHAIRMAN: I see, and then you would have added only back line 353 ----

MR. de la MARE: Exactly.

THE CHAIRMAN: -- instead of £356,071?

MR. de la MARE: Exactly, and the second problem with that approach is this penalty is justified by reference to considerations of deterrence, and you see that in express terms at VI.257, at p.1685. So what you have for us, on the facts of our case is two separate deterrent penalties being imposed, and that seems to be double punishment as we suggested in our skeleton argument. Of course, all of these problems would vanish if you applied an infringement approach as opposed to a decision approach, because you would be dealing with real figures, and the double counting would disappear.

THE CHAIRMAN: Just looking at that table, looking at the third column where the relevant turnover was £2,541, whatever that contract was saved you a great deal of money in the sense that if you had not earned that £2,541 that would also have been a zero and then you might also have had a much more substantial fine than the £127.

MR. de la MARE: Yes. There is a further problem with all of this. These proxies are arbitrary figures, indeed, the OFT admits as much at para. 267 of the decision, where they say in these terms, in response to one of the arguments raised by one of the parties:

> "Some Parties suggested the proposal would result in an arbitrary and unfair outcomes whereby, all other things being equal, Parties with very low relevant turnover in a market would end up with a lower penalty than parties with nil turnover in a market. The OFT acknowledges that this is a potential concern but notes that the impact of this is in fact minimal given the relatively low amount by which penalties are being increased …"

So they recognise in general terms, the risk of arbitrariness. What they never do is go back and look at the actual decisions where there are proxies applied, and ask themselves: has this in fact generated an arbitrary result, and here it has because the uplift by reference to supposed seriousness of a factor of many tens of times is, on any analysis, arbitrary. You can justify a massive uplift of penalty by reference to MDT on deterrence grounds, but it is impossible to see what the justification is for ramping up what would have been an £8,000 fine into a £356,000 fine.

So having acknowledged the risk of arbitrariness, we should have taken the next logical step, which is to see whether or not there was an arbitrary result in each of the 37 cases where they applied for proxy and if they had done that in relation to Apollo no doubt they would have said: "First and foremost, we should have done this before we applied MDT, so that there was not double counting, and secondly we should have done something a little more flexible. That leads me on to my second point because there are many ways that could have looked at the question of proxy. They could have done the kind of calculation I described to you in opening where you gross up from a previous year by reference to the increase in turnover. They could have simply decided to use the infringement approach for that particular level so that you did not generate a nil figure, or they could have made a discretionary adjustment down; all those things would have been reasonable things to have considered doing in relation to potentially arbitrary consequences like this, but they did not, because again they fettered their discretion. They described a general methodology and churned out the result through the sausage machine that is their calculus.

That takes me to ground 3, and ground 3 really comes down to this: if you are persuaded of the merits of any of the criticisms that I have made in terms of the overly mechanistic approach the refusal to engage on pain of principle a to the relevant turnover figures, or the manifest excessiveness of the proxy figures, then those are all matters you can take into account if needs be – if you are not satisfied they generate legal errors – you can take into account, assume it is your *Argos* general overarching discretion in any event, and we say this fine is excessive when you take into account the special features of this case and when

you take into account the distorting effect that the organic growth that my client has on the quantum of the fine, when you take into account the distorting effect of the use of proxies – this arbitrary £300,000 uplift. Indeed, it is a case where you can say with, I think, real conviction, that the methodology of the OFT generates perverse incentives. It penalises those companies that actually compete most effectively in a market free from the practice that the OFT is intending to target by competing effectively they gain increased turnover, increased business and, in consequence of that they pay a larger fine for something that happens before the lifting of the infringement and that is really quite perverse. It is quite perverse equally to reward uncompetitive companies that suffer in the heat of competition by reducing in comparative terms their fines. So there is a perverse incentive here, and when you couple that with the fact that my client was only providing a cover, they never took a cover, they have had real logistical difficulties in investigating this complaint, and they have conducted a highly thorough internal investigation as documented in Mr. Crouch's witness statement, and they had great difficulty in taking matters any further. There is pretty much documentary evidence for them to look at, they have done everything they can, there is no suggestion at all that any of the directors or senior management were involved in this practices, and they have been competing effectively because they say that that is their approach to business. When you take all of those factors in cumulation, the level of penalty applied to this company is excessive and, if nothing else, it engages the Tribunal's jurisdiction on the second limb of the *Argos* test. I would invite you to reduce the penalty.

The OFT says, well, we have not put forward any figures". Once again, that has the slight ring of boiler plate about it because we have put forward some figures. You have been looking at the figures we put forward. We have put forward a rival calculus of £939,000. Alternatively, we have put forward a calculus effectively attacking the £350,000-odd attributable to the proxy. Can we realistically be expected to set forward rival numbers for every single argument that the Tribunal should find attractive? No. That would be a novel principle of sentencing law. It is the OFT which actually has not engaged with our figures and indicated that they accept them as being accurate. We reject the contention that we have not argued in clear terms. Obviously, if we get into ground 3, it is up to the Tribunal to decide on the balance of argument how much to shave off as appropriate by reference to the arguments that you find compelling.

If thee is nothing else I can add, I will sit down. I apologise for being ten minutes late.

THE CHAIRMAN: Just one very small point. You say, "Well, they only gave a cover. They did not receive a cover". Is your contention then that that somehow is less anti-competitive, that giving a cover is less anti-competitive than accepting a cover?" I would have thought the other way round.

MR. de la MARE: In the round it is less serious not to have been involved in both sides of the process.

THE CHAIRMAN: I see.

MR. de la MARE: I accept, obviously, in terms of potential effect on the market that there may be little difference between the two, but it is nevertheless a relevant consideration.

THE CHAIRMAN: Thank you very much, Mr. de la Mare. Mr. Unterhalter?

MR. UNTERHALTER: Madam, we will address the submissions made to you very much in the order that they have been placed before you. Might I begin, though, with one or two general observations? The suggestion is made that what you read in the Decision is a very elaborate account of a general scheme of penalty imposition and a methodology that is justified as to its central elements, but that the OFT has simply failed then to take the next step thereafter and say, "Well, even if this structure is essentially sound, how should it be applied in a particular case? Is there any warrant for a variation of the application of the methodology in this particular case?" The criticism that is offered here is really two-fold: one in respect of how the Guidance is properly to be interpreted in respect of the year of turnover - and I shall come to the proper interpretation point in a moment; secondly, to suggest that in particular matters, such as, for example, the application of the proxy, this was serving, ultimately, a form of deterrence which it should not have and by so doing there was reason to scale back on the proxy figure that was adopted.

It would perhaps be useful to clarify that certainly as we reads the Notice of Appeal there has never been an attack on the proxy and the manner of its calculation - rather, as we have understood the challenge that is made, you would not have the problem of applying a proxy in the first place if you had used the infringement approach, and, secondly, that some deterrence was served through the proxy figure, which it should not have and consequently it was being utilised for a double purpose which it should not have, and, hence, to the extent it served deterrence you should shave off, as it were, that bit of the proxy that was doing work it should not have been doing. That is the challenge that was made.

There now seems to be a broader notion that the proxy is in concept wrong and is a further illustration of the fact that aspects of the application of a proxy figure in that way simply is a mechanistic application of the wrong proxy figure. We will simply deal with the case that

we came to meet, but in any event I will deal with how the proxy comes into being and what service it is intended to perform.

We submit that a proper reading of the Decision does not bear out the notion that however much, and however elaborately, justified the structure is, the application is always of a mechanical kind. In fact, on the contrary, though the consideration of the structure is indeed elaborate and very fully considered against the various objections that are made to it, there are, at every single stage, a variety of considerations as to what is particular. Perhaps I could just illustrate that for you - just to show why this rather broad characterisation is, in our submission, not correct? If I could ask you to turn to VI.138 of the Decision, this is an account that is under the heading of 'Seriousness'. This is an account as to what it is that is problematic about these kinds of practices and what is then tabulated are a variety of matters that are adopted from the *Apex* decision as to the particular respects in which cover pricing is problematic. One then sees from the following paragraphs - the first, second, third and fourth - the various characteristics of cover pricing which are thought to be ----

THE CHAIRMAN: What page are you on?

MR. UNTERHALTER: Page 1659. It is VI.138.

THE CHAIRMAN: Yes. I understand what you are saying now.

MR. UNTERHALTER: What is set out there are what are sometimes called the '*Apex* factors', but they are effectively each of the ways in which cover pricing will distort competition in a variety of dimensions. They are there described. There are then various objections which are taken to that way of thinking, and various efforts which were made to argue that cover pricing is altogether less serious than that, and those kinds of objections are dealt with. Then there is a determination that is made as to the 5 and 7 percent thresholds which are said to capture the sense of seriousness and the scale of seriousness of this kind of an infringement.

If I could ask you then to turn to VI.176 at p.1667? There it is said that around six parties submitted that the OFT should set the starting point individually for each party, taking into account the seriousness of each infringement.

> "The OFT has had due regard to the facts and evidence for each individual infringement, but (other than in respect of infringements involving compensation payments) considers that there are insufficient differences between them to justify any difference in starting point at Step 1".

Now, what he OFT is therefore doing is to say, "This practice, which was pervasive in the industry, has certain systemic consequences for competition. We analyse them. We are

satisfied that they are serious, and determines a scale against which that seriousness is determined". Various parties come along and say, "No, well, in my circumstances it is different for one reason or another. They are considered and they are found not to be materially different in a way that warrants a different application of the principle". Again, we submit that it is just not a correct characterisation to suggest, in all the myriad details, and this is just illustrative of the Decision, that there is somehow a mechanistic approach to these matters which simply fails to apprehend the differences. It is also a mis-characterisation for a different reason, which is that many of the objections that are made - and they are grouped together and dealt with extensively in the Decision, reflect the sorts of stances that parties are taking from their individual perspective. So, where there is, for example, a question as to whether cover pricing in fact is not in the most serious category because, for example, it is said that it was well-known in the industry, and there were textbooks which told you how to do it, and, "We never thought it was wrong because we could read it in the textbook", that is said by many parties. It is grouped together in a general account that says, "Parties submitted that by reason of the practice in the industry. It was not considered unlawful. Therefore it is not as serious. Considered. Rejected. Determined. Nothing that is un-nuanced or non-individualised about the treatment of that particular argument which represents certain facts and evidence relevant to the particular party concerned.

So, in our submission the first characterisation that is offered is wrong.

MR. MATHER: Mr. Unterhalter, could you just develop that point a little bit for me? What would have been a sufficient difference, hypothetically speaking?

MR. UNTERHALTER: In respect of seriousness, it is very difficult to actually comprehend a circumstance in relation to cover pricing and the actual conduct in question, since they were being determined according to object, that would really warrant a different treatment because in one form or another you are either giving a cover price or you are receiving it, and the material distinction, which was found to be relevant, was whether compensation payments were made which were said to be an aggravation as to seriousness in respect of the matter. But, if one wants to look at a category of consideration which is highly individualised, one has only to have regard to the financial hardship issues, for example, where there is a detailed consideration given as to whether the viability of a particular concern judged against three financial matrix of their future prospects will or will not give rise to a problem for viability. Each is considered, and in some instances very substantial

diminutions were effected through the consideration of financial hardship. So, I am just illustrating that there is also a step for other aggravating and mitigating factors.

We would respectfully ask the Tribunal to agree that this characterisation is correct as to how this decision has been taken. Indeed, if one compares it to other fining or penalty regimes, or even sentencing regimes, it is a very fully thought-through framework within which this is taking place and applied here, we would say, very carefully.

If I might then just make one preliminary observation about the proxy? Although we do not say it is properly challenged as to its calculation and conceptualisation, it is said that that is another example of simple, blind application. But, it is worth considering the question of a proxy and why a proxy is necessary, particularly against the facts of this kind of a case. The difficulty is this. The relevant markets that were utilised by the OFT in this case were very, very narrow. Indeed, they need not have been as narrow as they were because the approach to relevant markets for the purposes of penalties have been held to permit of a very broad assessment not against a strict economic test of substitutability. Now, we are dealing with tendering markets which are extremely narrow - hospitals in the West Midlands, and the like. That kind of detail of difference. So, whether you are applying a test on an infringement basis or a decision basis, one will see many instances where no relevant turnover will be generated. So, for example, in the many cases where a cover price is received there may simply be no participation on that market at all. It is simply not an instance where there would necessarily be tendering activity that would take place.

So, the problem here is really that you are dealing with tenders which, for various reasons would be submitted with no expectation of actually doing the business, in actually getting the work - which is part of what the practice was intended to secure to simply maintain credibility without actually having any risk of doing the work. So, you would generate no turnover. That is one of the consequences of the very practice that we are dealing with. So, if you use a year of infringement approach or whether you use a year of decision approach, the problems around proxies are going to exist in this kind of a case by reason of the relevant turnover problem.

So, again, this is not a case of simply adopting some formula and seeking to apply it to achieve the harshest consequences. It is simply trying to deal with a general problem that arises by reason of other features of the decision.

That raises a systemic point, which is that many of the challenges that are made seek to pull at one piece of the thread. What is important is that consistency does matter - we are not suggesting that one must not consider the individual circumstances and whether there is

reason to vary matters. But, what we would certainly urge the Tribunal to do is simply to engage in a process of intuitive reasoning about, "Look at this case. It seems on balance to be a little bit much. Let's just work out some penalty we think is appropriate and move on to the next case", because you will readily start picking up that what is apparently advantageous for one is deeply bad for another. It does matter that there is some consistency of treatment in respect of how a penalty regime is applied. So, one has to be sensitive to both dimensions of consistency across cases as well as seeing relevant differences between cases. That is precisely what the OFT has sought to do by way of the Decision that it has made.

If I might move to the question of the Guidance and its interpretation? We do not differ from our learned friend as to his first proposition concerning interpretation. We do not say that the OFT has within its margin of appreciation the ability to determine an interpretation for this case of the Guidance, and in respect of identical terms, to say it means something different for another case. It does have a meaning and the OFT has sought to interpret it according to what it thinks it means. If it should have erred in doing so, the Tribunal will say so.

THE CHAIRMAN: I think it is not so much that you might interpret it differently in different cases. I think the question is: Is the test that we apply something along, "Well, you have interpreted it that way. Is that an interpretation to which a reasonable regulator could adhere? Is that interpretation beyond the bounds of what a reasonable regulator could say?" I think what is being said is that that is not the test. It means what it says even if your interpretation was one of a number of reasonable interpretations. If it is not the same interpretation that we come to, then it is wrong and it is not a kind of margin of discretion or, sort of, judicial review type test. I think that is what is being said.

MR. UNTERHALTER: Yes - and I do not think that we differ from that position in the sense that we are not suggesting that there might be a range of possible meanings, and as long as we can choose one that fits within the reasonable scheme of meanings, then that is all right. We are accepting that there is an objective meaning that the Guidance has, and we have an interpretation. We will give you our reasons for the interpretation that we have. Ultimately, it will be for the Tribunal to determine whether we are right or wrong in the interpretation that we have had.

MR. MATHER: On the terminology, Mr. de la Mare told us quite frankly that he thought we had been wrong in an earlier case to use the term 'margin of appreciation' because that addressed more the reasonableness area perhaps which the Chairman was referring to and,

instead, should focus on a discretion to depart from the Guidance, which is a tighter concept. Would you adopt that approach as well?

MR. UNTERHALTER: In our submission, there are really two levels at which this takes place. The first is: What does the Guidance objectively mean? I think there is common ground between us on that score. There is a different question which is: How should it be applied? Now, in respect of application decisions there there is a margin in our conception in that there might be a number of ways of applying the Guidance, given its objective meaning. There is some margin that is due to the OFT in respect of how it applies that Guidance because that comes back to the proposition as to trying to identify what is the error that has been made. In our submission the Office would not have fallen into error if its application is a reasonable and proportionate one of the guidance that is has. That is where perhaps - I am not certain - we do differ with our learned friend. But, in our submission, there is a difference between the meaning of the Guidance and its application, and the circumstances in which departure from the Guidance is warranted, which is another area that has a discretionary component to it. Indeed, it seems to be part of what is being said: precisely because we have a discretion to depart and should give thought to doing so, it seems naturally to follow that that is axiomatically within some margin of discretion from our perspective.

So, there are those other dimensions where we would submit there is a margin. Ultimately it is for the Tribunal against the standards which have been enunciated to determine the overall position under its jurisdiction. But you would, in our respectful submission, follow the logic that the Office has determined to see whether, either on application questions or the question of departure, or non-departure (because it could be one or the other), the Office has acted within a rational, proportionate way. If you judge that it had not, then you would intervene.

That is the scheme, as we see it, by which the Guidance and the notion of discretion should be understood.

If I might then come to the question as to how the Guidance should properly be understood. Our starting point - dare I use the word - is somewhat different from our learned friend's. The categories under which we would seek to answer the question are not intrinsically different. Forgive some repetition from this morning, but my learned friend, unless he was hear, should at least hear the submissions so that he can deal with it.

The Guidance, in our submission, flows from a statutory structure of powers which situate what the Office may, and may not, do. I shall be relatively brief, but, in essence, the

argument is this: in s.36(1) there is a discretionary power that is given to the OFT in order to fine. That power is subject to a limit. That limit is expressed in s.36(8) which is that,

> "The penalty shall not exceed 10 per cent of the turnover of the undertaking, which is determined in accordance with the turnover schedule".

In our conception, that has very considerable importance because the universe within which penalties are determined are understood by reference to the grant of the power and its limitation under s.36(8). The Guidance, which fills out the framework within this universe, as it were, is then something that the OFT is required to follow when it sets any penalties in terms of the Guidance which is in place from time to time.

So, if one is thinking about the hierarchy within which to interpret the Guidance one has the statute (which frames the powers), the turnover order (which is stipulated in the statute and which is the second order of statutory instrument), and then one has the Guidance. So, when one looks at how to interpret the Guidance, one should look at it from the top down - not, as it were, as the appellant does, from the bottom up. It is a question of situating the Guidance within the statutory scheme - not the statutory scheme by reference to the Guidance.

The significance of all of this is that what changed in 2004 was the express language of the turnover order. That then stipulated in terms that the limits to the power are framed in relation to a turnover provision which is in express terms determined by the decision approach - not by the infringement approach. So, if you want to know where you can situate yourself by way of exercising your power, it is expressly determined by reference to the decision approach and not the infringement approach.

The way in which our learned friend deals with that when he comes to the Guidance is to say, "Ah! But that is really just about Step 5, and Step 5 is simply about the ability to pay. Therefore it has no real connectional bearing to everything that comes before it because that must be decided according to its own logic and according to its own separate language".

We submit that that is not the proper way of interpreting this. When one follows the order from the statute to the turnover order, one sees a thread. That then joins up in Step 5 and in the language that is directly reflected in 2.17 of the Guidance where there is a treatment of the question at Step 5 by direct reference to the decision approach rather than the infringement approach. So, it is quite clear, in 2.17 that,

> "The business year on the basis of which worldwide turnover is determined will be one year preceding the date on which the decision of the OFT is taken".

The clear enunciation of the decision approach logic. Here, in our submission, is the first and, we say, important feature of 2.17. The language is,

"The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 percent ----"

That cap, which is a reflection of the statutory provision is not simply put in the Guidance because it is seeking to serve the ends of affordability, as I think our learned put it, but, on the contrary, what it is doing is that it is giving effect to the statutory framework and it is doing so in express terms by reference to the method set out above, i.e. all the steps that have preceded Step 5.

So, in our submission, Step 5, and the capturing of the notion of turnover by reference to decision rather than infringement is very much a summation of everything that has come before - not according to affordability in the least. That is not why it is capped. It is capped because once one has taken all the factors into account that is the view that is taken as to the maximum by reference to which all of these factors may not exceed a certain threshold. That is the essential point that is made in Step 5. There is, in fact, no consideration of affordability in the usual sense of the word - somebody for whom the application of this threshold is trivial in relation to their overall reserves. It is not further punished, as it were. So, there is nothing about affordability that is intrinsic to Step 5. This is just an engrafting of a notion on to Step 5 which the express language of Step 5 does not bear out at all. Therefore the correct sequence in our submission is to proceed from the statute to the turnover order to Step 5, which expresses that threshold and captures everything that must take place within that scheme.

Our learned friend has pointed to various textual indications which, in his view, point to the infringement view rather than the decision view. Perhaps we might just very briefly respond to some of these.

The first is that it is said in respect of relevant turnover, which is in 2.7 - which is perhaps his main argument - where it is said.

"The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market ..."

We just observe that there is simply no temporal component there at all. It is simply saying that there are certain relevant product markets and the relevant turnover is defined in relation to those markets - not in relation to the way those markets existed at a particular time. No such component is required. All that the language affected by the infringement is intended to connote is that it is obviously concerned with what has happened on those markets and not conduct that has nothing to do with infringements on those markets. It is simply differentiating what is affected from what is not affected.

The curiosity is that if, when the temporal element is potentially implicated, which is in the undertaking's last business year, there is nothing that is said. One might have expected that if all of this was so critical, you would naturally expect there to be some determination of, "Well, which last business year?" In fact, it is silent on that point. We submit that in fact the natural meaning of 'last business year' when addressed to an undertaking at the time that this becomes an application is your most recent business year; that is what the language would naturally connote. So in our submission there is not this plain meaning that is so obviously favouring of the infringement approach.

In respect of the exceptional circumstances of zero turnover which is the provision in 2.13, where again our learned friend sought to say that the exceptional circumstances would only come about in respect of an infringement approach and not in respect of a decision approach. Again, we respectfully differ from him as far as that is concerned, that is in exceptional circumstances where the relevant turnover of an undertaking is zero and he stresses the "in exceptional circumstances."

In our submission for the sorts of reasons that people already suggested around proxies you have this problem which arises in many circumstances because of the narrow market definition problem and therefore there is nothing special about this provision because it would only become exceptional if you used one treatment rather than another. It is a problem which arises on either view whether you use the infringement approach or the decision approach you are going to get problems on zero turnovers depending on what your definition is. Therefore, the outcome that is suggested is not a textual pointer one way or the other.

Moving to matters from text to the justifications at the different levels, because one has at some point also to consider as we have done and as has our learned friend: how should we assess the steps in terms of what is the substance of what we are considering at each step and what is most meaningfully taken into account in trying to resolve this debate between decision and infringement.

We submit that there is again an error that is made by my learned friend in respect of step 1. My learned friend says that Step 1, in comprehending seriousness must, if you are going to look at a turnover standard, necessarily implicate what was happening in the relevant market at the relevant time and hence Steps 1 and 2 must implicate or be more suggestive of the infringement approach. We say there too the matter is one which is not consistent with the steps that are indicated in para. 2.3 of the Guidance which sets out very clearly the

seriousness of the infringement, which is the one consideration which is relevant, and the relevant turnover of the undertaking, which is a separate consideration.

In para. 2.3, under the "Starting Point", the seriousness is distinguished from the relevant turnover, and when looking at that together with 2.7 there is simply language which does not make a temporal determination. So where you consider seriousness for the purpose of discharging the functions under Step 1 you will determine, as was done in the decision, what is the relevant starting point as to seriousness, and that requires one to determine the relevant percentage to which that is then applied, and that is to say what is the concept of relevant turnover in which year is not implicated in the judgment of seriousness – that is a separate dimension of judgment and it is open both as to language and substance as to which year might be implicated and that is determined as to the consistency and structure of the guidance as a whole. This is, of course, part of the danger of approaching this matter simply piecemeal, one has to look at this together, because this guidance has to make sense together, and one has to adopt a consistent approach which is coherent.

In our submission the coherent approach is to use the same year of turnover, that is to say the decision approach, throughout at every step, because then you are able to compare like with like. If you adopt a different standard from Step 1 to the standard you adopt at Step 5 you have a rather uncomfortable situation where you are using rather different turnover standards within a single instrument, and you are doing so notwithstanding the fact that the same language is used at each step, which is last business year.

THE CHAIRMAN: But the other change that was made in 2004, as I understand it, was that the total turnover for the 10 per cent cap was changed from being worldwide turnover to being UK turnover.

MR. UNTERHALTER: Yes, madam.

THE CHAIRMAN: But I think in the original Guidance it said that the relevant turnover at Step 1 may include turnover generated outside the United Kingdom if the relevant geographic market for the relevant product is wider than the United Kingdom.

MR. UNTERHALTER: Yes.

THE CHAIRMAN: So under the old guidance there was a distinction between the turnover figure that you used at Step 1 which could include turnover outside the UK, and at step 5, which was limited to UK turnover?

MR. UNTERHALTER: Yes, but neither of those would affect the year

THE CHAIRMAN: No, but it is just going to the point that you are saying that it does not make sense to use different turnover figures at different stages of the process, but if one looks at

that change then there was not that degree of consistency before the 2004 amendment, is that right?

MR. UNTERHALTER: I think it was seeking to capture or simply mark something which is obvious, which is that you may have circumstances, for example, in a cartel where the relevant geographic market could extend outside the territorial border of the UK, and it was not, as it were, trying to apply that for the purposes of added seriousness, it was simply allowing for the fact that in the way in which you define the relevant market those markets may not be territorially confined to the UK. I think that, as I understand it, was the rationale behind that language.

THE CHAIRMAN: Yes, whatever the rationale is I am just trying to think through that under the old regime you could, in some circumstances be using a different infringement year turnover figure – well you would anyway because it is the point that we were ----

MR. UNTERHALTER: It was all infringement based, yes.

THE CHAIRMAN: It was all infringement based, yes.

MR. UNTERHALTER: And it was simply to mark out the fact that because the relevant turnover relates to the relevant market, the relevant geographic market it was simply making it clear that it could go outside the UK's territorial boundaries for the purposes of analysing that market. It was not, as it were, allowing for some other concept of turnover, it was simply how relevant turnover relates to relevant markets, nothing more and nothing less, so it was an elaboration, I suppose, of how one computes turnover not in relation to the year but in relation to geographical size.

Just to grasp again the threads of the interpretive argument. We submit that seriousness is determined in the percentage, it is not implicated in the meaning of relevant turnover. Then at Step 3 in our submission this is a very clear case in which the turnover figure is most meaningfully linked to the year of decision. On that score our learned friend sought to argue there is no reason for that because you can imply it at the year of infringement, and it will still act as a deterrent because it will be known that if there is some recidivism and the entity has grown then it will pay more in relation to the size it has now assumed. We submit that that is not at all the way in which deterrence is assumed to work. At the time the entity infringes is the time that we are concerned with culpability. We are concerned to understand what happened at that time in relation to the market and that is the judgment of seriousness that is made. When an infringement has occurred and has been investigated, uncovered and, in this instance admitted it is at that stage, when all of this has come to light and the question arises as to penalty, that the issue arises as to how do we incentivise this

undertaking as now constituted because it is the management as it now exists, in relation to the entity as it is now constituted that must have the incentive that is due to ensure that it does not happen again.

It is for that reason, because deterrence is forward looking and because the incentive must apply to those who manage the entity as it now exists, that that is the critical consideration. I did this morning refer to a number of the European cases which have made that point and that is to say effectively the point about deterrence is that it is concerned with the economic power of the entity concerned, its size relative to others who have infringed, and the reason to mark out size as relevant is because you need to ensure that the deterrence that is meted out to this entity – given its size – marks for it the significance of repetition versus entities that are much smaller. If an entity had been of a trivial size at the time it committed the infringement, and grew enormously thereafter, and a relatively small fine is then imposed on that undertaking years later, what incentive is given to the management? They say: "Gosh, we were lucky. We got off by reason of the fact that we happened historically to have a small turnover at the time of the infringement", and it is for the reason of their economic time at the time constitutes or, perhaps put slightly differently, it is the economic stature of the undertaking at the time of the decision that has the capacity to infringe and interfere with the competitiveness of markets. What you are concerned to do is to say to that entity with that degree of power and ability to distort markets you must not act in this way. That is why it is the link to the time of the decision and not to the time of the infringement. I do not want to repeat the references I gave but in *Degussa* (authorities bundle vol.8, tab 99) and particularly at paras. 278 and 285, that consideration of deterrence in relation to the size of the entity at the time of decision was the relevant one for the purposes of making this determination.

So at Step 3 there seems a clear substantive and conceptual reason why one would favour the year of decision, and since that is a key ingredient which then feeds into Step 5 and the language that is offered there, we submit that that is another important reason why one would want to apply that reasoning.

I have two further points to make on how one interprets this from the substantive point of view. The first goes to the notion that the proxy figure is also doing some work in respect of deterrence or, as it was put, that it was doing some work in respect of seriousness. Here we submit that again the same error was being made that we say arises in respect of the proper interpretation of the Guidance. All that the proxy figure is doing, and I am going to come to it in a little more detail is that it is providing a substitute for a zero turnover

number. It is not looking to capture how serious the conduct is because that is a separate dimension of judgment and that is the 5 or 7 per cent figure. So the proxy is not seeking to arrive at a relevant turnover which would then be a mark of seriousness in someway or another, and the suggestion that that is so in our submission is not correct.

The second and final consideration in relation to how properly to interpret the Guidance is simply to refer to the question of the European Guidelines, and what is to be said about them in relation to the Guidance.

Those Guidelines are in vol.12 under tab 171 and I will not spend very long on them, but perhaps it might be useful very briefly to turn them up. It is true that under these Guidelines if one looks at para. 13 that there is a calculation of the value of sales which says that:

> "In determining the basic amount of a fine to be imposed the Commission will take the value of the undertakings' sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic are. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement."

So as to that calculation it is absolutely express in terms of the scheme of these Guidelines. What one sees just by way of points of comparison is that it also utilises a very different conceptual structure, it is looking at a value of sales, and it is essentially specifying in terms here for the last full business year of its participation in the infringement in terms, which the Guidance does not do – it could have and did not do and hence allows for an interpretation which could be infringement, could be decision, but for the cumulative reasons we submit it is more properly interpreted as decision. Here you have a very clear specification and so there are very clear differences in the way in which these Guidelines are styled, they have actually decided the point and in respect of the calculation of the value of sales, which is not a concept one sees in the Guidance, these Guidelines have determined how they will be understood.

But if one proceeds through the Guidance, one sees there is a legal maximum, which is in para 32, and "the final amount of the fine shall not in any event exceed 10 per cent of the total turnover in the preceding business year" – that is the language that we see throughout the Guidance that we are concerned with, and it is that language which has been understood to refer to the year of decision which is why the turnover order, which was intended to bring the order into conformity with the European position, had specified for that language in relation to the year of decision rather than the year of infringement.

So what you have at best in the EU Guidelines in very clear language is the calculation of the value of sales specified as to which year, the language of the preceding business year and the turnover order which sought to capture that concept by specifically determining it in terms of the decision year rather than the year of infringement. What you end up with there is the Guidance, which we have to interpret it, which is materially different in one respect, which is that it does not have the concept that you see on the calculation of the value of sales, but what you do have is a structure which all gravitates around the central pull of the turnover order, and the year of decision which is relevant to it.

I had neglected, but should not have, the last matter that I wanted to deal with under the Guidance and then I will come to the last points because I see time is beginning to run against me as well. It is simply to deal with 1.15 and 1.16 of the Guidance. There really are two different points. In 1.15 there is the problem about double jeopardy.

> "In cases where an undertaking has committed an infringement of both the EC Prohibition and the equivalent UK Prohibition the undertaking will not be penalised twice for the same anti-competitive effects."

So that prevents the double jeopardy point, which would be impermissible. At 1.16 one is dealing with a different problem, one is not dealing with the problem of double jeopardy. In 1.16 one is dealing with the question of the penalty imposed in respect of an infringement of an EC prohibition, and there we say the proper interpretation is in most cases the penalty imposed by the OFT in respect of an infringement of an EC prohibition, that is to say if the choice was to pursue the infringement as an EC prohibition, the penalty would be imposed in respect of an infringement of UK prohibition. So it just goes to the choice of the cause of action, as it were, and the consequences that a penalty will be the same, but all of that relates to the OFT's choice as to which species of infringement it wishes to pursue and allows for equality of outcome in respect of the penalty that will be applicable to the one infringement rather than the other.

THE CHAIRMAN: Let me just be clear, s.38(9) of the 1998 Act deals with the fact that if a fine has been imposed by the Commission then you must take into account that when setting the amount of the penalty that you impose?

MR. UNTERHALTER: Yes.

THE CHAIRMAN: But I think you say 1.15 is not dealing with that situation, it is dealing with a purely domestic situation where supposing in these cases there was an effect on trade you would have proceeded against them under both Article 101 and the Chapter I Prohibitions, but you would not have imposed two separate fines, and the fine that you would have

imposed for both running concurrently, as it were, would be the same although that means that the way that you would calculate the fine for the Article 101 infringement would be different from how the Commission would approach it if it were dealing with it.

MR. UNTERHALTER: Yes, that is so. Just to wrap up in respect of the Guidance, there are different textual indications and one can look at them in different ways undoubtedly, but cumulatively in our submission there is a consistent way of looking at this matter, which does not lead to what seems to be the view that is adopted by our learned friend, which is that you can have different measures at different stages and in respect of Step 3 seemingly you would still have a Europe decision which we think is conceptually quite wrong. The easier and more consistent approach, which we think is the right interpretation objectively speaking, is that one looks at all the textual indications and the hierarchy within which the Guidance falls and applying all of these indications together and trying to arrive at the best coherent interpretation which one understands is a question of looking at many indications and indicators, we submit that the interpretation that is arrived at by the OFT, which has always been to interpret the business year in relation to the supremacy of the turnover order and what it is holding for in relation to the business year is the correct objective interpretation to be arrived at.

THE CHAIRMAN: Do not take me to this, but perhaps you can indicate where it is so that we can look at it later, in the Consultation which accompanied the draft New Guidelines in 2004 that was also neutral as to what was being done in relation to Step 1?

MR. UNTERHALTER: I am almost certain that that is so, but if I could we will find the reference to the way in which it was put. I do not believe it said anything one way or the other about Step 1.

THE CHAIRMAN: So is this a fair way of putting it, that it may be that if you look at just the wording of the new Guidelines, as if they had no baggage attached to them as it were, one might come to one interpretation, and there is a dispute over what that interpretation is looking at the internal textual indicators, but I think it is said against you that you have to look at what it was before, and what indications were given that things had changed, and also look at it in the context of the fact that this was being done to bring it into line with the Commission's Guidance to some extent, and that people who are likely to read and pay attention to this kind of thing would know how the Commission deals with it. Do you accept that those are factors that are relevant? How far they go when you are actually faced with the wording may be open to debate.

MR. UNTERHALTER: There may be some remote contextual issues as to how you situate the Guidance as against its precursor and mark the differences and similarities between the two, that would seem a perfectly permissible exercise in Statutory interpretation. I am not sure that one is necessarily applying an interested reader test directly, but certainly it is relevant that there was a former instrument, and this is the succeeding instrument – that is part of the context – we would not and could not defy. But as to what had changed, and what had stayed the same, one had a move from financial year to business year. In and of itself that may not connote terribly much, but the driving force behind the change, at least presentationally in terms of the language – and if you just compared the two texts cold and asked: "What is different?" – is the worldwide turnover provision. That was being brought into alignment with the provision in the European Guidelines, that is the significant thing that one sees changing about it. Then the question is: "You have now got these concepts such as "business year" and the like, and they have never stated a temporal dimension to that, it has always been neutral.

THE CHAIRMAN: That is the question we will have to grapple with, whether – as you say – the fact that the load star was being changed then feeds through to the body of the rest of the Guidance, basically, which you say it does on a proper reading of it.

MR. UNTERHALTER: Yes, because however much one stares intently at the word "business year" it is not going to yield up what one wants. The fact is it can only be yielded up in its context and for us the relevant context is the signal change that was made between the old and the new, and it was that which was being brought into consistency with the European Guidelines – not the whole European Guideline package, which was being made.

If I could just give you the reference of the consultation document, it is at vol.11, tab 134.

THE CHAIRMAN: Thank you.

MR. UNTERHALTER: If I could then briefly proceed to the question of the proxy. The one challenge in respect of proxy we have dealt with, which will be determined by the objective determination that you make as to which year is to be taken, but the second is to say that the way in which the proxy was utilised was, for the purposes of doing the work of deterrence and, consequently, by an application of the proxy there is now a double deterrence that is applying - once by reason of the application of the proxy and, secondly, by the application of the MDT. That is double punishment, and that is impermissible.

Firstly, if I could refer you to the Decision and two passages in particular? The first is in VI.256 at p.1684.

MR. MATHER: Will you be taking us to 257?

MR. UNTERHALTER: I am about to go to 257. Have no fear.

THE CHAIRMAN: So, where should we be reading?

MR. UNTERHALTER: Perhaps I should just read the brief excerpt?

> "Where the relevant turnover of an undertaking is zero and the penalty figure reached at the end of Step 2 is therefore zero, the OFT may adjust the penalty at Step 3".

That is a matter of the Guidance.

> "This may be the case for a variety of reasons, for example, where the undertaking has ceased trading altogether, where the undertaking in question remains in business but has exited the relevant product or geographic market ..."

The critical point about this is that what it is saying is that it is not seeking to apply the proxy as something over and above MDT, it is simply dealing with the practical problem and the practical problem is that by reason of the particular relevant market some of the various circumstances, some of which are tabulated in this paragraph, we do not have a turnover and so we are going to have to develop a substitute figure for that turnover in order to ensure that we can generate a number. That is all that is being done. So, if you would perhaps keep your finger at that portion of the Decision and then turn to p.1727, which is where the Apollo calculation is done? In respect of Infringement 154, that is where the problem arises where there is no relevant turnover. So, it is not being applied after MDT. It is simply that the position confronting the OFT at the end of Step 2 was that you have got zero turnover in respect of 154 and you have turnover figures for the other two infringements. By reason of that and the methodology that the OFT applies, it looks at the two infringements for which there is a turnover and what is generated by way of a penalty at the end of Step 2, and the higher of the two is the £9,353 and it is to that that the MDT is then applied. That then generates your MDT figure. One should not be misled by the sequencing here. All that is then happening is that because Infringement 154 must not go unpunished, because it was an infringement but there is a zero turnover figure applicable, the proxy is applied.

THE CHAIRMAN: But it makes a big difference to them whether that £356,071 figure goes in at Step 3 because if you put it in at Step 1, so that that row read £356,071, and then £9353, and then 127, then you would have applied the MDT to the £356,071 and got £1,907,524 and then added to that the £9,353 and the 127 - rather than having £1,907,524 and adding to that £356,071 and 127.

MR. UNTERHALTER: Yes. One can see that it makes a difference. But, the question is whether there is any reason why the OFT should not simply have applied what the MDT required, which was at the end of Step 2, which is the highest infringement? The infringement which generates the highest amount after Step 2 is the £9,353.

THE CHAIRMAN: But, why is it that you put the proxy in at Step 3 rather than at Step 1?

MR. UNTERHALTER: The explanation is the explanation that is offered at 256 which is that where the relevant turnover of an undertaking is zero and the penalty figure reached at the end of Step 2 is zero, then it may adjust the penalty at Step 3.

THE CHAIRMAN: That is not an explanation. It is a statement. I think that is the point that is being made - because you do it at Step 3 it makes it look as if it is a deterrent-ey-type thing whereas if all you are doing is trying to find some turnover to attach your 5 per cent to, it would be more logical to do it at Step 1.

MR. UNTERHALTER: Yes. The point, though, about it is that there is not a 5 per cent that is going to attach. Perhaps this goes to how the proxy figure ----

THE CHAIRMAN: That does go, then, to how the proxy figure is arrived at.

MR. UNTERHALTER: Indeed, and there is no challenge in respect of that. The proxy figure is not a 5 per cent of 0.14. In other words, it is the substitute that is offered because there is a zero turnover figure. The way it was done, and it appears from the Decision, and the easiest way of showing it to you – it is slightly technical – is at VI.269 there is an objection made as to how the proxy figure should be calculated. That makes it plain how the proxy figure was done. In effect, what was done was to take the percentage that is generated by way of the average of the relevant turnover as a percentage of total turnover averaged across all the infringements. That then generated a figure of 0.14. So, if one looks at the explanation at 269 it says,

> "Mowlem also suggested that when calculating the proxy figure, the OFT should base it on an average percentage of total turnover represented by the penalty reached at the end of Step 2, for all infringements ..."

Because it was for 'all infringements' it was a median figure which was taken because they included in that calculation all the zeros in respect of instances like Apollo, where there was a zero figure that was generated. So, rather than use an average of relevant turnovers where there was a positive figure, they included all the figures, including the zero figures and that is what was allowed under 269.

"The OFT is therefore using a figure based broadly on the median percentage of total turnover represented by the penalty reached at the end of Step 2 for all infringements".

Just to be clear, the actual calculus or the actual calculation of the proxy is based upon an average at Step 2 - not at Step 3.

THE CHAIRMAN: That does not make any difference because the duration multiplier is always one, is it not?

MR. UNTERHALTER: That is true, but ----

THE CHAIRMAN: You took the total turnover, what does it mean 'represented by the penalty'?

MR. UNTERHALTER: Could I illustrate it? This might be the simplest way. It arises in every case. If you would perhaps just turn illustratively to p.1769? If you look down the first column you will see that there is a line item which says 'Penalty after Step 2' and it says underneath that, 'Penalty as a percentage of total turnover'. Do you have that? The figure here is [Confidential]. Each one of those has been computed for all the infringements and if you do that computation you get to [Confidential]. That is what is being done. They have taken every single infringement for every single party, including those where there is a zero. They have put it all together and the figure that you generate after Step 2 as a percentage of the total turnover is [Confidential].

THE CHAIRMAN: I see. So, for all 103 parties they have added up the 3 or 2 where they have only had two infringements of those percentages, and then divided it by 103.

MR. UNTERHALTER: Yes - including the zeros.

THE CHAIRMAN: Including the zeros.

MR. UNTERHALTER: They have taken a median rather than a true average. But, I do not think much turns on that. (After a pause): I am told that there is a significant difference between the average and the median. The average would be 0.6 and the median is 0.14. So, a very favourable figure was taken in this assessment. But, just so that you understand the methodology, it is to take each one of the infringements for every one of the parties to assemble them, divide by the number of infringements that you have then accumulated - not the number of parties - and then taking a median rather than an average, that is the 0.14.

If I could, as I promised, just go to 257 because it is here that Apollo says that there is some deterrent aspect that arises. It is the language that is used at the end of 257 which is,

"There is a need to deter undertakings from infringing also in markets they have exited, or where they have never carried out any work, and this would not be

achieved if companies faced no penalty in respect of infringements affecting such markets".

So, it is said: "That must be trying to do some deterrence work".

In our submission, all that is being - perhaps not sufficiently clearly indicated there - is that you cannot allow an infringement to go unmarked in the scheme of the penalties. You have to generate a figure. A figure is generated. It is not doing any additional deterrence work. All that it is doing is allowing for a relevant turnover figure to be generated in respect of which a proxy number will be determined. That is not trying to do more deterrence than MDT. It is simply saying, as the Decision held, that in respect of each infringement there must be, apart from the deterrence, a penalty applicable for the seriousness of what has happened in that particular case. That is all that the proxy figure represents. So, in our submission, absent an attack on the methodology of the proxy, which has not been made, all that you have is a figure in respect of Infringement 154 which is a proxy figure which determines a penalty apart from the MDT and apart from the penalties applicable to the other two.

So, in our submission there is no added deterrence that is being applied and no warrant for a cut in the penalty on that ground. Those are our submissions.

THE CHAIRMAN: Thank you very much, Mr. Unterhalter. Mr. de la Mare, I notice the time. Are you able to carry straight on.

MR. de la MARE: If I have fifteen minutes at a push, maybe 20 minutes.

THE CHAIRMAN: Yes. You do not need a break now to gather your thoughts?

MR. de la MARE: No.

THE CHAIRMAN: Thank you.

MR. de la MARE: I am conscious with Murray and Nadal going on, we do not want to turn this hearing into Isner v Mahout

Let me address my learned friend's points in logical sequence. First of all, I am grateful to my learned friend for clarifying that he has abandoned paras 6 and 7 of his skeleton argument because until he got to his feet, he was taking issue with my submission that there was no margin of appreciation as to interpretation. Indeed, paras. 6 and 7 expressly joined issue on that basis and suggested that there was a margin of appreciation, and that we were wrongly trying to say there was none.

His case, as I now understand it, is that there is discretion in relation to application - a contention I have never disputed. My case goes further: that that discretion must be exercised in every case. He seeks to preserve some of the protective language of the

margin of appreciation in relation to it, whilst I accept that the appropriate question is one of latitude and what, in the circumstances, is the right degree of deference or latitude to give to the decision-maker in the circumstances. That concession on my learned friend's part will necessitate a clarification in this Tribunal's case law because it follows that the previous statements, often repeated, are now accepted by the OFT not to be correct.

Secondly, my learned friend seeks to take a pleading point. I intend no discourtesy in putting it that way. He says I have not joined issue sufficiently with the proxy. Well, I do not accept that Can I ask you to look at para. 30 of the Notice of Appeal and read it with 33(1)? There is a sustained attack in that paragraph upon the use of the proxy by reference to the decision approach; the results it produces of striking arbitrariness in para. 30.4; the strange tipping point effects that are produced and how Apollo maintains a small turnover in the market rather than a nil turnover; a small additional fine would have resulted, but because no turnover was maintained the figure was dramatically increased. There is an attack on the artificiality of that at 30.5. There is an attack at 30.6 on the double punishment consequence. At 31 there is a roundabout challenge on the whole. Then those matters are recycled in relation to ground 3 at 33.1.

Now, if my learned friend is really saying no more than this - that hitherto I have not articulated with utmost clarity the sequencing point that I identified in opening - namely, this point that obviously concerns the Tribunal about MDT being applied before the proxy being applied to the calculations - then, I say, "Yes, guilty", but I would respectfully suggest that that is subsumed within the challenge to the arbitrariness of the application of the proxy in this particular case.

If I am compelled to seek permission to formally amend my Notice of Appeal I will make that application, but with the greatest will in the world I think that that is really a position devoid of substance - not least in circumstances where my learned friend has shown himself well able to deal with the meat of the matter.

The point is that the way that the proxy has been applied in this case is arbitrary and has produced arbitrary results. That has been squarely attacked. The problem is that the OFT has been constrained to introduce the proxy at Step 3 because it is Step 3 of their Guidance that effectively empowers them to address nil figures generated by Steps 1 and 2. You can see that in the passage we looked at earlier at 2.13 (which appears in Step 3). The reason why they have never addressed their mind to the proper sequencing between that stage and the application of MDT is because MDT appears nowhere at all in this Guidance - it is the product of subsequent cases. But, what my learned friend has not addressed in any way is

why in principle the sequencing is the way round that it is. If the proxy is modelling the seriousness measure - the Steps 1 and 2 component - as its own decision says repeatedly that it is - "This is a proxy", and I will go back to the wording used at the bottom of the Apollo calculation - this is the OFT applying a proxy percentage to this party's most recent total turnover figure in order to derive a penalty figure at the end of Step 1. Some of the other ones they say at the end of Step 2. For the reasons, madam, which you explored, it makes no difference which it is.

It would be, on my learned friend's rigid application of the principle of consistency, a denial of equal treatment to deny my client the application of MDT after those three Step 1 penalties have been calculated. It is actually inconsistent with the treatment of all of the other parties which do not have to have proxies. There is no reason in principle why that result should flow. It is simply arbitrary. It is unjustified in the Decision and it does result in double punishment. It results in double punishment because, effectively, a fine that would be ramped up for one consideration is re-injected after the event, after MDT has been imposed, for reasons of general deterrence which do not take account of the fact that for everyone else that would be the particular infringement to which MDT would have been applied.

So, I say that the challenge has been properly brought in relation to that in any event given the overall challenge at Step 3 - the Argos-type overall disproportionality. It is a matter well within the Tribunal's competence. So, I do not accept the pleading point.

What, then, of the construction arguments that my learned friend advances?

THE CHAIRMAN: Just to be clear about that, when you were opening the case you seemed to be suggesting that there should have been some proxy which was less than the £353,000, or whatever it was, which one would arrive at by looking at ----

MR. de la MARE: -- infringement approach. My primary case is that you should calculate using the infringement approach, in which case the proxy issue does not arise at all.

THE CHAIRMAN: I see. Yes.

MR. de la MARE: My secondary case is that if you do not use the infringement approach the use of the proxy in this situation is unfair and arbitrary for the reasons identified in ground 2. There are two stages to it. The first stage of the argument is that it is wrong in principle to add back in the penalties once you have applied MDT. The second part of the argument, set out in para. 30, is an express attack on the arbitrariness of proxies in any event. So, the first part of the argument ----

THE CHAIRMAN: Is that attack limited to this point about whether it is put into the table at Step 1 or Step 3? I think if you are arguing for some other way of calculating the proxy, separate from your argument, "Well, it would not be necessary if you went for the year of infringement", but you are saying, "Well, even on the basis that it is the year of decision, so some proxy is needed for the year when you had no turnover ----"

MR. de la MARE: For Infringement 154, yes. The case I have made clearly at para. 30 is to attack the arbitrariness of the proxy applied in this case. I have said in terms that the approach adopted here produces an arbitrary consequence on the facts of this particular case. I do not have to challenge the general methodology of 0.14 per cent. I do not need to challenge that. I do not need to engage that It may be a perfectly acceptable methodology to use in every other case. I am entitled to say, irrespective of the position in every other case, its application on the facts of my case is arbitrary .That is precisely what I have done. I do not need to devise a rival calculus. It is enough for me to say, "This result is arbitrary" as it plainly is. That is exactly what the pleading does. In fact, there are a number of rival means by which a more tailored or fitted proxy can be identified. The point I was explaining in opening is that none of those have been considered. Instead, the ft has adopted a general rubric and applied it, without thought, to everyone else and without thought about its particular application to the facts of my client's case, producing an arbitrary result. That is the second way I put the case. With the greatest of respect to my learned friend, I think I have put my case fairly that way from the outset. That is why I say that that challenge has always been there, to the results generated by the proxy in this particular case. They are arbitrary.

Now, it is no answer for my learned friend - with respect to the over-arching complaint I make about the sausage machine of the general calculus - to point to one passage of the particular Decision dealing with the reasons why the OFT maintains its categorisation between simple cover pricing and compensation payment cases because it is no part of my argument to engage with that. I accepted at the outset that there was that categorisation running through the case. That is fine My challenge has been directed to the generic reasoning applied first and foremost in relation to the turnover used and, secondly, the generic reasoning deployed in relation to the proxies identified and applied to the particular cases. It is striking that on that terrain he simply does not respond. He does not engage with the argument made in relation to that.

I do not dispute that in certain instances parties have said, "Well, if you apply this methodology to me the following results will pertain". I do not dispute that in general terms

the OFT has not considered that. But, what they have to do in every case is, having constructed a methodology, to go back and sense-check whether the application of that methodology is robust and sensible. I can give you an example: when you have computer models built to model market share or built to model health economics it is no sufficient discharge of that exercise to say, "This assumption here is valid" and then you go to the next box and you say, "This assumption here is valid", and then you go to the next box and say, "This assumption here is valid" and not look at the combined product of the model. You have to look at the robustness of the conclusions generated by the model - whether it is by some form of quality assessment, etc. That is exactly the same exercise when you come to apply a model to a particular case. You have to ask yourself: Are the results generated by this model in fact defensible? Do they require fine-tuning? That is the exercise that has never taken place.

THE CHAIRMAN: That is the question. We often have people come here and say, "Well, the regulator ignored all our points on this", to which the regulator's argument is, "No, we did not ignore them. We heard them. You made them forcefully, but we just disagreed with them". Those are two very different situations. I think what Mr. Unterhalter is saying is, "Yes, lots of people made lots of different points about every different aspect of what we did. We did not ignore them. We did not just steamroller over them. We did take them into account in some circumstances in relation to financial hardship. We did bend from the straight and narrow and make an exception for people. There are other instances where we may have made an exception, but, generally, we did listen to everything that people said, but usually they did not cause us to make a deviation from the norm which we had set ourselves".

MR. de la MARE: I understand that. It is no part of my case to suggest that there was not careful and considered, and responsible generic consideration of the generic components of the model. But, that is not the same as saying, "Now that I have got this methodology, how does it actually pan out on the facts?" That is a necessary step, nonetheless, to be taken. You cannot tell the individual consequences of a particular modelling choice, let alone the cumulative consequences until you run figures through the model. So, what good is generic consultation unless you know the particular numbers are going to be generated in this way, and as they pan out through the sequence of decisions made - so, by accepting that we are going to go for a decision approach in relation to turnover, thereby generating a nil figures, combined with a proxy decision - you are going to result in this particular conclusion. Until you have the numbers you cannot actually stand back and say, "Well, do

these cumulative assumptions work? Is it actually fair to apply the decision approach in relation to turnover in conjunction with our approach to proxies----?"

THE CHAIRMAN: When did your clients then first see something that first looked like the table that we now see?

MR. de la MARE: The numbers come with the Decision. The OFT basically engaged with its methodology and explained what its methodology was going to be, and in various respects precise numbers or precise percentages were not given. They just indicated how they intended to proceed. That is why you have to stand back and look at the application of the general methodology and see what kind of numbers it generates.

Can I then deal with the question of the interpretation? My learned friend's argument in this respect was something of a push-me-pull-you - to use a favoured legal cliché - because when it suits him he refers to EC case law to support his interpretation. So, when *Degussa* seems to favour his interpretation as to, "What is the relevant turnover at Step 3" he is content to refer to EC law. When changes are introduced in order to align the domestic regulations with EC law, as is the case with the turnover order, he refers to EC law. But, when it does not suit him - as is plainly the case in relation to Steps 1 and 2 of the EC Guidance which proceeds on an express infringement approaching - then EC law has nothing to do with it.

With the greatest will in the world, that is not a principled basis on which to proceed It is not a principled basis on which to answer the case t hat these guidelines should be interpreted so far as they can be, and reasonably so, to correspond with and deliver the same result as the Commission Guidelines. It is equally no answer to the clear contents of para. 1.16 which are plainly intended to say that the sorts of results generated by the domestic guidelines here will be the sort of results generated by the application of the Commission Guidelines. There is no other sensible way to read 1.16. That is what it is saying. There is no possibility to have concurrent application of the EC and Commission Guidelines for any one case. It either falls within Article 81 or Chapter I. It cannot fall within both.

In terms of pointers in construction, my learned friend engaged vigorously with para. 2.7 and what the word 'affects' means. He engaged vigorously with para. 2.13 and my point about exceptional cases. Neither of those convince because at the end of the day 'affect' is a causative, or causal, term that must have a temporal element, and exceptional cases are still, on any view - on a Basil Fawlty "bleeding obvious" basis - much more likely to result until a decision approach than an infringement approach. But, what he at no stage engaged with was the expressly different language in Step 5 that was plainly intended to demonstrate

that a different turnover year is being used at Step 5. He has no answer to the fact that the Guidance goes out of its way to rely upon a different test at that stage. Once he is driven to accept, as he must be driven to accept, that a reasonable and literate man test - the *Raissi* test which he has now come to accept - necessitates a consideration of how the 2000 Guidance was interpreted and understood as part of the background to the interpretation of the 2004 Guidance. It becomes impossible to argue that the meaning attributed to those differently formulated passages that now find their way into 2.l7 do not have the meaning that were previously accorded to the passages similarly phrased formerly It is impossible to argue. It is no way out of it for him to say, "Well, the 'last business year' naturally means the decision approach because the natural construction given to those phrases as they appeared in the 2000 Guidance was that the infringement approach applied. So he loses on the claim of construction.

On the claim of principle, I would suggest that with the best will in the world he has not engaged with the point that I made in relation to deterrence. He has, in effect, conceded the point in relation to seriousness because he said in terms that seriousness is all about measuring the effect at the time of infringement, which militates in favour of the infringement approach. Move to the deterrence approach. The point nevertheless remains that you are trying to deter is future conduct and what will be in mind in terms of risk in the putative infringer at the moment they are considering whether or not to infringe, there is nothing unprincipled - indeed, there is everything logical - about saying that your risk at that time that you are considering infringing is linked to your turnover at the time that you are going to infringe because that tells you how much money you are going to lose. So, the infringement approach is every bit as forward-looking as the decision approach and it produces far greater certainty in terms of the risk being run by the infringer.

For those reasons we say ground 1 must prevail. In relation to ground 2 there has not been any satisfactory answer to the arbitrary effect of the proxy; nor any satisfactory answer to the sequencing because there is no satisfactory answer to the sequencing. It is plainly a mistake, as the language at the end of each and every one of the cases where the proxy reveals because it is intended to replicate what should have happened at Step 1 and Step 2. So, I would submit that if I do not succeed on ground 1 I should succeed on ground 2 because if I do succeed on ground 1, ground 2 falls away because we no longer use proxies. Unless there is anything else I can further assist you with, those are my submissions.

MISS HEWITT: Mr. de la Mare, in your Notice of Appeal, para. 23 gives us the figure £939,652 and you are suggesting that we should reduce your fine to that. That is in Exhibit GC5. That is the table for that.

MR. de la MARE: That is correct, yes.

MISS HEWITT: Then under your MDT heading you have another figure in para. 31. You have £1.8 million -odd.

MR. de la MARE: Yes .That is the sum imposed by the OFT less the proxy after the proxy has been discounted as appropriate for leniency and all of the other Step 4 considerations.

MISS HEWITT: Have you got a table for that?

MR. de la MARE: I do not. It is just a logical consequence of knocking that element out of the OFT's decision in the OFT's calculation.

MISS HEWITT: Right. Then, in para. 37 you have yet another figure, slightly different from ----

MR. de la MARE: I think it should be the same figure as appears in GC5.

MISS HEWITT: So, it should read £939,652, should it?

MR. de la MARE: Yes, I think so. Let me just check with my instructing solicitor who is much more numerate than I am. (After a Pause): Yes, it is an error which was not picked up from when we corrected our calculation in GC5. I am afraid it survived from a previous draft.

MISS HEWITT: We should change that in our copies.

MR. de la MARE: You are commendably eagle-eyed. Yes, we should have changed it. My apologies.

THE CHAIRMAN: Thank you very much, Mr. de la Mare. I realise that I, and maybe other people, have been reading out into what is Open Court figures which may have been excised from the Decision. I do not know whether that has happened, or whether it is problem ----

MR. de la MARE: It is not a problem for us, madam.

THE CHAIRMAN: Right. It is just a point to bear in mind, if when you see the transcripts there are figures which ought to be excised before the transcript goes up on to the web, perhaps you could let us know as soon as possible so that that can be dealt with.

MR. UNTERHALTER: Madam, if I may just raise one final matter? Just concerning the question of what was appealed, we would refer you to para. 8 of the Notice of Appeal where the grounds are set out. We would respectfully submit that one will not see this proxy case that has now sought to be developed latterly, and mostly for the purposes of argument today, in the respect that we have looked at. If Apollo does with to proceed with those

points - and perhaps they do - we would ask that they make a proper application for that because we would want to deal with it squarely.

MR. de la MARE: In my submission, madam, there is no need for an application to amend. Obviously if there is a need to amend, I say there is no prejudice and I make no application.

THE CHAIRMAN: I will think about that. Perhaps we could let you know whether we think there is an issue that needs to be resolved in relation to that.

MR. UNTERHALTER: We are not asking, plainly, for any formality . Obviously the point needs to be considered, but we certainly did not come to deal with that point today, and we are happy to deal with it perhaps in submissions. So, if that is all that it ultimately turns on, we are happy to deal with it in that form. But, formerly, that was really no part of the case as we understood it.

THE CHAIRMAN: Thank you very much everybody. We will let you know our decision in the usual way. We will be seeing some of you at least at some point again over the next few days.

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