IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1139/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 July 2010

Before:

VIVIEN ROSE
(Chairman)

GRAHAM MATHER
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

GALLIFORD TRY PLC Appellant

– v –

OFFICE OF FAIR TRADING Respondent

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

_____

HEARING

APPEARANCES

Mr. John Swift QC and Ms. Kassie Smith (instructed by Pinsent Masons) appeared for the Appellant.

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

_____

THE CHAIRMAN: Yes, Mr. Swift.

MR. SWIFT: May it please you, madam Chairman, Members of the Tribunal, good morning. On this, the seventh appeal to be heard in Court 1 and the joint 13th of all the 25 appeals I, and Miss Kassie Smith appear on behalf of Galliford Try and Mr. David Unterhalter SC and Miss Ford for the OFT.

We have, I believe passed up to the Tribunal a short core bundle to which I will make some brief references in the course of my brief opening. We do not know to what extent this Tribunal has read into any of the other 24 appeals which have been filed or read any of the transcripts of the hearings but we propose to treat this one as a discrete hearing on behalf Galliford Try.

I intend to keep to the discipline of a 45 minute opening, subject of course to any questions from the Tribunal and those around me will make sure that that discipline is adhered to.

Let me concentrate in my opening on two main issues. The first is the application of an MDT (Minimum Deterrent Threshold) of 0.75 per cent to the total Galliford Try worldwide turnover in the year ended June 2009. We say that this Tribunal should hold that the penalty arrived at through the OFT methodology, in particular one in which no account has been taken of the substantial increase in turnover in Galliford Try from the date of its last infringement, which is 2004, no account of the composition of that turnover, no account of the manner in which it has been acquired, that methodology in its result falls well outside the margin of appreciation which this Tribunal affords to the OFT in the application of the 2004 guidance.

The second main submission, which I can take very briefly at the end is that, contrary to the allegation made by the OFT, and the Tribunal will find this, for example, at para. 24 of the OFT's skeleton, Galliford Try has, indeed, put forward a range of fines – I say a "range" of fines – which in our submission more fairly and accurately reflect Galliford Try's individual circumstances. If, at the close of these proceedings, the Tribunal were minded to substitute its own view as to proportionality for that decided on by the OFT then we recommend that in the exercise of your full jurisdiction those are useful reference points. I will be going towards the end of my 45 minutes to remind the Tribunal about where it is in our notice of appeal that we have done some tables in which various adjustments are made to the OFT's own methodology.

What has happened in this decision, and I make no bones about putting it as bluntly as this, is the OFT has lost control over its own creature, which is the MDT. It is being used so as to set penalties in the name of deterrence which are manifestly, and even absurdly,

disproportionate to the infringements in issue. Galliford Try is a victim of that abuse of discretion. We are asking this Tribunal not simply to send out a signal to the OFT but this type of decision making is well outside its margin of appreciation, that when it develops policies that can have such extraordinary results it must act in a democratic manner with full consultation and with an opportunity for business, consumers and Government to respond. That opportunity has never been made available, and the OFT has failed seriously on a matter of due process.

May I turn now briefly to the factual context? We are now at the appeal stage of an inquiry which began in 2004 and ended with a decision in 2009. The infringements for which Galliford Try and most of the other appellants have admitted liability go back in some cases to the beginning of the decade. The OFT has decided, and this is an important aspect of its decision that the evidence did not support a finding of an industry-wide cartel operating systematically and of long duration. The Tribunal will have seen references in the decision and in the appeal documents to what they describe as a practice endemic to the construction industry, namely cover pricing. But in these decisions they have limited their findings to a large number of discrete cover price infringements in fairly narrowly defined product and geographical markets in which local authorities placed contracts out to tender. Moreover, in respect of none of the infringements at all - not least the infringements of Galliford Try - has the OFT sought to connect the entry into of the arrangements with any adverse effect on any relevant product market at the time of the infringements.

So, may I first remind the Tribunal as to the infringements for which Galliford Try has been found liable in 2001 and 2003, and 2004 so that we can first place all these arguments in relation to their proper context. If the Tribunal will now go the core bundle which I have just handed up, tab 1 is the Notice of Appeal. If you would go to para. 4 of that Notice of Appeal you will find that is a description of the infringements. No. 42 is 2001. That is at Uxbridge. No. 142 is the Judo, Walsall in March 2003 and the third is Infringement 186, Buswell's Lodge Primary School in Leicester.

If the Tribunal would now turn to Tab 2A of the core bundle what the Tribunal will find there is a summary of those three infringements as found by the OFT in its Decision. I have got, feintly, at the bottom right-hand side of the page a number 29. If the Tribunal can get to that page and then find that that, indeed, is Uxbridge, then we have made progress. That is Uxbridge. I am not proposing to take you through it. It is simply if the Tribunal wish to have a look at it. You see on the next page, Decision 4-1392. Those are the tender returns. Then, in the following paragraphs the OFT set out their reasoning as to why they conclude

that an infringement is taking place. They do the same, if the Tribunal would now go to p.62 - again, following the same pagination, the bottom left-hand of the page – that is New Judo Hall, Walsall Campus. Again a similar analysis in which it records the number of tenderers; the amount of the tender; who was awarded the contract; and then some notes. Then, similarly, at p.67 we have Buswell's Lodge. That is all I am proposing to show the Tribunal. That is part of the factual context.

Going back to the Notice of Appeal in the core bundle, if the Tribunal would look at para. 11, this is a summary of how the OFT has arrived at the penalty of £8,333,329.00 which you will find at para. 12F. To the extent that the Tribunal is familiar with this methodology I need not take you through it. The starting point is at 12A. Step 1 - 5 per cent to Galliford Try's turnover for, let us call it, the Decision Year – or the year before. I will call it the Decision Year. We know what that means in each of the relevant markets. So, these are the relevant product and geographical markets we were looking at in terms of the local authorities. Then we have £1 million-plus for Uxbridge; £654,000 for the Judah Hall; and £76,000 for primary school. Step 2 - no adjustment for duration. Then, Step 3 - the MDT applied to the penalty after Step 2 for infringement - 42. When we say 'applied to', what this really means is that it is added to the total. So, the multiplier is applied to the total worldwide turnover of Galliford Try, which is £1.462 million and, as a result, the penalty increases to £10.965, that is the end of column 1, and then at step 4 we have a reduction for compliance, which of course is an important programme, no adjustments to the penalties at Step 5 and the total of the penalties is therefore £11 million and the Fast Track Offer reduces that to £8.333, so that is the basis on which it is abundantly clear, as we all know, that by far the greater part of the fine of £11.1 million is accounted for by the MDT. Effectively it has raised the penalty at Step 1 from £1.8 million, this is adding up the three separate infringements which come to £1.8 million and we then arrive at a total of £11.17, about ten times the Step 1 figure, and that is how we get to £8.3 million. That again is explaining how we get to the various figures, the huge importance of the application of the £1.75 to the total worldwide turnover in decision year.

The Tribunal will have seen that in our skeleton we raise separate issues in respect of the limitation period and in respect of last business year. What I really want to do is to deal with those as briefly as I can before I get on to the core of our submissions which is the arbitrary and unjust application of the MDT.

The reasonable period of limitation goes to the Uxbridge issue, the first one we looked at in 2001. The Tribunal will have seen on our two skeletons there is an issue as between

Galliford Try and the OFT as to whether, either as a matter of law, or as a matter of what I might call rational policy this infringement should have been excluded on the ground that it occurred in 2001 and that is more than five years after the infringement came to the attention of the OFT in one of its dawn raids, I believe. Our case is a very simple one, it is set out in our skeleton at paras. 8 to 19, and it is this. The OFT should have taken the approach of the European Commission – it did not. The Competition Act and the Guidance leave the matter open. In particular there are no express relevant differences as between the UK position and the EC position. In those circumstances we say the inevitable conclusion is that both s.60 of the Competition Act, 1998, which enjoins a similar approach and the *Pernod Ricard* decision of this Tribunal, which I have just referred to established that the OFT should have applied a reasonable limitation period and if it had done it would not have included the Uxbridge infringement and the fine would have been reduced *pro tanto* by over £1 million. I will leave it to Mr. Unterhalter to develop his point and, so far as I am concerned, I cannot put the points any more clearly than they have been put in the skeleton. I will just say this: I am assuming – a dangerous assumption, I know – that the OFT is not contesting that if they are wrong there should be no deduction. On the other hand there was a hint in the penalty defence that the limitation period point does not really help Galliford Try at all. All the OFT will do is to eliminate the line of figures in column 1 which is Uxbridge, and then apply a minimum deterrence threshold to column 2, which is the Judo Hall, arrive at a figure and then raise that so that it got to £11.1 million because in some way the OFT regards that as the only figure which provides the appropriate deterrence for Galliford Try in this case. I am not asking Mr. Unterhalter to get up and confirm at this stage, but we would like to know what their position is in the course of this morning's hearing. Does it go or does it make any difference.

THE CHAIRMAN: Just to be clear what your case is on that, your case is that if one knocks out the Uxbridge infringement so that you have two infringements, then obviously subject to your point on the MDT, but assuming all else being equal, you would then apply the MDT to the next highest, whichever is the highest fine out of those two, and then add on one more fine, but you would not then add on the £1,068,450, so that would be the difference.

MR. SWIFT: I am glad you raised that, madam Chairman. I always find this confusing where the expression is used: "We apply it to the Column 1 figure". All they do is to stick the 0.75 in the Column 1 figure, but it is not an application, the 0.75 is applied to the worldwide turnover, a quite separate calculation. The reason why it is relevant here – if I can just go to Morgan Sindall which we say is this extreme case where the OFT were so locked into its

methodology it could not see the absurdity of following it. In that case Morgan Sindall had, say, three infringements, the highest sum was at, let us call it "infringement 1" – the first column, but Morgan Sindall had leniency in respect of that infringement, so what the OFT do is to apply the 0.75 in that column, they arrive at this much bigger figure, so they cancel it out because of leniency, and then they look at columns 2 and 3 and say: "We only apply the 0.75 to the column 1 figure, so we do not need to apply it to column 2 and 3, so Morgan Sindall gets away with a fine of £260,000 on a turnover of twice that of Galliford Try. That is an outrider. The main point we are saying is the one point nought something million goes out, the 0.75 of the total turnover stays the same, and then you add in step 1 and 2 and step 1 and 3, and what we want to know is whether Mr. Unterhalter says: "That is not right because on the OFT's methodology we have arrived at a figure which only £11 million is the sum that is required for there to be effective deterrence in your case." We will see what they say.

Guidance, may I take you to the Guidance in the core bundle, although for the Tribunal's note it can also be found at tab 135 in vol. 11. It is at tab 2H of our core bundle. Again, bearing in mind time and the Tribunal's experience of this matter I just ask you to go to the Guidance, you will see it headed "OFT's Guidance as to the appropriate amount of the penalty" – the word "appropriate" is the expression found in the statute – "understanding competition law", and then we go to an introductory note, and then the contents, paras. 1.1 to 1.3 refer to the background to the introduction of the 2004 Guidance, which is of course the modernisation regulation 2003, and then the key paragraph 1.4:

> "The twin objectives of the OFT's policy on financial penalties are:
>
> * to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
> * to ensure that the threat of penalties will deter undertakings from engaging in competitive practices."

And then the OFT describe its discretion and its intention where appropriate:

> "… to impose financial penalties which are severe, in particular in respect of agreements between undertakings, which fix prices or share markets and other cartel activities and serious abuse of a dominant position."

I know all this is highly relevant but it will be very familiar to the Tribunal, however, 1.7 is worth noticing in the second sentence, s.38(2) of the Act provides the OFT may alter the guidance on penalties at any time, but if altered the OFT must publish the guidance as altered, and then the Secretary of State must approve any guidance on penalties before it can

be published, just as the Secretary of State has approved the 2004 guidance as is stated in para. 1.8, and the OFT refers to this consultation on the last line of that page.

Turning over, at para. 1.9 the OFT confirms its statutory duty "to have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed" and this Tribunal will be well aware of the jurisprudence of this Tribunal and other disciplines, and other courts, as to what is meant by having regard to guidance for the time being in force. It was this Tribunal that said that expression connotes more than simply taking into account, so if there is a substantial departure, that departure is not justified. You need a substantial departure, which we cannot justify because it would represent a variation of the guidance which would have to be consulted on and get the approval of the Secretary of State.

Then, turning over to p.6 we get the stepping stones. 2.1 refers to the five-step approach. You will see at the third bullet at 2.1 'Adjustment for Other Factors' which, of course, is the Step 3 adjustment. Then we get at Step 1, paragraphs 2.3 and 2.4.

> "The starting point is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking."

We all know now that the relevant turnover is to be assessed having regard to what the OFT considers to be the relevant product market or the relevant geographic market having regard to its application of the standard economic tests of demand substitution, and so on. So, we are all very familiar.

At 2.5, the last line is important.

> "The assessment will be made on a case by case basis for all types of infringement taking account of all the circumstances of the case."

I do not think I need say any more on Step 1. It is not that I am making any deliberate omissions but I just want to concentrate here on the key elements. The key paragraph is, of course, para. 2.11.

> "The penalty figure reached after the calculation in Steps 1 and 2 may be adjusted as appropriate [a very important use of the discretion] to achieve the policy objectives outlined in para. 1.4 above".

Again, just to remind the Tribunal, para. 1.4 objectives are both seriousness of the infringement and the deterrence. The two go together. The twin objectives. In particular, of course, para. 2.11 says,

> "... of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practice".

So, that is a point of emphasis in para. 2.11. It is never saying that the point of Step 3 is solely looking at deterrence. It is a very important consideration.

Then, in para. 2.11 they list the number of considerations which they may take into account, including:

> "... any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial positions of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets".

Then, a very important paragraph at para 2.12. Bear in mind that this is a guidance which has a degree of statutory force. We know that it is not a statute. It is guidance which has gone out to consultation. It is guidance which has been approved by the Secretary of State. This is what they say,

> "The assessment of the need to adjust the penalty [and the need is a discretionary need] will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or a reduction of the financial penalty calculated at the next step".

Finally, turning over, p.10, Step 5 gives one the cap which we know is related effectively to ability to pay. That is the cap of 10 per cent of the worldwide turnover of the undertaking in its last business year.

Those are the points I wanted to make on the Guidance.

We dealt very briefly with limitation. Let me deal again, as briefly as I can - because I am conscious of this time limitation - with the last business year. I had the pleasure of spending half a day in Court 2 on Tuesday. I was allowed out! Counsel for the appellant spent a good forty-five minutes on this analysis of the last business year, taking Lord Carlile to a case of Mr. Justice Collins in *Royal Mail v. Postal Services Commission* on the meaning of the words 'have regard to'. Mr. Beard followed that with a very well expressed series of submissions on the ordinary meaning of the words 'last business year' and then going back to what it was in previous years, and the consultation paper. I thought, "I am going to run out of time if I spend that amount of time on the last business year". So, what I am going to say is that there is a matter which must be of concern to this Tribunal - or the CAT generally - and that is whether the OFT current Guidance of December 2004 entitles the OFT to carry out its Step 1 and Step 3 calculations on turnover in the way that it did - namely, to take

both the relevant market turnover of the undertaking and the total turnover as at Decision date in 2009.

Now, we have put our arguments in the skeleton at Section E, paragraphs 20 to 41 - no less than twenty-one paragraphs. However, you will see that in our submission as a matter of interpretation, the ordinary meaning of the term 'last business year' – whatever that interpretation is – the OFT should have maintained its pre-2004 practice whereby the assessment of the penalty was using Step 1 as a starting point, and then adjusting Step 1 and taking the turnover as the date of infringement. In our submission, if one looks at the guidance as a whole - and in particularly para. 2.5 of the penalty you will see that the considerations which the OFT are told to take into account seem to be backward-looking. They seem to be concentrating on what was happening in the market at the time that the infringements took place in terms of what was done, the gravity, the market shares. It seems to be backward-looking. If you look at the context by reference to which the 2004 Guidance was made, and one looks back, the OFT had a consistent policy of applying last business year before date of infringement, and to the extent that the OFT is seeking to align its policies with EEC Commission, then for many, many years the EEC Commission has also been adopting the date of infringement as the turnover date.

I can see the argument that if one is looking at deterrence, deterrence is a forward-looking adjustment. It is sending out a message to people as they are now and saying, "Well, would that not suggest that you take a year closer to the Decision?" There are arguments either way. The fact remains that the European Commission has found no difficulty in looking at the infringement year. The OFT had no difficulty in looking at pre-2004. It could have been done. However, what we are saying is that wherever the Tribunal comes out on this point as a matter of interpretation, what is clear, in my submission, is that (a) we say, of course, there was a deviation from the Guidance, but if the Tribunal were not to accept that, then the key point here is that the OFT should have realised that when they were moving their policy forward so as to ally each of the Step 1 and Step 3 years to the Step 5 year, it could have a very serious impact - as, indeed, it has had on Galliford Try in this case. If it had thought it through, it might have said to itself, "We have got to be very cautious. We are now entering new territory with our policy". But, far from abandoning caution, what is done in this case is to apply that policy with rigidity and insensivity as a mathematical formula that provides the solution to all problems. What the OFT failed to consider was the longer the period between the infringement and the beginning of the investigation and the decision the greater the uncertainty and the greater the lack of "correlation" it has been

called in what you do at the time of the decision and the seriousness of the infringement, you introduce for all businesses a huge degree of uncertainty which was not the case when you could ground turnover as at the date of the infringement. That was a known quantity, future turnover was not, and we will see when we come to one of the annexes in the notice of appeal, which I am going to come to at the end, just how arbitrary this policy becomes when you follow a turnover up, across, down and up from the time of the infringement to the time of the decision. Maybe when the OFT went to 2004 Guidance on turnover as the date of step 5 for all three it did not think there was going to be a difference. I have not gone through all the consultation documents, it does not look as if anybody focused on it at the time, and so there was no real debate before the 2004 Guidance came in. This case, and this series of appeals establish beyond any doubt at all why that policy decision is of huge importance in arriving at just and proportionate solutions in matters of this kind. The more you get away from the infringement, and the more you base your mathematical formulae on turnover that has been earned by companies that may be wholly different from the companies at the time of infringement, that creates problems, mathematical formulae do not solve those problems.

MR. MATHER: Mr. Swift, one of the arguments percolating in this area and I think it does go to deterrence, is that it is almost an argument about profiting form wrongful behaviour and that taking it closer to the time for the decision actually reflects that build-up of turnover which may be the result of wrongful behaviour. How would you address that argument?

MR. SWIFT: I would say that if that were the case, and that is a factual matter capable of being proved in each case, I – if I were the OFT – could still apply a policy based on turnover at the date of the infringement, but I would take that into account in any fine that I imposed. I would not have to move necessarily to the decision. That may be regarded as a technical point. The reality is, of course, in this case that is not what has happened. These are three infringements that had no effect on any relevant market, none established by the OFT. They started and finished at the time of the communication. No financial benefit has accrued to Galliford Try in respect of any of those contracts in any of those markets over the period we have been looking at. Plainly, were there to be such a benefit, it could only be taken into account in respect of the relevant turnover at Step 1. It has no possible relationship to the Group worldwide turnover which has been earned in markets wholly different from the narrow product markets decided upon by the OFT in this case. Whether that, in Galliford's Try case consists of building a research station in Antarctica or whether

it is in relation to matters such as house building they have no relationship whatsoever to the narrow UK based markets in this case. So Mr. Mather that is my answer to that question.

THE CHAIRMAN: Just on the point about the Guidance, I want to be clear what your case is. I understand the point that you are making, which others have made, is the proper interpretation of the Guidance, looking at its wording and looking at what had gone before is that actually there was no change in relation to Step 1, or at least not one that was properly consulted on and so actually the Guidance says that you should use the infringement year in Step 1, albeit that now you are using the decision year in relation to Step 5. That is your first point. If you are wrong on that and, in fact, the Guidance says you should use the decision year for all three stages or at least Step 1 and Step 5. Then there is a question you say: "That was a wrong change to make", as it were, and they should not have made that change in the Guidance.

The third possibility is, yes, they did make that change in the Guidance, regardless of whether it is right or wrong in the generality when you look at Galliford Try because of the distance in time between the infringement and the decision, and because of the great change in turnover and the reasons why that turnover has changed in this particular instance it was not fair to impose that change in this case.

I can see that it is open to you to make the first argument: What is the proper interpretation of the Guidance? And the third argument: if we are wrong on that then this is an exceptional case and should have been treated as an exceptional case, but I am not sure it is open to you, if you are seeking to say it, that if the Guidance has been changed then the Guidance ought not to have been changed and they should have stuck, as the general rule, with the previous position of the infringement year, because that seems to me a challenge to the Guidance as such, which is not really ----

MR. SWIFT: No, no, I have not made my point very well on the point two. On the first point, if as a matter of interpretation it was outwith their discretion, then that is it, the decision goes. On the other hand if, as the OFT strongly contends, that is what the Guidance means, that is how they construed it, that is what they have done, the Tribunal said "Right, it was open to you, therefore, to go that route, open to you to look at Step 1 turnover at decision date, look at statutory adjustment, and look at, let us say, the turnover of the undertaking as at decision date" you have to move very cautiously, not just for Galliford Try but more generally. The more you move away from infringement date to decision date the more likely it is that the undertakings on whom you are imposing these fines could have changed quite dramatically. It is not just a Galliford Try point. We are saying Galliford Try is obviously an extreme

case, in its case its turnover has increased from £468 million to £1.5 billion in the course of six years. This, of course, is a general point and I can refer the Tribunal again to very well established cases in the European Court – the *Musique Diffusion Française SA* and the *Archer Daniels* case if necessary to show how careful regulatory authorities have to be when dealing with this blunt thing called turnover, and indeed I think it is in *Musique Diffusion* that they say indeed the lower percentage of total turnover, the relevant turnover, the more careful the authorities have to be in how they treat turnover, which of course is precisely the opposite of what the OFT did in this case.

This is quite separate, of course, from the MDT. It is the MDT using the mathematical formula that then makes it clear why the OFT has got to exercise extra care when it begins to operate on a formulaic basis rather than a case by case basis.

THE CHAIRMAN: Yes, I understand, thank you.

MR. SWIFT: Miss Smith reminds me, there is, of course, no reference to the MDT in the Guidance.

The point I am making here is whether it is lawful or not, under the Guidance, what the OFT is doing is developing a new regulatory policy that has implications for business undertakings and for the way in which it should exercise its own decision, and when the OFT uses that language it reminded me of the late departed Lord Diplock, he used to use the words "Beyond peradventure" and here we find it in the skeleton – it is classic, archaic – the OFT actually now admit, they say it would have been better if, in their Guidance, they had said that they were proposing to operate on the basis of the same business year for Step 1, Step 3 and Step 5. What they should have done in retrospect is to say: "not only are we doing that but we are introducing an MDT, and we are introducing an MDT along the following lines, but we only found that out when we came to *Makers*". The OFT has said consistently, nobody disputed this 2004 policy, nobody said "You cannot possibly apply it to decisions", so we have done that and nobody has objected and the Tribunal had a good look at it in *Makers* and agreed with us. So it is important to establish for what proposition *Makers* can stand. Again, in view of time I will just refer the Tribunal to *Makers*, a decision of the CAT, where you, madam Chairman, were a Member it is at vol.4 of the authorities bundle at tab 54.

Let me state very briefly how far *Makers* went and how far it did not go, in my submission. Let me state first of all in a somewhat negative way, the proposition for which *Makers* cannot stand, and that is that in every case in which a subsidiary of a parent company infringes competition law, such as in cover pricing, and where that subsidiary's turnover in

the relevant market is less than 15 per cent of the total group turnover, that the only effective deterrent is to apply a levy of 0.75 per cent on a total group, worldwide turnover. You will recall, madam Chairman, that in *Makers* the MDT was applied only to the turnover of the subsidiary Makers itself, not to group turnover which already included the turnover of Maker's parent company Keller. The OFT recognises this, of course, in para. 6.244.

The other proposition for which *Makers* can stand is this: the turnover in markets unrelated to those in the relevant market, where the infringement took place and such turnover acquired between the infringement and the decision will always count as relevant total turnover; no such issue arose in *Makers*.

The Tribunal will recall, bearing in mind that there has been no reference to the MDT in the Guidance, that you had to, and I use the expression as politely as I can "tease out" from the OFT what on earth was their basis for increasing Makers' fine from £6,500 which would, on almost any standard, fail to meet the twin objectives of para. 1.4, to over £550,000. There were certainly reasons in the decision, but the reasoning in the decision did not allow this Tribunal to get anywhere near the connection between the two. It was only after probing and hearings at this Tribunal that the OFT finally came clean and explained its mathematical formulae, the 15 per cent and the 5 per cent formulae. If you are below 15 per cent of total group turnover then what you do is apply 0.75 per cent to the total group turnover, because 0.5 per cent is five times 15 per cent(sic) The first time the MDT had ever been exposed to any form of public scrutiny. This was the policy that was being adopted by the OFT, nothing in the Guidance, but you the Tribunal found it out.

As the Tribunal, hopefully without glossing on your decision concluded, it may work in individual cases but it may not, you tested it in Makers, and you found that the use of the MDT as such was within the margin of appreciation and even though the uplift to the £6,500 was in the order of no less than 80 times it was still permissible under Step 3 in the circumstances of that particular case.

Then, applying the jurisprudence of the Court of Appeal and of your own Tribunal you stood back, you applied the broad brush approach on the issue of proportionality and you held that such a fine was indeed proportionate to the infringement in that case, and you upheld it, and there was a fine of £550,000. That is as far as *Makers* went. The big issues that we are dealing with in this appeal were never before this Tribunal.

So, we have looked at the Guidance. We have looked at the starting point. We have looked at the factual background. The Tribunal will know that applying the 5 per cent, which is on

the scale of 1 to 10, to the relevant Galliford Try turnover at the date of the Decision for the three infringements, the OFT arrived at a figure of £1.8 million. That is our Step 1 figure. Now, did anybody - and I ask this question rhetorically; I cannot really ask it of the Tribunal; I ask it rhetorically on the basis that it should bounce back from that back wall somewhere on the left-hand side - in the OFT ever say to themselves, "£1.8 million for three infringements. Do we really need to make an adjustment at Step 3? Does the £1.8 million by itself not meet the twin objectives of the seriousness of the infringements (all three) and deterrence?" I do not know what decision was made at the OFT. That is why I put the question rhetorically.

My point in terms of process is that if minds were not directed to that issue at the end of Step 1 then there is a serious problem with the OFT process because one inference that can be drawn from that is that the OFT did not go through what was prescribed by the guidance and say to itself, "Is it right for us to exercise the discretion here?" What it said, having regard to 102 infringements, may, in the individual case, be too complicated. "What we are going to go for is a 'must'. We are going to move from a discretion to something we should do. Maybe it is along the following lines: they have been through *Makers*. The new foreman had passed some kind of an initiation test. Why not move it from what was effectively an aberration of £6,500 in *Makers* to a fully-fledged policy of adjusting the penalty wherever the relevant market turnover at the date of Decision as being nought to 15 per cent of the total group turnover? So, the exercise of a case by case discretion is transformed into a presumption, or, as we would say, a rule has been adopted for every undertaking in this case that satisfies the less than 15 per cent rule. The penalty must be increased by that fixed percentage, which is the 0.75 per cent. Of course, the MDT, never consulted on, now has to find a way of dealing with matters such as leniency. You remember before, I dealt with Morgan Sindall. Completely absurd. They had to keep within their rules, so they say. How do you deal with three or more infringements? We will stick to three. How do you deal with one infringement only? How do you deal with a group where a new owner takes over an existing undertaking? Should we be applying the 0.75 percent to the total turnover of the new enlarged group? Is that sending out the right message, or should we take into account that the parent group, in a sense, innocent of the previous infringements, and therefore its turnover should not be taken into account. Balfour Beatty. All these are policy issues - policy issues. In our case, of course, the innocent turnover of the companies that Galliford Try have been acquiring counts to the 0.75 per cent. The innocent turnover with the Balfour Beatty group attracts no penalty at all. The

more I go into it, the more the Tribunal see that these are not matters that yield to a mathematical formula. The mathematical formula is always going to deal with problems. Wherever there is a problem you try to find a solution. The more you try and find a solution, you find a Morgan Sindall case or a Balfour Beatty case. Everything suggests that this has got to be treated with very considerable care.

So, what have they done? They have moved away from *Makers*. They have said, "We can now adopt Decision turnover as Step 1 and Step 3 so as to be consistent with Step 5. We can use the MDT because that has been approved by *Makers*. We can be consistent with *Makers* because this is a cover price case. So, we will use 5 per cent and 0.75 per cent. What is the difference? The difference now is group worldwide turnover - group worldwide turnover at the date of the Decision." What a difference that has made.

What do the OFT say? The OFT say, "Well, in multi-party collusion agreements - even though it is not a collective agreement - on a case by case review, despite being mandated in the guidance - would put at risk the principle of equality of treatment". But, the OFT's insistence on equality of treatment is nothing more than ensuring consistency. We know, from your jurisprudence and the EU jurisprudence that ensuring consistency, putting parties in objectively different situations, breaches the principle of equal treatment. The OFT's problem is that unless its formula produces results that take into account the particular circumstances of the particular case, and are proportionate to the infringement, then it turns out to be a monster, rather than an MDT. This is the creature which has now got out of control. It is now becoming a very blunt and a very dangerous instrument.

So, what is the OFT's final position? It is forced to defend itself by reference to an argument which is purely circular. You will find this in paras. 12 and 32 of the OFT's skeleton in our case. What they are saying is that only a fine based on worldwide turnover will do sufficient hurt as a specific deterrence. Only if you calibrate the penalty to the turnover at the date of the decision worldwide will you impose the right message, a sufficient message, a sufficient hurt - however they put it in their appeals. That is a Manichean approach. There are no greys. It is black or it is white. That is the only effective way to secure not just deterrence, but the twin objectives under 1.4. How can that possibly be the case? But, in our case you need to fine Galliford Try over £11 million in order to meet the twin objectives at para. 1.4 of the Guidance. Only if you believe, as the OFT believe, that in some way - some Manichean way - this mathematical formula produces not just an effective decision but, much more important, a proportionate decision - proportionate to the infringement. This Tribunal will know, not just in the context of

penalties, but more generally having regard to the jurisdiction of the Competition Commission, when remedies are imposed that are appropriate to meeting the adverse economic effect, the AC, the deterrence effect. This Tribunal has brought in the principle of proportionality - the *Fedesa* principle. I have not quoted any of these authorities, but the Tribunal is familiar with it. It came up in the *Tesco* case. It was being said to the Competition Commission, "It is all very well for you to establish that a remedy is effective to meet an adverse effect, but if there is another remedy which is equally effective, but imposes a lower cost under the undertaking, then according to the principle of proportionality you do not have a discretion - you must always go for the lower cost. That is exactly what we have got into here. What we have got into here is precisely because the OFT has never looked, at the end of Step 1, or having done its Step 3 calculations, or said to itself, "We have arrived at this figure, but is there a large sum of money that will act as an effective deterrent, still be proportionate to the infringement and meet these objectives?" It just has not done it. It is a failure of process. There are risks in doing this. Deterrence is a penalty. Deterrence is there to cause pain. If deterrence is coming at a cost which is disproportionate to the infringement, then that is bad policy. We have got a bad policy in this case, and that is what is causing the problems.

As to turnover and the caution to be adopted in looking at turnover, I have already referred to the *Musique Diffusion Francaise* case. This is the old *Pioneer* case. June 1983 - a long time ago. That is to be found at Tab 69, Volume 5 of the authorities bundle. *Archer Daniels* is Tab 92, Volume 7 of the authorities bundle at para. 77. May I just read into the record this very important passage in *Musique Diffusion* at para. 120? "In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case". Really what I would like to emphasise are the points at para. 121. (After a pause): So far as I am aware that has been regarded as not even good law, but law relevant to the decision-making powers of this Tribunal as well.

I refer to *Archer Daniels* because *Archer Daniels* is, again, twenty-three years on, and cites *Musique* as continuing to be very good law.

So, on the end of my first issue we say the OFT has not acted within its margin of appreciation under the 2004 Guidance. It could, and should, have consulted after *Makers* on its approach to what it is now doing. In this case it is imposing penalties for infringements which took place before it changed its guidelines in 2004 and at a time when its policies were based on infringement turnover. I have used this expression before about

Manichean. I cannot think of a more suitable adjective. It admits of no nuancing. It admits of nothing related to the particular circumstances of the case save only that these were undertakings that committed the same kind of infringements.

The final reference to the Notice of Application and to the core bundle is at Annex 15 to our Notice of Application – 2G. It is a comparison of how Galliford Try's worldwide turnover has moved from 2000 to 2009. You see in 2004/2005 we then get the rise to a figure over £1.8 billion in 2008 and the drop to £1.462 is, of course, the collapse of the housebuilding market. It tells one something, just looking at end dates. It is odd to take an end date of £1.462 as it would have been absurd to take an end date of £1.8, but if the OFT had got its skids on and produced a Decision in 2008, then no doubt Galliford Try would have been told that the only effective deterrent is one that has 0.75 percent of a turnover of £1.8 million, despite the fact that that money would have been had to pay by Galliford Try at a time when its housebuilding business had collapsed. Treat these turnover figures like gelignite.

So, what you see in the difference between the £742 million and the £1.462 is the acquisitions and as we have pointed out in the Notice of Application, those acquisitions are of companies that are largely not engaged in the construction market at all. It is hypothetical. It is not part of the Galliford Try history. But, looking at the way these numbers go up and down assume that in the course of 2008 Galliford Try had gone into the United States and bought a regulated utility. It cost it £1 billion. The essence of regulated utilities are that they are monopolies and they are controlled. Because they are monopolists they have nobody to collude with. Because they are controlled they cannot abuse the dominant position. So, here you have £1 billion of turnover going into a company. That £1 billion turnover is generating a regulated return and yet according to this mathematical formula 0.75 per cent of that £1 billion goes to the Treasury in order to send out the right messages to undertakings in the United Kingdom construction industry. That is absurd. I am not putting that as an absurd hypothesis. It is something that could have reasonably happened. But, according to MDT - this creature, out of control, no account should be taken - that £1 billion goes into turnover and the Treasury takes 0.75 per cent. By that time one has lost all connection with the first of the twin objectives. Is there a way through without a remittal? Obviously implicit in my submission is that the OFT Decision has got to be revoked in respect of Galliford Try for the reasons I have been trying to put forward. Is there a way forward? This inquiry has gone on for five years. If there is a remittal it is

going to involve more and more costs, more and more uncertainty, and maybe more and more appeals back to this Tribunal. Well, yes, we say there is.

So, we reject the OFT allegation at para. 24 of its skeleton that we have not grappled with, as they have put it, the principles to be applied or consider the ramifications. It is not, frankly, for us to consider the ramifications. It is for the OFT to arrive at just decisions on a case by case basis. That is what it is there to do. That is what this Guidance tells it to do.

So, let me go now to Annexes 9 to 13 of the Notice of Application which Miss Smith will tell me are found at Tab 2B and following. Madam Chairman, this is the core bundle at Tab 2B. Annex 9, Table D. This will be familiar because this is the one we started with. This is the one at para. 11 or 12 of our Notice of Application. This is the current position in the OFT's Decision. We have been through all that. That is how you get to the £8.33 million at the bottom. So, that is just our first reference. If we turn over to Tab C, we made a variation here. We said, "Right. Take the 5 per cent starting point as the year before Decision". We said, "Right, we will not disagree with you on Step 1 - the year of the Decision. But, then we will go for applying at 0.75 per cent MDT to total worldwide turnover before the Decision, but excluding the turnover which is attributable to the companies acquired since 2004". You recall that is the graph that we have just looked at - a big increase from £742 million to £1.4 billion. That brings one down to a figure of 5.9 fixed penalty compared with the 11.1.

THE CHAIRMAN: There is a series of these tables, dealing with various potential adjustments.

MR. SWIFT: There is a series of them, yes. There are various different co-ordinates. In other words, if you have to go out to the individual circumstances of this company as at the time of the Decision and you look at what happened to it, this is what you would have found. Now, the OFT has had this information before it - certainly since the time we put in the Notice of Application Yet, it says in para. 24 of the skeleton, "We have done nothing". We are here, trying to help the Tribunal. Those are choices that are capable of being carried out by the OFT when it embarks on a policy that is capable, when using a blunt instrument, of having these disproportionate effects.

Those are our submissions - that the Tribunal should revoke the Decision; that it has sufficient information before it to enable it to arrive at a just and proportionate decision in this case. That would be consistent also with the jurisprudence of this Tribunal. Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRMAN: Just one point from me, Mr. Swift. When you say, "Well, they should have addressed their minds before Step 3 to say, 'Well, we have got to £1.8 million, or whatever.

Is that enough to be a deterrent without having to do anything at Step 3?'", how do they decide? What would they look at to decide whether that is enough of a deterrent, other than what proportion of the total turnover of the group it comprises? Do they have to ask Galliford Try, you know, "Are you really shocked by what has happened," You have promised not to do it again". How do you decide whether a particular amount of fine is likely to operate as a deterrent? Do they have to try and see whether the company really does appreciate the seriousness of what it had done? Or what? When you say they should have turned their mind to it, what kind of factors should they turn their mind to?

MR. SWIFT: First of all, I think you would look back at the Guidance and you would look at all those matters that you do take into account under Step 3. You approach it in a qualitative way. It could be to do with - as Mr. Mather was pointing out - "Has there been a substantial benefit from this infringement? Should we be doing something? Has there been something in the behaviour of the company? " You can go through a whole series of qualitative assessments. If you want to combine a qualitative with a quantitative assessment, then you do what we have suggested could have been done in this case. You get to a figure using a quantitative assessment, but then, using your judgment you say - and this is a question of judgment - "How can it seriously be said that we need to impose a fine of £11 million when the level is so arbitrary having regard to our own processes? Let us maybe do some cutting. Let us do some different co-ordinates". Then the judgment would be, let us say, applying one of our co-ordinates that we come to a fine of £4 million. Then it is a question of judgment. Then Galliford Try would have to say that in its view in some way it is disproportionate, just as the Tribunal would have to form a view as to what is proportionate. The Tribunal is, itself, also left in a very difficult position. As the Tribunal has said, "We are not bound by the Guidance. It is quite clear from the statute that we have got our own minds, as an impartial Tribunal, and that is enjoined on us through the Human Rights Act". These things are by nature difficult, but they do not yield either to a toss of the coin, they do not yield naturally to the use of a mathematical formula. They do yield to a serious analysis of factual matters because that is the only way in which you can get through a case by case approach, which I go back to. This is 2.5. That, admittedly, is Step 1. Then, of course, we must always remember that we have Step 4 which has to come into consideration.

THE CHAIRMAN: Let us not re-open other things. I have asked a question and I think you have answered it.

MR. SWIFT: I am not a regulator. I am just saying that if I had been in that position, hypothetically, I think I would have been asking the OFT team, "What are the next steps?

Are there any steps other than going immediately to the MDT of 0.75 percent?" I would have expected to get an answer, "Yes, there are other steps" and if they had said, "No", I would want to know why not.

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

MR. UNTERHALTER: Madam, there is one matter in respect of which we would need to take an instruction just a propos the limitation point and how the calculation would take place in the event that Infringement 42 was to be found to be subject to limitation, but I can do that after my address if that would be more convenient.

THE CHAIRMAN: Yes. Thank you.

MR. UNTERHALTER: There is one central theme which runs through the submissions which have been made by the appellant - that is, that the accretion of turnover which has occurred since the infringement has taken place is a matter that must register in the different considerations by which the penalty is determined, and, consequently, the challenges that are made seek to grapple with that issue and seek to make alterations to the scheme of the Guidance in accordance with diminishing the effect of that accretion, and, consequently the submissions that are made about the year of turnover and the manner in which the MDT operates.

We will make submissions essentially in three areas. The first is to deal with the question of limitation which, in itself, is a somewhat discrete matter and does not directly engage this concern about turnover accretion. The second is to consider the year of turnover and how properly the Guidance is to be interpreted. In our submission there is a question of interpretation that is a legal matter which must be considered. The outcome of that interpretation is then applicable and the OFT is bound by the correct interpretation of the Guidance, and we will endeavour to show you why it is that the submissions which are made as to how a year that is related to the infringement in respect of Step 1 is not a correct reading of the Guidance and, consequence, upon a proper reading there is coherent scheme and we will suggest that that is the proper way in which the Guidance should be understood and hence applied and the OFT did so.

The third area concerns the critique that is made of the MDT. Like many appellants it is said that this is too mechanistic in its application and fails to take account of the particularities of this appellant, and consequently consistency is not a sufficient virtue. Indeed, it leads to unequal treatment because what is required at the end of the day is individual justice, not some systemic scheme that is thought to be fair, but ultimately does not realise justice. That is the fundamental point that is made in respect of the MDT. We will submit in that regard

that having regard to what the MDT is intended to achieve - which is that it is concerned with deterrence and it is a forward-looking measure and is consequentialist in its considerations - there is nothing about either the manner by which the MDT is constructed, nor its application to undertakings of this kind, that is in any measure either unfair or visits any unequal treatment because there is a reasoned consideration that lies behind the MDT policy - that is, that the size of an undertaking at the time that the decision is made is the relevant consideration for determining economic power, and in decisions concerning deterrence it is economic power on a forward-looking basis that is relevant to securing the objectives of deterrence. I will expand upon that submission to make it clear that there is a justification. It is not a mechanistic formula that is just applied by rote. Its construction is tailored to this case and with a particular purpose in mind which seeks to treat undertakings in an equal way - not without regard to their individual circumstances, but with regard to what was engaged in by way of the infringements in this case and how they are situated, one against the other in respect of these infringements.

If I might then return to the first topic, which is the question of limitation? In our submission the proper approach to this question is to begin my understanding and interpreting what the power is that is conferred upon the OFT and we would ask, if you would, to have regard to the well known provision in s.36(1) of the Competition Act, which says:

> "On making a decision that an agreement has infringed the Chapter I prohibition the [OFT] may require an undertaking which is a party to the agreement to pay [the OFT] a penalty in respect of the infringement."

It is a discretionary power that is confirmed in those terms by this provision in the statute upon the OFT. It is subject to certain limitations and among the important limitations that have been considered in these proceedings, include the cap that is reflected at s.36(8) and equally the requirement that the Guidance must be observed which is treated of in s.38. But these then hedge about by statutory design the power that is granted by way of a discretion to impose an appropriate penalty. There is nothing in this legislative scheme which says that the power, which is a public power is limited in some way by way of limitation provisions and here would draw and have sought to draw in our skeleton a fundamental distinction between private law proceedings where limitation questions arise and the exercise of public powers where they are granted in a plenary form, subject to their proper understanding by way of the limitations upon the power, as they are reflected in the Statute which gives rise to those powers. Therefore, this is not a case in which there is a lacuna, an

absence of regulation, the canvas – as our learned friends would have it – has not been filled. It has been filled, there is a power, it is not restricted as to when it may be imposed. It is restricted in other respects but Parliament has chosen not to put in a limitation, that is the ambit and scope of the power that has been determined. So we are just simply not correct as a matter of statutory interpretation to say: "This is a matter where Parliament has said 'we are leaving over for some judgment at another time and in another way the question as to whether or not limitation will apply" and then that can be added on at an appropriate time and in an appropriate way. No, the power has been determined in plenary terms, and that is the proper interpretation of the power.

If that submission is correct, and we submit it is, then everything flows from this in respect of how that matter is then properly treated by way of its relationship to the limitation provisions which is under the regulation in European law, because then quite plainly this is a relevant difference in the appropriate sense, and s.16 defines these matters, and there is really very little more to be said about the proposition that is offered, because if the power is properly construed, and the characterisation error which we, with respect, would say our learned friends had made on the score is recognised that it is not a problem of a lacuna, it is a problem of not properly understanding the power and the relevant difference is clear, s.60 applies and the question of limitation simply falls away.

So, on our submission, there can really be no scope for the notion that the provisions in the European regulation are of application in these circumstances at all, and it would be an oddity, as we have also sought to indicate in our skeleton, where in many circumstances – including in the Enterprise Act in respect of the criminal provisions – there are no limitation provisions that apply, that is a matter of domestic policy, and the decision has been made. It is a difference, it marks a difference, and that difference is relevant within the meaning of s.60. So we do submit on that score that there is little to be said for this proposition.

We would also submit that there is no authority that we can find that would suggest that limitation is a required incident of the principle of legal certainty. It may be an application of that principle, but it is not required that one must have a scheme that necessarily engages some aspect of limitation and it would be an oddity if it were the case because these go to fundamental questions of the policy, choice, particularly where we are here dealing with a penalty regime, and not with some regime of civil liability or private law liability which entails rather different considerations.

There is one final submission that we would make on the score of leniency, and it is this – and if I might ask you to turn to the notice of appeal bundle, because we got the core bundle

just before the proceedings and have not been able to add it to this – in the notice of appeal bundle 1, and it is under tab 18, which is where the Regulation 1/2003 appears, and the limitation period is dealt with under Article 25, and if we could direct you to the provisions under Article 25:

> "Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing …"

- and we would emphasise these words –

> "… or repeated infringements, time shall begin to run on the day on which the infringement ceases."

So the regulation distinguishes between a situation where there is an infringement which is committed where it shall begin to run on the day on which the infringement is committed, and other circumstances where one has either continuing infringement, or repeated infringement, and then there is a different date that applies for the purposes of the running of the period of limitation.

We make a very simple submission as far as that is concerned. In respect of this appellant it is perfectly clear that it is engaged in repeated infringements, the last of which occurred in 2004 and you can see those set out in the decision, but perhaps most conveniently it is reflected at p.1902 of the decision, where one can see the date of the three infringements, and the date of each infringement, the last of which occurred on 23rd March 2004.

In a world in which the regulation were to apply this appellant would not be able to take advantage of its provisions and consequently we submit the limitation argument can go no further.

If I might then proceed to deal with the next topic, which concerns the year of turnover. Our learned friend has said that there are perhaps, on substantive grounds different considerations which could apply. For the purposes of Step 1 he says that it is important that there should be a link between the infringement and the judgment of seriousness and concedes that for the purposes of deterrence it is Step 3 that is a forward looking consideration and so might be more appropriately considered as at the date of the decision, but says that ultimately there is no reason to move away from the manner in which these matters were considered prior to 2004 and at least in circumstances where you have an appellant, such as his client, in those circumstances where there is an accretion of turnover, you should apply the Guidance in a way which is sensitive to those facts.

We start with this submission, which is that the guidance has a meaning and the OFT has interpreted it, and it has interpreted it and it has interpreted it in a fashion which sought to

give a consistent interpretation of the different steps of the Guidance, in respect of the language of year of turnover.

That interpretation is either right or wrong, but if it is right then that is the manner in which it must be applied. It seems difficult to understand that one could, on some basis or other simply say because there is an accretion of turnover that has arisen in a particular case that is a reason to deviate from the Guidance. It raises one systemic question around these determinations of what is the relevant year?

In determining any rule, whether it be a speed limit or whatever, there are always winners and losers in respect of determining a particular line that is drawn. As one looks at the array of cases in this matter there are some instances where there is a diminution in turnover after the year of infringement. It may well be said that that is beneficial, they get some advantage from the fact that they began to exit certain markets; so be it, that is simply a consequence of drawing a line and determining that in respect of that line there will be, for certain reasons, some who gain and some who lose simply by reason of the variations in their business practices which carry on and are decided for reasons which have nothing to do with the manner in which a regime of penalties is going to be imposed. But one has to have a rule and the rule that has been decided upon within the scheme of the Guidance is, in our submission, a perfectly rational and justifiable one and the interpretation that is offered is consistent. Perhaps let me explain then why we say that is ----

THE CHAIRMAN: Just one factual point, I know the Step 3 stage of the MDT is not covered in the Guidance in so many words, and so it is not said in the Guidance, as I understand it, whether you are using the year of infringement or the year of decision. But do you know whether pre-2004 was the year of the infringement used in the Step 3 calculation?

MR. UNTERHALTER: I will take an instruction. As I understand it before 2004 it was consistently applied in respect of the year of infringement. That is my understanding, if I am wrong I am sure I will be corrected.

If we could then explain why the OFT has the interpretation that it does of its Guidance. The first deals with the question of understanding the Guidance within the statutory scheme because the Guidance flows from the Competition Act and the scheme that arises from the Competition Act. Critical to the Act, and we have already touched upon this for the purposes of the limitation argument, but in respect of s.36 and s.38 one has the power to impose the penalty and one has the statutory cap under 36(8) and that is, as a matter of statute, determined in relation to the turnover threshold, which is expressly referred to in 38(8). So the statutory universe within which penalties may permissibly be determined

arises as a result of the Statute and in respect of the cap, which is the maximum limit, that is determined by reference to the turnover order, and the turnover order in 2004 was changed so as to reflect the year immediately prior to the decision.

So the change from infringement to decision as the relevant year was a function of a determination made through the operation of the Statute, in relation to the turnover order that had been made. So the turnover order then read in terms: "applicable turnover for the business year preceding the date on which the decision of the OFT is taken, or if figures are not available for that business year the one immediately preceding it." So the decision year was then adopted as the relevant standard for the cap at the top.

It has been said that that just deals with the ability to pay, but that is in our submission absolutely not the case as the matter of the clear language of the Guidance itself. If I could ask you to turn up the Guidance, which is in the core bundle, and if I could take you to step 5, which is para. 2.17 of the Guidance. It says:

"The final amount of the penalty calculated …"

- and these are the words which we would say are important –

> "… calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the OFT is taken …"

So 2.17 does two things. It reflects what is required by way of the provisions of the Statute read with the turnover order, but the critical language is calculated according to the method set out above, in other words the method which includes Step 1, Step 2 and Step 4. In our submission, that is a very clear undertaking that this cap does not just exist in order to ensure that undertakings are able to pay. What it is saying is taking all the factors which are reflected in the Step by Step methodology outlined before you will reach a figure, but the one thing is that taking all of those considerations into account it cannot be more than a certain threshold level, which is determined by reference to the year of decision, not the year of infringement.

It would be an oddity in our submission when one is contemplating the steps by which you move towards a potential cap or maximum, in other words within the universe constituted by this cap that you would start working with different concepts of turnover within that scheme, because the clear language is to frame the arrangement on the basis of a year of decision rather than a year of infringement.

Secondly, we say that in respect of the Steps themselves, and what underpins each of the Steps, we would again ask you to consider the language that is referred to because in our submission even on a textual interpretation of what is contained here, at Step 1 – and if I could ask you to have regard to para. 2.3 it says;

"The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to …" and then there are two considerations, namely: "the seriousness of the infringement" and "the relevant turnover of the undertaking."

In our submission, seriousness at Step 1 is certainly determined by reference to all the questions of how the infringement is situation within the relevant market has been suggested, but that is determined by a decision as to what relevant percentage is going to apply on the scale as between 0 and 10 per cent, which is the scale that is permissible, and then one determines where one is going to decide on that relevant percentage; that deals with the consideration of seriousness.

The relevant turnover does not need to have any necessary connection to the infringement, and indeed the two considerations are separated for the purposes of Step 1. The seriousness of the infringement is its own consideration and that is what the 5 per cent represents.

There is then the movement through to Step 3. As far as Step 3 is concerned, there seems to be common ground that this is plainly a forward looking consideration, and we shall make some further submissions as far as that is concerned.

It would be perfectly natural, we would submit, that in the context of a forward looking consideration that one would be concerned to impress upon the undertaking as it is constituted at the time that the decision is taken, that there must be adequate deterrence, and that is the point of principle which is relevant to how one effects deterrence, which is once deterrence is forward looking what you are trying to do is to influence this entity as it is constituted. You are not trying to influence the undertaking in some earlier incarnation of its existence, you are saying that given your size, how are we going to make a sufficient impression upon this undertaking so that it will influence its future conduct. This is where the considerations of seriousness, and the considerations of deterrent are not quite clearly the same thing because deterrence is a consequentialist or instrumentalist policy. It is saying we are going to use the undertaking in order to achieve two things, namely we are going to deter this undertaking, specific deterrence, and generally we are going to impress upon those who would look at the outcome of this decision, the risks that attach to engaging in this kind of conduct, and it must be done relative to the size and economic

power of the undertaking you are seeking to influence in these ways, and as a reminder to those who observe these matters, that this is a matter that requires action and that provides the requisite incentives that are necessary for this purpose.

So we do submit that if one is looking at Step 3 there is a very close and obvious conceptual linkage between how the undertaking is constituted, and the time of the decision because that is the entity you are seeking to influence.

I might refer, though I will not take you to the passages but just give you the references to them, in the *Degussa* case in the general court, it is in vol. 8 of the authorities under tab 99. There are a number of passages which deal with the question of deterrence, and in that context it refers to the relevant time to consider these matters is at the time that the fine is imposed and particularly if one has regard to para. 285 the following is said:

> "It follows that those resources must be valued so as properly to achieve the objective of deterrence in accordance with the principle of proportionality at the time when the fine is imposed."

That makes eminent good sense for the reasons that we have sought to elaborate upon.

The next interpretive point is that the language in the Guidance speaks about the last business year, that is the language that is reflected in 2.17. There it is given a particular meaning and interpretation and that is made clear by the second sentence in 2.17, but if one just steps back for a moment and says "If one says of an undertaking we want your turnover for the last business year", what is one referring to? One is almost always naturally, as a matter of ordinary language, saying: "Your most recent turnover figures", so as a matter of ordinary language t hat would seem to be what is indicated simply by the language of "last business year".

For the purposes of 2.17 it is made clear beyond question what is being referred to, which is the year prior to the decision. When the like term is then reflected at Step 1 it is hard to suggest that it should now bear a different meaning when the identical language is used.

THE CHAIRMAN: Well, yes, but if you look at 2.7, which is what we are talking about here, what does it mean in that context, and that defines the term "relevant turnover" which is printed in bold, presumably because it is a defined term, and we see it then involved in 2.3 and in 2.8.

MR. UNTERHALTER: Yes.

THE CHAIRMAN: But you do not use that bold term "relevant turnover" then in 2.17, and it also strikes me as strange that you say in 2.8 "The starting point may not in any event exceed 10 per cent of the relevant turnover for the undertaking", whereas in fact if you are

right that the relevant turnover is the same as in 2.17 or 2.18 it could not possibly exceed that because that is the cap.

MR. UNTERHALTER: It is not that the concept of relevant turnover is the same, or the turnover, it is clear that one is moving from a relevant turnover standard at Step 5. It is clear that there is a move in the concept of turnover. The question is it is the language of the last business year of that turnover, and that language is the same in both 2.7 and 2.17. So we are not wanting to suggest that relevant turnover does not have a particular meaning in Step 1, it does. The issue is when you are working up from Step 1, it would be a great oddity, in our submission, given that you are trying to work to an ultimate cap that was bounded by a total turnover standard in respect of the last business year that one would apply a different meaning for "business year" at Step 1 as opposed to the position at Step 5, because the language is the same though of course the concept of turnover is different in the two instances.

THE CHAIRMAN: The point has been made also that similar wording was used "last financial year" was used previously and yet it did mean "the year of infringement" in the pre-2004 version of the Guide.

MR. UNTERHALTER: That is so, but the reason that it was so understood was precisely because the statutory capping mechanism was also understood by reference to the year of infringement, rather than the year of decision so in effect what is happening is the OFT is interpreting, and says it should be interpreted in an entirely consistent fashion where, in the prior turnover order you had a different formulation, which worked with the year of infringement, rather than a year of decision, then there was a different structure and a different interpretation gave rise to a different meaning in respect of the financial year. So in our submission were you have got the same language that is being used then you should apply it in a consistent way. What our learned friends must be submitting is that where you see it in 2.7 the same language of last business year, it here carries different meaning and we submit that there is not only no reason to come to that conclusion but, as a matter of ordinary interpretation there is every reason to come to a different conclusion which is that the same terms should be interpreted in the same way where they appear in a Statute. In our submission that is the correct basis upon which this should be understood.

THE CHAIRMAN: Just one final point on that, at para. 1.16 – it may be that you are coming to this in relation to the comparison with how the Commission does it – there it says that in most cases the penalty in respect of an infringement will be the same at the EC level as it is

at the UK level because the OFT will calculate the penalty according to the same steps as set out in Part 2.

` "However, in some cases the penalties for infringement of an EC prohibition and its equivalent UK prohibition will differ, such as where the infringing agreement or conduct commenced before 1 March."

That seems to be implying that mostly the penalties will end up being the same because you are applying the same steps as the EC Commission, but in fact, if you are right that there is this difference between your practice and the EC Commission's practice then will not the penalty be quite different from what the Commission would apply?

MR. UNTERHALTER: Bear with me one moment. (After a pause) I want, if I may to consider that point and come back to it. There is one matter I just wanted to raise, but it does seem – perhaps I should make firstly this submission and then there is one other to make, but I just want, if I may, to return to it.

Under the European Guidelines, you do have a different structure, but it is not one which is comparable in relevant respects because it works with entirely different language for the purposes of the starting point, so the significant difference that exists in respect of the European regulation is that the starting point figure is calculated, it is true, in respect of the date of infringement, but under a completely different formulation of the manner in which one looks at sales, and there is a statutory definition of a very different kind that appears for that purpose. In our submission it is not that there is a similar set of language that is utilised, or there is conceptual continuity between the two. There is actually considerable discontinuity in respect of Step 1. Thereafter the two systems are very much in keeping with each other, both in respect of deterrent and in respect of the final step because the turnover order which was introduced in 2004 was to bring the regime here into conformity with the position under the regulation in Europe. So, the introduction, the problem, as it were, all arose because it was necessary as a result of the turnover order changing and the movement to the year of Decision rather than the year of infringement – that move, as the result of conformity reasons – then required that the Guidance had to be interpreted in the light of this change which was in conformity with not a move in Europe, but a change to the turnover order that thereby required a move from the date of infringement to the date of decision.

So, in our submission, that provision allows for differences, and there are quite significant differences in respect of the very formulations that take place in what is the equivalent of Step 1 under the European regulation.

It is pointed out to me that the distinction that is in fact being drawn is between the OFT's fining policy when there has been a contravention of Article 81, and the OFT's approach when there has been an infringement of Chapter I. That is the distinction that is being drawn. It is not that there is going to be a similarity of approach between the OFT's approach and that of the Commission. In other words, it is a different distinction that is being drawn.

THE CHAIRMAN: I do not quite understand that point. I will think about it.

MR. UNTERHALTER: I will perhaps return to it if it be necessary. As to the central point, we do submit that the coherent standard, which is what fundamentally we submit is necessary in order to have a coherent step by step approach to the question of how one treats turnover ending up in a statutory cap does require consistent treatment of the same language that is used at every stage. That is fundamental to what we say is required. It can also be justified exactly as we have indicated on a substantive basis.

There is just one other point concerning this matter as to the change that was effected. The OFT is criticised on the basis that if there was going to be a change to the approach that has taken us to the year of turnover, or, indeed, in enunciating the MDT, well, there had to have been some consultative process that took place as far as that is concerned. Could we refer you in that regard to the *Dansk* case, which was approved in the *Archer Daniels* decision? It is at Volume 7, under Tab 97. (After a pause): I think that is the reference to Archer *Daniels*. The relevant passages begin at para. 227 where it says,

> "As already stated at para. 169 of this judgment in connection with the pleas alleging breach of the principle of protection of legitimate expectations, it follows from the case law of the court that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated by Regulation No. 17 .. It follows, as already held at para. 173 of this judgment, that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines. Consequently, the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of the fines in imposing fines in individual decisions

> but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the Guidelines".

The basic proposition is this: that this constitutes guidance - guidance and change. There must be an allowance that it may change and that no legitimate expectation arises in respect of these changes of guidance.

In summary, therefore, as far as this is concerned, we do submit that there is a proper interpretation. It is the one that we have suggested. It was applied and was properly applied and the complaints that there was a change that came about as a result of the Guidance that was published in 2004 does not give rise to some legitimate expectation that every incident of that Guidance must then be subject to some further process of consultation. Indeed, it has been, as we have said in the papers, consistently applied since 2004 in exactly the manner that we have indicated.

Since time begins to run against me, may I just come on to the question of the MDT and some submissions as far as that is concerned? The criticism that is offered, as I have indicated, is that it is said to be mechanical and simply of invariable application by way of a formula rather than by reference to the specific circumstances of the appellant here concerned.

If one has regard to the MDT and the manner in which it is explained - and perhaps I can take you to the Decision at VI, para. 209 where one sees the first account that is given of why MDT arises - it indicates and sets up the problem in paras. VI.209.

> "For some parties, the financial penalty calculated at the end of Step 2 of the calculation represents a relatively low proportion of the undertaking's total turnover, as a consequence of that party's relevant turnover being a low proportion of its total turnover because it may have significant activities in other markets. In such case, the OFT considers that the penalty figure reached at the end of Step 2 is unlikely to represent a significant sum for that party, and it will therefore be necessary to increase the party's penalty at Step 3 to arrive at a sum that represents, for that party, a sufficient deterrent ..."

That is being interpreted to suggest that there is simply some mathematical notion of proportionality or proportions rather than proportionality that is being applied. But, that misunderstands what MDT is seeking to do. Exactly as was said in the *Musique Francaise* case which my learned friend took you to - and it is the same passage but it underscores the very point that underpins MDT - at para. 121, you do not need you to turn it up, but if I may just read it to you,

> "It follows that on the one hand it is permissible for the purpose of fixing the fine to have regard both to the total turnover of the undertaking which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power".

So, turnover stands for approximately. It stands for the notion of economic power.

The issue is: Is there anything problematic about the notion that because an undertaking is relatively large in comparison to other undertakings that have engaged in this activity that that is an impermissible basis for applying a penalty in respect of deterrence? We submit quite the contrary - it is a reasoned and perfectly justifiable basis to say that an undertaking that is relatively small should not bear the same penalty in the interests of deterrence that a very large undertaking that operates in many markets of considerable size should have to bear so as to impress upon those charged with the commercial future of that company that it will not repeat this kind of an infringement.

If one looks at the other position, if you take - and it has arisen for some appellants in these proceedings - they are relatively small or medium-size construction undertakings that have got a disproportionate amount of their turnover generated in the very narrow, localised markets that were defined for the purposes of this decision. Their complaint is that in fact because they have got so much turnover in the relevant markets, that in fact they are being unduly exposed to harsh treatment.

So, what the MDT is seeking to do is to measure up the relationship between the economic size and, hence, power of different undertakings in order to bring them into a relationship with one another so as to ensure that when a fine is imposed it is imposed in relation to the impact it is intended proportionately to have on the undertaking concerned. In doing so there is a no injustice that is thereby done. It is simply ensuring that deterrence is achieved for each undertaking relative to its size. That consideration, we say, is a completely justifiable one. It is not done, as was suggested, out of pure reasons of consistency. It is done because economic power is the relevant consideration in determining how deterrence should operate. So, we say there is a principled basis upon which this operates. It is not the case that we are submitting - and nor does the decision in respect of MDT suggest - that the 15 per cent formula is of invariable application to every single market and to every single case. It may not be. The reason that it was adopted in this case was that similar levels were applied in the roofing cases as is reflected in the *Makers*' decision and because, as is also said, it appears that the construction industry here (and in allied markets) had not learnt

anything from what had happened in roofing, and that indeed a higher level of MDT could permissibly have been applied but was not.

So, all that is being said is that size in this relevant dimension is the consideration and why should there be a deviation from it.

Now, Galliford's explanation is to say, "But that is because our turnover increased since the date of infringement". But, if one accepts - and we say this is clear - that it is a forward-looking consideration which is intended to affect you at the time as you are constituted when the decision is made, that is of no moment. You are as big as you have become for whatever set of reasons. That is why you must be dealt with in the manner that is proportionate to your overall size relative to other entities. In our submission, that is a perfectly justifiable approach to the matter.

Finally in respect of *Makers*, it is not the case in our submission that *Makers* is simply a case where a particular 15 per cent of total turnover was approved for the purposes of that case. It was the methodology that was approved. Perhaps lastly, and very briefly, I could ask you to turn up Makers in Volume 4, Tab 57. The relevant passages are to be found from para. 121 onwards. I certainly will not read it to you. Effectively, as one sees there, there is a reproduction of the different steps that have been taken, and how the OFT arrived at the figures that it did.

However, the relevance of the treatment here is perhaps best captured in para. 134 where the following is said,

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

So, what my learned friend correctly pointed to was that the OFT had failed to give a proper account of how it had done the uplift that it had effected, but once it had been explained what Makers stands for in our submission is that this is a perfectly acceptable methodology to be applied for all the reasons that we have sought to further explain in these proceedings.

Finally, in our submission, there is nothing intrinsically problematic about MDT. It exists for a perfectly rational reason. The complaint that more turnover has arisen by the very acquisition rather than organic growth is not a relevant difference. Firms grow for all sorts of reasons. But, in the application of the MDT by reason of deterrence there is a

consideration as to the undertaking, as it is constituted, and why it is applied at that time and for that purpose which is completely justifiable. The effort to pull out examples which are said to be somehow differentiating or where it is said that this appellant was treated more harshly than others is not understood by us.

In respect of the Balfour Beatty case it is simply confusing how you understand the undertaking with what the relevance is of subsequent accretions of turnover which is a completely different consideration and in the Decision these were consistently applied in each instance. So, we do not see those as relevant differences. If there is any sense in which some other party was treated with some leniency, which the appellant does not think was warranted, it does not alter the justice and appropriateness of the penalty that was applied to this appellant. It does not follow that because someone else seems to have got off with something more lightly by reason of leniency that you are entitled to less. You are not. you have got your just desserts, and in our submission that is all that is required.

So, we do submit on the various grounds that they should be dismissed and that the appeal as a whole should be dismissed. I need to take an instruction just in respect of the limitation issue, but I can do it at whatever time suits the Tribunal.

THE CHAIRMAN: Yes. Just remind me of that point?

MR. UNTERHALTER: It is the point that if the limitation argument were to succeed in respect of Infringement 42, what would the calculus be? I think I understand the position, but I will just check and confirm that it is so. It is simply this: what would happen is that Infringement 42 would fall out of account. One would look to the next highest infringement at Step 1. One would then apply the MDT to that infringement and you would add on the further infringement, unaffected by the limitation problem, and the sum of those would then amount to the penalty. That, in concept, is what will happen, but if anything turns on the particular figures and calculations we can perhaps provide that to the Tribunal and to our learned friends.

THE CHAIRMAN: Thank you very much.

MR. MATHER: Just one question, if I might, Mr. Unterhalter. I thought I heard Mr. Swift, earlier, opine on the way in which the Tribunal itself in its Decision should treat the guidelines. I think I heard him say that we were not confined by those. I just wondered if you had any observations on that point.

MR. UNTERHALTER: It goes to the question as to the nature of your jurisdiction and as to which there is a good deal of common ground between the parties, which is that your jurisdiction is to determine what the correct outcome is in this case, but as the various

decisions have made plain, since the OFT is bound by the Guidance, the Tribunal is not bound by the Guidance. But, that does not mean that in trying to identify what the error is, that you would not have regard - and, indeed, the entire structure of the debate is around what the relationship is between the Guidance, properly interpreted and its application. Therefore, we do submit that although you are, ultimately, yourselves, not bound by the guidance, in trying to identify the error that was made, the Guidance is the necessary framework in which one will consider that. It really relates to two issues. The first is that it would be, with respect, an oddity if the Tribunal were going to seek to re-engineer the entire Guidance. I do not think anyone has ever thought that. The most that has been said on that score is that the interpretations and decisions that follow in these sorts of proceedings will be added on to our understanding of how the Guidance should be applied. The second is this: that the decision as to where the Office went wrong, if it did go wrong at all, is not based upon some subjective intuitive judgment that, namely: "We think it is too much. We cannot say why it is too much, we just say it is too much" , the key for the Office has been to try and develop something which (if one thinks of the analogies to criminal law) is to try and subject fining and a penalty process to some scheme of rational determination and proper and consistent application as opposed to a view which would just say, "We take each case as it comes and we put our finger in the wind. We get some sense of it and then make a decision". That, we would suggest, would be a retrograde, and ultimately unhelpful approach. So, in direct answer to the question, you are not bound by the Guidance, but it is a framework which, unless it has been wrongly understood in some form or another and/or unless there is some view that there is a requirement that it must be departed from in a particular case and we say this is not such a case, then that would be the natural scheme within which one would situate the decision. But, of course, there can be different reasons why you might, in a particular case say either that the Guidance was not correctly applied or that even if it was correctly applied the OFT had reason to deviate in this particular case from the guidance. Those are, of course, all available outcomes that the Tribunal could come to. We would say that this is not such a case.

THE CHAIRMAN: Thank you very much, Mr. Unterhalter. Mr. Swift?

MR. SWIFT: Would it be possible to have two minutes?

(Short break)

MR. UNTERHALTER: I wonder whether I might detain you for just thirty seconds to offer a clarification of what I was trying to convey rather ineffectively in respect of para. 116 of the Guidance? In our submission, what that paragraph is intended to say is that in most cases

the penalty imposed - and if you were to notionally put in at that point - 'by the OFT' in respect of an infringement of an EC provision, it would be the same as the penalty imposed in respect of an infringement of a UK prohibition. So, it is governing its own conduct if it should choose to proceed in respect of an Article 81 prohibition or do so under Chapter I. So, what it is really saying is that we will mostly get the same outcome, but it is all about governing its own domestic penalty regime - not saying that it is going to be bringing itself into alignment with the position under the European regulation.

So, our submission is simply that it is of domestic application to the conduct of the OFT in respect of the infringements it may pursue. It is not seeking to indicate anything about parity with European treatment. Those are our submissions.

THE CHAIRMAN: So, in the previous paragraph, where it refers to 'the undertaking will not be penalised twice' it is not then talking about the point, "Well, if you have had a fine imposed by the EC Commission, then you will not have a fine imposed domestically". It is saying, "In our Decision we will not double up the fine because we are finding that you have infringed both prohibitions."

MR. UNTERHALTER: Yes. It is entirely of domestic application.

THE CHAIRMAN: Thank you very much. Mr. Swift?

MR. SWIFT: With the permission of the Tribunal we are going to split the reply. Miss Smith will take the limitation issue.

MISS SMITH: Madam Chairman, members of the Tribunal, I would just like to address the OFT's new argument - it does not appear in their defence or their skeleton - to the effect that Galliford Try's arguments on limitation are defeated by Article 25, para. 2 of Regulation 1/2003. If we could go back to Regulation 1/2003 which is at Tab 18 of the first appeal bundle you will find Article 2 at p.394. We say on a plain reading of Article 25.2 it does not apply to situations such as the present case where there are three distinct infringements. It applies to continuing single infringements or to repeated infringements which, together, are to be treated as one single, continuous infringement. So, for example, where there is a cartel within which there are a number of agreements - on, for example, what price should be fixed each year where the cartel goes on for a number of years - each of those agreements may be treated as a separate infringement, but you will be aware that there is case law to the effect that such conduct may be treated as one single, continuous infringement. Article 25.2 says that in those type of cases time will begin to run from the date on which that single, continuous infringement ends. If you look at the language of Article 25.2 it is clear, we say.

"Time shall begin to run on the day on which the infringement [singular] is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement [singular] ceases".

So, it is talking about one single, continuous infringement which goes on for a period of time and may involve continuing or repeated infringements within that one single infringement. Time in that case starts to run from the end of that period.

In the present case the OFT specifically found that there was no single, continuous infringement. Each of the infringements was distinct and separate. I can take you to it, if you wish, but those findings are contained in paras. VI-14, VI-15 and VI-19 of the Decision.

Unless I can assist you further, those are our submissions on that point.

THE CHAIRMAN: Thank you.

MR. SWIFT: Madam Chairman, just a couple of points in reply. Madam Chairman, you went to para. 1.16 of the Guidance and asked my learned friend, Mr. Unterhalter, some questions as to the penalties imposed in respect of an infringement of an EC prohibition being, in most cases, broadly the same as the penalty imposed in respect of an infringement of UK prohibition. This is reflecting, of course, the modernisation regulation - the expectation that the regulatory authorities would be coming together more in taking decisions of broadly the same type in respect of broadly the same infringement, which tends to support the view that the policies of the OFT, where it has a choice, assuming it does have a choice, should be more in line with the methods adopted by the EC Commission rather than going out completely on a limb on its own.

I think in respect of the cases which have been cited - *Dansk* or *Degussa* - in all cases there is no doubt that the principle of deterrence is important, but deterrence has to be linked with the other principle of proportionality. This is always a balancing judgment. What we are saying in the present case is that the OFT has gone for deterrence, but it has not considered deterrence in the light of the principle of proportionality. That is the defect. By quoting also the first part of *Musique Diffusion Francaise* Mr. Unterhalter has not reminded the Commission of the very important second part. Paragraph 121 of *Musique Diffusion Francaise* - which I am sure this Tribunal will come back to again - is in two parts. It is, on the one hand, and it is on the other. It is 'on the other' which is extremely important - that is, how much weight you give to the total group turnover, particularly in circumstances where the relevant turnover is a relatively small part. That is as important a part of *Musique Diffusion Francaise* as the first part, and it should not be forgotten. It is entirely consistent

with my point that a measured approach is required and the OFT has not applied a measured approach in this case. It has simply said, "You are as big as you have become". That is the message. "It does not matter how big you are or how small you are. You are as big as you have become. At that point, wherever you are, the fine hits."

Now, plainly, there has got to be, again, in the scheme of things, a recognition that fines are being imposed on an undertaking and you look at that undertaking at the time of that decision. But, you are not blind to the manner in which the undertaking has got to that decision in the time between the infringement and the decision itself.

As to the OFT's statement - and it is an unfortunate statement, but they have made it - that in any application of policy there are going to be winners and losers. In my submission, for a regulatory authority to leave the Tribunal with that message is not the message I think they should be giving. It should not be a question of winners and losers. It should be a question of arriving at a just decision, in each case having regard to the facts of that case.

THE CHAIRMAN: Thank you very much. Thank you, everybody, for sticking to time. We have finished promptly.