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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1140/1/1/09
1141/1/1/09
1142/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 July 2010

Before:

THE HONOURABLE MR. JUSTICE ROTH
(Chairman)
MICHAEL DAVEY
DR.VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) HAYS PLC
(2) HAYS SPECIALIST RECRUITMENT LIMITED
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– and –

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED
(2) CDI CORP.

Appellants

– and –

OFFICE OF FAIR TRADING Respondent

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HEARING
DAY FOUR

APPEARANCES

Lord Pannick Q.C., Mr. Mark Brealey Q.C. and Mr. Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

Mr. Paul Harris (instructed by Addleshaw Goddard LLP) and Mr. Mark Clough Q.C. (of Addleshaw Goddard LLP) appeared on behalf of Eden Brown Ltd.

Ms Ronit Kreisberger (instructed by Blake Lapthorn) appeared on behalf of CDI AndersElite and CDI Corp.

Mr. David Unterhalter S.C. and Ms Maya Lester and Mr. Alan Bates and Mr. Gerard Rothschild (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE CHAIRMAN: Can I just record we have had the two notes from the Office of Fair Trading for which we are very grateful, thank you. Yes, Mr. Brealey?

MR. BREALEY: Thank you, Sir. Subject to your direction, we have agreed between the appellants, I am going to speak for 45 minutes on all the grounds of appeal in Hays' case, and then Mr. Harris.

THE CHAIRMAN: Yes.

MR. BREALEY: What we have done, to try and speed things up, hopefully it is the last thing we are going to hand up to you – essentially what we tried to do, I handed up at the beginning of the case the points of emphasis which set out our grounds, and what we have tried to do here is incorporate the relevant evidence-in-chief and in cross-examination as it applies to the various grounds of appeal. So in this bundle we have handed up you will see tab 1 – notice of appeal, net fees, etc., seriousness, compliance, and senior management. I hope it is all there, it is just hot off the press.

Could I start off with net fees, that is tab 1? Just to give the structure of this document, essentially the first seven pages follow broadly the submissions I made in opening. Then at annex A and B (annex A starts at p.8) we set out the evidence that we say applies to the type of services that we are providing, and then annex B (p.16) is the relevant financial metric.

If in the next 15 minutes I go through this document, as I am sure you are aware now, Sir, and Members of the Tribunal, we set out our case at p.2, the object of identifying relevant turnover. Then we have tried to set out what are the relevant activities – what actually is the service that is being provided. I summarise it at para. 6, but the argument that appears to be advanced by the OFT now, but one cannot really see it from the Decision, is that Hays provides the temporary workers' services to the client. In other words, there appear to be two bilateral relationships, and not what we call a triangular relationship. We will come on to the *Muscat* case that Mr. Harris handed up yesterday. There the Court of Appeal describes the service we are providing as a triangular relationship.

The thrust of the cross-examination of Mr. Venables and Mr. Herron was that the worker is providing a legal service to Hays and Hays is providing that service to the client. We say that is a fundamental misunderstanding. We do not see it in the decision but that was the thrust of the case put by the OFT before the Tribunal. We say that when one looks at all the evidence, including the contracts, it is simply a fundamental misunderstanding to say that we (Hays) are providing the services to the clients. Hays is a recruitment agency, it is placing workers. It is not, as I said in opening, liable for any negligence on the part of a temporary worker insofar as providing legal service or engineering services goes.

So Annex A to this note – I am obviously not going to read it out, but hopefully the Tribunal will find it helpful – at p. 8, we show the relevant evidence relating to the service provided. First, we have set out the evidence of the factual witnesses because it is material to see how the witnesses see themselves providing the services. It is relevant because according to Mr. Venables it would almost be unworkable if Hays were providing legal and engineering services, they do not have the infrastructure. That is the thrust of the evidence of Mr. Venables.

We then set out the evidence in Venables 2. We then set out the cross-examination of Mr. Venables, and he still maintains that he is placing a worker, and that worker is providing a service to the client.

At p.11 we set out the evidence of Mr. Shepperd and the Tribunal will note that this evidence is unchallenged. Then we set out also the evidence of Mr. Herron at Eden Brown and the cross-examination because he gave, as did Mr. Venables, a frank summary of how he perceived Eden Brown were providing services. So I do not obviously propose to go through that, that is for the Tribunal's note, but the thrust of that factual evidence is that the worker is providing the service to the client. The worker is providing the service to the client, and Hays is providing the worker. That is the factual evidence. Let us have a brief look at the standard terms and conditions to see whether the contracts fit in with the factual evidence. The Hays' standard terms with the client – some issue was made as to whether they were standard terms or whatever – the standard terms are at NCB 4, vol.2 and if we can go to that to look at the relevant clauses. This is all in the context that Hays is not providing the legal service to the client, or the engineering service to the client. Although on the note I have emphasised particular clauses it is worth just having a look at the "Terms of Business for the Introduction and Supply of Temporary Workers."

> "The parties hereby agree to the introduction and supply by the Employment Business to the Client of the temporary worker . . ."

The word "supply", when we look at the decision the OFT uses the word "supply" in the context of permanent workers and temporary workers, there is no difference, it is a supplier. Clause 1.2 is quite clear and, Sir, you referred to this during the cross-examination. Clause 1.2:

> "Subject to clause 4.6 below, the Assignment shall commence at the start of the first day on which the Temporary Worker, provides the Services to the Client".

That is not Hays, we submit, providing legal services to the client. Then we have "Charges", and I emphasise the word "commission".

Then we also emphasise clauses 9.1 and 9.2 over the page:

> "The Temporary Worker has been engaged by the Employment Business under a contract for services. The Temporary Worker is deemed to be under the supervision, direction and control of the Client …"

That is important, so not under the supervision, direction and control of Hays, and then:

> "The Client agrees to be responsible for all acts, errors and omissions of the Temporary Worker as though the Temporary Worker is an employee of the Client."

This is an indication of what we would call a triangular relationship. This is not simply two bilaterals, this is a triangular relationship, to use the words of the Court of Appeal in a case we will come on to in a moment.

When one looks at the terms of contract between Hays and the worker, 1107 of the same bundle. What I need to do is hand up the temporary assignment confirmation letter which goes with this, which I gave to Mr. Unterhalter at the start of the week. It has never been referred, but maybe that can be slotted behind exhibit 16.

THE CHAIRMAN: Shall we make that 1110A. (Same handed)

MR. BREALEY: Here it refers to "Assignment":

> "*Assignment* means the assignment of the Temporary Worker …"

THE CHAIRMAN: Where are you now? You are in the document?

MR. BREALEY: No, I am on the terms, I am on the contract, I will come on to the new document in a minute.

> "*Assignment* means the assignment of the Temporary Worker by the Employment Business to a Client …"

So the temporary worker is essentially being assigned to a client –

> "… in the relevant Assignment Confirmation Letter …"

THE CHAIRMAN: Is that what you have given us?

MR. BREALEY: That is what I have given you, and just while we are on it, you will see the third paragraph of that letter. I would imagine that the identities of the parties are confidential, but it does not really matter. You see what Hays is saying to the temporary worker in the third paragraph:

> "You must submit your time sheets and the client for whom you are working will authorise the time worked …"

One looks at the contract, and look at provision of services. Mr. Unterhalter and the OFT may, although they did not in the decision, rely on 2.2 and 2.3 where:

> "The Temporary Worker is under no obligation to accept any Assignment which may from time to time be offered to him or her by the Employment Business … but on acceptance of any Assignment he/she will supply his/her service to the Employment Business in order to enable it to supply services to the Client."

We say that, on a proper interpretation of that clause, all that is doing is saying that the temporary worker is making him or herself available – "available" – to Hays, so that Hays can make the temporary worker available to the client.

THE CHAIRMAN: What are the "services" that the temporary worker is supplying to Hays?

MR. BREALEY: "Services", I interpret this, will be, say, the legal services, so the worker is saying, "I will make my legal services available" ----

THE CHAIRMAN: Legal services?

MR. BREALEY: Or engineering services, or whatever services the temporary worker is a specialist in, and "I will make my services available so that you, Hays, can make them available" ----

THE CHAIRMAN: You say it is "will supply", so, "I will supply my engineering services to Hays"?

MR. BREALEY: Yes.

THE CHAIRMAN: So that Hays can supply them to the client – that is what it says, is it not?

MR. BREALEY: That is what it says, yes.

THE CHAIRMAN: So it is supplying the services to Hays, and Hays is then supplying those services to the client? That is what it says, is it not?

MR. BREALEY: Yes, and we say that is not how it should be read.

THE CHAIRMAN: How do you read it?

MR. BREALEY: Making the services available.

THE CHAIRMAN: That is not what it says. It is pretty plain English, is it not. As *Muscat* makes clear, you start by looking at the wording of the contract.

MR. BREALEY: Yes, and we say that when one looks at the contract as a whole, the three documents that I have given, which is the temporary assignment confirmation, these terms of assignment ----

THE CHAIRMAN: The temporary assignment confirmation is time sheets.

MR. BREALEY: On a proper interpretation of these three documents, is it the case that the temporary worker is providing plumbing services, legal services, engineering services to Hays, so that Hays can provide those very services to the client. We say that on a proper interpretation that is not the case. What is happening is that the temporary worker is

making his or her services available. It is a contract for services, entering into a contract for services and Hays is, in turn, making the temporary worker available to provide those services to the client.

THE CHAIRMAN: The second part is certainly correct – that is what Hays is doing to the client, they are making the services of that engineer or whatever available to the client. As between the engineer and Hays, if this means what it says the engineer is self-employed working under a contract for services, not a contract of employment, with Hays, so that Hays can then offer him out to their clients.

MR. BREALEY: Offer him out so that the worker ----

THE CHAIRMAN: The client gets the benefit.

MR. BREALEY: So the worker can provide the services to the client.

THE CHAIRMAN: That is what achieved. There is no doubt about that, that is common ground. Clearly the actual engineering work is being done for the client, it is not being done for Hays. I am not sure how that really helps us.

MR. BREALEY: It is not how the contract works. The contract does not work in the way suggested by the OFT in this case, though I do repeat that it does not make this case in its decision. The contract simply does not work as if Hays is responsible for providing the multitude of services that we saw in those 17 specialisms right at the beginning in my opening – accountancy, construction, legal. It is simply not passing those services on, it is making available the temporary worker so the temporary worker can provide those services to the client, as we see from the temporary assignment confirmation letter, that is why I handed this up because this also puts the terms of assignment into context. "You must submit your time sheet and the client for whom you are working".

THE CHAIRMAN: That seems to be entirely neutral. You can have a window cleaning company that sends out contract window client, and it says: "When we send you out to clean the windows at Freshfields we like Freshfields to sign your time sheet because we would like to make sure you have actually been there doing the work."

MR. BREALEY: It also says that you are working for Freshfields.

THE CHAIRMAN: Yes.

MR. BREALEY: So there is Hays telling the temporary worker that the window cleaner who has been sent off to Fleet Street is working for Freshfields, to clean Freshfields' windows.

THE CHAIRMAN: Well, if you interpret that meaning contractually.

MR. BREALEY: We know that there is no formal contract between the temporary worker and Freshfields in that case. But that is why that lacuna posed a problem for the Court of Appeal in the *Muscat* case.

THE CHAIRMAN: We can look at that in due course.

MR. BREALEY: That is the high water mark of the OFT's case advanced to the Tribunal that it is pinned, the whole case seems to be pinned on clause 2.2. If that is the way it works, that Hays is providing the services to the client it is contrary to all the factual evidence, that is not how it works. How it works is that Hays, as a recruitment agency, places a worker and that worker provides a labour service to the client. That is not how Hays understands it, that is not how the market understands it; that is not how Mr. Shepperd understands it, and Hays interprets clause 2.2 as making available the services to Hays so Hays can make the services available.

We interpret that clause as one of the services ----

THE CHAIRMAN: I think we have the point.

MR. BREALEY: It is making themselves available to provide a service, a contract for service. We have seen the factual evidence, we have seen the contracts.

Previous decisions: Mr. Harris handed up the *Muscat* case, and I take the point, Sir, that each case must be read on its own facts, but here we did have Cable & Wireless as the client, we have the company Abraxas as the agency and we have Mr. Muscat, through Abraxas as the worker. What I would emphasise here is that the set up seems to be fairly similar to the set up in the present case, Hays, Eden Brown, CDI, which is that the worker enters into a contract for services with the agency, so there is a very similar contract.

THE CHAIRMAN: The issue in that case, because it is an employment case, is whether there is a contract of employment between the worker and, in that case, Mr. Muscat, and, as it turned out after the takeover, Cable &Wireless. We are not concerned with whether the engineer who was introduced is an employee of Taylor and Woodrow, and I do not think you are even asking us to go that far, are you.

MR. BREALEY: There is absolutely no reason why this Tribunal should be determining the contractual relationship between a worker and any unidentified client. What I would ask the Tribunal to take from this case is that the entering into of a contract for services with the agency does not mean that the agency is providing the services to the client. So in Hays' case there is a contract for service, we have seen it, the fact that there is a contract for service, and a similar assignment, Abraxos, the agency, assigns the worker to the client.

The entering into the contract for service with the recruitment agency does not mean t hat

the agency is providing the services and that is why there was then a problem because the Court of Appeal perceived that the worker was providing the labour service and that caused the problem because, as the court recognised, the worker is providing the labour service, but on the face of it has no protection.

THE CHAIRMAN: Well he was not an employee, that was the issue. Did he have employment rights? He was under a contract for services with the agency.

MR. BREALEY: And was providing the services to Cable & Wireless, as in this case there is no formal contract between the worker and the client. One sees at para. 25 in the *Dacas* case, the court was then concerned that the worker, in that case Mrs. Dacas, had been found to be employed by no one.

THE CHAIRMAN: Yes, so had no employment rights.

MR. BREALEY: Yes.

THE CHAIRMAN: That is a quite different question. It could well be that the engineer here is employed by no one, is self-employed, which is the issue there, it does not help us on the point you are addressing.

MR. BREALEY: Well it does, with respect, because she had no employment rights, but was still providing a labour service to the client. So the vice was the worker was providing a labour service to the client, as a fact, was providing the service to the client but appeared to have no contractual rights.

THE CHAIRMAN: The vice was that Mrs. Dacas was employed, it was said, by no one, it would not have been a vice if she had been employed by the agency. I think it was argued she was employed by the agency, I think they were asked to appear in the Court of Appeal.

MR. BREALEY: And they are not employed by the agency they are a contract service.

THE CHAIRMAN: Because of the contract ----

MR. BREALEY: Service, yes.

THE CHAIRMAN: And therefore to see could you imply that in those circumstances she might be employed by the client – in fact she was not, was she?

MR. DAVEY: No, she was not.

THE CHAIRMAN: In the end.

MR. BREALEY: But a contract for service with an agency in this case did not mean that the agency was providing the service to the client, and that is the point that I would like to emphasise.

The point is made that it is a specific case, but this is the sort of triangular relationship that does happen in the recruitment industry. The temporary worker enters into a contract for

services with the agency, that does not mean that the agency is providing the very service to the client, and we can see that from the temporary assignment confirmation letter. Whereas one does not see actually what service this person is supposed to be providing, that will be determined by the client. All that the temporary assignment confirmation letter is doing is it is saying: "You are working for the client …"

THE CHAIRMAN: As a project accountant in that case, that is what it says.

MR. BREALEY: Absolutely.

THE CHAIRMAN: So that is the service you are providing.

MR. BREALEY: Yes, the worker is providing that service, but not Hays.

THE CHAIRMAN: All I am saying is that temporary assignment confirmation does specify the service.

MR. BREALEY: Yes, but the service that is provided by the worker, not Hays.

THE CHAIRMAN: But your question is "to whom?"

MR. BREALEY: When it says "accountancy" it is a job title.

THE CHAIRMAN: But it is also a service, is it not?

MR. BREALEY: I remind the Tribunal of the standard agreement between Hays and the client, which specifically talks about the worker providing the service to the client. That is the contract between Hays and the client.

THE CHAIRMAN: It specifies, the new document you have given us, various things that the worker must and must not do in the course of carrying out his work. The last page, the various bullet points, the penultimate – "Do not operate tools, plant, equipment unless authorised and trained to do so." That is the kind of thing you say to your staff, you would never say that when you introduce a permanent employee to someone else, because it is nothing to do with you, you have done the introduction, that is the penultimate bullet. I see just under half way down: "If you are involved in an accident ensure Hays are made aware". You would not be doing that if the agency has no interest in your carrying out the work.

MR. BREALEY: Can I come back to the "Terms of Business for the Introduction and Supply of Temporary Workers." The OFT can only succeed in its case that Hays is providing a service to the client if it can prove that by reference to the contractual relationship between Hays and the client. So this is an important point, Sir. The agreement between the worker and Hays cannot impose an obligation on Hays.

THE CHAIRMAN: Well it would be part of the factual background you could look at in construing the agreement between Hays and the client.

MR. BREALEY: And vice-versa.

THE CHAIRMAN: And vice-versa.

MR. BREALEY: When one looks at the terms of the contract between the client and Hays you do not see a clause which says "Hays is providing the plumbing service, the engineering service, p.1735. The OFT has to point to some obligation ----

THE CHAIRMAN: Well I asked about the other one because you took us to it in your note.

MR. BREALEY: Well I have to, the Tribunal must have all the relevant information, and the three documents seemed to me to be the three relevant documents. The contract between the client and Hays – I take your point that the others can be used as a context – the OFT have to point to some specific obligation and clause 1.2 quite clearly reflects what the market believes is happening, which is that Hays is assigning the worker ----

THE CHAIRMAN: Yes, well you have made that point.

MR. BREALEY: -- to provide services to the client.

THE CHAIRMAN: We have the point in that context, you have made it orally and in writing.

MR. BREALEY: That is then the service of the provider, the Tribunal has the point that the service of the provider is not the service of the worker as such.

Then Annex B, The Relevant Financial Metric. If we are correct that the service is the service of placing, and I emphasise the fact that it is the supply of the worker which is used in the decision. The decision does not venture into the sort of detail we are going through now, but once we are into annex B: what is the relevant financial metric? There I have set out the accounts, and you saw me cross-examine Mr. Allen yesterday and he accepted that net fees was used as an indication of the amount of money being earned by the specialist department.

THE CHAIRMAN: Yes, you brought that out, Mr. Brealey, very clearly in your cross-examination of Mr. Allen .

MR. BREALEY: The factual evidence was set out, the first witness statement of Paul Venables, p.19, witness statement of Mark Shepperd again was unchallenged, on net fees, and then we have the expert evidence, and again I do emphasise for the purposes of our ground 1 the acceptance by Mr. Allen that due to the characteristics of the recruitment industry, the very last paragraph on p.22:

> ". . . the market considers the Net Fees figure to be the equivalent of the turnover figure for most other industries."

and I would ask the Tribunal to accept that. In this industry, the net fees figure is the equivalent of the turnover figure. Why is that relevant? It is relevant because, as I submitted in opening, and I we repeat in the first part of this submission – I am looking at

paras. 13, 14, and 15 – in the decision the OFT expressly state that net fees is irrelevant, it is not material. All it will look at is a turnover figure that appears in the accounts. In my submission the OFT has to have a step back, accountants live in the real world but a lot of other people do too, and it has to ask itself what in the real world is the proper metric to determine the scale of activity of Hays in this market and that is net fees.

Those are my submissions on ground 1. I have five minutes really to do the rest. Seriousness we have set out at tab 2. We emphasise that the scale of the agreement was just over one year.

THE CHAIRMAN: Is that relevant to the percentage, given that that is separately dealt with at Step 2?

MR. BREALEY: It is in duration but if something has gone on for years, in my submission, that would probably reflect the seriousness, because ----

THE CHAIRMAN: No doubt if you were appearing for someone whose infringement went on for years you would be saying that would be double counting because you are dealing with it at Step 2 by multiplying it out. If you put up Step 1 that would be most unfair.

MR. BREALEY: Like tomorrow. (Laughter).

THE CHAIRMAN: I hope not tomorrow!

MR. BREALEY: I take your point. Joking apart, if an agreement is going on for a sustained period of time, yes, for duration, but it may have a greater impact on the market, there is a flavour of the more serious the longer it is, but I take your point ----

THE CHAIRMAN: That is your point (c) is it not, ineffectiveness?

MR. BREALEY: It was ineffective.

THE CHAIRMAN: Yes, well I understand that point, but it seems to me it might be ineffective because of duration, but you put duration as a separate point.

MR. BREALEY: The market factors, we emphasise that this is a consideration that the OFT should be looking at. The participant did have only a 13.6 per cent share of the market.

THE CHAIRMAN: The 13.6 share of the market ----

MR. BREALEY: Of all of them.

THE CHAIRMAN: -- how is that calculated?

MR. BREALEY: That is by turnover?

THE CHAIRMAN: Turnover?

MR. BREALEY: Yes.

THE CHAIRMAN: Gross turnover?

MR. BREALEY: Yes.

THE CHAIRMAN: But I thought that is not the relevant metric?

MR. BREALEY: It is not.

THE CHAIRMAN: So why are you using it?

MR. BREALEY: That is the OFT's position.

THE CHAIRMAN: But you do not accept that.

MR. BREALEY: No, I do not, but ----

THE CHAIRMAN: So what is it on net fees?

MR. BREALEY: I can give the Tribunal the figure. We will do that ----

THE CHAIRMAN: You have not got it at the moment.

MR. BREALEY: I do not have it to hand, no. We are taking the OFT's case at its highest.

THE CHAIRMAN: Yes, but you are asking us to cast that aside.

MR. BREALEY: I am.

THE CHAIRMAN: You cannot then say, "And it is only a small part of the market", saying we should look at the market differently, on a different metric.

MR. BREALEY: With respect, I should be able to do, because I am saying it is wrong. We will give you the figure.

THE CHAIRMAN: You will get us the net fees.

MR. BREALEY: We will. I am informed that we may not have those figures. This is the OFT's case against us and they say, "You have a 13.6 per cent market share", and we say, "If that is the case that is not the sort of market share that should attract 9 per cent". That is our case. The ball is being thrown at us by the OFT and we are trying to bat it back. We are saying, "On your case, all the participants have a 13.6 per cent market share, and if you are right on the market share that is not sufficient for 9 per cent". The point is as simple as that. I do emphasise, if one goes back a page, that there is no evidence of any impact on consumers. In its Guidance the OFT says that is an important factor.

That is seriousness. On the schedule that has been handed up by the OFT, we are still looking at that, Sir. We are unclear whether that is truly representative of all the cases.

THE CHAIRMAN: When you say "representative", we understood, and hoped, that it was not just representative, but complete.

MR. BREALEY: So did we. It may well be that some cases are missing. It may well be that some of the information on the schedule is incomplete. The reason I say that is that certain members in this room have appeared in some of these cases. They are confidential. It may well be that the people in this room that have appeared will have to submit in confidence to the Tribunal.

THE CHAIRMAN: You are referring not to the list of cases but the descriptions and factors as not being complete?

MR. BREALEY: We are trying to check. We believe there may be one that is missing, and certain market share figures are missing.

THE CHAIRMAN: You have only just had a chance to look at this, so you have not obviously been able to work through it properly, if you have comments on it you can send them in the first instance to the OFT. One would hope that this could be something that can be agreed, because really it is just reciting what comes out of decided cases and you can have an agreed version. I appreciate you have not had time to do that. Equally, they did not have time on your one. We could get that in the course of next week.

MR. BREALEY: We will try and agree with the OFT and then ----

THE CHAIRMAN: In the course of next week.

MR. BREALEY: Yes.

THE CHAIRMAN: Thank you.

MR. BREALEY: Very quickly, senior management. We have set it out in writing. I would urge the Tribunal – although this note is attached, it is not actually, but it is at NCB 3, volume 1, and I am looking at para.6 of tab 3 of the note handed up this morning. Paragraph 6, tab 3, senior management. There is a table or a chart, whatever one calls it. It is p.336 of NCB 3, volume 1. There we try and show that there was Mr. Simon Cheshire. He was on the C&P board. The blue is what we would call the senior management. How senior do you have to be before you are going to attract a 10 per cent increase. He is not sufficiently senior.

I would just emphasise two further points, which we make in the note. The first is that the only evidence is that he was acting on his own. So, yes, he was on that C&P operations board, but he was acting on his own. So there is no suggestion, although at times Mr. Unterhalter tried to make the suggestion, there is no finding that collectively that C&P board was guilty of the infringement.

THE CHAIRMAN: That is correct, yes.

MR. BREALEY: The very fact that one of the managers on that C&P board has been misguided means that everything in the blue must come into the equation. Again, one looks at the schedule of the Annexes to the decision, there is no employee of the Plc anywhere in the blue who is responsible for the infringement. So the fact that there is one small person down on that board, in my respectful submission, just does not merit a 10 per cent increase based on worldwide turnover. That is a very important point, and it is £4 million.

THE CHAIRMAN: That is because of MDT.

MR. BREALEY: Yes, MDT and gross/net fees. It is a lot of money for one person who is not on those blue charts.

THE CHAIRMAN: I think in you quote Mr Lawson's witness statement, sub para (f) of para.57, he had no responsibility beyond the South-East of England. I think Mr. Lawson accepted that is not correct because he was had responsibility for national accounts. That was Mr. Lawson's evidence. He said that in his statement and he accepted, when asked about that, that that was not correct. He did not know Mr. Cheshire and he did not know the other gentleman.

MR. BREALEY: He did accept it. We do not hide the fact. It is in the evidence. We put that in at para.4. He did have involvement in national accounts, we accept that.

THE CHAIRMAN: Which presumably is why he was the person invited to the CRF.

MR. BREALEY: The last ground is compliance. Obviously that dovetails with MDT. What we have tried to do is summarise at para.6 the extent to which Hays went about introducing its compliance. It was not just in the property and construction business, it was rolled out worldwide – 20 presentations to key managers ----

THE CHAIRMAN: We will read it, in the interests of time, so you do not have to take us through it.

MR. BREALEY: I do emphasise the extent of it and the scale of it.

THE CHAIRMAN: Yes, Mr. Harris?

MR. HARRIS: Sir, with the Tribunal's permission, I have 30 minutes available to me to make brief concluding submissions on four topics. Three of them are delightfully short. When I have finished the fourth, I will also spend two minutes with my own version of a table as to what we respectfully submit ought to be the nature of the fine to be applied to Eden Brown, taking the submissions in the round.

Taking them in order of brevity, as to topic number one, seriousness, I respectfully and gratefully adopt the submissions of Mr. Brealey, including his written note. Eden Brown only adds one point, which is that in their case they are not a big player, quite the opposite, they are a small player, one can see that from the respective net fees figures. That is all I have to say on topic one, seriousness.

Topic two, mitigation: that is fully argued out in the skeleton arguments. The basic point is extremely clear and has never been answered by the OFT. That point is that we have done more than simply adopt a compliance policy, and yet, by way of mitigation, we have only been credited with having adopted a mitigation policy. The two specific elements ----

THE CHAIRMAN: A compliance policy?

MR. HARRIS: Yes, I do beg your pardon, a compliance policy. We have done two things that are additional. One is we have apologised. That is in the chairman's unchallenged statement, it is an express apology. That does not form part of a compliance policy; nor, as is suggested at one point in the OFT's skeleton, does that sort of thing form part of leniency. With respect, that is just wrong. We have done more than is required by compliance, more than is required by leniency, we have apologised and no credit has been given for that whatsoever. The OFT simply do not answer that point.

Last but not least, they also do not answer the point at all that we have made an offer to provide training on compliance and competitional matters to the respected industry body, the REC. Of course I accept that although that offer is outstanding and Eden Brown remain willing to comply with it, it has not yet been taken up by the REC. Very briefly on that front, of course, we, Eden Brown, are entirely in the REC's hands on that front. We cannot force them to accept a particular date.

THE CHAIRMAN: We understand that.

MR. HARRIS: I will move on. That is topic number two. Topic number three will detain us for just a few minutes longer. It is a discrete topic to Eden Brown. It is the question of the correct year of relevant turnover at Step 1 of the fining process. Again, this argument is very fully argued out in the skeleton so I do not propose to traverse the way in which it is set out in the notice of appeal, the defence and the respective skeletons. It is, if I may say so, extremely clear. What I do propose to do is just deal briefly with the three points that are put against me in the OFT's skeleton, which currently is the last word on the topic. In a nutshell, as I said in opening, the dispute is not just discrete, but very short and simple.

What we say is that the phrase "last business year" at Step 1, that means, properly interpreted, the last business preceding the end of the infringement. In contrast, the OFT says the words "last business year" mean the last business year preceding the decision. The point I made in opening remains good, which is that of these competing interpretations – it is common ground that this is an interpretation argument, as a matter of law – certainly the interpretation that I advance is capable of being correct because it is the very interpretation that for many years the OFT itself used to adopt.

The OFT has changed its interpretation. That alone, we respectfully submit, ought to set the alarm bells ringing since the words have not changed, but be that as it may the OFT now in its skeleton argument puts forward three responses to my suggestion that they should not have changed and the interpretation has not changed. The first is at CB2, tab 11, pp. 350-351, paras.15 and 16 of their skeleton argument ----

THE CHAIRMAN: Just give us a moment. That is CB2.

MR. HARRIS: That is right, CB2. The skeleton against Eden Brown is tab 11.

THE CHAIRMAN: You say it is paragraph?

MR. HARRIS: Paragraph 15 is where ----

THE CHAIRMAN: Page 350, para.15.

MR. HARRIS: Yes, and you will see the opening words of para.15 are, "As a matter of applying ordinary principles of interpretation", so what the OFT says in its skeleton is that on ordinary principles of interpretation they should now succeed. We do not, frankly, understand this point. What the OFT seems to be saying is that there is a principle of interpretation such that one should copy the definition of a phrase from a piece of legislation and use that in a different document, namely the Guidance, that is prepared for and directed to a different purpose. So the legislation and the Turnover Order are directed to the back-stop. We are not concerned here with a back-stop. That is Step 5. We are concerned with the relevant turnover at Step 1. So it is a different purpose and a different context, and yet the OFT's first point is that somehow, copying and having consistency between the two is an ordinary principle of interpretation. It is not a principle of interpretation known to us, that one should copy things between different documents in different contexts for different purposes; and, unsurprisingly, there is no authority cited for it.

On the contrary, we say that the Tribunal should adopt the orthodox purposive approach to the words "last business year", and ask yourself, "What are those words intended to achieve?" As we set out in our skeleton, and indeed what we thought was common ground with the OFT was that Step 1 is supposed to be a measure of the seriousness and extent of the wrongdoing. After all, that is what it says in the Guidance.

We submit, very simply, that plainly measuring the seriousness and extent of the wrongdoing cannot be done by looking at a period of time that bears no relationship to the seriousness or the extent of the wrongdoing.

That is my response to the OFT's first point.

The OFT's second point is to be found in the following paragraphs, 17 and 18 of the skeleton, and the heading is useful. It says, "***Policy arguments do not point clearly …***" so they are suggesting there are ambiguous policy arguments. With respect, again, we find this point extremely difficult to follow. In para.17 they accept that it would be "reasonable" – that is their word – to select a turnover figure that is closely related, or indeed falls within,

the period of the infringement. So that is the OFT itself saying that that is reasonable. That is exactly what I urge upon this Tribunal.

Just to remind you, the infringement dates in respect of Eden Brown were November 2004 to January 2006. That is the 1.25 years for our case.

THE CHAIRMAN: And everyone, is it not, 1.25?

MR. HARRIS: No, I think some parties got one year.

THE CHAIRMAN: The three appellants here?

MR. HARRIS: That may be right. As across the CRF, I think some people fractured out of it - this ineffective cartel - at an earlier stage. In any event, that is the period of time. The dates are more important than the duration – November 2004 to January 2006. Our case is that the relevant business year, bearing in mind that you are attempting "serious" and "extent" of the wrongdoing, is the business year ending in March 2005. So our business year that we advance is 2004/05, ending March 05, and that falls slap bang in the middle of the period of our infringement. In contrast, of course, the OFT's proposed year, that preceding the decision, is mandatorily years after the end of this wrongdoing. It does not fall anywhere within it.

Secondly, in pointing to these other reasonable options – these are the parentheses in CB2, tab 11, page 351, para.17 – the OFT is here hypothesising some other possibilities. What they say is, "On Eden Brown's argument you could have some of these other possibilities". So on their policy reasoning it does not support their case.

That is problematic, we respectfully say, for the OFT, because, number one, it is clear that the alternatives that the OFT now put forward, which of course are not their case to you today, these are just hypotheticals, would, in fact, reflect the purposive approach which we urge upon the Tribunal. So either, if it occurs over a number of years, you take the year at the end, or you take the average. Both of those alternatives support my approach, the purposive approach, of locating within the focal time period; and secondly, and in any event, it is difficult to see how, on anybody's interpretation, either of those could fall within the phrase "last business year". They do not bear any resemblance to the three words "last business year".

Last but not least, the OFT's third point is to be found in para.19. Do you see at the bottom of para.19 (CB2, tab 11, page 352) the OFT says that it stands by its using the year before the Decision. That is their case –

> "… is '*calibrated to the seriousness of the infringement …*'"

With respect, that is obviously not right. There are two major flaws in it. The first, very straightforward point is that an undertaking could have a completely different size at the date of the decision than it had at the date of the infringement. Indeed, I put it as high as this, it would be, frankly, a matter of pure fluke or coincidence if it happened to be literally identical in size some years later when the decision was made. So, it is not calibrated to the seriousness of the infringement. The final point on this issue is that we do regard it, as we say in our skeleton argument, as illegitimate for the OFT to purport at this stage – and this most relevantly comes out at CB2, tab 11, page 353 para. 21 of their skeleton argument – to purport to bring in a stage, the deterrence objective. We are here arguing about Step 1, what year relevant turnover to take at Step 1. But it was abundantly clear, if I may put it like this, from Lord Pannick's submissions yesterday, that deterrence does not form part of Step 1; and yet here is the OFT purporting to bring in deterrence at Step 1 in order to support what we say is the flawed choice of relevant year. There they say, in para.21, that does not mean that Step 1 has nothing to do with deterrence", but that is not to be found in the Guidance, and as Lord Pannick explained yesterday, it is certainly not how they behaved in the remainder of this Decision. Indeed, – I do not know whether the right word here is "irony" or "inconsistency", but the final sentence of para.21 is most revealing. That says that on the contrary, penalising undertakings by reference to the seriousness of their infringements *is* apt to deter infringing behaviour. Well, that plays right into the hands of the submissions that were made by the appellants on MDT. That is their very point. So, it is difficult to see quite where the OFT stands on this issue of deterrence, blowing a little bit hot and cold. But, in any event, the basic point is that they cannot have their cake and eat it. They proceed throughout the entire remainder of the Decision on the basis that deterrence is not relevant to Step 1, and yet when it is exposed that their principles of application to year of relevant turnover are flawed, all of a sudden they appear on the face of it to change tack completely and pray in aid deterrence at Step 1, notwithstanding the inconsistency it has with the remainder of their case. My case is quite simple – deterrence has nothing to do with it at Step 1, it cannot be prayed in aid by the OFT at Step 1, and that further underlines the inability on the part of the OFT to point to any issue of principle in support of their choice of the year of relevant turnover.

So, that is what I have to say on the third issue.

THE CHAIRMAN: Can I just ask you, in your notice of appeal, which is at tab.4 of this bundle, that is to say core bundle 2 where the OFT skeleton is.

MR. HARRIS: I am sorry, my Lord, would you mind repeating -----

THE CHAIRMAN: In your notice of appeal, which is in this bundle at tab.4, you deal with this (it is ground 4, starting at p.172, section 7). That is where you make this point.

MR. HARRIS: Yes.

THE CHAIRMAN: And then at the end of that, at 7.16, you give the confidential figures that would apply for what you say is the year that should have been used. That is right, as opposed to the ones the OFT used.

MR. HARRIS: Yes, I believe so. And I have just been prompted about this – my instructions are that the OFT have never denied our submission about the the figures.

THE CHAIRMAN: No, I do not think the figures are in issue. Those figures are gross turnover.

MR. HARRIS: Yes.

THE CHAIRMAN: If we were with you on your ground 1, I do not know if it is your ground 1, but on the net fees issue.

MR. HARRIS: Yes.

THE CHAIRMAN: Of course the relevant year is the separate point – have you given us the net fees figure for what you say is the right year, namely the year ending March 2005?

MR. HARRIS: I believe that that will be part of the table that I was going to hand in for the relevant year, if we win.

THE CHAIRMAN: Yes.

MR. HARRIS: Yes, so the table I hand in at the end does include the net fees figure for 2004-2005.

THE CHAIRMAN: Right. That was my question. So we will get -----

MR. HARRIS: Yes, I will deal with that briefly at the end.

THE CHAIRMAN: Yes. That is just getting the figures, that would be helpful.

MR. HARRIS: Yes, I am grateful.

THE CHAIRMAN: Also, if you are, if you have finished with this point.

MR. HARRIS: Yes.

THE CHAIRMAN: Mr Harris, you appear not only for Eden Brown but I think also for Hays.

MR. HARRIS: Yes, sir.

THE CHAIRMAN: Do you, wearing your Hays hat, adopt for Hays the argument you have just presented, wearing your Eden Brown hat?

MR. HARRIS: No, sir, no. This is a discrete argument advanced by Eden Brown, and Eden Brown alone.

THE CHAIRMAN: But, do you then, wearing your Hays hat, disagree with it?

MR. HARRIS: Wearing my Hays hat, I take no – I have no instructions on the point – I take no stance on behalf of Hays. You may wish to ask somebody else, but my position is that this is advanced by Eden Brown and Eden Brown alone and I have no part of my Hays hat on in making this submission.

THE CHAIRMAN: Yes, I understand that. Then, I think I should ask Mr Brealey, to spare your embarrassment, and obviously we have not heard the OFT, still less reached a view, but if we were to be persuaded that this argument is correct and that that is the year that should be used, would it not be right that that year, this is a point of interpretation of the Guidelines, has to be used for at least the appellants who are before us if we are to make any – if we do make any change to the penalty? I can see that if we dismissed your appeal on all grounds and just did not disturb the penalty – Mr Brealey, I will let you take instructions after asking the question, if you will just listen to the question.

MR. BREALEY: I do apologise.

THE CHAIRMAN: I can see that if we dismissed your appeal completely and said therefore the Decision stands, one might say, "Well, you do not then interfere in the Decision on a ground not advanced. But if we are persuaded by one or more or all of your arguments that the penalty imposed cannot stand and therefore the Tribunal has to calculate the penalty, if Mr Harris is right on this, it seems to us it would be a bit odd then to apply a year which we are in our judgment saying is the wrong year.

MR. BREALEY: Can I -----

THE CHAIRMAN: Can you take instructions?

MR. BREALEY: I am grateful. (After a pause)

MR HARRIS: Sir, perhaps I could just complete the other submissions while -----

THE CHAIRMAN: Well, no -----

MR HARRIS: I just wondered whether he needed a few moments.

THE CHAIRMAN: And, Miss Kreisberger, we will be asking you, of course, the same question, so, if you need to take instructions?

MR. BREALEY: We are not pursuing that ground of appeal, and therefore we would want any fine to be calculated, I think by reference to ----- We are not advancing an argument similar to Mr Harris, the date of infringement. We would ask the Tribunal to calculate our fine by reference to net fees in the accounts you have just got.

THE CHAIRMAN: We understand you are not pursuing it. It is not in your grounds of appeal, but if we do re-calculate your fine and exercise our jurisdiction to do so, do you submit that we are precluded from applying what, on this hypothesis, we hold is the right year, just

because it has not been in your ground of appeal; and that we as matter of jurisdiction have to apply what on this hypothesis we hold is the wrong year?

MR. BREALEY: Usually the appeal, even on fine, is by reference to the grounds of appeal, and in the absence of a ground of appeal, the Tribunal should be fixing the fine by reference to our grounds of appeal. I understand the point that you are making to me, sir.

THE CHAIRMAN: Yes.

MR. BREALEY: We do say you have a full jurisdiction on the merits, that is part of our case.

THE CHAIRMAN: Yes.

MR. BREALEY: Whether you as a matter of jurisdiction preclude it, your jurisdiction is probably, so far as Hays is concerned, fixed by reference to our grounds of appeal. I think that is all I can say.

THE CHAIRMAN: Yes.

MR. BREALEY: I am not instructed to -----

THE CHAIRMAN: I understand that you do not advance the argument, I fully understand.

MR. BREALEY: As to whether the Tribunal has jurisdiction -----

THE CHAIRMAN: Yes, I think we would, nonetheless, ask that you would please supply us with the gross and net for the year that would be the last business year on the alternative argument, even though we fully understand that is not what you are urging. Yes. And, Miss Kreisberger, same question.

MISS KREISBERGER: Sir, we of course say that the Tribunal is not precluded from applying this to us, and we do not argue that the Tribunal is so precluded. What we would say is that it cannot be assumed that the same reference year should be applied across the board. And, actually, that is something which arises out of a case I am going to be addressing in my closing submissions in ten minutes or so. Having said that, we do not have a good reason for the Tribunal as to why a different reference year should apply to CDI, and so we are in the Tribunal's hands on this.

THE CHAIRMAN: Yes. Thank you. And, Mr Unterhalter, we will in due course ask you the same question.

MR. UNTERHALTER: Indeed.

MR. BREALEY: Can I just on that, very very quickly, obviously we can go back to our accounts and have a look at the net fee figure. But I am told it took Hays about six weeks to work out its net fee figure in the relevant market. So, it will take -----

THE CHAIRMAN: Yes – that was not supplied in the response to the SO?

MR. BREALEY: It was not, no. So, we will do our best, but it will take some months -----

THE CHAIRMAN: I think six weeks will not cause problems.

MR. BREALEY: No. But it costs thousands of pounds, I am told – can I take instructions?

THE CHAIRMAN: Yes, you can come back after lunch and explain.

MR. HARRIS: Thank you, sir, I am grateful. That leaves me, then, just with two topics: one, some concluding remarks on gross net, and then just handing up my table.

If I could perhaps just spend five or ten minutes on gross net – with this in mind, that of course Eden Brown's case on gross net is substantively the same as Hays, and therefore I adopt the submission both oral and in writing -----

THE CHAIRMAN: Yes.

MR. HARRIS: -- that Mr Brealey said on behalf of Hays in so far as they apply to Eden Brown.

So, it leaves me only to provide some different points – I am not going to duplicate anything – and one or two points of emphasis, in this sense in no particular order, because he has already had an opportunity to go through it. But, taking them item by item, the *Cable & Wireless* case, can I just invite the Tribunal's attention to the OFT's skeleton against Eden Brown which is CB2, tab.11, and in particular to paras.42-43 which are on pp.359-360. Picking it up, if I may, at the end of para.42, the OFT's case – this is literally identical to the case against Hays, it is a cut and paste job here – there is a chain of contracts between the work seeker and Eden Brown's client, not as Eden Brown's analysis infers, merely one contract with Eden Brown acting as a payment conduit. And, as the OFT stated at para.5.140 of the Decision (CB1 page 256):

> "When supplying temporary workers [Eden Brown is] linked with the temporary worker by an agreement for services – there is a purchase of services by the recruitment agency from the worker, which are then supplied under a different contractual arrangement … This contrasts with the placement of permanent staff, where an employment contract is signed between the worker and [Eden Brown as client] and the hirer".

So, what the OFT is doing here in part of its case in support of its choice of gross over net is, it is identifying what it claims is a linear relationship as opposed to the direct relationship between the worker and the client in the case of permanent staff. What they say, as you know, and this is brought out as well in Mr Allen's expert's reports, is effectively sub-contracting. The analogy is with a sub-contracting relationship. You will recall the example of Chime Communications that Mr Allen gives. And where we say it is relevant to have regard to *Cable & Wireless* is that, on a legal analysis, notwithstanding what might be described as "linear contractual relationships", nevertheless there can, as a matter of law be

a true triangular relationship, or one bends the line into a circle – either into a triangle or a circle – the point being that it is the contrast that the OFT seeks to rely upon here of there being no link between member of staff and client, is a false contrast. And, perhaps it is most succinctly put by the Court of Appeal at one of the paragraphs we have not looked at, para.31 of *Cable & Wireless v Muscat*. What the Court of Appeal there is reciting from is the *Ready Mixed Concrete* case, the well known "basic requirements of a contract of employment". And the one to which I would invite your attention in particular is one where there is a contract of employment a critical component is:

> "(i) that the servant agreed in consideration of remuneration to provide his own work or skill in performance of service for the master".

So, what it is saying is that notwithstanding the linear relationship of two contracts, nevertheless, the legal analysis can be - depending upon the facts and circumstances of each case, I accept that - a direct relationship between the end worker and the client; and it has to be part of that relationship, because otherwise it could not be an employment relationship. It simply must be part of that relationship that the worker is:

> "providing his own work or skill in the performance of service for the master".

So, that is the point that I just wish to draw out from *Cable & Wireless*.

My next point relates to *Manpower*, the French case. I am happy to turn that up if the Tribunal would like, but I would simply just want to remind the Tribunal that the key paragraph is para.168 of the Decision. That is the one to which I took the Tribunal in opening. That is the one that says that the French Competition Commission has chosen gross margin because that is proportionate in the circumstances of this sector, bearing in mind "their very specific activity". And that is the point upon which I rely, and nothing that the OFT says in its latest note alters the basic proposition that, in order to be proportionate, they have founded themselves upon net fees, not gross turnover. So, I obviously do not take issue with the fact that there are differences in the way it is put in France. What I would draw to the Tribunal's attention, and I invite them respectfully to take cognisance of in its own time in NCB2 at tab.13. That is a letter from my client setting out submissions on this very case at the SO stage. We relied upon this case at the SO stage and have continued to do so ever since, to put the two basic points emerging from this letter is, as it says in the final major paragraph on p.309, that case was infinitely more severe than this case. I will leave the Tribunal to have regard to the details, but under no stretch of the imagination could the CRF be equated on seriousness scale with the Manpower cartel. It is like chalk and cheese. But then, over the page, the other thing just to draw to the Tribunal's attention,

is that although they do not spell it out in the Decision, the basic starting point for the penalty, then adjusted for various other factors, is 6 per cent. These are my figures at the bottom of p.310. And, 6 per cent of what? Well, 6 per cent of net fees.

THE CHAIRMAN: Yes, we do not know much about how the percentages are applied under French law.

MR. HARRIS: No, I have performed those calculations myself.

THE CHAIRMAN: No, but whether 6 per cent is what they do for a very serious case, and whether they operate the same way, I mean, your first point on the Decision, namely that they use net fees because that is proportionate calculation. You say, "Well, that is the same point, you can read it across". The 6 per cent – not sure we can really read that across.

MR. HARRIS: Perhaps that is my mistake in putting the point forward. What I mean to say by drawing the Tribunal's attention to the 6 per cent is that the end result that the Commission has reached, taking express account of the need to be proportionate is that even in a much more serious case it is all at or around this figure of 6 per cent of net fees. You have the exact figure because that was on a different table I handed in earlier. That is my point, it is a proportionality point rather than if they have a Step 1 starting percentage, that is not my point.

I would just like to deal with one more issue on gross / net, and then I will hand up the table. Mr. Brealey took you to various of the terms and conditions of Hays. I am happy to turn up again the Eden Brown terms and conditions, but I am slightly conscious of the time. They are in NCB2, relevantly at tab 7 and tab 9. They are the standard terms, with the client on the one hand and with the temporary worker on the other. It may be that the Tribunal remembers without having necessarily turned them up certain of the critical points, thus for example, in Eden Brown's terms and conditions there is express reference to "commission", the commission we earn for our service, that is revealing and highly indicative as we went through Mr. Allen, of an agency relationship. There is express reference in more than one place to passing on the wages from the client to the temporary worker.

THE CHAIRMAN: Yes.

MR. HARRIS: Last, but not least, there are those definition sections, the Tribunal has the point, and I would just like to finish on this issue by reminding the Tribunal of a passage of evidence that we had with Mr. Herron in re-examination. Do you recall the issue arose as to why it was that Eden Brown, and for that matter Hays have provisions in their respective contracts about, for example, being informed when there is sickness, or being informed

when somebody is going to terminate, or being informed when there is a health and safety incident, or that sort of thing. The evidence that Mr. Herron gave (transcript, day 2, p.46, lines 13 to 21) was that it is a key commercial opportunity for a provider of labour to know what is going on with the labour that it provides and, in particular, whether it is no longer there, or it might no longer be there, or it is having problems.

Therefore, Mr. Herron's view is that that is the reason why those sorts of provisions are in there, it is not because they somehow engaged the services of the client. Unless there are any questions upon those four discrete grounds I would just like to end by handing up and across an indicative table to assist the Tribunal in its ruminations about the level of fine in the case of Eden Brown.

If I may open with these remarks which is that I share Miss Kreisberger's predilection towards optimism, and therefore the foundational assumptions for this table can be seen in the bullet points in the right hand column at the top, which is it is "relevant net fees", so it is a net fees not gross turnover, and it is from the year of relevant turnover that I advance. The starting percentage is reduced to seven from nine, and for the reasons I have advanced Eden Brown ends up getting 10 per cent for mitigation, which effectively at Step 4 means a net adjustment of zero, because we were upgraded at that level for senior management and we do not appeal on that ground.

THE CHAIRMAN: So what you call "turnover" is actually net fees in your third column?

MR. HARRIS: Yes, that is not intended to be a slight of hand.

THE CHAIRMAN: No, I understand that, but just to be quite clear. We have the turnover figure in your notice of appeal. These figures are confidential, are they?

MR. HARRIS: Perhaps we should proceed on that basis, I am not sure.

THE CHAIRMAN: Well they are quite historic.

MR. HARRIS: Perhaps I will just take instructions on that. Can I give you the reference for the turnover figure at the top of the right hand column? No, Sir, they are not confidential. The relevant net fees figure for financial year 2004/05 is taken from the spreadsheet which appears at Michael Sterling 2, it is an exhibit to Michael Sterling's second witness statement, and I will provide in due course the precise page reference (NCB3, tab 10, page 758).

Can I just explain one thing, unless there are questions on this document, Sir? You will see the suggestion is made that at Step 3 there is a non-adjustment either way.

THE CHAIRMAN: Yes.

MR. HARRIS: That is because, for the reasons I advance, in the case of Eden Brown the proportion that is arrived at for Eden Brown, when one has dealt with Steps 1 and 2 is obviously higher than for any other party. I do not want to repeat those submissions, but it remains true even on this figure. Plus, for example, £464,291 as a proportion of the net fees figure is 8.7, if somebody could just do that again for me – I wrote it on a piece of paper and I do not know where it is now – I think it was 8.75 per cent. Our submission will be that if one adopts an optimistic approach to the other appellants then we are likely, even on this approach to remain significantly higher as a proportion of net fees at this Step 3 than any other appellants.

THE CHAIRMAN: As Step 3 is looking at deterrence, your current position is important. You made the point when addressing us on the relevant year to be used at Step 1 saying that Step 1 is not concerned with deterrence, and you criticised that part of the OFT's skeleton, where they said one reason for using the most recent year's deterrence and you made the point, "No, that is not part of the Step 1 exercise". The Step 3 exercise, which is deterrence, the current year, the most recent year would be relevant, would it not?

MR. HARRIS: Our case is that the most relevant metric there is current profit.

THE CHAIRMAN: Whether it is profit, or net fees, or gross fees, it is the current position, not ----

MR. HARRIS: I do accept that but that is because what is being measured by deterrence, as Lord Pannick says ----

THE CHAIRMAN: The future, forward looking.

MR. HARRIS: The future, it is forward looking and its impact. I would simply repeat the point that he made, which is it is one of the relevant factors to take into account at that stage. It is not determinative, but what has gone wrong is that the OFT have ignored it as if it were irrelevant.

So, Sir, just to confirm the percentage that one arrives at by placing £464,291 at the Step 3 box over the turnover figure of £5.3-odd million, is 8.75 per cent. Therefore, I do feel able notwithstanding the apparent optimism to submit that it would be open to the Tribunal not to rest with a nil adjustment, but actually to maintain at the Step 3 a downward adjustment which, after all, is what the OFT itself considers is appropriate. I accept of course that the equation and flavour is altered by what one does with the net fees etc.

Those are my submissions unless I can assist further.

THE CHAIRMAN: Thank you. Yes, Miss Kreisberger?

MISS KREISBERGER: I would like to cover the ground 1 point: temporary wages. I can say a few words at the end on the other grounds, but I will not be addressing them in any substance at all.

On temporary wages I would like to cover three points in my submissions today. First, is the purpose for which turnover is calculated at Step 1. I can be brief on this, I am aware the Tribunal has been addressed on this already. Secondly, the intermediary principle, and the *Endesa* case, which is an argument only CDI advances; and thirdly, the nature of the recruitment services supplied by CDI, and that is a factually distinct point I would like to make for CDI AndersElite.

Dealing first with purpose, just to develop some comments which I made in opening. We say in fixing the amount of the fine it is not permissible to lose sight of the purpose and the objectives for which the fine is fixed, and if I may just take the Tribunal to *Britannia Alloys* briefly, and that is at authorities bundle 2, tab 32 and p.4456 of the judgment. This is the case I had in mind on reference year, although that is not the point I am addressing here. You will see at para. 20, it was an issue between the parties as to how to determine the concept of "preceding business year", and in that case it was because there had been substantial changes in the economic situation of the undertaking between the infringement having been committed and the Commission's decision. The Court of Justice held at para.21 that it should be pointed out according to settled case-law that it is necessary:

> ". . . in interpreting a provision of Community law to consider not only its wording but its context and the objectives pursued by the rules."

At para. 22 the Court refers to the Commission's power to impose fines, to carry out the task of supervision, and then if one turns the page at para. 23, the court held that:

> ". . . the Commission is required to take into account the gravity and the duration of the infringement . . ."
>
> In the light of those factors, the Court has stated that the limit relating to turnover . . . seeks to prevent fines imposed . . . from being disproportionate in relation to the size of the undertaking concerned."

Then we have the conclusion at para. 25, and I will read this out in full, it is important:

> "It is clear from the above considerations that, in determining the 'preceding business year' the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 17, the intended impact on the undertaking in question,

taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed."

THE CHAIRMAN: The issue there was whether it should be the year preceding the decision ----

MISS KREISBERGER: That is correct.

THE CHAIRMAN: -- or Mr. Harris's point.

MISS KREISBERGER: Exactly.

THE CHAIRMAN: This, you say, supports Mr. Harris's argument.

MISS KREISBERGER: It does, it does. We do not rely on it for the specific point of the reference year, we rely on the approach that the Court of Justice confirms as to the interpretation of provisions. We also rely on it as to the need for individualised consideration on which Lord Pannick has addressed you, and I also suggest the Tribunal there turns up para.44, perhaps we need not look at it now, but for the note it refers to the need for the differentiated treatment of undertakings concerned.

I should say on the point of reference year, the Tribunal would need to be in a position to take a decision on the facts so it is a matter for the Tribunal as to whether it can take a different decision from the OFT not having heard argument on this particular point, but the point made at para. 44 is it is always a question of individualised treatment. That is true for reference year, it is true for turnover, and it is true for the other aspects of penalty assessment. It is a fundamental precept of fining.

Coming back to the issue here, we say that the purpose of setting fines by reference to affected turnover is to give an indication of the scale of the infringement. I do not need to take the Tribunal to this, and Lord Pannick took the Tribunal, I think yesterday, to para. 121 of *Musique Diffusion française*?

THE CHAIRMAN: Yes, I think it is quoted somewhere.

MISS KREISBERGER: He quoted, but the relevant wording is an indication of the scale of the infringement, that is why one looks at affected turnover, turnover in the services which were the subject of the infringement. For the note, Sir, that is authorities 4, tab 57, p.1909 at para. 121.

As I mentioned in opening, that is also reflected at para. 2.9 of the penalty Guidance. Again, I do not suggest the Tribunal turn it up now. The reference is authorities 1, tab 15, p.9, but para. 2.9 says: "Where an infringement involves several undertakings …" the starting point is assessed for each one individually "… in order to take account of the real impact of the infringing activity of each undertaking on competition.", that is the point. That is why a careful assessment needs to be taken of relevant turnover at Step 1, that is

why we do this. As I said in opening, it is a simple point, the more effective turnover an undertaking generates, the higher it can expect the fine to be.

In my submission, in assessing turnover at Step 1 the OFT was required to have regard to the facts of this case, the facts being AndersElite's function as a recruitment agency, the essential nature of which we say is unchanging, whether it is placing temporary or permanent candidates. We say the OFT failed to do this because it adopted a formalistic approach, it closed its mind to commercial reality in opting to place absolute reliance on the accounts. I think this is a point that the Tribunal already has, that the OFT says the position is dictated by the 2000 order, which says turnover should be construed in accordance with GAAP. Whilst there may be good reasons why the limit, the statutory maximum should be set by reference to reported turnover, we say it does not follow that that is determinative of the question of affected turnover, which may be something less than the headline figure in the accounts.

I should just make clear here that we are not advocating a measure for Step 1 other than turnover, such as profitability. All we are saying, we are making a narrower point here, is that deductions should be made to the overall firm, AndersElite's reported turnover, in order to reflect the substance of its commercial offering in the market.

If I may, I will turn now to my point two, *Endesa* and the intermediary principle. We have heard an awful lot about accounting standards. Our position is that those are matters which are not determinative. We say that for two reasons. One, because it is a determination made for a different purpose, whether an entity account is a principal or agent. The second reason is because the correct approach, and I will come on to explain why, is, first, to define whether an entity is, on the facts, an intermediary; and then decide how to treat turnover in the accounts. What the OFT has done is to put the cart before the horse.

THE CHAIRMAN: Then decide how to treat turnover – you said turnover in the accounts.

MISS KREISBERGER: Yes, so if one takes the headline figure in the accounts as the reported turnover and whether a deduction is necessary. We rely on *Endesa* and the Commission Notice which is construed there for the principle that in certain circumstances it is appropriate to make deductions to the headline figure of reported turnover in the accounts in order more accurately to reflect the scale of the undertaking's activity.

I should mention at this stage, and I will come back to this, that the OFT rely on *Endesa* for the decision which the court there reached on the facts. In my submission no analogy can sensibly be drawn, but I will come back to that.

We say it is perfectly proper and in line with the requirements of fairness to treat AndersElite for these purposes as an intermediary, and that is where I will turn to the case because we say that the Tribunal, in our respectful submission, should have regard to the Commission practice in the context of mergers for the assessment of turnover.

Could I ask the Tribunal to turn up, first, the Commission Notice, which is authorities bundle 1, tab 19, p.35. The Tribunal will be familiar with these paragraphs. We had a rather creative interpretation, I would suggest, from Mr. Allen, the OFT's expert, but he effectively resiled from that yesterday. My submission is that if one looks at the wording, just going through it, para.157 begins by saying that the concept of turnover is usually sales, the figure that appears under sales in the accounts. At 158 they say that is normally the right approach for services as well, but things may be a little more complex for services. It is straightforward where you have one undertaking providing the entire service to the customer, but in other areas, such as package holidays and advertising – that is the example given at 159 – the service may be sold through intermediaries, even if the intermediary invoices the entire amount to the final customer, the turnover of the intermediary consists solely of the amount of its commission. Then an important paragraph at 160:

> "The examples mentioned …"

travel agents, media agencies –

> "… show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed."

We rely on that specifically. That is why I said earlier, first, what the Commission here is saying is, first, you determine if an entity is an intermediary, and you do that by reference to the underlying legal and economic relations. Then, if it is, you construe turnover as the commission element of this payment. That is what we say should be done here.

So what we say is that when you look at all of the circumstances in the round, AndersElite should be treated as an intermediary.

If the Tribunal could keep open the Commission Notice, but also turn to the *Endesa* case, which is authorities bundle 3, tab 38, p.2608. Given the importance of this, I will just read it out. Paragraph 208:

> "… it should be noted first of all that … the concept of 'turnover' … refers explicitly to 'the amounts derived from the sale of products and the provision of services'. 'Sale' as a reflection of the undertaking's activity is thus the essential criterion for the calculation of turnover, whether for products or the provision of services.

> Furthermore, the requirements of legal certainty and speed which apply in the context of control of concentrations mean that both undertakings and competition authorities can in principle rely on a foreseeable criterion and immediate access. In those circumstances, the turnover to be taken into account in order to determine the authority competent to examine a concentration must, as a rule, be calculated on the basis of the published annual accounts. It is therefore only by way of exception, where particular circumstances so justify, that certain adjustments should be made in order to best reflect the financial position of the undertakings concerned."

Then at 210 the court refers to the notice and says that it:

> "… envisaged the possibility, in certain circumstances, of calculating the turnover in a different way than by reference to the aggregate of sales of products or the provision of services."

Then they quote the notice.

THE CHAIRMAN: It is the earlier version.

MISS KREISBERGER: It is the earlier version of the notice, yes.

THE CHAIRMAN: Is it effectively the same?

MISS KREISBERGER: They are effectively the same. We do have both appended.

THE CHAIRMAN: We have got the quote here, and you have given us the new one. I am wondering, have they changed in any way?

MISS KREISBERGER: No, they are not different in substance at all. They confirm at 211 that:

> "… the Notice concerns a particular category of intermediaries with the services sector only, whose sole remuneration is the amount of commission they receive. It is, therefore, an exception to the general rule that the relevant turnover must be calculated on the basis of the total amount of sales. The concept of intermediary must therefore be interpreted strictly."

So the importance of the judgment, we say, is that it upholds the principle that whilst turnover is usually relied on, overall turnover, based on the overall sales figure in the accounts, the court says, and we accept, that it is by way of exception and where particular circumstances so justify, but certain adjustments to the overall figure of turnover or revenue in the accounts should be made to reflect the undertaking's financial position.

We say that when you look at the circumstances of AndersElite as the recruitment agency, it should be treated as falling within the exception for the purposes of penalty assessment, or at least some adjustment should be made to the fine to reflect that fact.

I think I must turn to the facts of *Endesa*, as I mentioned that the OFT rely on the finding on the facts there. Can we just look at the reasons on which the ruling was based, because we say there is no comparability on the facts. This is dealt with at paras.213 to 216, so carrying on on p.2610:

> "In addition, in the absence of any evidence of a legal nature put forward by Endesa to the contrary, the legal relationship existing between Endesa and the end customers must be regarded as a contract for the sale of electricity. Such a sale is a commercial act which involves the transfer of ownership.
>
> The same applies as regards the legal relationship existing between Endesa and the electricity generator providing electricity …"

and they give some reasons why that is, which I do not think I need read out. Then at para.215 they reject the argument that the distributor is not the owner of energy. They conclude at 216:

> "Therefore, as the activity of distributors [Endesa] involves, in particular, purchasing electricity or gas from their suppliers and then distributing it and selling it to the end consumers, it cannot be classified as the provision of services limited to supplying a product on behalf of [the electricity] generators …"

So it is not an intermediary for that reason.

> "Endesa cannot therefore from a legal point of view be regarded as a mere intermediary …"

and it does not fall within the exception.

Could I just ask the Tribunal to look back to the Commission Notice, footnote 116, p.36, where we were, refers to *Endesa*, it refers to para.213, which I just taken you to:

> "An undertaking will normally not act as an intermediary if it sells products via a commercial act which involves a transfer of ownership."

So, in my submission, there is nothing surprising at all about the court's rejection of Endesa's claim that it should be characterised as an intermediary. In fact, *Endesa* is the most straightforward of cases.

Endesa acted as a distributor of widgets, whatever. Two points: the first is that electricity is a good, albeit an intangible one. It is not a service. Second, and I think I have laboured the point enough, Endesa bought that good from the generator, acquired ownership in it, and sold it on to customers. You can substitute any product you like. Mr. Allen mentioned cars yesterday. If you buy something and you sell it on, you cannot claim to be an intermediary,

because if you are an intermediary everyone is an intermediary. So that is all we can take from *Endesa* on the facts.

THE CHAIRMAN: That is the legal analysis. They go on, do they not to consider, notwithstanding that, on the facts might it be said that they act as an intermediary, the economic reality, as it were. That is 218.

MISS KREISBERGER: Yes, and if one looks, for instance, at 223 – this is a point which the OFT relies on, and they say ----

THE CHAIRMAN: Do you want to say something about that?

MISS KREISBERGER: Yes, I will

THE CHAIRMAN: This is your chance.

MISS KREISBERGER: Yes, I will now, I am about to. I would like to make one little point before I do, which is what the Commission and the Court of First Instance did not do in *Endesa* is say, "The answer lies in the accounts, and we do not need to make any investigation". They did what para.160 of the Commission Notice says they should do. Taking my opportunity to take a shot at this, the main point the OFT takes here is that *Endesa* bears the risk of non-payment, and that starts at para.223 and the conclusion is at 226. They conclude that on the facts Endesa carried the credit risk, and that was a factor which also pointed against Endesa being an intermediary. We do not shy away from this but, first of all, the court looked at this after the issue of the transfer of ownership point. The question became whether, notwithstanding that there is a transfer of ownership in a good, could Endesa's challenge be saved by the fact that it did not bear the risk of non-payment. The answer to that from the report was, no, it could not.

Perhaps a more fundamental point is again coming back to the Commission's indication at 160. You have got to form a view on the basis of the legal and economic relations. You have to look at matters in the round. The answer does not lie in a single indicator.

Can I come on now to discuss the considerations which we say point firmly in favour of AndersElite being an intermediary and why a different conclusion from that reached in *Endesa* should apply here, but one factor does not tell you anything in itself.

THE CHAIRMAN: Yes. Can we put *Endesa* away?

MISS KREISBERGER: Yes. I will try very hard not to duplicate here, but of course I must just draw together the evidence as it relates to AndersElite. Our first point is that, as has been said many times, AndersElite supplies a recruitment service, it acts as a middle man whether supplying a temporary or permanent candidate. The OFT says, "But the services fundamentally differ". We say that is not borne out by the facts as they apply to

AndersElite, and I rely on the following, and the first is not an AndersElite specific point, the others will be. The first is the Decision itself. I do not think the Tribunal need turn this up, but for the note it is CB1, p.40, para.2.128. At 2.128 under the heading "Recruitment Agency services supplied to the Construction Industry" – perhaps the Tribunal might prefer to have that in front of it. The OFT explained that recruitment agencies combine two functions, the search function, which is the identification and the sourcing of candidates; and the selection function, selecting and matching candidates with vacancies. The OFT tells us there in terms that the positions filled by recruitment agencies may be permanent or temporary.

So the service supplied is recruitment, and there is no suggestion here that agency supplies the labour services, the building service or the architectural service.

I would also like to draw attention to – and here I would ask the Tribunal to turn it up – para.5.25 of the decision, which is at p.220. This is important because here the OFT defines "relevant turnover". It says:

> "… relevant turnover for the purposes of the imposition of financial penalties relates to the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK."

There is no division there at all, no distinction between temps and perms there.

The relevant market, I accept, has only been defined for the purposes of penalty assessment, so it is not a detailed economic assessment of market definition. Nonetheless, if one looks at para.5.23 the OFT cites *Replica Kit*, the Tribunal's judgment there, that confirmed that there can be a consistent grouping of products where it reflects commercial reality.

I would suggest that it does not, therefore, lie in the OFT's mouth to say that the two services fundamentally differ when, as a matter of commercial reality, they appear to take the view that they do not differ at all.

Could I ask the Tribunal to take core bundle 3, I am now turning to the CDI specific points on AndersElite's role. And tab.14 of core bundle 3 is Mr Ballou's statement. And I would ask the Tribunal to have regard to paras.5.

THE CHAIRMAN: Tab 14, you say.

MISS KREISBERGER: It is tab.14, p.140, paras.5-10 and also para.15, just aware of the time, just to summarise effectively what Mr Ballou says is that, really, the choice of whether a vacancy ends up being temporary or permanent is often arbitrary. It can change over time. It is determined after the candidate has been selected, effectively, the same consultants,

AndersElite recruit for both temporary and permanent, and at para.10, the hallmark of recruitment is that the workers are under the control, supervision, direction of the customer.

THE CHAIRMAN: Yes.

MISS KREISBERGER: I will not turn it up now, but for the note, sir, I would also rely on transcript day 2, p.23, line 8, to p.24, line 4, on the type of service supplied. Mr Ballou there says very much the same thing. Actually, I may just quote from a bit of that chunk.

THE CHAIRMAN: We will look it up.

MISS KREISBERGER: I am grateful, sir.

THE CHAIRMAN: The case is short enough that we can still remember its outlines.

MISS KREISBERGER: So, we say, "Well, the only material distinction is the question of on whose payroll does the temp sit" – and the matters which flow from that. And we say, looking at matters in the round, this is not a factor of sufficient importance for it to mean that it is wrong to treat AndersElite as an intermediary. I will, just very quickly, read out from the transcript, this is transcript day 2, p.29, line 10, just a very brief point which Mr Ballou made, which is, when I asked about the payroll services he said:

> "We have seven clerical employees, we've outsourced it to India and [the seven clerical employees] working in India provide the payrolling services for the contractors … It costs some tens of thousands of pounds. I'm not sure of the exact number, but it's in the tens of thousands of pounds."

And the ball park figure was, this is across 500 or 600 contracts".

So, we say then, let us say it costs AndersElite £250,000. It may well be less, seven clerks in India, even £250,000, that is £50 per contract per annum. It is a drop in the ocean. It is an ancillary service which does not justify treating temporary recruitment services as to very different to permanent recruitment services to the tune to CDI of £70 million of relevant turnover.

Now, Mr. Unterhalter, and this is something the Tribunal has heard from Mr Brealey on today, attempts to suggest that there is this linear supply of services from the worker to the agent to the construction company, and we say as far as AndersElite is concerned, this is a fiction. It truly is a triangular relationship. And I would like to refer the Tribunal here to AndersElite standard terms and conditions which were not put to Mr Ballou. They are in NCB3, vol.2, tab.15, p.1153 – tab.16, 1153.

THE CHAIRMAN: Right at the end.

MISS KREISBERGER: It is the first page of tab.16 at the back. It is a document called "Client terms of business".

THE CHAIRMAN: I do not think we have seen this.

MISS KREISBERGER: You have not seen this, sir. It was not put to Mr Ballou, and this is an area, sir, where we urge individualised consideration on the Tribunal. If I could draw the Tribunal's attention to the following:

"'Definition of Applicant', means the person or Contractor introduced to provide services to the Client". That is the construction company.

'Assignment', means the period during which the contractor or temp is supplied to the client to provide services.

'Client' means the person, firm or corporate body requiring the services of the applicant.

'Perm' [further down] means an individual who is introduced to provide services to the client on a permanent basis".

I also draw attention to 'Temp to perm', which shows that temps can switch to perms.

I would also just ask the Tribunal to look at p.1155 which is the terms of engagement for temporary workers. It is appended to the letter of engagement you see at 1157. These are the standard terms and conditions to which it refers, and you will see very much the same sort of thing – "Assignment" means the period during which the temp is supplied to the client to provide services. "The client" is the person requiring the services. So, it is quite clear, according to AndersElite's terms and conditions, that the service is to supply direct from the worker to the construction company. This is not an *Endesa* case. There is no transfer of ownership of the goods, there is a chain of contracts, yes, but AndersElite simply pays the workers to supply services to construction companies. Uncontroversial.

And just, perhaps, for a bit of colour, it might be helpful for the Tribunal to note that Mr Unterhalter, perhaps inadvertently, was describing as far as CDI's activities are concerned, outsourcing. I will not take the Tribunal to it now, but it is covered in Mr Ballou's statement at paras.11-12. The point about outsourcing is that is where CDI supplies a product or a service direct to the client using CDI employees. Sometimes they are situated at the client's premises, the example Mr Ballou gives is running a client's mail room, for instance, but they are under CDI's control -----

THE CHAIRMAN: Yes.

MISS KREISBERGER: -- and CDI contracts for the provision of what is referred to in the Form 10K as "a deliverable". So, a product for a service. And whilst you have the T&Cs open there, I would also just ask the Tribunal to take account of paras.13.3-13.4 under the heading "Liability", under which -----

THE CHAIRMAN: This is in?

MISS KREISBERGER: This is p.1154, so it is the terms of business. It is the standard terms with the client. At 3.3: "AndersElite is not liable for the negligence of a temp". And, as I have already said: "Temps are under the supervision, direction and control of the client".

THE CHAIRMAN: Yes. I am not sure how far that helps one way or the other, that sort of exclusion, because the other way of looking at it is the reason they have to exclude it is that otherwise they would be. Or, you say, "No, they would not be, and it is just there for abundance of caution". But it does not really, then, cut to the heart of the question.

MISS KREISBERGER: Yes, I refer to it for completeness. I think the main point here is the triangular point.

THE CHAIRMAN: Yes.

MISS KREISBERGER: The other point I should just briefly make on outsourcing is, we have heard the expression, I think, "On the bench" employees on the bench. That is exactly what happens in outsourcing. CDI does manage the workforce for outsourcing. They are on the bench. They are ready there to do the work. But the absolutely key consideration is that CDI only engages a temp once a construction company has accepted the supply of the candidate. It does not have the employees on the bench. The arrangement with the client comes first. The temp is then engaged so it can provide services to the client. When the assignment is over, so is the contractual arrangement with the temp and, just for the Tribunal's note, that is Terms and Conditions, p.1155 that we were just looking at para.10.4; it is also referenced in CDI's form 10K, and that is NCB2, tab.17, p.335.

We say this is at the very heart of this case, and it really undercuts the OFT's claim that AndersElite manages a workforce. It does not. Not for temporary workers. It does for outsourcing. Yes, it provides ancillary payrolling services. Yes, it carries the risk of non-payment and pays tax, but it does this pursuant to employment law obligations. But none of this converts it into a supplier of labour services, architectural services, whatever one is talking about. That is a fiction. And the suggestion made for the first time in the defence that AndersElite acts as a recruiter of labour for perms, and the provider of labour for temps, which is not a distinction drawn in the decision, I say is highly unsupported; and I would just note this is covered in our skeleton, but my solicitors did write to the OFT on 24th May asking for the source of this new factual allegation, this factual distinction, and none was forthcoming. The response my solicitors received was that the OFT did not consider that the defence required further elaboration. The correspondence is NCB2, tabs.22-23. But we say this just simply does not correlate with reality, AndersElite provides recruitment services and some minor ancillary services in relation to temps under the employment law

framework. So, to conclude on this ground, we say it is a manifest failing that the OFT refused to look beyond the accounts and closed its mind to commercial reality. We say this is a serious error of approach. We say the small differences which exist in the arrangement between temps and perms which arises through operation of law for the protection of the temporary worker do not justify the treatment of turnover resulting in a fine at Step 1 of almost five times greater than it would otherwise be, £8·3 million to what we say should be £1·8 million. And we say this could at any step have been cured by the OFT stepping back and effecting a downward adjustment of the fine to reflect that commercial reality and to comply with the requirements of fairness. So, those are my submissions on ground 1. Perhaps if the Tribunal has any questions on that ground?

So, for completeness, then, on seriousness we adopt the submissions of Mr Brealey, and have nothing to add.

THE CHAIRMAN: Yes.

MISS KREISBERGER: On totality I dealt with that in my opening statement, and I have nothing to add in addition to the comments I made on Monday. And, on ground 4, I have had an indication – this is the specific ground – from Mr Unterhalter, but I think it would be most efficiently dealt with by me if necessary in reply to Mr Unterhalter. And then, just the very last thing, although we will wait to hear from Mr Unterhalter on that, I am going to carry on with my bout of optimism and hand up the table I mentioned yesterday, which simply makes the ground for adjustment.

THE CHAIRMAN: Yes.

MISS KREISBERGER: Again, those are confidential figures.

THE CHAIRMAN: So, this is another, as it were, reiteration of the table that you gave us.

MISS KREISBERGER: Yes, sir.

THE CHAIRMAN: With the grounds for adjustment.

MISS KREISBERGER: Precisely. That appears on the table as "Less net ground for exclusions".

THE CHAIRMAN: Yes.

MISS KREISBERGER: And, very lastly, simply since I mentioned the -----

THE CHAIRMAN: I think the figure of the exclusion is not confidential, is it?

MISS KREISBERGER: No, I do not think the figure is.

THE CHAIRMAN: It is in your notice of appeal.

MISS KREISBERGER: The confidential figure is the cost of service for temporary workers, CDI's cost of service.

THE CHAIRMAN: Yes.

MISS KREISBERGER: And, lastly, I mentioned Keller Group accounts. I just hand that up, just to -----

THE CHAIRMAN: This is from Makers?

MISS KREISBERGER: This is from Makers. Just to firm up on that from yesterday's submissions on the Keller Group, the parent company's revenue, the figures that I gave in the accounts for 2005 which is £685 million.

THE CHAIRMAN: Yes.

MISS KREISBERGER: You just have that there in the accounts. Sir, that completes my submission.

THE CHAIRMAN: So, we will return at ten to two.

(Adjourned for a short time)

MR. BREALEY: Sir, if I could just trouble you on this net fees issue for 2004/05?

THE CHAIRMAN: Yes.

MR. BREALEY: We have tried to come to some agreement with the OFT but I understand that has proved fruitless. Can I just explain the position? I would ask the Tribunal not to order us to recalculate the relevant turnover. If I can make the points and then just very quickly show you why.

The first point is that it is highly unlikely that we have the data available – we are now 2010 and this is relating to 2004. I understand that the worker placement databases have been replaced, so it is highly unlikely that we can do it, that is the first reason.

The second reason is that it will be hugely time consuming and expensive, and if I could very quickly ask the Tribunal to look at CB3, tab 1, which is Mr. Venables' first statement.

THE CHAIRMAN: Yes.

MR. BREALEY: Page 22, paras.64 to 68 but particularly para. 66. You will see there when we first did this exercise in response to the s.26 notice in particular it ----

THE CHAIRMAN: It does not actually say when you did it, but presumably you did it in mid-2008, early 2008?

MR. BREALEY: That is right, but we did it for the year that is before the Tribunal. If one looks at para. 68 it says:

> "We allocated a team of 5 Hays employees to work nearly full time for a period of 6 weeks to review thousands of placement records, complete 26 spreadsheets and review underlying financial data . . ."

So that is the sort of exercise we went through to get the relevant turnover, which is only some of the candidates in the construction industry, not all of them, so you have to separate those out. It was an extraordinary amount of time and expense which Hays will be put to if Mr. Harris's point is successful and the OFT have made an error. So that is the second point.

The third point is that it is not part of our appeal. The fourth point – and I can only put this forward as some sort of compromise, we have put this to the OFT but at the moment there is no agreement – it may, and I just emphasise the word 'may', it may not make any difference. The reason that I say that is that if you look at, for example, the net fees for the UK and Ireland for 2004/05, and the accounts are in the bundle ----

THE CHAIRMAN: Yes.

MR. BREALEY: -- it is £354 million, that is net fees. For 2009 accounts it is £330 million, so there is £20 million difference, so it is slightly higher for 2005 than for 2009, but of course that is for UK and Ireland.

But we have, we say, £33 million net fees for 2009, that is what we say our figure is in the relevant market. That is a tenth of the £330 million net fees. So if you are looking at tenth ----

THE CHAIRMAN: That is in which year?

MR. BREALEY: 2009. The net fees for UK and Ireland for 2009 was £330 million.

THE CHAIRMAN: So it is 10 per cent of the total.

MR. BREALEY: It is 10 per cent. For 2004/05 it is £354 million, if you took 10 per cent of that, that is ----

THE CHAIRMAN: Another way possibly, because I appreciate what you have shown us at para. 68, I think without turning it up that the accounts break down the net fees by sector. Indeed, you made use of that in cross-examining Mr. Allen.

MR. BREALEY: In 2009, I have not gone back to see whether that is by sector in 2004.

THE CHAIRMAN: Just to finish, you know where I am going, I think, that one could look at the construction sector in 2008/09 and look at what proportion of that is the £33 million, namely what percentage had to be stripped out and then if one had the construction sector in 2004/05 one could say on a broad brush basis probably the same proportion would be stripped out and that would be a simple way of doing it and clearly a little bit more refined because the total net fees cover all other sectors where the performance may have changed.

MR. BREALEY: Another compromise is to take a percentage of the Plc's turnover. All I am saying is that if it is broadly similar we should not be disadvantaged without all the analysis

coming through, and what I would urge the Tribunal to adopt is if Mr. Harris wins on his ground that the Tribunal treat 2009 as if it was 2004, because ----

THE CHAIRMAN: That would be a bit odd when you have just pointed out the figures are different.

MR. BREALEY: Well they are different, but are they so different – in order to get the accurate figure we would have to do this six week exercise which, on one view we cannot do.

THE CHAIRMAN: How does the £33 million compare to the figure in the accounts for construction?

MR. BREALEY: There is no breakdown in the accounts. For 2009?

THE CHAIRMAN: Yes, but I thought the £33 million is 2008/09.

MR. BREALEY: Yes, it is but I do not have that figure for 2004.

THE CHAIRMAN: No, no, I am asking you, that is the figure of relevant turnover after taking out certain categories.

MR. BREALEY: Yes, it is.

THE CHAIRMAN: How does that £33 million compare with the figure in the accounts for construction net fees in 2008/09?

MR. BREALEY: It will be NCB4, vol.1, p.131. That is net fees C&P, 131.

THE CHAIRMAN: That is worldwide, is it not?

MR. BREALEY: No, we have UK and Ireland. 131.

THE CHAIRMAN: 131 is just UK, yes. 75.7, is it?

MR. BREALEY: My main point, Sir, is that if it is going to be against us, and it could be slightly higher, we would be forced to spend £200,000/£300,000 as I understand it for the six weeks' work in order to get the correct figures.

THE CHAIRMAN: That is why I am wondering about, if this were the line we took, doing it this way.

MR. BREALEY: You can hear from behind me, it is a lot of work, I am told it could be six weeks, it could be three months. The amount of detail you have to go through, if it exists ----

MR. UNTERHALTER: Perhaps I could be of assistance to my learned friend, there is apparently a figure for 2005 and 2006 in the annual accounts, for 2006 on a breakdown basis. It is p.411.

MR. BREALEY: That is 2006, as I understand it.

THE CHAIRMAN: It goes to the next year, does it not? 411?

MR. BREALEY: 411, on 410 there are 2 people, one of which you will maybe recognise. Then on 411 in the left hand column, we see year ended 30th June, 2006 and 2005, 411.

THE CHAIRMAN: Is that UK and Ireland.

MR. BREALEY: Yes, it is, you will see that from the bottom of 410.

THE CHAIRMAN: So the equivalent, what was £75.7 million in 2008/09 was £97 million in 2004/05.

MR. BREALEY: But, as I say, one does not then have any smaller breakdown as to what is relevant turnover.

THE CHAIRMAN: No, but one might assume that the same sort of percentage would apply if you do not want to do the work.

MR. BREALEY: Or can do the work.

THE CHAIRMAN: You said it is very unlikely, you are not saying for certain, you need to make further investigation.

MR. BREALEY: Obviously Hays has to go back and ask its technical team whether it can be done, and again one has to take on board that if this is an error on the OFT's part, then this is the first time we have been put on notice of that error and we should not be prejudiced by it, particularly when we are not taking the point on appeal.

THE CHAIRMAN: You heard what I said before, I was trying to see if that is a quicker way, unless it is said that the elements that have to be stripped out were of a wholly different proportion than a few years before and ----

MR. BREALEY: But one just does not know.

THE CHAIRMAN: Well your clients will have some idea of that because they know what their business is, will they not? I do not want to spend more time on it, but I think we would like to know whether it can be done, you say it is highly unlikely they have the data.

MR. BREALEY: Those are my instructions.

THE CHAIRMAN: That is what you have been able to establish over lunch.

MR. BREALEY: My last point then is that if I come back and say: "It can be done, but it is going to be extremely expensive" ----

THE CHAIRMAN: Yes, well then you can give us an estimate.

MR. BREALEY: -- and we could ask for the costs from the ----

THE CHAIRMAN: Well you can give us a broad brush figure of costs.

MR. BREALEY: The best thing to do, Sir, is to leave it to the Tribunal, given our position.

THE CHAIRMAN: If you say that either cannot be done or is very expensive, perhaps you can make a constructive suggestion of how one can get at a reasonable estimate.

MR. BREALEY: And the OFT can as well, if it is their error, they should ----

THE CHAIRMAN: No, it is this Tribunal which is fixing the fine and we want to know what is a reasonable basis on which we can do so. We are not interested, on this assumption, on how the OFT might have done it.

MR. BREALEY: I take your point.

THE CHAIRMAN: Yes, Mr. Unterhalter?

MISS KREISBERGER: Sir, could we just make our point on that as well very briefly indeed. Our position is that we see the force in the argument, we certainly do not argue against it. The position for CDI is that the data does exist and we think we can do the work to access it.

THE CHAIRMAN: Do you know how soon you can supply it?

MISS KREISBERGER: If I can just take instructions. (After a pause) We think at most a month.

THE CHAIRMAN: A month is satisfactory. We are bound to say that this a point that occurred to all of us on the Tribunal when we read the notices of appeal. So we are a little surprised that at least some of the parties have not been prepared to address it as we had expected, but there we are.

Mr. Unterhalter?

MR. UNTERHALTER: Thank you, Sir. We have prepared a note to assist in these closing submissions. It is not comprehensive note, it simply seeks to address some of the issues, particularly where there are issues of evidence where we have tried to assemble some of the relevant citations. Perhaps I could just indicate what it does not contain. It does not deal with MDT, which is what I shall commence my submissions with. It refers tantalisingly under (d) to the argument concerning turnover in respect of CDI, as to which I will make a very brief submission. Other than that, those are the topics that are covered. The only other matter that I will be addressing that is not reflected here is the year of turnover debate.

THE CHAIRMAN: Yes.

MR. UNTERHALTER: Can I then commence by dealing with the challenge on MDT grounds. There are three basic criticisms that are offered, the first being the most significant, at least in conceptual terms, and that is that there is no link to the concept of the culpability. The second is that if there is to be an uplift it should be an individualised assessment and not a mechanical formula. Thirdly, it is too singular in its focus because there are other dimensions that should be taken into account for the purposes of making a deterrence assessment, and that engages questions such as profit and the like.

Let me begin with the first of those, which is the thesis that there is no link to the concept of culpability or the determination of culpability, and so there is a problem with proportionality and a failure properly to apply what the Guidance requires.

It was notable that in our learned friend's address on this score he came at the end of his address on this matter to refer to what he took to be the preferred outcome, which was to say that there should be an approach applying multiples of what had been determined at Steps 1 and 2. That is, of course, a commitment to the proposition that somehow or another the work of deterrence is better done on a principle of multiplication from what is determined at Steps 1 and 2. When one probes what is the foundation for that notion, other than saying that it begins from Steps 1 and 2 there is no rational principled basis upon which that multiplication exercise takes place. It seems that Hays allows for the fact that that multiplication may be many times over in certain kinds of cases, but why it is set at that level and what the rationale for it is, at least on the argument, wholly unknown.

The first question one poses is, what is it about that connection between the point arrived at Steps 1 and 2 and multiplications from it that is properly and proportionately doing the work of deterrence; whereas the MDT is not doing that work. We want to submit that if one looks at that offering as to how deterrence should be done, one sees indeed a much cruder principle of deterrence being applied. We say that for this reason: what has been determined at Steps 1 and 2 is, firstly, along the one dimension a determination of seriousness; and secondly, an allowance as to relevant turnover which is in effect the impact of the infringement in the relevant market. So one is asking a very limited question, which is: what is the scale of the undertaking in the relevant market?

It is said for Hays, and those who adopt its argument, that that is somehow a proper basis for working out what will deter an undertaking. The question is: why is that so? Why is the relevant variable there? The extent to which the undertaking has engaged in activity within the relevant market, the crucial variable for the purposes of constituting the foundation from which one determines deterrence.

This is where one comes to the second proposition that we would offer, which is: what is one trying to do by way of deterrence? One is not trying to do the same work by way of deterrence that one is trying to do in capturing the notion of seriousness. It is, as everyone has said, an instrumentalist or consequentialist approach to penalties. We are looking to use this offender for the purposes of dissuading this offender for the future, and indeed others who might be tempted to act in a similar way given what this offender has done.

So there is no question that we are not trying to, as it were, capture the same topic again in deterrence. We are trying to do something different and that is why the Guidance is plain on this subject. It say, "You may adjust", and you may adjust precisely because there is a different object that is to be served by this next step in the analysis.

So when one thinks realistically about what Hays is proposing on this score, they are saying that it is a necessary aspect of proportionality and necessary for the purpose of complying with the Guidance that the question of deterrence must be rooted in the proposition of how much this undertaking has engaged in activity within the relevant market. There are only two matters that are determined at Steps 1 and 2, the seriousness percentage and the relevant turnover. Those are the only two things that are being determined.

THE CHAIRMAN: Step 2 is duration.

MR. UNTERHALTER: Step 2 is duration, but from the perspective of Hays – I should correct myself, it is Step 1 that is considered to be the culpability factor which is said to be at the heart of Hays' proposition, and it is really made up of those two points.

In our submission, that is a very bad indicator in many circumstances for the purposes of doing the work of deterrence. We say that precisely for the reason that the MDT has been created, which is that a very large undertaking that operates in many markets and has the ability and potential to do very considerable harm across a range of economic activities, it is that kind of undertaking that must be deterred, at least by way of specific deterrence. If such an entity has a relatively small turnover in the relevant market, it seems to be an altogether counter-indicator to use that relatively small amount of turnover in the relevant market as the conceptually right basis for deciding how to deter a very large undertaking.

That is the central proposition about MDT. MDT is not of invariable application. MDT is of application in the case where the margin of deterrence will not be great enough because the participation of the undertaking in the relevant market is too small relevant to its overall size.

All that the Hays' proposition stands for is to say, "It is an inclusive indicator of deterrence for the purposes of working out the foundation for the multiple. What is the extent of activity that the undertaking has engaged in in the relevant market? That is what this proposition comes down to. The question is: why is that rational? We would submit that it is often entirely contingent. It is not rational at all.

In many circumstances – we know from having assessed many cases, certainly across the construction sector – one finds that undertakings of different size are wholly differently situated in respect of how much of their turnover is accounted for in the relevant market.

You have medium sized undertakings that have very significant turnover in the relevant market, or small undertakings that do so, and you have very sizeable undertakings that have very little relevant turnover. It is an entirely contingent matter depending on how the relevant market is defined and how much activity is taking place in a particular year on that market. Those are commercial variables that have very little to do with the question of the consequentalist, forward looking issue as to how deterrence is going to work.

We submit that the Hays' proposition is actually the contingent proposition and does not offer a very satisfactory account as to how deterrence should work.

The OFT's policy is a defensible one and perhaps I should indicate why we say it is rational and defensible. It has a number of features. The first of them is that it takes the turnover figure that is generated at Step 1 and, after the duration is applied, Step 2, and it asks itself this question: how much of the overall undertaking's turnover is captured by what we have assessed at Step 1 and 2? Where it accounts for a sufficiently sizeable amount of the overall size of the undertaking then we do nothing more. We are not required to because we are quite satisfied that that penalty will also serve deterrence purposes. We have captured enough of the undertaking's turnover.

In circumstances where that is not the case then something more is required, because too small a part of the undertaking is being impacted by reason of these contingencies that affect relevant turnover. So a figure is arrived at for the purposes of working what is enough that is representative of a sufficiently sizeable part of the undertaking's activities to be the base as to which we would apply deterrence.

So it is a policy that is only triggered where there is a judgment that not enough is captured and therefore it is a policy at the margin, it is not of invariable application. That is the first feature of it, so it is tailored to the circumstances of the undertaking and the particular features of how relevant turnover relates to total turnover.

The second feature of the calculus is that it does not lose touch with seriousness at all. In those circumstances where there is no warrant to apply MDT because enough of the overall size of the undertaking is captured at Steps 1 and 2, then Steps 1 and 2 serve the purpose, nothing more is done, and in that sense what counts for seriousness counts for deterrence.

In circumstances where the MDT is an application, there is still a link to seriousness because, of course, it is the seriousness percentage – in this case the 9 per cent – that is applied to the 15 per cent, and that is an invariable feature of the MDT. That is not contingent at all. So the linkage continues to be in place.

There is a third feature of MDT, which was not remarked upon at all by any of the appellants. That is that all of the objectives that are sought to be served by the penalty regime have to be situated within a universe, and that universe is dictated as to its extremities by a cap that is calculated in terms of 10 per cent of worldwide turnover. It postulates this: it says, "If you assume the very worst kind of infringement by the most sizeable and potentially dangerous undertaking, it would in those circumstances, other things being equal, be circumstances where 10 per cent of worldwide turnover would be a competent penalty to apply". It is always the case in setting penalties that one is trying to get a sense of where does this case lie as between the most trivial and the most serious. Because that limit is a statutory injunction, it is not a matter of Guidance, that is how Parliament has determined that the universe should look at its extremities, in those circumstances it is unsurprising that the standard that is relevant here is worldwide turnover, it is not the importation of some oddity and some overly expansive conception of turnover. That is the very notion that is intrinsic to the exercise because you are situating this case within that universe.

We say for that reason too it bears a strong relationship to what the exercise is intended to capture.

Then there is the quite separate feature as to what is deterrence about, not as a general matter but particularly in circumstances where we are concerned with competition law infringements. This touches to some degree on the many submissions made which have said in a variety of ways, "We mean to be good citizens, even if we were not in the past, and see as evidence of that the rigorous nature of our compliance programmes". There is the point already made by the Tribunal concerning the difference between an *ex post* adoption of a compliance programme and an *ex ante* one. One can understand a rigorous programme adopted *ex ante* which fails, but nevertheless there was a determined effort to make it succeed; and an *ex post* effort, which says, "Now that we have been caught red-handed, we will try to be better". That is no doubt laudable, but does it have a very strong bearing upon the question of deterrence? We want to submit to the Tribunal that in the context of competition law infringements it is a peculiarly weak indicator of future conduct for this reason: cartel behaviour is not irrational behaviour for profit maximising firms in markets. It is a constant feature of those interactions within market transactions, that there is a temptation to coordinate, because in certain circumstances that can be a perfectly rational thing to do if you can fix a market by so doing. We know it is unstable, as indeed most cartels are, but that does not avoid the temptation. So, if one is thinking about firms from

an economic perspective, which is what this legislation is intended to engage, one is thinking about undertakings where those who are charged with making decisions to profit maximise, to ensure their margins, are constantly open to the temptation of some species or set of combinations and co-ordinations. And the way to make sure that firms understand the gravity of giving in to that temptation, is to affect the bottom line of the firm. It is to say "Your turnover is at risk here, and if you are tempted again into this kind of conduct, then it will directly bear upon your ability to be a profit maximising firm. Understand that".

And there is another feature of deterrence also much spoken about but, again, which warrants some emphasis, which is that cartels are enormously difficult to detect. When they are detected it is extremely important that, quite simply, an example needs to be made for deterrence purposes, because it is the only systemic way that we have to bring home to undertakings the gravity of what is being done in these circumstances. And so, we have parties and appellants before you now seeking to use every means they can to diminish the amount that they should pay for their wrongdoings and seeking, as it were, and we have heard now Hays suggesting that on their most optimistic forecast of the outcome of the case that they should be paying, I think it was suggested, around £3 million or £4 million, which would be a very small amount even of their profits in a year. We submit that that is a wholly incorrect framework within which to be thinking about deterrence. For a firm, for an undertaking of the size of Hays, from its own perspective it has to know that if it is tempted into this sort of behaviour again, significant turnover is at stake, not some 10 per cent or so of its profits for any particular year. And so we have a very great difference as to the practical significance of deterrence and what work needs to be done to impress upon those who infringe the Act as to what the consequences will be of those infringements. And that is just in respect of Hays. There is the entire universe of other undertakings in every part of the economy that must look upon these occasions and say, "We are fearful. We are very fearful as to what will happen. We cannot ever make an economic calculation that would allow for the possibility that we can absorb this loss, because the basic calculus is not very difficult if one thinks about it in a cynical way. If 10 per cent of your profit stream is at stake and the probabilities of detection are extremely low, then it is actually a bargain worth taking. What deterrence is intended to do, is be a corrective to that cynical calculus. It is intended to say to undertakings, "However low is the risk of detection the consequences will be grave", and that is why the sorts of figures that are being bandied about are, with respect to our learned friend, simply not sufficient on any basis to do what is required.

There is one final feature of the MDT that we wanted to indicate conceptually as to why it is the right way of going about this task – which is that it works with worldwide turnover and it is therefore a transaction-based measure. Now, I am going to make some brief submissions about profitability in a moment, but there are clear advantages in adopting a transaction-based measure because of course at the level of deterrence it is the entering into of tractions that constitutes the cartel behaviour. It is the arrangement to disintermediate park and set up arrangements under tractions with Vinci to their exclusion that presents itself to managers for the purposes of them making decisions. And turnover, as we have seen through the many iterations of that subject over the last few days, is a transaction-based measure. And worldwide turnover is the summation of the sales activities of an undertaking. So, when one is asking, "How big is this undertaking?" "How much activity does it engage in?" "How risky is it for the future?" Worldwide turnover is unashamedly the correct way of looking at this, because size here speaks to economic power, and it is the corrective to the abuse of economic power that lies at the heart of what MDT and any deterrence regime is about. And we submit that therefore MDT meets all the requirements for the purposes of ensuring that proper deterrence is done. It is individuated because it is concerned with the specific features of the size of the entity concerned. It is applied to the particular percentage, through the 9 per cent of the 15 per cent, which is individual to this entity and what it has done and the seriousness of what it has done. And it is also concerned not to apply deterrence gratuitously, because if that has already been captured at Steps 1 and 2, nothing more needs to be done, and that is of course the most important corrective for any lack of proportionality. So, in our submission, far from being a disproportionate ungrounded conception of deterrence, it is a well thought through conception, and it has much much more to be said for it than the conception that is offered by Hays.

THE CHAIRMAN: You say it does not lose touch with seriousness because the percentage is applied and the percentage is calculated on seriousness, and I understand that. But, the seriousness may be the percentage, but the Step 1 is looking at and regards as relevant when one is considering culpability, not only the character of the infringement, which is the percentage, but the scale of it, and one can see why with good reason. Once you substitute MDT for relevant turnover, the link to the scale of the infringement is gone, is it not?

MR. UNTERHALTER: Well it is, but for a very very compelling reason, and a warranted reason in order to do the work of deterrence, and this is why seriousness is not the same enterprise as deterrence. The reason that one applies the worldwide, one looks at worldwide turnover,

is precisely because if you are too small a participant in the relevant market, though very big overall, you are not going to do the work of deterrence.

THE CHAIRMAN: It means that whatever the scale, as long as it produces something that is below 15 per cent worldwide turnover, you end up with the same result. And that seems strange.

MR. UNTERHALTER: Well, for a very good reason. Which is that if the amount of turnover that is generated amounts to something more than 15 per cent of worldwide turnover in respect of Steps 1 and 2, then one is saying that deterrence is served because the size of the entity that is captured by the penalty is represented in that figure already. So, there is no substitution. It is not as if, as was suggested, that one is abandoning what has happened at Step 1. One is saying, "Is it doing enough?"

THE CHAIRMAN: That, I understand – that one asks that question. But if the Step 1 result affects 1 per cent, ½ per cent of worldwide turnover because the scale is so small. Or on the other hand it affects 12 per cent because the scale is so big, either way you end up with a penalty through applying MDT that is exactly the same.

MR. UNTERHALTER: Yes, indeed.

THE CHAIRMAN: And that is where it is said, and speaking for myself I can see why you have lost the link to one important aspect that you have very properly considered in Step 1 – even though, I take your point, seriousness in terms of character of the infringement is still preserved through the percentage.

MR. UNTERHALTER: In our submission the answer to that is that you do not need to maintain that link for the purposes of deterrence. Because, what is the point -----

THE CHAIRMAN: You may not need to maintain it for the purpose of deterrence, if that is the only purpose of the fine. But it is not the only purpose. There are two purposes, and are you not then losing an element – one of the two elements – of the -----

MR. UNTERHALTER: With respect, not. Because, if it is serving seriousness at the, say, the 2 per cent level, or the 12 per cent level, then what you are asking is a question at the margin. You are asking, "Is something more necessary?". Now, the fact that the amount more that is necessary, in the one case where there is 1 per cent, as I say, or for argument's sake, well, there you need 14 per cent, and the other you need to make up a smaller increment, is only because what you are really concerned with is whether 15 per cent is the right amount to determine how much of the overall turnover you need to capture to do the work of deterrence. In other words, there is no reason why one has got to use relevant

turnover percentages to then decide how much more is required for deterrence. The issue is simply one of size, because that is what is relevant to deterrence.

The only alternative is the Hays proposition which says, "Well, somehow this contingent figure about relevant size, or size in the relevant market, is somehow a determining factor for the purpose" -----

THE CHAIRMAN: But it is not yet. That is the one they put forward. It is not yet. One could also look at that figure and say, "We think this is too low, we are not going to apply a percentage to it, we are going to add £X million having regard to worldwide turnover, profit, any other special features". Now that would also be, they are all, there is no sort of limit to the number of ways one can look at that, trying to achieve deterrence.

MR. UNTERHALTER: Yes, indeed. We accept, and it is to be recalled that MDT is not, it is a technique that is utilised in this case. The question is, there may be others, the question is, is it in any measure either unlawful in the sense that it is not permitted by the Guidance, or if it is permitted by the Guidance, its application in this case is somehow problematic.

THE CHAIRMAN: Yes.

MR. UNTERHALTER: We say neither is the case, and we submit that that is so because, when you have determined (forgive me if this is repetitive) but when you have determined the percentage participation that the firm has in a relevant market, you are not saying anything of significance that is relevant to the matter of deterrence, because it may or may not be enough for the purposes of registering the size of the entity, which is the critical consideration for deciding what you need to do to deter. And that is why the notion that you have to link it in is a proposition which we submit is unreasoned and therefore the notion that you are committing an act of disproportionality because you do not keep the linkage is itself unwarranted, because unless you can show why the capturing of relevant turnover must matter for deterrence, and thus you need to start from that premise, it is not availing for the purposes of saying that it is a necessary foundation without which no proportionality can be done. We submit that neither on the Hays suggestion, nor any conception that is premised on the percentage of relevant turnover is a meaningful basis for doing the work of deterrence, and that is our fundamental conceptual argument in respect of the defence of MDT.

There are two lesser categories of objection that are raised. The first is that it is not individual, it is not specifically tailored, and here this is a very puzzling argument in our submission, because it seems that from Hays' perspective what is achieved at Step 1 and 2 is absolutely fine, and so they would simply apply a multiple to Step 1 and 2 and therefore

on assumption it is tailored, sufficiently tailored. And how is it tailored? It is tailored on the two, let us perhaps just for the purpose of exposition keep it at Step 1. It is tailored as to percentage and it is tailored as to the percentage of that percentage applied to relevant turnover. That is what that argument means by way of being individually targeted. Now. Let us compare that with MDT, for the percentage is still utilised which was the one feature that was tailored and is apparently acceptable in the Hays argument. And what is then said not to be, or insufficiently, tailored is something presumably about the use of 15 per cent, in other words, the difference between the amount generated on the relevant turnover standard and the total turnover standard.

But what is not explained is what is wrong with 15 per cent? One has to arrive at some level that captures sufficiently the size of the undertaking in respect of which some deterrence needs to be applied. Now, we would allow for the fact that no doubt there may be some argument that one could use 12 per cent or 10 per cent. But there is a great risk in this particular debate to try and render, as it were, something scientific that at best can mark out some rational lines of demarcation and not much more. And that is illustrated by Hays' difficulty that their multiplier is just, because we think that that is about right, it is the intuitive judgments that I addressed in my opening, which is said sometimes to be what is required for proportionality. It is actually just, it is just recourse to subjectivism in one form or another.

THE CHAIRMAN: Given the huge difference, particularly when you are going from worldwide turnover to between, as you said, one could have an argument to use 10 per cent or 15 per cent, a vast difference, you have only got to look at Hill McGlynn to see the scale of that. What we do not find in the decision, is what is the thought process that led to the presumed considered conclusion that actually really it needs to be 15 per cent.

MR. UNTERHALTER: The demarcation at 15 per cent is reasoned on the basis that you need to work with a base of - well, there are two components. The one is worldwide turnover. The second is: what is the percentage?

THE CHAIRMAN: Yes.

MR. UNTERHALTER: As to worldwide turnover, that is to capture the entirety of the undertaking's commercial engagement.

THE CHAIRMAN: Yes, I understand that.

MR. UNTERHALTER: So, in our submission that is entirely rational and acceptable basis for doing the work of deterrence. Then the question is "Well, why is 15 per cent of that number a sufficient or a sufficient basis for doing the work of deterrence?" And the answer to that

is simply that it is enough for the purposes of creating serious incentives for those who might be tempted to commit these very grave kinds of wrongs.

THE CHAIRMAN: On what basis does one conclude that it is enough, as opposed to very much more than enough? No doubt on that basis one could say, "Well, 30 per cent would be enough, it would be a very effective deterrent".

MR. UNTERHALTER: It is not a judgment that, I mean, one can never – I cannot reason deeply on this point, nor can anybody around these matters, but it is not a reason to suggest that the alternative that is being proposed is an acceptable one, which is just to say some multiplier is right, or some other set of intuitive judgments, 15 per cent is a judgment that is made on the basis that it is a significant portion of that turnover, but not so large as to start doing terminal damage to the business. In other words, we want it to be something that is healthy, that is large enough to make a major impact, but not so big as to potentially irretrievably damage the undertaking, because that would be, if I may put the point this way, it would be wholly irrational for a competition authority to seek to cause damage to undertakings that are meant to operate competitively for the future.

So those are the considerations. Now the Tribunal may conceivably reach a judgment if it says "Well, worldwide turnover is the right standard to begin with", and that of course is the very matter upon which the appellants will have nothing. They will not allow for a worldwide turnover standard. They want to work from a relevant turnover standard.

THE CHAIRMAN: I do not think that is right. I think if it is net fees, in this case they would accept that worldwide net fees is a relevant consideration. That was my understanding.

MR. BREALEY: Sir, can I make it very clear, I thought I had expressly accepted that it is not just profit that is relevant, I accepted that turnover, worldwide turnover, is certainly a relevant factor.

MR. UNTERHALTER: We are encouraged, then, by that. It means, in our submission, worldwide turnover is the correct framework to which to apply a deterrence issue. It is not a seriousness issue but a deterrence issue. And once you accept that, then it is a question of "Well, what is the percentage?" Some of these percentages seem more daunting than they are, because of course you are still going to apply the 9 per cent to the 15 per cent, so you end up with a percentage of worldwide turnover which is usually between 1 and 2 per cent.

THE CHAIRMAN: Yes.

MR. UNTERHALTER: So, sometimes these figures, you know, appear to be large, when they finally are done, it is not what it seems. I have indicated what the considerations are as to big enough to make a significant impact upon the turnover of the company, but not so big as

to impede its future ability to trade in markets. And that is where 15 per cent comes from. Now, there may be other judgments to be made on that score, but we have not heard from the appellants by way of assisting the Tribunal, how you achieve a better metric of how that work is done. Is 10 per cent the right figure?

THE CHAIRMAN: Well, I think they say it is, of course it is a point you are about to come to, that it is too singular.

MR. UNTERHALTER: Indeed.

THE CHAIRMAN: I do not want to take you out of your order.

MR. UNTERHALTER: But indeed, the world that the appellants inhabit is a multi-factoral world where, in effect you just look at a lot of different things and effectively you come to a somehow or another judgment because very often one is comparing very differing things in that mix. So in their conception you would look at relevant turnover, worldwide turnover, profitability, you would look at compliance programmes, and put all of this somehow in the mix and come out with an answer. Our submission is that that is an unprincipled basis for approaching deterrence, and it is going to yield a plethora of objections of the kind that says: "I cannot see, against this multi-factoral world, how you have achieved a particular number" because you are often just comparing very different things. How does one compare the question of a compliance programme against some conception of profitability, against some notion of worldwide turnover? I raise these questions rhetorically because if the Tribunal is to be tempted into this world it will have to itself seek to engage that world, and we would submit it is a very difficult one to understand and navigate one's way through.

THE CHAIRMAN: There is always, as you have acknowledged, an element of subjective judgment, 15 per cent is the subjective judgment.

MR. UNTERHALTER: The difference in our conception is there is an element of having to draw a line. It is within an explicable and principled universe, in other words there are clear lines that are drawn and it is against a reasoned account as to why worldwide turnover is being utilised, and why size in that sense is significant. The other world is simply one in which you look at all these different things and somehow measure them up to make a judgment. We would submit that that would be a retrogressive feature of ----

THE CHAIRMAN: One might say 2.11 of the Guidance is saying that. There are a lot of factors, some more relevant in some case than in another, and in some cases one might be completely irrelevant, but it is a multi-factored debate, and it is undertaking, or at least adopting the task of looking at not compliance, because the compliance programme I fully

take your point that is not dealt with here at all, but certainly one which does not particularly arise here, but its benefit may and that is something which you may take account of when looking at deterrence, because if it is a case where the undertaking actually has made this cynical calculus you might want to say: "It has to be shown to everyone that it does not pay". So there is that element to multi-factored approach in the Guidance.

MR. UNTERHALTER: There may be circumstances in which, for example, on the benefit proposition there are specific features where one can show the cynical calculus, and then that might be, but bearing in mind the MDT is a "minimum deterrent threshold", so more may be required by way of deterrence in respect of certain dimensions such as the benefit theory for example. But that is a very particular and calculable reference point. But if one looks at the key variables here, special characteristics including the size and financial position of the undertaking in question. The one that is raised to prominence in this example is exactly what the total turnover standard is intended to capture.

THE CHAIRMAN: Some might think size and financial position might bring in questions of profitability.

MR. UNTERHALTER: The question is really this, whether one must necessarily look at profitability. In other words it is a mistake if you do not, and our submission is it is not an error not to do so, it may be a factor that in certain circumstances could be looked at, the question is whether MDT is fundamentally wrong because it must, as an obligatory matter have regard to profitability in every circumstance and any failure to do so is to close one's mind to something that is necessarily relevant and our submission is that that is not so.

THE CHAIRMAN: Might there be circumstances where it would not be appropriate to look at MDT – well MDT is just a concept, but to look at 15 per cent of worldwide turnover and not apply that at all?

MR. UNTERHALTER: In our submission it would always be necessary to have regard to the overall size of the undertaking.

THE CHAIRMAN: But not to say that it must be 15 per cent at least.

MR. UNTERHALTER: It is quite possible that there may be industries that present themselves, or circumstances that present themselves where one could have a debate as to why 15 per cent may be too much or too little.

THE CHAIRMAN: Take Professor Bain's example from the other case.

MR. UNTERHALTER: About the Shell cases and so on. It may be that one could be confronted with the facts of that kind, which make one say "perhaps 15 per cent is too much". In our submission it would never be wrong.

THE CHAIRMAN: You need to ask that question, and look at the figure you get and say: "Looking at the nature of the infringement, have we got something that is just too much?"

MR. UNTERHALTER: In our submission, there are always cases at the extremes and because you can generate extreme cases it does not show that there is anything fundamentally wrong about what lies at the heart of the methodology. When the case comes along where it is said, but this multi-national is so big, and operates in markets so far flung that you are going to be doing some grievous financial harm to this company.

THE CHAIRMAN: Well you will not be doing that because you made the point you do not get above 10 per cent of 15 per cent, so you will not be doing grievous financial harm, but you just end up with a number and some might think that your argument would have had a little more difficulty if Hill McGlynn had not been the immunity applicant and was standing here saying "How can it be right that £160 million should be imposed, on the scale of the world today, for this?"

MR. UNTERHALTER: The OFT accepts that there will be extreme cases, and where there are outliers that those are cases that would need to be carefully considered when a reasoned case is put up as to why that is too much on some reasoned basis, but these appellants do not make that kind of argument, they are not saying that Hays is a far flung Empire covering deserts and forests and multi-sectoral engagements across many markets. It is a focussed company that operates worldwide and why is 15 per cent wrong?

Our submission is that we do not say one cannot work with different percentages and test them against reasoned argument but we have not heard those arguments, what we have heard is that MDT is fundamentally problematic, and we submit it is not fundamentally problematic, it engages the very heartlands of what deterrence has to do.

I have dealt with the individual aspects of how MDT is tailored, but if I could just deal with the factors that are said to warrant special consideration and were not specially considered. The first of those is the question of profit, and it is said: "We are not suggesting profit alone should count, but it should count for something".

May I just indicate a number of reasons why adopting a profitability standard has many, many disadvantages when one thinks about deterrence? The first problem with profit is which standard is one going to adopt? If the issues over gross and net have seemed tiresome and certainly long-winded, the question over the adoption of the correct profitability standard will tower above those because there are many different ways of looking at profit, and, more particularly, there are many, many different ways in measuring profit. For example, when one is considering the profitability of a company, and this turns

out to be the usual difficulty in this area, how does one account for different kinds of costs, and particularly the way depreciation policies and other matters are accounted for which can yield up very, very different profitability figures.

So we will have the published accounts, and we will have the kinds of arguments that you have had paraded before you over the last few days, which is: "But that is not a proper account of our true underlying profitability, because in fact we would ordinarily have committed ourselves to a capital project and that would have greatly shrunk our profits, so if we happen to delay it by a year you are looking at a completely unrealistic view about the profits and profitability of this entity." It is an intrinsically difficult standard to work with.

The second is, as we pointed out, it is a highly variable standard. Our learned friend, Lord Pannick, said "So is turnover". He is not correct. Turnover is generally a relatively stable financial metric. It does go up and down, but if you look at financial reports year on year you will see that turnover is not a figure that drastically changes, but profitability does. So to use illustrative examples you can have an undertaking such as British Airways, take a series of years, it is sometimes highly profitable, and in many years it makes losses, it is the nature of that particular industry, its turnover is huge, and it is generally relatively stable; that is another reason why profitability is not a very useful standard.

There are also reasons of principle about profitability as a standard and particularly in a competition law context. It can offer entirely perverse incentives to adopt profitability as the basis upon which one imposes penalties, because it is a tax upon efficient firms. If you are an inefficient firm and have low profits you get a low penalty by reference to this criterion. If you are highly efficient you get a high penalty, you are taxing the efficient firm, which is a very perverse result for a competition penalty regime, and so we suggest that that too is a reason why competition authorities throughout the world are usually very wary about using a profitability standard. So it is there but we would invite the Tribunal not to go down that road.

One feature of what Mr. Woolland had to say was that in respect of materiality – I do not need you to turn it up – but in fact the fine that was being proposed was not likely to have a material bearing on Hays' ability to engage successfully in markets; that is another consideration.

The second suggestion made by our learned friend was to say that gross turnover itself should not be used as the standard because it effectively exaggerates the position, and so at the deterrence level one should not have regard to gross turnover. That is really just another way of saying that one should look at margins because it is effectively by looking at net fees

one is looking at the gross margin, and that is just another way of looking at a profitability standard, it is not a different argument it is just an example of one measure of profitability which is "Look at gross margins". So it does not seem to stand on a different leg, it is just one other reason why you might want to look at profitability.

THE CHAIRMAN: That links really on to the gross/net issue which you will come on to.

MR. UNTERHALTER: Which I will address fully. The critical point for us is that conceptually for all the reasons I have given it is worldwide turnover that is the proper approach, and it is hard to see why one would want to mediate that notion, because that is the best sense of size. Absent a consideration around financial hardship, which is something that is looked at at Step 3, although it is not of application to any of these appellants, there is no warrant, we would submit, to adopt a second measure, as it were, and examine profitability.

Lastly, there is the question of compliance, and I am not certain I need to say much more on that score because in our submission it is a different consideration that figures elsewhere in the Guidance and can adequately be dealt with in the place that it is, for the purposes of imposing a penalty.

That in general terms is our submission on MDT. There is just one matter that I must deal with at a general level which is, of course the question of how to treat *Makers*? It is, of course, the case enjoyed least by appellants both in this Tribunal and, of course, in the construction cases which have been heard, because in various ways various efforts are made to distinguish it and find ways for suggesting it does not stand for what we submit it does.

THE CHAIRMAN: Do you say it binds us?

MR. UNTERHALTER: We say it is an authority – I am not certain that it is binding in the sense that you would be free to differ if you thought it was clearly wrong, but, in our submission, it is a very strong and authoritative statement of why MDT as a methodology is consistent with the guidelines and is perfectly lawful.

Could I ask the Tribunal to turn up this authority which is at volume 4, tab 54.

THE CHAIRMAN: Yes, we have not actually been taken to it although it has been mentioned quite a bit.

MR. UNTERHALTER: The relevant reasoning proceeds from para.128 on p.38 of the judgment.

The OFT was criticised by the Tribunal because it had not properly explained how the MDT had been applied and the Tribunal found that that was a perfectly warranted criticism to be made of the OFT. If one picks up the reasoning at para.131 it says:

> "In its defence dated 6 June 2006, the OFT attached an Annex setting out how it had calculated the penalties. The explanation of how it arrived at the uplift at Step

3 was based on the assessment of a 'minimum deterrence threshold' applied to all the parties to the decision in order to determine whether there should be an uplift at Step 3.

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

The very opposition that we have been debating.

"In such a case, therefore, the OFT calculates what the figure arrived at by Steps 1 and 2 would have been, if the undertaking concerned had derived 15% of its total turnover on the relevant market. An amount is then added at Step 3 to bring the overall figure up, broadly speaking, to that threshold figure."

So there is a description as to the method by which MDT proceeds.

There is then a calculation that is done in respect of how that method was applied to Makers, and that is captured in 133. The figures appear. I will not read them unless you wish me to. In 134 the following is said:

"We therefore reject Makers' assertion …"

THE CHAIRMAN: The previous sentence gives the figure they get to.

MR. UNTERHALTER: I am sorry:

"If 15% of Makers' total turnover of £69 million [odd] had been derived from the relevant market, then the figure resulting from the application of Steps 1 and 2 would have been £522,585. This figure is 0.75% of the total turnover, which is the same as 5% (which was the starting percentage used by the OFT at Step 1 for Makers) of 15% of the total turnover …"

Then it says, on the basis, and it gives the calculation.

"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."

Here are, in our submission, the important words:

"The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way …"

in other words, it is dealing with the means, not how this happens to capture in this particular case –

"… 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, since the existence of the calculation of the MDT did not become apparent …"

In our submission, it is very hard to read this decision on the basis that you can apply the MDT because this is a special case in which we have only addressed to the UK parent and not to the ultimate holding company, or because we have generated such an utterly trivial amount for relevant turnover, you can apply it in these circumstances. The reasoning is that here we have teased out the method you have applied, there is a problem because the amount of relevant turnover is insufficient in relation to the totality of the size of the undertaking, and we approve, under the Guidelines, of the method.

In our submission, that is an authority strongly supportive of MDT as a method, as a means, of doing the work of deterrence. Whilst the Tribunal could, of course, come to a different conclusion, it is a method that has been approved for some time and has been applied in many cases.

THE CHAIRMAN: Has it been applied in many cases?

MR. UNTERHALTER: In the construction cases.

THE CHAIRMAN: But quite a lot of those are under appeal.

MR. UNTERHALTER: That does not mean that it was not applied. It may be right or it may be wrong, but it was certainly applied.

THE CHAIRMAN: This is the only consideration of this methodology by this Tribunal, as I understand it.

MR. UNTERHALTER: Yes. There are then some slightly different issues which are raised by Eden Brown on the one hand and by CDI on the other. Perhaps I could just take the Eden Brown proposition first. It is a curious argument that says, "We need more of a reduction because although nothing more was required by way of deterrence, we must get a reduction to bring us in line with the overall figures that are being imposed upon Hays and the like". It is a strong claim for, as it were, uniform treatment in respect of percentages. Our submission is that this is a submission that simply fails to understand the scheme within which the OFT has applied the penalty regime. Eden Brown suffered a penalty at Steps 1 and 2 simply by reason of the seriousness of what it had and the extent to which it did it on the relevant market. Save for the net/gross figure debate, there is no suggestion that ---- I correct myself, there is an issue about seriousness. Making an assumption for the moment that those issues are resolved one way or the other there is no conceptual challenge to the

notion that those two dimensions of judgment, which is the percentage judgment and the relevant turnover judgment, are in any way wrong for the purposes of judging seriousness. The question then is, nothing more was required by way of deterrence. That was the judgment that was reached by the OFT. So conceptually we can see no reason whatsoever why, in fact, Eden Brown is entitled to some additional reduction because everything that was needed to be done could have been wholly justified at Steps 1 and 2 without any alteration of the figure. The fact is that the OFT nevertheless did reduce it by the percentage indicated. It did not have to do so, because nothing about the Guidance required it to do so. That was conduct sufficiently serious in relation to the activity engaged upon in that market that generated that figure.

THE CHAIRMAN: If the figure generated is significantly more than required to achieve deterrence, does the Guidance not require the OFT to consider a reduction? Is that not what 2.12 is saying?

MR. UNTERHALTER: The question is, what would it be reducing it for in those circumstances?

THE CHAIRMAN: Because it is a figure that is so much more than is necessary for deterrence, otherwise I do not see on what basis 2.12 says there might be a reduction.

MR. UNTERHALTER: The reduction might arise, for example, in a hardship case.

THE CHAIRMAN: Is that not in 2.12?

MR. UNTERHALTER: Hardship, as I understand it, is dealt with at Step 3. That accounts for what is sought to be done at 2.12. It is hard to conceive, since deterrence is a forward looking consideration, if you determine that by dint of seriousness a particular fine is due, deterrence is something more that you are trying to achieve and sometimes you will require an uplift for that purpose, but it is hard to conceive conceptually as to why you would get a reduction by reason of not needing to do anything more to secure deterrence. This is where the two objectives are served and each is sufficient for the purpose. There is no warrant to reduce. There may be a warrant to further increase, which is the judgment that was reached.

THE CHAIRMAN: You say hardship is encapsulated in Step 3?

MR. UNTERHALTER: Yes. It is financial ability to pay, which is one of the standard considerations.

THE CHAIRMAN: That is set out, financial ability to pay?

MR. UNTERHALTER: It is the financial position of the undertaking, which is in 2.11.

THE CHAIRMAN: I read that in the context of 2.11 dealing with deterrence.

MR. UNTERHALTER: Yes, deterrence is only one of the matters that might be relevant to Step 3.

THE CHAIRMAN: Hardship is ability to pay, that is the basis for reduction. You judge ability to pay on turnover? Is that the right metric for ability to pay?

MR. UNTERHALTER: The cases say on financial hardship that is a question really as to whether the viability of the undertaking would be significantly impaired by the imposition of the penalty. There is a fair amount of case law on that subject. Effectively it is a viability standard. If the entity can show that it is going to be significantly compromised to the point that it will find it difficult to continue in business, then that the essential issue that arises.

THE CHAIRMAN: Was that the basis of the reasoning?

MR. UNTERHALTER: No, that was not the basis.

THE CHAIRMAN: I have looked at the reasoning such as there is.

MR. UNTERHALTER: It was simply said in the decision that it seemed excessive, it seemed to be too high.

THE CHAIRMAN: It is said to be too narrow the range of penalties. That is the only reasoning, nothing to do with ability to pay, it is to do with the range of penalties.

MR. UNTERHALTER: I am making this submission as a matter of what the Guidance permits of and what it does not. In effect, what the OFT did is that it looked at this and it said that it seems a bit too high. Maybe that is a residual discretion it has, and perhaps it is one that the Tribunal would, of course, have judging this matter on the merits as well. It is not a function of getting a reduction for deterrence, which is essentially the argument that Eden Brown is seeking to advance.

THE CHAIRMAN: I do not think they are, I think they are saying, "We want equal treatment and this is inconsistent, because we get to a point that is now higher; even with your 40 per cent, we are still above the others on what is said to be a minimum level". Mr. Harris, is that a fair summary?

MR. HARRIS: The Decision says quite clearly at para.5.254 that it would result in an excessive penalty as the penalties would be greater than necessary in order to achieve deterrence. That is the rationale which is employed. It is not to do with these other things.

MR. UNTERHALTER: To be clear, it is to do with a number of things in the way that this is reasoned in the Decision.

THE CHAIRMAN: I think Mr. Harris is right, is he not, the only reasoning is 5.254 as to why – that is the reason for making an adjustment; and then the nature of the adjustment, the reasoning is 5.256. Then there is just a statement that 5.260 that this the appropriate one. The only reasoning of the nature of the adjustment is to know the range of penalties.

MR. UNTERHALTER: If one has regard to 5.385, that says:

"The OFT has granted Eden Brown a reduction of [percentage given] …"

THE CHAIRMAN: I think you can read it out.

MR. UNTERHALTER: Very well:

"… 40 per cent of its penalty at Step 3 to ensure that the penalty is not excessive (given Eden Brown's large proportion of total turnover generated in the relevant market) but is still sufficient in order to achieve deterrence."

In other words, you are not getting a reduction for deterrence, it is saying, "We do not need to do anything more by way of deterrence, but we do not want to be excessive". It seems to be a residual effort by the OFT not to cut down a tall tree.

Conceptually, and as a matter of the Guidance and its proper application, if a penalty is warranted because of seriousness at Step 1 and 2 then it is a justified penalty. If that serves deterrence you do not get a reduction because it serves deterrence. If I may submit, on that score, there is no inequality. If you happen to have engaged in more serious conduct by reason of the fact that you have been more engaged in the relevant market where the infringement took place, you cannot complain if you end up with a higher penalty than those who were not as involved. This is the oddity of seeking to, as it were, level it down to the kinds of stock percentages that others derive.

This is the very opposite of what Hays and Eden Brown are seeking to contend for, which is that you must tailor the penalty to what has actually been done by the particular parties. If you happen to have committed your infringement where you are more active, then that is a very important differentiating reason as to why you get a higher penalty at Steps 1 and 2, and that does not seem to be problematic at all.

So, in our submission, Eden Brown's approach to this does not give rise to any lack of proportionality or any discrimination because they are actually getting a substantial discount in circumstances where it is not technically required by the Guidance at all, and certainly not required by way of doing something by way of a reduction in the interests of deterrence, because that, for the reasons given, makes not conceptual sense whatsoever. So, to the extent that the OFT relied upon that reason it was not an availing reason for coming to that conclusion.

Can I very briefly deal with CDI, because I must move to other matters, in our submission, as far as CDI is concerned, theirs is a case where they were on the cusp, as it were, between – they came just over the 15 per cent level and so no MDT was applied to them. The consequence of the arguments that are now being addressed in respect of the net gross issue and the like is that they are going to, assuming MDT is a good policy, they are

going to come under that threshold, and if MDT is applicable in the way that we suggest it is, either in its current form or in some variant that the Tribunal approves, then it cannot somehow escape the application of a deterrence factor for the purposes of the Tribunal arriving at the right figure. The burden that rests with the Tribunal is that it has a jurisdiction to engage these matters afresh on the merits, and arrive at the correct figure on the facts as they present themselves to the Tribunal. Well, that sometimes works to the detriment of the OFT and sometimes not. But CDI certainly cannot avoid the consequence that it cannot escape the need that something is done by way of deterrence as far as it is concerned. And so we would submit that if the OFT does not prevail on some of the other issues that would bring it below the threshold and MDT in its present form is upheld, or a variant of it, then the Tribunal would apply the MDT to CDI, whether on a gross or a net basis depending on where that argument comes out, and that would be the appropriate penalty to apply. So, those are our submissions as far as CDI is concerned.

May I proceed, then, to the gross net topic, which is the next major item. We have here sought to capture some of this in the note that we have offered to you.

One must begin this analysis by having regard to what the concept of turnover is, because that is the standard that is to be found in the Guidance, and it has a meaning and we submit that there is perhaps very little difference that now arises in respect of what that meaning is, but certainly the OFT's position is that whether one is applying one or other of the accounting policies which we have examined, UK GAAP or others of the standards, the basic concept is always the same. And that is the concept that is applicable as it is set out in the Turnover Order and as it would be applied to relevant turnover, the concept of turnover has a very well understood meaning. And, as we have set out in the note, one can trace a number of the ways in which it is measured, and we have set out those definitions at para.12 and thereafter. But it all begins with an appreciation of what good or service is rendered in respect of which a consideration becomes payable constituting an economic benefit which is then registered as turnover? That is what the concept amounts to. And it has entailments, because one begins by asking the basic question which is, "What good or service is being offered that permits the firm to register turnover as for consideration?" We have heard a whole variety or arguments to suggest that this is – the true contractual relationship that exists is triangulated, and the true service that is being rendered is in fact that by the worker and it is not by the employment business.

But there is one enormous difficulty with all of these submissions, which is that they account for these matters as turnover, and that is not rigid formalism, it is not simply being

transfixed by company accounts, as we have heard from everyone, that is a judgment that those charged with the business have made, and it is a considered judgment because it has to be made against the relevant accounting standards. And, probably more important than anything else, as Mr Allen confirmed in his testimony, it is a judgment of substance. So, of course the Tribunal can examine all of the contracts and those that are somewhat more suggestive of an agency relationship and those that are more suggestive of a principal relationship, and one can stack up those contractual indicators in any way that one likes, but at the end of the day the irrefutable fact on this issue is that those who are actually charged with the business and have compiled their accounts, have made their determination. And when those very persons now come back to the Tribunal and say, "No, no, no. We received no economic benefit. This is all simply a pass-through, and that is not the true nature of the services that are rendered". They are simply saying things which are wholly inconsistent with the judgments that they have already made. And that is something that simply cannot be allowed. The point of financial statements is to tell the world and most especially in the case of public companies, to tell everybody, what it is that they do and what income they receive for the things that they do; and they have; and they have made that clear. None of them have said that they have made an error. So the judgment that has been made has been made in a considered way against the relevant accounting standards on advice of qualified auditors with board approval of the highest level, and they have made that determination that they are acting as principals. That is not a matter of legal form, that is a matter of substance, because otherwise their accounts would have been materially mis-stated and they cannot avoid the consequence that there is an economic value that has flowed to the entity, because otherwise they could not account for it as turnover.

So, until such time as they correct their accounts and make material alterations and now say what they thought was a principal relationship is indeed an agency relationship and they are going to allow for these material alterations to their accounts, they are bound by their determinations that they have made; and in a sense that really is the beginning and end of this debate, because no amount of scrutiny of the contracts, no amount of people coming along and saying, "Actually, you don't understand the way the business really works, it really works this way, notwithstanding what our contracts say", none of that can get away from the basic proposition, and that is the proposition that Mr Allen has adhered to throughout, which is, "They have made the decision. They must live with the decision that they have made".

Now, we have set out in some detail why it is on the contracts that this is a principal relationship, and we submit the Tribunal does not really need to go there. It is enough that the accounts say what they do. They speak to substance. And then there is the consideration which, again, many witnesses seem to put to one side, which is that when you act as an employment business you are required to act as principal. It is not, as it were, some witnesses perhaps said, "Well, that is just a question of law". It is not just a question of law. It goes fundamentally to the obligations that you are required to undertake as a principal. And the difficulty with all of these arguments is, if you are undertaking obligations as a principal, then you must be rendering some service in respect of which you can then account for what is returned as revenue, and one comes back to the same issue time and time again, what that really is, that lies at the heart of it.

It is true, as we have heard, that it is a judgment that needs to be formed; it is a judgment that is made against various criteria; but the one thing which seems perfectly plain is that these undertakings take on risk. It is perfectly clear. And they take on risk for the obvious reason that they employ the services of these workers. They are required to pay them irrespective of whether they are paid or not, and that is a question of risk, exposure, not risk, mitigation. And given that they employ the services of the worker.

THE CHAIRMAN: They employ the worker.

MR. UNTERHALTER: They employ -----

THE CHAIRMAN: Employ the services.

MR. UNTERHALTER: I beg your pardon. They employ the worker, they hire the services of the worker.

THE CHAIRMAN: No, they hire the worker -----

MR. UNTERHALTER: To render the services.

THE CHAIRMAN: -- to render the services, that is right.

MR. UNTERHALTER: I am corrected, yes.

THE CHAIRMAN: Might be a different -----

MR. UNTERHALTER: Indeed, and having done so, they must then do something with what they have thereby acquired, and what they do is they enter into the agreement with the client. And that is why we do say this is a back to back arrangement, and it is the fundamentals of the way in which this works. Our learned friend did suggest, our learned friend Mr Brealey, suggested that this back to back point had not been made in the decision. That is not correct. It was. And we have cited the relevant passage of the decision in these notes. It is at 256 at para.5.140, it is the final dot on that page:

"When supplying temporary workers, the Parties are linked with the temporary worker by an agreement for services – there is a purchase of services by the recruitment agency from the worker, which are then supplied under a different contractual arrangement".

So, with respect, I think our learned friend is not correct on that score. There is, of course, a very considerable body of evidence that you can of course have regard to in respect of what various witnesses have had to say concerning the nature of the services that they render, what difference it makes as to the time over which they are rendered, what credit risk has to say. We have sought to capture the essential points on this score, and I am not certain that it would be profitable to repeat that summation of these points. We have set them out at p.8 in paras.22 and thereafter.

Might I just make one supplementary submission concerning it, which is if these kinds of arguments around gross net issues become a norm, which is to say that when the OFT looks to the published accounts and it sees that certain determinations are made and it relies upon closed determinations, but then one has this kind of enterprise, which is to look behind the accounts and seek to, as it were, reason away-----

THE CHAIRMAN: We are not looking behind the accounts, the net fees are all in the accounts.

MR. UNTERHALTER: Yes, well -----

THE CHAIRMAN: We are looking behind the gross turnover at other figures in the accounts.

MR. UNTERHALTER: Yes, to fasten upon another item, as it were, in the accounts as the proper basis for approaching turnover – and this is where the question is, "Has the definition of turnover been properly applied?" If that question is always going to give rise to this sort of enterprise, we are going to end up in an extraordinary circumstance where the Tribunal is going to be faced with endless accounting disputes of this kind, because parties will come along and say, "Well, I know that there is a definition of turnover in the Guidance, I know that my accounts say that turnover is represented by a particular figure, but now you must understand that that is not the proper way of understanding turnover for the purposes of this inquiry".

THE CHAIRMAN: I understand that point, Mr Unterhalter. But there are two, as it were, separate questions. One is that as regards Step 3, the word "turnover" is not used; what is used is the size and financial position of the undertaking in question. So, that is not limited to turnover, and therefore it may be said that where you have a particular feature of an industry, whether it is a travel agents or whether it is recruitment agents, where in fact it is well recognised that the turnover includes a large element of charging for the fees or

temporary wages of temporary workers which are then passed on and therefore everybody in associated companies, and comparing one with another, as Mr Allen recognised, looks at net fees, but when you are looking at the size and financial position of the undertaking, you should not for the purpose of Step 3, say "All we are interested in is turnover. All we need for turnover is necessarily the magic number". That is the first question. The second one, which you may be coming on to, which is really a lesser question which is, even though Step 1 does say turnover, of course the statute does not require you to apply that literally. The OFT must consider whether, having regard to what is said in the Guidance, Step 1, there are particular circumstances in this industry that make it appropriate or indeed necessary to depart from that and apply a different measure – albeit one that is in the accounts and audited and therefore does not involve, as it were, going behind the accounts, which I fully understand, would create a lot of difficulty.

MR. UNTERHALTER: Perhaps I could deal with, I could look at both those propositions. The first is that of course the burden of the argument that has been made on this issue is not directed to Step 3, although it has implications for Step 3. It is largely devoted to a calculation of turnover in respect of relevant turnover. That is the first place that this engages; and we have submitted that it is, say, relevant turnover is a concept that is to be understood by reference to the Turnover Order, and that is the legal question. Separate is whether you should depart from the Guidance in respect of it, but that is a point I shall come to in a moment. In Step 1 and 2 there is undoubtedly reference to a "concept turnover" and it must be applied in its terms, unless there is warrant to depart.

The second is that although Step 3 does not mention turnover, the inquiry there is whether there is reason to increase the penalty that is derived at Steps 1 and 2. So, it must be a material question as to, I mean, one is looking at two benchmarks. The first is what have you derived at Steps 1 and 2 by reference to a particular meaning of "turnover", Steps 1 and 2, and your ultimate limitation which is in respect of worldwide turnover which is the extreme limit as to where you can go by way of an uplift. That is the area that you are considering, and that is all bounded by a concept of turnover. So, when one is looking at Step 3, the ordinary way in which one would consider this would be naturally to say, "Well, is an increment required, and how close is it getting to the limit?" That would be the natural way of considering a Step 3 adjustment, to us the same coin, as it were.

THE CHAIRMAN: Why would you think how close to the limit? You think what is necessary for deterrence? Indeed the OFT does not anywhere, I think, refer in its consideration of Step 3 to the limit.

MR. UNTERHALTER: Conceptually, when you are asking how much does one want to uplift by, you are of course wanting to do the work of deterrence, but you know it has a limit. You cannot be, sort of, unbounded as to what you can do by way of deterrence, both as to concept and as to statutory limit. So, I am simply submitting that the framework is wrong that is bounded by turnover considerations.

Now, the next point about Step 3, though, which is in our submission conceptually linked to turnover, is because the general indication of size is a turnover related concept, and that is one of the key provisions in Step 3, it is about size.

The important difference there is the difference between size and performance. It is said that for other purposes you can judge comparably across sectors by reference to net fees because that is a performance indicator, it does not mean it is an indicator as to size, which is the critical consideration conceptually in relation to deterrence, because you are trying to work out: how can I use a metric that will reach enough of this entity for all the reasons that I have already developed under the MDT analysis.

When one comes to what is happening in Step 3 ----

THE CHAIRMAN: You said it can affect the bottom line of the firm?

MR. UNTERHALTER: Yes.

THE CHAIRMAN: Which, it may be for a recruitment agency is more in terms of net fees than gross turnover, because the difference is entirely one that is automatically recouped, as it were, it is not incurred unless it can be recouped.

MR. UNTERHALTER: The bottom line certainly that I intended to covey was not a bottom line around marginal profitability, the bottom line that I was intending to convey is one around the transaction values of the enterprise, because it was in that context that I had sought to indicate that you want to reach transactions because that is the way in which infringements are engaged in markets, that was the conceptual link that I sought to draw. So we submit there are a number of principled reasons why when one is concerning oneself with size one is much more likely to be looking at Step 3 at a turnover calculus which would also then allow you to make a much more simple commensuration as to what the relationship is between Step 1 and 2 and whether any increment is warranted, because that is the exercise that is confronting the regulator under Step 3. The question is what uplift is warranted? What adjustment is being made? And it is very hard to engage that exercise without saying: "We have generated a certain amount by reference to turnover at Step 1 and 2, now what more do we want to do?" The natural way of doing that, apart from the conceptually relevant way of doing it, is by reference to turnover. So, in our submission, Step 3 is largely

connected to and for principled reasons connected to a turnover consideration. That does not mean that for no purpose could one ever not look at profit in certain circumstances, that is possible, but I have indicated all the disadvantages that accrue doing so, and in adopting that standard, so it is not impossible to do it but there are many disadvantages that attach to doing so.

THE CHAIRMAN: Well if it is profit only, for reasons you eloquently explained, I follow that. When it is net fees in this particular industry, those disadvantages of applying profit standards generally do not seem to apply.

MR. UNTERHALTER: It is a gross profit figure, that is what it stands for in the accounts. The fundamental question still remains: why would you want to adopt a different standard to reach the size of the enterprise given, for accounting purposes and substantively, the actual scale of the undertaking in respect of temporary workers is reflected by the turnover figure. So there is not a special reason to depart from that standard in this case simply because net fees is widely used for comparability purposes in assessing performance. Unless one considers that performance is somehow relevant to deterrence, but in our submission it is a very weak indicator in relation to deterrence. A stronger indicator in relation to deterrence is: how big are you, and what is your transaction size? The transaction value of the enterprise is indicated by its turnover figure. So we do submit that there is every reason to develop a concept of turnover at Step 3 and generally not to deviate unless there are some very compelling reasons to do so.

We have set this out in rather more detail but I shall not trouble you – given what I still need to cover – with more detail on this issue. We have, at p.14 dealt with the *Endesa* issue, and that is effectively seeking to advance the proposition that even if your Guidance in this case by reference to merger control indicates a particular standard, there may be circumstances to deviate, so the claim would be – and this would necessarily have to be an alternative argument – that the appellants are advancing, which is to say "Not that you should apply your Guidance, but that you should deviate from it". The question is: when is deviation warranted? In our submission both as to the terms in which the merger notice is framed, and also the reasoning that is suggested in the *Endesa* decision, we suggest that deviations are generally exceptional in nature, and they are entirely linked to specially indicated circumstances where there is going to be some reason why you are not capturing size, because that is at the heart of what the merger notice is trying to get at. In other words, if one is considering the size of a concentration one wants to know whether it is going to meet certain thresholds and you would ordinarily take the turnover figure but if there are very

special circumstances which may not be indicative of size you might deviate. But *Endesa* does not appear to be saying anything more significant than that, so the question here is, is there any reason to deviate either for the purposes of Steps 1 and 3, or for the purposes of Step 3? In our submission, there is absolutely no warrant to do so, because these are principal relationships, they do reflect the transaction values that these entities have engaged in. They are a reflection of size for the purposes of Step 3, and the *Endesa* reasoning is simply unhelpful.

THE CHAIRMAN: Is the concept of deviation used in *Endesa* because the legislative framework was rather different? There you have a regulation which effectively says: "You shall use turnover", then you will have a notice which says, by way of interpretation of that regulation, "notwithstanding the way you might exceptionally use something else", so there it is real deviation.

MR. UNTERHALTER: Yes.

THE CHAIRMAN: In this case you have a Statute equivalent to the regulation which says you must have regard to your Guidance, so you are not, as it were, under the same normative framework in quite the same way ----

MR. UNTERHALTER: Yes.

THE CHAIRMAN: -- and so if you say: "We are not going to use the turnover in the accounts here", you have to explain why not. You have to have regard to the fact that the Guidance says that is what you do, but you are not really deviating in quite the same way that one can say in *Endesa* there really is a deviation from the regulatory text.

MR. UNTERHALTER: *Endesa* is prayed in aid by CDI, and we are effectively saying it is not particularly helpful to CDI's case because, apart from the fact it is in a very different context of merger control provision, but that aside, it simply speaks to the need to bring yourself within an exception which, with respect, Sir, you are pointing out, is a different normative construct. We accept this is Guidance ----

THE CHAIRMAN: So it is easier for you to depart from turnover when appropriate?

MR. UNTERHALTER: We are not in the grip of the same statutory limitation.

THE CHAIRMAN: But a bit more flexibility, which means it is more open to you to say: "Actually, yes, that is the general approach which we have said we would take and we have regard to that, but when we look at this industry it has particular characteristics, and therefore here we think it should be net fees."

MR. UNTERHALTER: The chain of reasoning under the Guidance, it speaks about turnover, what is the concept of turnover? And how does that apply in the ordinary case? Then there

would have to be reasoning which says: "Why, given the work that is intended to be done at Steps 1, 2 and 3 thereafter, is there reason to deviate from the Guidance?" because this is the case, as I indicated, of deviation, of a requirement to deviate. Here, one would certainly want to invoke some margin for the purposes of making the judgment as to whether a deviation is warranted, but in our submission substantively there is absolutely no reason to deviate, because these transactions are done on a principal to principal basis in the conception of the industry, and across the industry, that is the treatment that is given to these matters, and so if one is asking: "What are you trying to work out at Steps 1 and 2 in respect of relevant turnover?" You are trying to work out what is the scale of the infringement in the relevant market, and if that is what you are trying to do then the scale of the infringement must link to the kinds of transactions that are being undertaken, and those are ones which yield economic value, for all the reasons that we have given, substantively, because it comes back to the basic proposition the accounting treatment is a substantive determination of what these undertakings are doing in the market. They are receiving an economic benefit and that is why it is accounted for as turnover, that is the transaction. So to the extent one is seeking to capture transactions for the purposes of scale in Steps 1 and 2, and for the purpose of size in Step 3 there is no warrant to deviate, in fact quite the contrary, one would be under counting very significantly.

It is also pointed out to me that the deviation in *Endesa* is a deviation from the accounts, in other words, the published accounts that reflect turnover in a particular way, it is not a deviation from the concept of turnover. In other words you are still, for the purposes of the regulation capturing turnover, you are just trying to reason why turnover can be differently understood, whereas I understand the proposition that is being put to me under the Guidance is, you could have a concept of relevant turnover as a matter of legal interpretation, but a deviation from that standard might be warranted. In other words, that one would not work with relevant turnover as defined, and I accept that that is possible under the Guidance by reason of the normative character of Guidance.

Might I then move to the question of the year of turnover? That is not captured in this note, Sir, I am afraid it is reflected in oral argument.

THE CHAIRMAN: That is perfectly acceptable.

MR. UNTERHALTER: We accept that this is a question of legal interpretation and there must be a right answer that is yielded up as to what is being referred to by the "last business year".

We do submit that when one is seeking to construe that language in 2.7 of the Guidance, one needs to see the Guidance within a hierarchy of statutory norms, because there is a concept of turnover ,and the last business year for that purpose which derives from the Turnover Order itself, which refers to the year before the decision rather than the year prior to the infringement, and it is precisely for that reason if I could refer you to 2.17 of the Guidance, which says:

> "The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the worldwide turnover of the undertaking in its last business year."

- the exact language that one reads in 2.7. That has been included in the Guidance at Step 5 by reason of the formulation of the matter as reflected – if one wants to follow the trail it is footnote 20, which in turn refers to footnote 10, and footnote 10 says: "… calculated in accordance with the Competition Act and it is the Turnover Order that is there referred to. The Turnover Order speaks about the turnover of an undertaking for the purposes of s.36(8) being the applicable turnover for the business year preceding the date on which the decision of the OFT is taken.

Our learned friend, Mr. Harris, was puzzled as to why we thought there was a hierarchy of norms that was relevant here. That is the reason. In other words, one situates the Guidance in the light of the Turnover Order, and its determination as to what that language of the last business year means.

The Turnover Order which issues from Parliamentary enactment, by way of the powers that are given to the Secretary of State has made a determination as to what "last business year" means for the purposes of calculation. When the Guidance is issued it brings itself into conformity with the higher legal norm for that purpose, and therefore not only does the Guidance state that that is the case in 2.17, but the identical language, which is this last business year, is one which is formulated, if one is going to have a consistent interpretation, by reference firstly to the Turnover Order, and then the implementation of that order within the scheme of the Guidance by way of the repetition of the language of the statutory Turnover Order reflected in the language of the Guidance itself.

Our submission is that when the Guidance is published in 2004, as a result of the changes that have occurred by way of the Turnover Order, and specifically incorporate the language which refers to the date of decision, rather than the date of infringement, that is a very clear indication as to what the meaning of the Guidance is when it is published in 2004 because

for that purpose it is seeking to make it perfectly plain what the relevant year is for that purpose.

THE CHAIRMAN: The inclusion of footnote 20, which makes clear in 2.17, this is by reference to the order, there is no equivalent in footnote 14 to 2.7.

MR. UNTERHALTER: That is certainly true. The point though is that the same language – the identical language is used – and so one is being offered two interpretations. One is a coherence interpretation, which is the one that we argued for, which says you have the same language used, and there is a reference to the year prior to the decision for the purposes of stipulating how that concept is to be understood and it should be consistently applied throughout the document.

THE CHAIRMAN: Accepting that for a moment as one approach, which is, if you like, the purist or the literalist approach to interpretation, the alternative approach is to say that there should be a slightly more purposive approach, especially as this is Guidance and not statute, and when looking at turnover in 2.7 one should understand that in the context of Step 1 is seeking to achieve, and in particular the explanation in 2.9 that it is designed to take account of the real impact of the activity. The real impact of the activity is, of course, in the year when it is carried out, not possibly many years later.

MR. UNTERHALTER: There are a number of submissions to make around that, and the first of them is that one of the reasons to prefer a coherent interpretation rather than a segmented one, as it were, is because what occurs at Steps 1 and 2 has significance for the steps that are then to follow and the comparability exercise that necessarily has to be done, which is, "Are you exceeding a limit?" It is a matter of statutory obligation that the OFT cannot exceed the statutory limit and that is determined by reference to a worldwide standard.

THE CHAIRMAN: The purpose of the limit is so that you do not do terrible economic damage to the company which obviously is relevant to it now.

MR. UNTERHALTER: Yes, indeed, but for the purposes of trying to have a coherent approach to these matters, it would be an oddity that you work on year of relevant turnover for Steps 1 and 2, you then apply that or some other notion of turnover at Step 3. Of course, Steps 1 and 2 may suffice for deterrence purposes, so one has got to have a concept of turnover that can be utilised at Step 3, and the Guidance does not speak to a concept of turnover at Step 3, so that has to be determined; and which concept is that? Is it worldwide turnover prior to the decision or prior to infringement? One would have to take a view on that. Our submission is that the right view is, of course, a consistent view. In the Step 3 phase if you need to consider an uplift you should consider an uplift, but it is within the overall scheme

of turnover under the Guidance. In other words, one should work with one concept at each level, otherwise one could conceivably have a situation where you generate a relevant turnover figure by reference to the year of infringement. You then have to potentially consider an uplift not by reference to that concept of turnover but by reference to some distinctive concept of turnover, and then compare it to a concept of turnover at Step 5, which is different again. We submit that the simple approach and the consistent approach is reason it logically and consistently in accordance with the statutory instrument under which this Guidance falls.

One can see why there is a temptation to think that relevant turnover should be more closely linked to the year of infringement rather than the year of decision. Even that is not an argument of the force that perhaps our learned friend considers, and for this reason: this is effectively a penalty or sentencing regime, which necessarily is decided many years after the infringement. There are often good reasons why you would want to use up to date turnover material. We have already seen the kind of issue that can arise about having to go back long periods of time to look into financial information which may or may not be available. The fundamental feature of the penalty regime is that you want to apply it at the time to the entity as it now exists. That is certainly relevant for the purposes of deterrence. So it would be an oddity to apply a turnover standard by reference to the year before the infringement in respect of doing the work of deterrence which is future looking,, and at least should take account of the undertaking as it is now constituted. That poses the difficulty that you could theoretically have a different standard for conceptual reasons at Step 3 and a turnover standard at Steps 1 and 2, which was by reference to the year of infringement, and that would be a statutory mess, in our submission.

Our submission is that, for these reasons and those that we have relied upon in our skeleton argument, the interpretation is one that should be coherent.

It is also the case that the OFT has always sought to interpret those words consistent with the position that applied under the statutory order. That has always been its touchstone for engaging in interpretation.

THE CHAIRMAN: That does not, of course, bind us in any way.

MR. UNTERHALTER: No, it does not bind you, it is simply to explain how the OFT comes to the interpretative judgment on that score.

Might I then proceed to seriousness?

THE CHAIRMAN: Before you do that, is there anything you want to say on the jurisdictional question that I asked Mr. Brealey and Miss Kreisberger? If we were against you and

accepted Mr. Harris' submission, do you see any – and Miss Kreisberger said she does not – impediment to the Tribunal applying what we say in our view is the right year if we are having to reassess the penalties on other appellants in this appeal, even though they have not raised that as a ground?

MR. UNTERHALTER: The position of the OFT on this score is that we do accept that once an appellant comes before the Tribunal and can upset the decision that has been made in respect of them on a particular basis, the Tribunal must then determine what is the right penalty. It may seem inconsistent for the Tribunal then to have different outcomes depending on which point of appeal was raised at which time. We have some reservation, only on this score, and it may not really arise around the year of relevant turnover proposition, but it would be an oddity if, in respect of every ground of appeal no matter whether an appellant raises it or not, every single determination that is made in the appeal would then become applicable to every other appellant on every occasion. That would suggest that there would really be very little discipline that arose in relation to what particular errors were being identified for the purposes of pursuing an appeal, you could literally come here with one matter and, as it were, get this yield of all the determinations that were made across the range. There is some conceptual difficulty, in our respectful submission, about taking that view, but we do accept the basic proposition, which is that the Tribunal must come to a determination which it considers to be consistent treatment across cases that it is now having to determine on the merits.

Whilst on that subject, there have been, in the course of the submissions made by our learned friends for the purposes of putting all the figures all the Tribunal, certain figures that have been yielded up which are now simply effectively statements made, in one case under oath, as to how these figures have been culled by some financial officer who says that is how the relevant turnover has been determined on a basis. As one will perhaps have seen from the statement of objections and the administrative process, the way in which relevant turnover was calculated was a very, very detailed process of determining almost contract by contract whether you are in or you are out. Now we have a situation where, in effect, the Tribunal is simply being offered up statements as to how a process that took many, many months – and this is in a sense is Hays' difficulty, in part one suspects with exercise – parties are now simply putting up figures to the Tribunal which certainly the OFT has not had an opportunity to scrutinise, and neither, in a sense, does the Tribunal know the status and the methodology by which some of those figures are being put to you. It certainly was

a process that took an enormous amount of time and took many persons at the OFT and their interlocutors a great deal of effort to try and work out.

We would simply indicate that when the Tribunal wants to be fully informed, which we completely understand, it is being presented with figures in this way. That might suggest to the Tribunal, depending on how the legal issues are resolved, that some other process is required to pin down some of these figures with greater transparency as between the parties as to how they are arrived at. It does not apply to all of them. Some of them are derived from published accounts and there is no issue about that. If one is going to change the year of relevant turnover on a net fees basis, that is an enterprise of a rather different kind. There are only two ways of doing it. Either the Tribunal would need to engage the parties in that process, which is a lengthy and complex one, or there is some agreed or quick fix way to try and get through it, but we would not want to under-estimate the difficulties of what that entails.

Whilst I am dealing with these arguments perhaps I could just make one or two other submissions on some points that go to issues that have been raised. One other consideration which no doubt the Tribunal will take account of on this question of consistency is that the appellants are here joined together for convenience. These could have come as sequential appeals. There would have been no issue raised then as to how this applies across unless, having made a determination in the one appeal, again when you are at large to determine the right penalty you would then feel obliged, as it were, to use that reasoning in another appeal, even though the point had not been raised. Our general submission is that we entirely understand, as the regulator, because ultimately we will be guided by what the Tribunal says on this score to apply matters consistently. There are some complications around how this works.

Just apropos ground four in respect of the CDI issue, if I could just indicate what our position is concerning that matter. We are not contesting that ground of appeal, but by that we should not be understood to be admitting it either in the sense that from the OFT's perspective there is a very lengthy and highly resource intensive process that is undertaken with parties in order to try and arrive at turnover figures that are meaningful in relation to the categories that are under consideration for the purpose of relevant turnover. It is very problematic from the OFT's perspective to have a situation in which parties do not respond within the terms of the notices that are issued so as to allow the OFT to come to a proper judgment on the matter, and then to come later by way of an appeal before the Tribunal and say, "Now that we better understand what this is all about, here are the figures and they are

true and correct". The reason that the OFT does not consider that this is process is appropriate for that task is that we could have spent days, no doubt, with all the source documentation agonisingly going through the process of working out worker by worker, contract by contract, whether it falls on one side of the line or the other. That is the process that was undertaken in the administrative process. The OFT's judgment was that that was not a proper use of its own resources or indeed those of the Tribunal. Whilst it leaves this matter with the Tribunal to determine, it does wish to indicate that this way of proceeding is not one that it considers to be appropriate for the purposes of Tribunal proceedings.

I am also instructed that as to these questions where there are figures that are being put up to the Tribunal for consideration in relation to penalties, relevant years of turnover, and the like, these are matters where the OFT would like to scrutinise the documents. We have been given them but more or less as counsel have made submissions on this score. We may want to make such comments as we can, though in some instances they lie within the knowledge of somebody in America who works for CDI who has apparently been looking at a database to try and derive these figures.

THE CHAIRMAN: Certainly you can put in observations on the figures and if you need to ask, by correspondence, questions to clarify a figure then of course you can do so. Equally, if Mr. Brealey puts in a suggested more rough and ready, but nonetheless fair methodology, you can comment on that saying that you do not think it is fair or it needs adjustment.

MR. UNTERHALTER: Yes, and we will obviously endeavour to be of assistance by way of trying to get to what the right figures might be as far as that is concerned.

Can I then proceed to seriousness. This is a topic that we have addressed at p.16 of this note.

THE CHAIRMAN: You addressed on this, and very eloquently, if I may say so, in your opening submissions. Although it may seem now a long time ago, it was only on Monday! We have not forgotten what you said.

MR. UNTERHALTER: I certainly will not repeat any of those matters that were advanced as far as that is concerned.

THE CHAIRMAN: You have set it out.

MR. UNTERHALTER: We have set it out in some detail. The key features, and this is partly what we would perhaps want to say by way of general submission, is that there is always the temptation to engage in this approach to the matter of seriousness, which says, "If I can discern some element in some other case which was not on all fours with this case, then ours must be less serious". Of course, the difficulty with that approach is that, as we have

heard so often, a judgment of seriousness is an all things considered matter and it has to deal with all of the factors that are relevant to the particular infringement. It cannot be this rather superficial approach which says, "In a particular case you found that this was a consumer good and so that is relevant and that is more serious". This is not a consumer case. Just to illustrate that point, this happens to be a case, as I did indicate on Monday, where we are dealing with over 6 per cent of the UK GDP, and we are dealing with a huge industry where the construction sector is vastly dependent upon these services. Is it seriously being suggested that because this is not a classic consumer product but is a service in a key sector of the economy in respect of which this is a key service, that is somehow less serious? This, we would submit, is simply to look unhelpfully at categories without digging into the content that is relevant to it.

We have set out the factors here. We do submit that this is a case where there is compounding, both by way of the exploitative abuse and the exclusionary abuse.

As to the issue of effects, which is one of the grounds upon which complaint is made that this is not serious enough. But we would just make two submissions: the first is that where a matter is serious enough to be judged and condemned by object because its potential harm is so great that it is per se and obviously serious, there is no requirement – not just as a matter of liability to look at effect, but effects are understood by reference to the characteristics of the infringement to the potential for harm is necessarily part of the infringement that has been discerned. And so the absence of any detailed treatment of concrete effect is not something which makes it less serious; it is not necessary because it is so serious. That is our first submission as far as that is concerned.

The second is that although the OFT goes no further in the Decision than to say that they may have been significant effects, in fact there is a reference to the whole of the analysis that is offered in Part 4 of the Decision when the question of seriousness is considered, and as I indicated in opening, that includes the very significant admissions that were made by the parties that went directly to effects, because they acknowledged that they were bargaining on a preferential basis that might have put Vinci and others, I think in that instance the admission is in respect of Vinci at a disadvantage in the bargaining process. Well, it is hard to imagine what is a more concrete effect. And, lastly, the notion that this cartel came to an end without intervention is not an indicator that it is not serious. Cartels often, well, cartels are almost as a matter of course unstable, and they frequently come to an end in acrimony because they are still built around a very conditional kind of self interest, which can easily break down. It breaks down because of self-interest. It does not break

down because parties suddenly believe they must become lawful actors again. And that goes to seriousness. So it is not that suddenly there was an outbreak of virtue; it has continued to be an application of self interest and that was as serious as one can imagine to be. So, we do submit that 9 per cent is a perfectly proper penalty. We have set out a table where we have indicated the factors as to how it is situated in the universe of other infringements, but we say two things: that one needs to be cautious about how one situates within that universe, because those are cases decided on their own facts; and, secondly, we point to the policy which says that the OFT can permissibly increase penalties and indeed probably should be in circumstances where, if after a number of years of this regime there are still firms that continue to engage in this kind of conduct, it is clear that more needs to be done. So, the fact that seriousness increases is perhaps a very natural consequence of the fact that once a regime has been in place for a reasonable period of time parties such as these should act differently and have not.

And then, I believe lastly, I hope subject to any further instructions, but, just on this question of the senior management.

THE CHAIRMAN: You need not address us on that.

MR. UNTERHALTER: Those, then, are our submissions.

THE CHAIRMAN: Thank you very much.

LORD PANNICK: Sir, should I reply on MDT now, would that be convenient?

THE CHAIRMAN: Yes.

LORD PANNICK: The submissions the Tribunal has heard on MDT confirm the vice. The vice is that the penalty is being identified by reference to what is needed to secure deterrence, effectively divorced from culpability and without an assessment of the individual circumstances of the company concerned. As I submitted yesterday, the OFT can increase the penalty for deterrence, but in order to satisfy proportionality there are two essential requirements which Mr. Unterhalter has addressed but which, in my submission, he cannot address adequately.

The first requirement is that the fine must remain linked to culpability in that the culpability figure at Step 2 must be the foundation for the fine. The fine must be built upon it and the Step 2 figure must not be discarded. That can either be done by percentage, which is what Mr. Unterhalter addressed or I would accept it can be satisfied by adding a further amount of money to the Step 2 figure as Mr. Davey put to me yesterday.

The second requirement of proportionality is that the OFT must give individualised consideration to what penalty is required to secure deterrence in the circumstances of this company.

Those requirements are imposed not just by principle, proportionality can require no less than this, but it is also as, Sir, you put to my learned friend, the requirements of the OFT's own Guidance, and my friend really has no answer to this point. Paragraph 2.12 of the Guidance speaks of a need to adjust the penalty, and it cannot be consistent with the Guidance to set aside the penalty at Step 2, and proceed then to look at gross worldwide turnover.

Paragraph 1.4 speaks of the twin objectives of culpability and deterrence, and that again requires that one cannot set aside the Step 2 culpability figure based on turnover in the relevant market, and proceed to look at something else. The Guidance at para. 2.12 says:

> "The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking."

Paragraph 2.11 adds as, Sir, you pointed out to my friend, that consideration will be given to: "...the size and financial position of the undertaking in question."

My friend says there are three links to culpability. He says that first of all Step 2 is applied where it is sufficient for deterrence, but that does not establish any link to culpability where Step 3 is applied which, of course, is our case. It does not assist him that there is a link when Step 3 is not applied. His second argument, as to his link to culpability is that the seriousness factor, the 9 per cent is applied at Step 3, but of course it is applied to a total worldwide turnover figure, which we all agree has no connection to culpability. Step 1 looks at relevant turnover because that is the relevant figure for culpability.

My friend's third point on the alleged link with culpability was to point out that there was a 10 per cent cap based on total worldwide turnover. Sir, members of the Tribunal that cannot establish that the figure arrived at within the cap is a proportionate figure linked to culpability. The existence of a cap cannot sensibly be said to validate any principles which lead to a result within the cap. The figure arrived at must be proportionate by reference to culpability.

Then my friend turned to why he says there is individualised consideration but his argument here – his only argument – was that there was individualised consideration because the specific worldwide figure of this company is used as the basis for Step 3, but of course that does not address our complaint, because our complaint is that other factors relevant to the economic condition of the company i.e. factors other than its worldwide turnover, are

ignored by the OFT, and they are ignored despite the fact that the Guidance requires reference not just to the size of the company, but requires reference, para. 2.11 to the "financial position of the undertaking in question". It is despite the fact that the European Court of Justice in *Musique Diffusion Française* (authorities vol.4, tab 57, para.121) says expressly that worldwide turnover gives "an indication albeit approximate and imperfect" of economic power, and so is impermissible to fix a fine as "a result of a simple calculation based on the total turnover". My friend, perhaps understandably, said nothing at all about the ECJ decision in *Musique Diffusion Française.*

The 15 per cent figure – 15 per cent of gross total turnover, and these are his words: "cannot be rendered scientific." He conceded, and I wrote down is words they were so striking, that he could not "reason deeply" on why 15 per cent is used, and not some other figure. Of course, our complaint is not just that 15 per cent is used without any rational explanation. Our complaint is that indicators of economic strength other than worldwide turnover are simply ignored and no assessment is made of the economic position of this undertaking and what figure for deterrence is needed. A pure assumption is made, and it is no more than an assumption that 15 per cent of worldwide turnover is required for deterrence. We submit, this is the essence of our case, that will not do, and it will not do when the object of the exercise, let us recall, is to identify what extra penalty is required above culpability by reference to the economic power of this undertaking and it is in the context, let us not forget, that the exercise that the OFT has undertaken results in an increase for my clients of a fine of £15 million to £41.3 million. One really cannot do that without at least a careful assessment of the individual circumstances of this company.

Then my friend said it is "unprincipled" – his word – to look at all factors to assess deterrence. Well why is it unprincipled? You look at all the relevant factors as the OFT if you are concerned that the culpability figure is inadequate and you make a judgment, and that is precisely what para. 2.11 of the Guidance requires, it is precisely what *Musique Diffusion Française* says is required, and it is precisely what any notion of fairness and any notion of proportionality requires, and that is especially so when Mr. Unterhalter himself accepts the OFT's approach – "let's take 15 per cent of worldwide turnover – is itself a subjective analysis. There is no science about the OFT's approach. Therefore, if one is gong to adopt a judgmental approach, as one must, do it in a fair and proportionate manner linked to culpability.

Then my friend said there are problems, and again I wrote down his words: "in adopting a profit standard". I sought to make clear, and I repeat our case is not ----

THE CHAIRMAN: You are not urging a profit standard.

LORD PANNICK: I am certainly not urging a profit standard. My submission is, I hope, a more modest one, that all factors are relevant including total worldwide turnover, but also including other factors which are relevant in the judgment of the Tribunal in the economic circumstances of the particular company. We say in this context profit is plainly relevant to an assessment of what sum is required for deterrence. We say that the actual net turnover is also plainly relevant to what sum is required.

THE CHAIRMAN: Yes, we have that point.

LORD PANNICK: The Tribunal has that point. The compliance programme Mr. Unterhalter says is of little relevance because, he points out, cartel behaviour is rational, albeit unlawful, very difficult to detect, and we are seeking to mitigate the wrongdoing. Two answers: the OFT has itself accepted that we have adopted effective compliance programmes, deterrence is concerned with practical reality as to the circumstances of this company and we do not need a larger fine for deterrence purposes because we already have, in the OFT's view, effective programmes.

THE CHAIRMAN: Has the OFT accepted that you adopted an effective programme, or just a thorough programme?

LORD PANNICK: They said they were appropriate programmes, by which I understand them to mean appropriately effective. A programme cannot be appropriate without it being effective.

THE CHAIRMAN: Yes, "appropriate" was my recollection. You say "appropriate" means effective?

LORD PANNICK: Well it must do. In my submission it is para. 5.337 (CB1.p.302)

THE CHAIRMAN: One would like to think it means "effective".

LORD PANNICK: They say:

> ". . . appropriately active measures to introduce compliance measures that are appropriate for the size of the company or company group in question."

Two other points, Sir, if I may. First, Mr. Unterhalter suggested that the Professor Bain's example, Shell and BP, simply shows – this is my friend's submission – a difficult case at the margin. In my submission, what it actually shows is that it is wrong in principle simply to take a percentage of total worldwide turnover. To be proportionate it is vital to look at the circumstances of the individual case. The hard case of Shell and BP simply demonstrates the lack of proportionality in the OFT's analysis.

Finally, I make three points about the *Makers*' case. First, it was a very special case on its facts, (see paras. 122 and 133 of the judgment. Authorities bundle 4, tab 54) because of the derisory sum that was arrived at after Step 2, £6,500.

The second point we make, and I hope it is fair to say, that the arguments which we have advanced in relation to Step 3 were advanced there.

Thirdly, and no doubt for that very reason, there is if, I may respectfully say so, a very cursory analysis of the Step 3 issues by the Tribunal at para. 134. Prior to the construction cases and these cases, *Makers* is the only case in which the MDT has been addressed by the Tribunal. We would respectfully submit that if our submissions on MDT otherwise have force, the *Makers*' judgment can provide no comfort whatever for the OFT.

Sir, unless there are other matters that my friend raised on which the Tribunal would wish me to have the opportunity to respond, that is what I want to say on behalf of Hays. Thank you very much for the opportunity to do so.

THE CHAIRMAN: Thank you very much, Lord Pannick.

MR. BREALEY: Sir, just three points by way of reply. The first concerns materiality, the second seriousness, and the third gross/net.

On the issue of materiality Mr. Unterhalter just slipped in a submission that, according to Hays the fine was not material. I just make this by way of reply, that is incorrect and is raising an issue which is dealt with in the evidence, if I could just give the Tribunal the note.

THE CHAIRMAN: This is the debate about what is said in the report?

MR. BREALEY: That is right. It is Venables 2, paras. 47 to 51, and Mr. Woolland at tab 6, and that deals with the issues of materiality and insider dealing. The evidence is quite clear that the fine is material to Hays, but I felt I had to make that point.

THE CHAIRMAN: Yes.

MR. BREALEY: The second point, Sir, is seriousness and the issue of object and effect. The submission is made by the OFT essentially that because an agreement has as an anti-competitive element as its object, therefore it is of the utmost seriousness, and really that is the end of the case.

As the Tribunal knows, where there is an object agreement the OFT does not have to prove anti-competitive effect, because the agreement usually has, by its very nature, a distorting effect. But the principle, in my submission, is that where you have an object case if the infringer can prove that there has not, in fact, been an effect, that reduces the seriousness of the infringement – that is actually quite an important principle.

So even in an object case, if the infringer can prove that the agreement did not have an anti-competitive effect, then that reduces the seriousness of the infringement, and as to that I would remind the Tribunal that Hays adduced the evidence of a Mr. Jellicoe from Vinci, and that has remained unchallenged (tab 4), and particularly at paras. 16 and 17 he says it is nonsense to suggest that the CRF had any effect on him and the rates being charged. So I would ask the Tribunal to consider the evidence of Mr. Jellicoe from Vinci when considering the seriousness of the infringement.

The last issue by way of reply concerns gross/net. Essentially I have two points here. The first is the nature of the service provided, and in my submission it is still quite vague as to what the OFT is actually saying. I refer in particular to para. 27 of their skeleton argument, which has just been handed up. It says: "It is Hays itself that owes obligations to the client . . .", it does not define obligations, and then it says: ". . . even though obviously it is not Hays itself which does the building or plumbing work".

In the same paragraph it refers to the paragraph in the Decision 5.140, which again is quite vague when you actually go back to it, it talks about purchasing services and the OFT in the Decision does not actually define what service is being purchased. My simple point is that if the OFT, at para. 27, is saying that Hays itself does not provide the service, and Hays is a legal person, if it is not as a legal person providing the service it cannot be purchasing those services from the worker. That is the ambiguity on the service provided.

The second point by way of reply is this "beginning and end" point. It is said by Mr. Unterhalter that really the accounts are the beginning and the end. They may be the beginning but they are certainly not the end.

As to the beginning ----

THE CHAIRMAN: You are not going behind the accounts?

MR. BREALEY: No, but I would go further and say that when one looks at the accounts, Hays' accounts, Hays is quite clearly telling the market – and this to a certain extent was accepted by Mr. Allen – that the service it is providing is placement, and the money that it earns from placement is net fees. So that is the beginning, even on Hays' accounts in my submission, although we are not going behind them it is plain the message being sent to the market is that it is earning money from the activity of placement.

As to whether it is the end, it is not the end, and I again refer the Tribunal to paragraphs 5.22 to 5.25 of the Decision and the *Argos* case, and in particular the *Football Kit* case where the OFT says we have to look at the relevant market from a group of services which reflects commercial reality.

Again, if one goes to 5.23: "In *Replica Kit* the CAT confirmed the OFT's approach consisting of grouping products …" we can substitute "services", "… in one relevant market where it reflects commercial reality . . ." and the commercial reality in this case is that the net fees constitutes the scale and magnitude of Hays' activity. One can see from all the evidence that Hays has attached to the note that was handed up this morning from Hays itself, from Mr. Shepperd, that the commercial reality is that the relevant metric is net fees, not the gross wages of the temporary workers, that is the end, the commercial reality. Thank you.

THE CHAIRMAN: Thank you, very much. Mr. Harris?

MR. HARRIS: Sir, yes, with the Tribunal's permission I have five very short Eden Brown specific points by way of reply. First, Step 3, the fact is that it is common ground between Eden Brown and the OFT that there is a significant over deterrence, the number needs to be reduced because it is too high and excessive (Decision CB1, page 286, para. 5.254). What my learned friend, Mr. Unterhalter, did not deal with was my point that, as a matter of proportionality, there is no justification for Eden Brown to end up after the Step 3 adjustment, at a level of fine that is significantly higher, substantially higher than any other party to this same cartel, by any of the relevant measures, whether it be proportion of net fees, or worldwide turnover, or whatever, and he simply did not deal with that point.

My second point – equally short – is my learned friend mentioned material misstatements. If you recall a central part of his thesis on gross/net was that if the appellants are now right it must follow that their accounts are materially wrong and in error, but that wholly failed to grapple with either the Robert Walters' example, that I put to Mr. Allen and features in Mr. Hall's report, that is of course the recruitment company that changed its accounts, and there is no suggestion at all that in restating their accounts they had committed a material error. On the contrary, this issue was addressed in terms by the finance director of Eden Brown, Mr. Sterling, and you will recall his evidence – I gave the citation at an earlier stage – that if he were, as he says he could, to present the numbers for Eden Brown, it would simply be a question of altering the labels applied to the very same numbers, and that would not have any effect on any, even uninformed, reader of the accounts, let alone the informed and diligent reader that we are directed by IAS 8 to conceive of as the reader of a company's accounts for these purposes.

My third point is that Mr. Unterhalter said at one stage that the gross/net issues – and I jotted down these words – "was located at Step 1" . He then went on to make some submissions about its relevance at Step 1, and this was following some questions from an

intervention from the Tribunal about the relevance of Step 3. Of course, in opening, and I very deliberately used the phrase: "my major point" on behalf of Eden Brown was the double disproportionality. One needs to take account in our respectful submission of the disproportionality that arises from using gross turnover in this case rather than net fees, somewhere within the calculation, somewhere within the methodology that eventuates in the bottom line figure, the outcome figure. So therefore, we do not accept that the relevance of gross/net is limited or located only in Step 1. For proportionality purposes, provided it is taken full account of that is what matters.

My fourth point relates to year of relevant turnover. My learned friend's case effectively on this amounts to two points, his coherent strategy or interpretive technique and his hierarchy of statutory norms. I will take them in reverse order.

With respect we say that the hierarchy of statutory norms upon which he places so much reliance is meaningless if the norms within that hierarchy are directed to different purposes. They self-evidently are directed to different purposes within the Steps of the Guidance. Year of relevant turnover is at Step 1, that has a certain purpose, size, extent and seriousness. Step 5 is completely different.

A fifth and final point, and then one postscript about a sub-issue. Still on year of relevant turnover, my fifth and final point is that my learned friend suggested that there was an oddity in having different measures or metrics of turnover at different stages of the Guidance, notwithstanding their different purposes. We respectfully say it would be odd the other way around. It would be odd to have the same turnover when the purposes are so transparently and obviously different. He finished on this score by saying – this seems to be a new point, it is not ventilated anywhere else in any document at any stage in these whole proceedings, but he submitted that it would be odd for there to be a turnover standard of one type at one point in time for the purposes of Step 1 (year of relevant turnover), but then to be a different turnover standard for deterrence purposes at the Step 3 stage at a different point in time.

With respect, we find that a very odd submission for the OFT to make, because on our understanding of what they used to do, before they changed their interpretation, that is exactly what must have happened. On their case deterrence requires a look at the most recent number going forward, but on their former practice they did not take that standard for the purposes of the year of relevant turnover. So the very issue that he is saying prevents me winning is something that they used to do.

THE CHAIRMAN: I seem to recall the previous version of the Guidance made that point, that it was using different turnover.

MR. HARRIS: Yes, but it still does not get around this issue of having different standards, and as I understood the submission that was made: "You cannot really be right because it means having different standards ----"

THE CHAIRMAN: This is a point in your favour! (Laughter)

MR. HARRIS: I am so "enthusiastic" – to take Mr. Unterhalter's word. Perhaps I will wrap it up very briefly then. The point is made, I think through Mr. Unterhalter's mouth on behalf of the OFT that there may be a lack of clarity and it is unfortunate where certain figures have come from net fees and what have you, we cannot believe that this point applies to Eden Brown because the only figures that we put forward in the calculation table that we handed up are drawn from the sworn second witness statement of Michael Sterling which is CB3, tab 9, page 115, and not only has the OFT had them since November ----

THE CHAIRMAN: Just one moment. (After a pause) Yes.

MR. HARRIS: So, Sir, if one has regard to p.1, of the second statement of Michael Sterling, do you have, Sir, the financial year "2004/05" at the bottom of p.1?

THE CHAIRMAN: Yes.

MR. HARRIS: And the "Relevant Net Fees" figure of a certain amount.

THE CHAIRMAN: Yes.

MR. HARRIS: That is the figure that then appears on the table that I handed in, and those figures have not only been in the OFT's possession since November 2009, but they are supported by the exhibits to Mr. Sterling's statement, and if you would like the reference to those, the reference is NCB 3, volume 2, tab 9.

THE CHAIRMAN: I do not think we need that reference. Your figure is not a new one that was handed up.

MR. HARRIS: I am grateful. Unless I can be of further assistance, those are the submissions in reply for Eden Brown.

THE CHAIRMAN: Thank you. Miss Kreisberger?

MISS KREISBERGER: Sir, I am feeling the weight of responsibility having the last word in this hearing. Sir, can I take it that the Tribunal does not want to hear from me on ground 4?

THE CHAIRMAN: Yes, one can understand, as it were, the note of caution that the OFT sounded, whether on the facts that applies in the particular case of your client or not, is not something we are going to reach a view on. One can appreciate why Mr. Unterhalter and the OFT have that concern, and their concern would resonate particularly strongly if that

were the only reason an appeal were brought and the only ground of appeal might then have very significant consequences in costs even if an appeal were successful, but I think in this case, given all the other matters it means that I think the OFT accepts – while it does not accept the background as set out in your grounds and evidence, which it has not cross-examined on – that the figure can be adjusted, that is my understanding of the position, so you need not address us further.

MISS KREISBERGER: I think in that case I need say nothing more. I will take MDT very briefly indeed. All I propose to say on that is that of course CDI accepts that the Tribunal is entitled to consider deterrence, and frankly, we would be on a hiding to nothing if we thought to argue against that, but Mr. Unterhalter failed to address CDI's central point on MDT, which is that CDI is in a unique position, for the reasons I have already given (and do not propose to repeat) and is therefore not comparable to Hays, and on that basis there is no call to apply to particular methodology which was applied to Hays in the decision because of the need for individual consideration which has not been given to CDI if the relevant figure is the net fees, the gross profit figure, that simply has not been looked at, so it cannot be assumed that the calculation applied to Hays, if they fail on this ground, should automatically, mechanically be applied to CDI in respect of figures which have not been considered – they should have been, but they have not been considered. That is all I propose to say on MDT.

On CDI's ground 1 (the gross versus net issue) like Mr. Brealey I was also going to pick up on the accounts and the beginning and the end comment but to make a slightly different point. If that comment is tantamount, and we know that it is in the way in which it applies to CDI, to saying that reported turnover is the figure, it is not simply looking at the accounts, because the answer is in the accounts. But if the answer that is being given is that reported turnover is always the answer, we say that is precisely where the OFT has gone wrong.

In my submission, this is the fundamental misconception on the part of the OFT as to the job it needs to do on penalty assessment, and it is a failing that we find deeply troubling because (i) it does not admit to the possibility of exceptions; and (ii) it ignores economic reality. Yet, the Commission says, even in the context of merger control which, Sir, you pointed out is a less flexible area when one is dealing with turnover, and a more rigid framework, even there the Commission says it is necessary to have regard to economic reality, to context, in the Notice and we have the ruling from the Court of Justice in *Britannia Alloys*, and that is in the context of penalty assessment – regard must always be

had to the economic situation of the undertaking in the light of the penalty assessment exercise. We say that it is this failing on the part of the OFT, and with respect we say it is a failing which infects both Step 1 and Step 3 of the calculation which really underlies the flawed assessment that we are looking at here.

Mr. Unterhalter admitted that *Endesa*, on which we place such reliance, is concerned with the construction, construing the meaning of "turnover", and I say as an aside that that is exactly why CDI's case does not lead to endless accounting disputes which Mr. Unterhalter referred to on the gross versus net debate. We are talking about turnover, and *Endesa* says that you construe turnover in the light of the economic circumstances, legal circumstances in order to determine whether the entity that you are dealing with should be treated as an intermediary. Then you decide how you are going to treat turnover by taking the position that the answer will always be reported turnover, regardless of circumstances. The OFT has shut its mind to economic reality as a matter of principle, and so fails to meet the obligation incumbent upon it to give individual consideration in order to achieve the objectives of the penalty regime. It is because the OFT has adopted that approach that it has put itself in a position of having to justify this blind devotion to the figure of reported turnover, which has meant that the OFT has had to engage in certain contortions as regards the facts of AndersElite's case to attempt to fit it into the box of *Endesa* in which box it does not fit because, as I have already discussed, the facts are so different.

That was all I was proposing to say. Sir, those are the submissions of CDI in reply, unless I can be of any further assistance.

THE CHAIRMAN: Thank you, Miss Kreisberger. I think that as regards further matters to be addressed, there is the table of prior decisions that the OFT produced in response to our request which the other parties will be looking at and give any comments, and we ask that that can be done if at all possible by agreement with the OFT regarding revisions, and if we could have that by the end of next week, please?

The CDI figures, Miss Kreisberger, net fees for 2004/05 you said you are going to produce within a month, and again if they can be submitted to the OFT for them to look at those before they are sent to us – again, we hope there is no argument about those.

Mr. Unterhalter, as regards Eden Brown, as Mr. Harris pointed out – of course this always was in Eden Brown's appeal – those figures you have had and so I do not think there is need for anything further.

Then Hays, Mr. Brealey, you will consider further (a) whether there is the data; and (b) if it would be a major exercise to prepare it whether there is an alternative means – slightly

rough and ready, but these are only starting point figures – to arrive at a fair estimate of what they were in that year, and again if that could be submitted to the OFT, and if that can be done also within a month.

I do not think there was anything else due to be supplied, in the light of which it just remains for us to thank all counsel and indeed the legal teams working with them, for all the help that they have given us in this case, and also to the shorthand writers who have been producing a very rapid transcript. We will of course consider our decision and you will be notified when it is ready.

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