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IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1114/1/1/09
1119/1/1/09
1127/1/1/09
1129/1/1/09
1132/1/1/09
1133/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

11 March 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR ANDREW BAIN OBE
PETER CLAYTON

Sitting as a Tribunal in England and Wales

BETWEEN:

KIER GROUP PLC
KIER REGIONAL LIMITED
BALLAST NEDAM N.V.
BOWMER AND KIRKLAND LIMITED
B&K PROPERTY SERVICES LIMITED
CORRINGWAY CONCLUSIONS PLC
THOMAS VALE HOLDINGS LIMITED
THOMAS VALE CONSTRUCTION LIMITED
JOHN SISK & SON LIMITED
SICON LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 28 to 30 June 2010

JUDGMENT

APPEARANCES

Mr. Mark Brealey QC (instructed by Simmons & Simmons) appeared on behalf of the Appellants, Kier Group plc and Kier Regional Limited.

Mr. Christopher Vajda QC and Ms. Ronit Kreisberger (instructed by CMS Cameron McKenna) appeared on behalf of the Appellant, Ballast Nedam N.V.

Mr. Thomas Sharpe QC and Mr. Conall Patton (instructed by Shepherd and Wedderburn LLP) appeared on behalf of the Appellants, Bowmer and Kirkland Limited and B&K Property Services Limited.

Mr. Paul Harris (instructed by Nabarro LLP) appeared on behalf of the Appellant, Corringway Conclusions plc.

Ms. Bernardine Adkins (of Wragge & Co LLP) appeared on behalf of the Appellants, Thomas Vale Holdings Limited and Thomas Vale Construction plc.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Mayer Brown International LLP) appeared on behalf of the Appellants, Sicon Limited and John Sisk & Son Limited.

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

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I. INTRODUCTION

1. On 21 September 2009 the Office of Fair Trading ("OFT") published a decision under the Competition Act 1998 ("the 1998 Act") entitled "Bid rigging in the construction industry in England" ("the Decision"). The Decision is the longest decision ever adopted by the OFT, running to nearly 2,000 pages. It followed an extensive investigation which took place over some five and a half years between April 2004 and September 2009 which was by far the largest undertaken by the OFT, in terms of the number of parties involved, the number of inspections made and the number of suspected infringements.

2. In the Decision the OFT found that, in the period 2000 to 2006, 103 undertakings had each committed between one and three infringements of the prohibition contained in section 2 of the 1998 Act ("the Chapter I Prohibition"). That prohibition applies to agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

3. By far the majority of those infringements consisted of what can perhaps be referred to as "simple" cover pricing, to distinguish them from the six infringements described at paragraph 21 below. "Simple" cover pricing occurs where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price.

4. The OFT imposed penalties totalling approximately £129.2m in respect of 199 infringements.

5. Admissible appeals against the Decision have been lodged by 25 companies. Of these 6 challenge both liability and penalty, and the remainder are appeals against penalty only.

6. In the light of submissions provided to the Tribunal at a joint CMC held in January 2010 the Tribunal decided that, although there were certain common themes in the penalty appeals, it was not appropriate to determine those separately as preliminary issues, but rather to deal with them at the same time as hearing each appeal as a whole. Separate oral hearings in respect of each appeal were listed. For logistical reasons the penalty appeals were allocated between three panels of the Tribunal. The desire on the part of some of the appellants to intervene in other penalty appeals where common issues were perceived to arise was satisfied by permitting the parties to make brief post-hearing written observations on any relevant matter contained in the transcripts of the oral hearings in appeals other than their own. Any such observations were ordered to be provided to the Tribunal by 10 September 2010.

7. The oral hearings in the six appeals against penalty to which this judgment relates took place between 28 and 30 June 2010, and further written submissions were received in the course of September in accordance with the arrangement referred to above. For the remainder of this Judgment we will distinguish these six appeals from the construction appeals generally by referring to the former collectively as "the Present Appeals". We will refer to the appellants in the Present Appeals as "the Present Appellants".

8. In view of the overlap between the grounds of appeal we have decided to determine the Present Appeals in a single composite judgment. This will enable the recurring issues to be considered in the context of all the relevant submissions from the Present Appellants. We will examine these issues before considering each specific appeal. Although this approach means that this composite judgment is lengthy, we

hope that it will avoid much of the repetition that would have been inevitable had we given six separate judgments.

9. Before turning to the issues to be determined in the Present Appeals it is necessary to describe: (1) how the OFT's investigation proceeded; (2) the Decision itself; (3) the process by which the OFT arrived at the penalties imposed on the Present Appellants; (4) the relevant statutory framework.

II. THE INVESTIGATION

10. On 1 April 2004 the OFT was contacted by an audit manager acting for the Queens' Medical Centre Nottingham University Hospital NHS Trust. The audit manager alleged that there had been collusion in the bidding process for tenders for works at the Queens' Medical Centre. Following up on these allegations, between November 2004 and January 2007 the OFT used its powers under sections 27 and 28 of the 1998 Act to carry out inspections of the business premises of some 63 companies in the East Midlands, Yorkshire and Humberside areas as well as certain nationally-based companies. The OFT also sent out over 500 notices under section 26 of the 1998 Act to the undertakings suspected of having breached the Chapter I Prohibition, their clients, liquidators and administrators, requiring documents and information. It also conducted a large number of interviews with employees, consultants and ex-employees.

11. According to the OFT, by the autumn of 2006 it had obtained evidence of general widespread cover pricing in the construction industry throughout England. It also had specific evidence of cover pricing involving over 1,000 companies and over 4,000 tenders ("Suspect Tenders"). At an early stage in its investigation, the OFT had decided to focus on those companies which, according to the evidence in its possession at the time, appeared to have engaged in cover pricing activities in connection with at least five separate Suspect Tenders. However in the light of resource constraints, it adopted a number of further consolidation measures. Principal among these was the decision to focus its investigation on those companies for which it had the best evidence and for which it had evidence of the most repeat behaviour. It was also decided to amalgamate the evidence from the

previously separate investigations conducted in the East Midlands, Yorkshire and Humberside, and nationally.

12. As a result of these measures the OFT reduced the scope of its investigation to a total of 122 companies. The OFT also decided to continue to investigate five Suspect Tenders per party, chosen according to certain criteria, the most important being the quality of the evidence available (Decision, II.1444-1469). Its aim was that, at the conclusion of the investigation stage, it should proceed to a statement of objections for a maximum of 3 alleged infringements for each of the parties who had not applied for leniency.

13. By early in 2007 the OFT decided that it had sufficient evidence of suspected breaches of the Chapter I Prohibition. As already mentioned, some of this evidence had been collected following inspections of company premises, sometimes known as "dawn raids". Further evidence was forthcoming as a result of a large number of leniency applications (37) made by companies following such inspections. Having concluded that evidence of any more infringements would prevent the OFT from progressing its investigation in a timely and efficient manner, it decided to close the door to new leniency applications. The OFT made a public announcement to this effect on 22 March 2007, and on the same day wrote to the 85 parties under investigation who had not to date applied for leniency, setting out the terms of a "fast track offer" ("FTO") whereby in return for admissions of liability for specific infringements and cooperation with the OFT in other ways, the OFT guaranteed a 25% reduction in penalty. According to some of the Present Appellants, this was the first time they had become aware of the OFT's investigation into cover pricing and of the fact that they were suspected of infringing. We will return to the FTO in the context of one of the grounds of appeal raised in several of the Present Appeals (see paragraph 187 below).

14. As required by subsection 31(1) of the 1998 Act, the OFT issued a statement of objections to 112 parties on 16 April 2008 ("the Statement of Objections"). The recipients of the Statement of Objections were broken down into 33 parties who had applied for leniency and 79 non-leniency parties, 45 of whom had admitted engaging in cover pricing activities in response to the FTO (Decision, II.1507). In

relation to each of the non-leniency parties, the Statement of Objections set out the details of 3 alleged infringements. In most instances those parties who had applied for leniency were accounted for in the Statement of Objections as counter-parties to the infringements alleged against the non-leniency parties. However where a party that had applied for leniency was accountable in this way for fewer than 3 alleged infringements, the OFT made a further selection from the list of tenders being investigated for that party (Decision, II.1499).

15. The OFT issued supplementary statements of objections to a number of parties in late 2008 and the first half of 2009 on the basis of information coming to light following receipt of written representations on the Statement of Objections by over 100 parties (Decision, II.1584-1590).

III. THE DECISION

16. The Decision, published on 21 September 2009, found that in the period from 2000 to 2006 some 103 undertakings had each been party to between 1 and 3 separate agreements and/or concerted practices infringing the Chapter I Prohibition (Decision, I.1). The conduct at issue, "simple" cover pricing, is described at paragraph 3 above.

17. During its investigation the OFT was told by industry participants that the practice of cover pricing (also referred to as "taking help" or "giving assistance") was long-standing and endemic. As such, many of the companies subject to the investigation stated that no one regarded cover pricing as improper conduct (Decision, IV.10-IV.18). One of the principal reasons given for carrying out such activities is described at paragraph IV.30 of the Decision:

> "The reason given by most of the leniency Parties for the practice of cover pricing is that it enabled them to remain on the tender lists of those involved in arranging contracts for the provision of building services. In response to the Statement [of Objections], many other Parties also cited this motive."

Companies were concerned that if they did not respond to an invitation to tender, they would be regarded as being either unable to carry out the work or uninterested in doing so. It was believed that this might well lead to their being placed at the bottom of tender lists and ultimately removed from such lists altogether.

18. Whilst emphasising that such motivation did not provide any defence to the infringement, the OFT accepted in the Decision that the perception within the industry of the adverse effects of not participating in a tender process, when invited to do so, was genuine and widespread, and that there may have been instances when the feared effects (exclusion from tender lists) had materialised (Decision, IV.44).

19. An additional reason to engage in cover pricing (also apparently considered by the OFT as genuine, albeit irrelevant to liability) was in order to avoid the significant time and expense incurred in calculating genuine figures for a tender. Such expense would be wasted where the company was submitting a bid merely to remain on a tender list rather than to win a particular contract (Decision, IV.47-IV.50).

20. In the course of the Present Appeals there has been some debate about the nature and extent of the harm inherent in such conduct. According to the OFT its vice is that it deceives the client as to the true nature of the bidding process, it denies the client the opportunity of substituting a competitive tenderer in place of the company submitting a cover price, and it enables that company to enjoy a credibility with the client to which it is not entitled and which may cause it to be retained on the client's tender list for future contracts, displacing potential tenderers who may be more efficient. In addition the OFT points to the advantage which the collusion between the two companies affords to the provider of the cover price in relation to the specific contract: this company submits its own tender in the knowledge that at least one of the other tenderers is not in reality a competitor. In the OFT's submission this advantage is capable of affecting the price being tendered. These factors led the OFT to regard cover pricing as an infringement "by object" (as distinct from "by effect") and as a serious infringement. Some of the Present Appellants took issue with the degree of seriousness which the OFT attributed to the conduct. We will need to consider the parties' respective arguments on this aspect in due course.

21. In addition to "simple" cover price cases, six of the infringements found in the Decision involved compensation payments. In four of these cases payments were

made by the company providing the cover price to the company receiving it, if the former won the tender. In the other two cases the companies agreed that the winner would pay the loser a specific sum said to be in compensation for the cost of tendering even though no cover price may have been provided and each of the companies prepared and submitted competitive tenders (Decision, III.74 and III.127-157). Such conduct was considered by the OFT to be more serious than "simple" cover pricing, thereby meriting a higher starting point for the calculation of the appropriate penalty (see further paragraph 41 below).

22. The individual fines imposed on undertakings range from £713 (imposed on J. Harper and Sons (Leominster) Limited, together with its ultimate parent company Harper Group plc) to £17,894,438 (imposed on Kier Regional Limited, together with its ultimate parent company Kier Group plc) (Decision, VI.665). The overwhelming majority of fines became owed to the OFT on 24 November 2009, subject to an offer by the OFT of additional time to pay the penalty (3 years) (Decision, VI.665). However by virtue of section 46(4) of the 1998 Act, those parties that have appealed the Decision have in effect suspended their obligation to pay their respective penalties until the determination of their appeals and subject, if so directed by the Tribunal, to payment of interest.

23. The OFT considered that the infringements in question had already come to an end by the time of the Decision, and accordingly it did not issue any directions under subsection 32(1) of the 1998 Act (Decision, VI.3).

24. We now turn to consider the methodology used by the OFT in arriving at the fines which it imposed in the Decision.

IV. THE CALCULATION OF THE PENALTIES IN THE DECISION

25. Subsection 36(1) of the 1998 Act, as amended, provides as follows:

> "On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay to the OFT a penalty in respect of the infringement."

26. The OFT can only impose a penalty where it is satisfied that the infringement in question has been committed intentionally or negligently (subsection 36(3)). In this regard, the Tribunal has previously stated that an infringement is committed intentionally "if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition" (see *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, paragraph 456). An infringement is committed negligently "if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition" (*Napp*, paragraph 457). In the Decision, at paragraph VI.39, the OFT set out its view that it considers infringements of the Chapter I prohibition such as price fixing or bid rigging are likely to have been, by their very nature, committed intentionally. At Decision VI.51 the OFT concludes:

> "The OFT is therefore satisfied that each of the Parties intentionally or at the very least negligently infringed the Chapter I prohibition."

27. Subsection 36(8) of the 1998 Act provides:

> "No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

28. The relevant measure for these purposes is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309). In its original form Article 3 of that Order provided:

> "The turnover of an undertaking for the purposes of section 36(8) is […] the applicable turnover for the business year preceding the date when the infringement ended…"

However, with effect from 1 May 2004 the Order was amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). As a result Article 3 now provides as follows:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date *on which the decision of the OFT is taken*, or, if figures are not available for that business year, the one immediately preceding it." (Emphasis added).

The Tribunal will refer to these versions respectively as "the Original Turnover Order" and "the Amended Turnover Order" as the case may be.

29. Section 38 of the 1998 Act, so far as relevant, provides:

> "(1) The OFT must prepare and publish guidance as to the appropriate amount of any penalty under this Part.
>
> (1A) The guidance must include provision about the circumstances in which, in determining a penalty under this Part, the OFT may take into account effects in another Member State of the agreement or conduct concerned.
>
> (2) The OFT may at any time alter the guidance.
>
> (3) If the guidance is altered, the OFT must publish it as altered.
>
> (4) No guidance is to be published under this section without the approval of the Secretary of State.
>
> (5) The OFT may, after consulting the Secretary of State, choose how it publishes its guidance.
>
> (6) If the OFT is preparing or altering guidance under this section it must consult such persons as it considers appropriate.
>
> (7) If the proposed guidance or alteration relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.
>
> (8) When setting the amount of a penalty under this Part, the OFT must have regard to the guidance for the time being in force under this section.
>
> …"

30. Pursuant to its obligation under subsection 38(1) the OFT published its Guidance as to the appropriate amount of a penalty (OFT 423, December 2004) ("the Guidance"). This replaced an earlier version and is relevant to the penalty calculations set out in the Decision. In view of the considerable reliance which was placed upon the Guidance by the Present Appellants as well as by the OFT itself, we have set out the most pertinent provisions of it verbatim in Part A of the Annex to this Judgment.

31. The OFT states in the Decision that it is applying the Guidance in arriving at the penalties. It will be necessary in due course to consider the specific factors which the OFT treated as relevant in respect of each of the Present Appellants. At this

stage, however, it is sufficient to outline how the OFT went about applying the 5 steps in the Guidance in order to arrive at the penalties imposed in the Decision.

Step 1

32. At Step 1 the OFT identifies a starting point for the penalty by reference to the nature and seriousness of the infringement and the "relevant turnover" of the "undertaking" (paragraph 2.3 of the Guidance). "Undertaking" is not defined in the 1998 Act but by virtue of subsection 60(2) of the 1998 Act its meaning is governed by EU law, which treats it as encompassing any natural or legal person engaged in an economic activity regardless of its legal status. Depending on the specific facts, a parent company and its subsidiaries can be treated as a single undertaking where they form a single economic unit. This may well be the case where the parent exercises "decisive influence" over the subsidiary (see, for example, Case C-97/08 *Akzo Nobel NV and Others v Commission*, [2009] ECR I-8237, at paragraph 60). In the case of some of the Present Appellants the OFT treated parent companies and subsidiaries as a single undertaking for the purposes of calculating the penalties to be imposed on them. None of the Present Appellants challenges the Decision in this regard. However, the effect of the resultant combined turnover on those penalties is very contentious, particularly in relation to Step 3.

33. As to "relevant turnover", the Guidance states that this is the "turnover of the undertaking in the relevant product market and relevant geographical market affected by the infringement in the undertaking's last business year" (paragraph 2.7). The OFT interprets this as meaning the relevant turnover in the undertaking's last business year *prior to the Decision* i.e. 2008 in the present case. This interpretation and/or application of the Guidance is disputed by some of the Present Appellants, who contend that the relevant turnover should be identified by reference to a year which is related to the *infringement* which is being penalised, in accordance with the OFT's previous decisional approach. We will need to return to the rival contentions on this point later.

34. At this stage we should describe briefly how the OFT went about identifying the relevant product and geographical markets for this purpose. In the Present Appeals,

other than in very limited respects, there has been no challenge to the OFT's market definitions. However, the markets have been defined very narrowly indeed, and this aspect of the Decision has tended to render the Step 1 provisional penalties lower and also more "hit and miss" than might have been the case if the markets had been more broadly defined (see further paragraph 110 below).

35. To help it identify the relevant markets, the OFT sent questionnaires to each of the construction companies under investigation and to private and public sector clients of those companies seeking information about the characteristics of the firms, the categories and sectors of work in which they operated, and any constraints they faced in expanding their commercial reach. Client questionnaires probed the types of construction work being put out to tender, as well as the factors relevant to choosing a contractor (Decision, II.1605). Using the results, the OFT categorised each infringement according to the precise sector in which it occurred. Whilst recognising that it might have been possible to group some sectors in the same market, the OFT took a "cautious approach" and identified each of the following sectors as corresponding to a relevant product market for the purposes of Step 1: private housing, public housing, defence, education, entertainment (including leisure), garages, health, office, places of worship, police / fire and rescue, prisons, retail, distribution, other industrial buildings, and warehousing.

36. Turning to the relevant geographic markets, these were defined principally according to administrative boundaries as classified by the Office for National Statistics, so-called "Government Office Regions" or GORs. In doing so the OFT took account of the fact that over half of the alleged infringements involved construction work for public authorities with structural links to GORs, and that many larger companies under investigation were structured on a regional basis similar to GORs. The relevant geographic markets were therefore identified as comprising the following regions: East Midlands, West Midlands, Yorkshire and Humberside, North East, North West, East of England, London, and South East England.

37. The upshot was that each alleged infringement was categorised as falling into one of a possible 120 different relevant markets.

38. In accordance with its normal practice the OFT arrived at the Step 1 starting point by applying a percentage figure to each undertaking's relevant turnover. The OFT considered the factors set out in paragraphs 2.4 and 2.5 of the Guidance, including the nature of the infringement, the nature of the product, structure of the market, and effects on customers, competitors and third parties, together with the submissions of the companies under investigation. To the extent that the parties' conduct was motivated by concerns other than an explicit intent to overcharge the customer and make financial gain – for example, due to limited estimating resources, cost of tender preparation or a desire to remain on tender lists – the OFT indicated that it took this explanation into account too. The OFT also apparently acknowledged that there was no evidence that any of the infringements had resulted in direct inflation of price and/or profit margin, and stated that this factor had been taken into account in setting the starting point (Decision, VI.145). However, while there might be no impact on the price paid, cover pricing could nonetheless affect the customer's perception of the level of competition in the market and thus have an impact on future tenders (Decision, VI.160). The submission of a cover price also deprived the customer of the opportunity of seeking a replacement (competitive) bid.

39. The OFT concluded that the infringements were not as serious as they would have been if "collusion in relation to individual tenders had been part of an overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel over a period of time and/or with the explicit intention of inflating the level of the winning bids" (Decision, VI.103). There was no evidence of any such overall arrangement here. Nevertheless "the agreements and/or concerted practices described in this Decision involved collusive tendering (or bid-rigging) and most also amounted to a form of price fixing… Price fixing and other cartel activities (including collusive tendering) are among the most serious infringements of the Chapter I prohibition." (Decision, VI.102-3).

40. Further, in the OFT's view the giving or acceptance of a compensation payment that facilitates collusion and that is generally concealed through the submission of a false invoice is a particularly serious breach of the Chapter I prohibition. The starting point for infringements involving compensation payments was therefore set

at a higher level than the one used for cover pricing only in order to reflect the comparative seriousness of the two types of infringement (Decision, VI.118).

41. In the light of these and other considerations (which are fully set out in the Decision itself) the OFT set the starting points at 5% of an undertaking's relevant turnover for all infringements involving "simple" cover pricing and 7% for all those involving compensation payments (see Decision, VI.100-180). These levels are the same as those used in the OFT's previous investigations into bid-rigging activity in the roofing industry (see, for example, OFT Decision no. CA98/01/2006, dated 22 February 2006, paragraph 722). The OFT considered whether the starting point should be set at a higher level than in those earlier decisions, and decided that would not be appropriate given that many of the infringements had occurred before those decisions were published, and given the widespread ignorance about the illegality of cover pricing (Decision,VI.173).

42. As we noted earlier, a number of the Present Appellants strongly contest the OFT's assessment of the seriousness of cover pricing, arguing in particular that their infringements had no real adverse effects of any kind.

Step 2

43. Step 2 provides for an adjustment upwards or downwards for duration. The OFT made no adjustment of the penalty for duration in respect of any of the infringements. The OFT concluded that although the infringements lasted less than a year, this should not reduce the starting point because the anti-competitive effects were irreversible in respect of the affected tender. There could also have been a continuing adverse impact on future tendering processes (Decision, VI.181). None of the Present Appellants specifically challenges this aspect of the Decision.

Step 3

44. Step 3 provides for "the penalty figure reached after the calculations in steps 1 and 2 …[to] be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4" of the Guidance. These objectives (sometimes referred to during the

proceedings as "the twin objectives") were (1) to impose condign punishment on the infringer having regard to the seriousness of the particular infringement, and (2) "to deter undertakings from engaging in anti-competitive practices."

45. In the Decision the OFT emphasised that deterrence is an important aspect of its fining policy, and that it took two forms: *vis-à-vis* the parties to the infringement ("specific deterrence"), and *vis-à-vis* other undertakings who may be considering engaging in bid-rigging activities ("general deterrence"): Decision, VI.192-202.

46. The OFT was concerned that in some cases, where the infringing undertaking's turnover in the relevant market represented a low proportion of its total worldwide turnover, because the economic unit of which the infringing company formed a part may have significant activities in markets other than the relevant market, the penalty reached after Steps 1 and 2 would be small in relation to that total worldwide turnover. In order to ensure what it regarded as appropriate deterrence having regard to the overall size of the economic undertaking, at Step 3 where necessary the OFT increased the penalty to a level equivalent to a specific proportion of the undertaking's total worldwide turnover in the last business year prior to the Decision. This "Minimum Deterrence Threshold" or "MDT", as its name implies, represents the OFT's view of the minimum figure needed to deter the undertaking concerned and other similar sized undertakings (including those in other sectors) from engaging in unlawful behaviour of this kind (Decision, VI.238).

47. In the Decision two different MDT levels were applied. For all those undertakings whose infringements did not involve compensation payments (i.e. for "simple" cover pricing), the MDT was set at an amount equal to 0.75% of the undertaking's total worldwide turnover in the last business year prior to the Decision. For all those infringing undertakings who had at least one infringement involving a compensation payment, the MDT was 1.05%. These percentages were apparently arrived at by *assuming* that the undertaking's turnover in the relevant market represented at least 15% of its total worldwide turnover. The OFT then applied the relevant Step 1 starting point percentage (5% or 7%, as the case might be) to this assumed 15%, resulting in the 0.75% or 1.05% figures. In other words, the OFT considered that for each infringer one of the penalties should be at least a sum

representing 5% (or 7%) of an *assumed* (not actual) relevant turnover. Thus, where the MDT was applied the penalty for the particular infringement ceased to be related to actual relevant turnover and became instead related to total worldwide turnover (see paragraph 165 below).

48. As with Step 1, when deciding the level of adjustment at Step 3 the OFT took into account the widespread ignorance about the unlawfulness of cover pricing, and in view of this maintained the MDT at the same levels as those used in its previous decisions in the flat roofing cases (Decision, VI.249-251). The OFT did not consider it would be appropriate at Step 3 to differentiate between undertakings on the basis of the number of infringements in which an undertaking was involved, given in particular the way in which the investigation had been streamlined, as described above. Nor did the OFT consider that there were sufficient other differences between the various parties and their infringements to justify its adopting a range of MDT levels (Decision, VI.230). Accordingly one or other of the two rates of MDT was applied to each infringer, if appropriate.

49. Where the penalty for a particular infringement at the end of Step 2 already exceeded the relevant MDT there was no need to apply the MDT at Step 3. Where this was not the case (i.e. where the relevant threshold was not reached after Step 2), then in the case of multiple infringements the MDT was applied to the infringement with the highest level of penalty after Step 2. It was not applied in respect of a second and/or third penalty (Decision, VI.214-215).

50. Under Step 3 the OFT also considered how to deal with infringements to which the MDT did not apply (for example, because the MDT was being applied in respect of a different infringement) and where the relevant turnover of the undertaking was zero. In such cases the penalty figure reached at the end of Step 2 was also zero. (The relevant turnover might be zero for various reasons, including, for example, where the undertaking in question has ceased trading altogether, or remains in business but has exited the relevant product or geographic market since the infringement took place.) The OFT did not consider it appropriate that a company should avoid a penalty for any of its infringements by virtue of having no turnover in the relevant market in the material period. There was still a need to deter

undertakings from infringing also in markets they have exited, or where they have not carried out any work to date, and this would not be achieved if such companies faced no penalty. Paragraph 2.13 of the Guidance provides that in exceptional circumstances of this kind the OFT may adjust the penalty at Step 3. The OFT therefore used a proxy figure based on the median percentage of total worldwide turnover represented by the penalty reached at the end of Step 2 for all infringements in the Decision (regardless of the market in which they occurred). The proxy was 0.14%. The OFT considered this to be robust since it would be relatively unaffected by the particular market positions of other firms. This percentage was therefore applied to an undertaking's most recent total worldwide turnover for any infringement to which the MDT did not apply (i.e. the undertaking's second and/or third infringement) in cases where the penalty at the end of Step 2 would otherwise be nil (Decision, VI.256-270).

51. The OFT also wished to ensure that the cumulative impact of the aggregate penalty was not excessive where more than one of a particular undertaking's infringements had been committed in the same relevant market and a large proportion of its total turnover in the relevant business year was achieved in that market. To deal with this the OFT decided that where an undertaking had either two or three infringements in the same market and the individual percentages of the undertaking's total turnover represented by each of those penalties at the end of Step 3, when added together, would amount to more than 4.5%, a downward adjustment should be made to the penalties for each of the infringements in that market in order to bring the overall penalty for that undertaking to a level which is sufficient to ensure deterrence and which is within the range of penalties imposed on the other undertakings (Decision, VI.271-3).

52. In relation to the financial position of undertakings being penalised, the OFT stated that this could be a relevant consideration in the context of determining whether the sum reached at the end of Step 2 is an appropriate amount for deterrence. Financial hardship claims would be considered on a case-by-case basis. The basic criterion applied by the OFT was whether the proposed penalty would seriously threaten the viability of the company concerned. The OFT noted that many undertakings had

asserted that the imposition of a penalty would adversely affect their financial position but did not provide the OFT with evidence to substantiate that claim.

53. In determining whether the penalty should be reduced on grounds of financial hardship the OFT took into account its decision to allow all undertakings to pay the penalty by instalments over a three year period, subject to payment of interest and other conditions. The OFT also considered the following factors relative to the size of the penalty: the level of net current assets, the level of net assets, adjusted to take account of dividend payments in the last three years, and the level of profit (or loss) after tax averaged over the last three years. Where the evidence, taken in the round, indicated that payment of the full penalty, even in instalments, would seriously threaten the undertaking's financial viability, the OFT considered what reduction in penalty was warranted on the evidence before it (Decision, VI.276-288; Consolidated Penalties Defence, 156-7).

54. The decisions adopted by the OFT at Step 3, particularly its application of the MDT, have been subjected to sustained criticism in the course of the Present Appeals. Each of the Present Appellants has challenged the MDT on one ground or another. These challenges range from a complaint that the Guidance does not provide for the use of this MDT, which goes far beyond any "adjustment" of the Step1/2 penalty envisaged at Step 3, to contentions that in applying the MDT the OFT has not had proper regard to individual cases but has instead applied a "one size fits all" mechanism producing penalties which are manifestly excessive and disproportionate. These submissions, and the OFT's response to them, will be considered in due course.

Step 4

55. Step 4 provides a further opportunity for penalty adjustments – to take account of aggravating or mitigating features of individual cases. Paragraphs 2.15 and 2.16 of the Guidance respectively contain a non-exhaustive list of such features.

56. In relation to aggravating factors, the OFT in the Decision described its approach in relation to a number of such factors, together with its reasons for adopting that approach.

57. *Repeat infringements*: There would be no uplift in penalty on this ground; none of the infringing undertakings had previously been found to have infringed the Chapter I or Chapter II prohibitions, and a separate penalty was being imposed for each of multiple infringements (Decision, VI.292).

58. *Instigation*: The role of an undertaking as a leader in, or an instigator of, an infringement may also be aggravating factor. This was the case in relation to one infringer who was not one of the Present Appellants. Its penalty was accordingly increased by 5% (Decision, VI.297).

59. *Director involvement*: The OFT applied an uplift of between 5 and 10% where it had evidence of director involvement generally in bid-rigging activities, or where the OFT had evidence of specific director involvement in relation to a particular infringement (Decision, VI.309). None of the Present Appellants was subject to such uplift.

60. *Intent*: The Guidance points to intent as an aggravating feature. The OFT was satisfied that all the infringements were committed either intentionally or, at the very least, negligently, but did not increase the penalty for intent (Decision, VI.315).

61. As far as mitigating factors are concerned, the Decision reflects a series of arguments put forward by infringing undertakings. Among the factors urged upon the OFT were the following: setting up a competition compliance programme; cooperation with the investigation; early termination of the infringement; genuine uncertainty as to the law; the severe pressure to engage in cover pricing in order to remain on customer tender lists; and the fact that an infringement was committed negligently rather than intentionally.

62. *Compliance programme*: The OFT accepted that setting up a competition compliance programme in the wake of the OFT's investigation may be a mitigating factor meriting a discount on the penalty. An undertaking must adequately demonstrate that it had taken positive steps to introduce a formal compliance policy appropriate for its size, and to ensure that all appropriate staff have been made properly aware of their competition law obligations. The OFT reduced the fine imposed on around 80 infringing undertakings by 5-10% on this ground (Decision, VI.316-9).

63. *Cooperation*: The OFT acknowledged that cooperation during the administrative procedure which is conducive to the speed and efficiency of the enforcement process is a mitigating factor which could be rewarded. Acceptance of the FTO was a form of cooperation, but that would be taken into account after Step 5. Undertakings already benefiting from the leniency programme or the FTO would not receive an additional reduction in financial penalties to reflect general cooperation. Other than in one case, the OFT was not aware of any exceptional cooperation by any company which enabled its investigation to be concluded more efficiently and speedily, so as to warrant a downward adjustment at Step 4 (Decision, VI.320-22).

64. Separately, in response to the Statement of Objections, the OFT received new admissions from a number of undertakings that had not applied for leniency and that had not accepted the FTO in respect of one or more of their alleged infringements. Although those admissions were made at a very late stage of the investigation, the OFT decided to reduce the fine imposed at Step 4, albeit the discount was smaller than the one given to companies which had accepted the FTO. The following discounts were granted in these circumstances:

(a) where a company made a clear admission of the facts, or alternatively a clear positive statement that it did not dispute or contest the facts, it was given a 10% discount;

(b) where, in addition to the above, a company had clearly admitted that its conduct constituted an infringement of the 1998 Act, the OFT made a 15%

reduction in the fine instead of the discount noted in the previous subparagraph. (Decision, VI.323-8)

65. *No other mitigating circumstances*: The OFT decided that no other mitigating circumstance justified a reduction in the fine at Step 4. Neither the absence of director involvement in the infringements (Decision, VI.330), nor the termination of the infringements as soon as the OFT had intervened (Decision, VI.331), nor the charitable works and community activities carried out by infringing undertakings (Decision, VI.332), warranted a reduction in the penalty. As to the alleged widespread uncertainty within the industry as to the lawfulness of cover pricing, the OFT had taken this into account in deciding not to increase the penalty above the level applied in its previous decisions or to increase the level of the MDT above that which applied in those decisions (see Decision, VI.51, VI.173 and VI.251). The OFT also rejected the contention that companies were under severe pressure to engage in cover pricing in order to remain on customer tender lists (Decision, VI.335). Engaging in illegal conduct in order to remain on a customer's tender list did not amount to "severe duress or pressure" to commit an infringement, within the meaning of the Guidance. Nor did the OFT consider that a discount was warranted merely because an individual has acted on his or her own initiative or acted outside the scope of their authority (Decision, VI.336). A reduction should not be made to reflect the financial position of the construction industry generally (Decision, VI.289). Finally, that an infringement had been committed negligently was not treated as a mitigating factor (Decision, VI.337).

Step 5

66. Step 5 ensures that the statutory maximum under section 36(8) of the 1998 Act is not exceeded. It also deals with the risk of double jeopardy in circumstances where a penalty or fine has been imposed by the European Commission or by a court or other body in another member state for the same agreement or conduct.

67. In the Decision the OFT described the statutory maximum as being 10% of the worldwide turnover of the undertaking in its last business year before the date of the Decision, in accordance with the wording of the Amended Turnover Order.

However, the OFT considered that where an infringement ended prior to 1 May 2004, any penalty must also be within the maximum penalty applicable before that date pursuant to the Original Turnover Order, namely 10% of the turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.

V. PENALTIES IMPOSED ON THE PRESENT APPELLANTS

68. Adopting the approach described above, the OFT imposed penalties on the Present Appellants as follows:

(a) *Kier*: total penalty £17,894,438 (3 infringements: 2001, 2003, 2005).

(b) *Ballast Nedam*: total penalty £8,333,116 (3 infringements: all in 2001).

(c) *Bowmer*: total penalty £7,574,736 (3 infringements: 2000, 2001, 2003).

(d) *Corringway*: total penalty £769,593 (2 infringements: both in 2002).

(e) *Thomas Vale*: total penalty £1,020,473 (3 infringements: 2000, 2002, 2004).

(f) *Sisk*: total penalty £6,191,627 (1 infringement: 2003).

VI. THE RELEVANT APPEAL PROVISIONS

69. The Present Appeals are brought pursuant to subsection 46(3)(i) of the 1998 Act. Section 46, so far as relevant, provides as follows:

> “46 Appealable decisions
>
> (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section “decision” means a decision of the OFT —
>
> …

> (i) as to the imposition of a penalty under section 36 or as to the amount of any such penalty,
>
> …"

70. Paragraph 3 of Schedule 8 to the 1998 Act, as amended, provides that:

> "…(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
>
>> (a) remit the matter to the OFT,
>>
>> (b) impose or revoke, or vary the amount of, a penalty,
>>
>> (c) …
>>
>> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
>>
>> (e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.
>
> …"

VII. RECURRING ISSUES IN THE PRESENT APPEALS

71. As we said at the outset, the arguments presented to us by the Present Appellants revealed a number of recurring themes upon which it is convenient to express some conclusions at a general level before seeking to deal with the specific circumstances of the individual appeals. We now turn to these common issues. In this part of the judgment and later when we come to the individual appeals we refer only to what appear to us to be the main arguments raised by both sides, rather than setting out each and every one of the numerous points that has been put to us orally and in writing. We have of course considered all such points.

The Tribunal's role

72. Although the nature and extent of the Tribunal's jurisdiction in relation to penalty appeals under section 46 of the 1998 Act has been considered on a number of occasions, including by the Court of Appeal, this subject nevertheless received some attention in the written and oral submissions of the parties. For example, Kier submitted that in assessing the appropriate fine the Tribunal's ultimate task is to assess its proportionality. Citing the judgment of the General Court in Case T-175/05 *Akzo Nobel NV & Ors v Commission* [2009] ECR II-184, Kier submitted that in determining the proportionality of any fine regard must be had to all the circumstances, including the nature and seriousness of the infringement, any harm caused to the market, any gain obtained by the infringer, and the impact of the fine on the latter. Bowmer submitted that the Tribunal's role is to decide for itself whether the penalty imposed by the OFT was the correct one in the sense of being appropriate, fair and just. It is not just for the Tribunal to determine whether the penalty was one which the OFT could have rationally imposed, i.e. the standard was not that which is applicable to judicial review but appeal on the merits. No margin of appreciation enjoyed by the OFT in relation to its application of the Guidance could save a penalty which was not in the Tribunal's view appropriate, fair and proportionate having regard to all the circumstances. Corringway, too, argued that the jurisdiction of the Tribunal is "at large", and that a full and independent judicial scrutiny of the penalty imposed was required in order to protect a defendant's human rights. In those circumstances there could be no undue reliance upon any margin of appreciation or discretion. Thomas Vale and Sisk each made corresponding submissions.

73. The OFT's position was stated in its Consolidated Defence as follows:

> "25. An undertaking on which the OFT has imposed a penalty is entitled to have that penalty reviewed by an impartial and independent tribunal able to take its own decision. Pursuant to paragraph 3(2) of Schedule 8 CA98, the Tribunal has a full jurisdiction to review the penalty which has been imposed.
>
> 26. In *Argos*, the Court of Appeal quoted with approval the following passage from the Tribunal's judgment in *Napp*:
>
> > "498. Schedule 8, paragraph 3(2) of the Act, provides that "the tribunal may confirm or set aside the decision which is the subject to the appeal,

> or any part of it, and may … (b) impose, or revoke, or vary the amount of, a penalty … or (e) make any other decision which the Director could have made."
>
> 499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.
>
> 500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties."

> This passage was specifically applied by the Tribunal in *Makers*.
>
> 27. Thus whilst the Tribunal is not bound by the OFT's Penalty Guidance, it will not disregard it. Nor would it be right to ignore the OFT's own approach and reasoning in the Decision under challenge. Instead the Tribunal should take the Penalty Guidance into account and recognise that the OFT must be afforded a margin of appreciation in its application thereof.
>
> 28. Moreover, in undertaking its assessment of the penalties imposed, the Tribunal should not analyse each step of the Penalty Guidance in isolation from the other steps. Rather, it should have regard to whether the final figure arrived at is proportionate to the infringements involved, looking at the matter in the round. Provided that the OFT has remained within its margin of discretion in applying the Penalty Guidance, the Tribunal should assess the justice of the overall penalty. It is only if the Tribunal considers that a penalty is wrong after it has taken account of all these factors that it should impose a different penalty."

Tribunal's observations on its role in penalty appeals

74. The passage from *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 cited by the OFT, and approved by the Court of Appeal in *Argos Limited and Littlewoods Limited and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, is relied upon by all sides of the Present Appeals. It deals succinctly and clearly with how the Tribunal should regard the Guidance itself and its application by the OFT in any decision under appeal. In short the Tribunal will disregard neither the Guidance nor the OFT's approach and reasoning in the specific case. On the other hand, the Tribunal is not bound by the Guidance,

and should itself assess whether the penalty actually imposed is just and proportionate having regard to all relevant circumstances as put before the Tribunal in the course of the appeal. So much seems to be common ground.

75. What has perhaps sparked a reaction from some of the Present Appellants is the reference to the OFT's "margin of appreciation" in the application of the Guidance (see for example the last sentence of paragraph 27 of the Consolidated Defence above). In the context of a typical judicial review this language would imply the presence of some restriction on the intensity of that review. However, in our view that is not what the OFT is intending to convey by its use in this context. As we understand it the OFT's submission is that the Tribunal's role is not minutely to analyse each step of the Guidance but rather to consider the matter in the round, and on that basis assess whether the final penalty is appropriate. This is what the Tribunal itself stated in its judgment in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 at paragraph172:

> "In our view in all those circumstances the Tribunal should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. In our view, provided that the OFT has remained within its margin of appreciation in applying the Guidance, the Tribunal's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT, particularly as regards Step 1 and Step 3. The criticisms by the appellants in this case directed at Step 1 should not overlook the fact that, had the OFT taken a different starting point at Step 1, a different calculation could have been used in Step 3, for example."

76. The "margin of appreciation" to which the Tribunal there refers does not in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors. In these circumstances any debate about the scope of any margin of appreciation becomes somewhat sterile. The Guidance reflects the OFT's chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the Guidance at each specific step. As the Tribunal said in *Argos* (above), the Guidance allows scope for adjusting at later

stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low.

77. On the other hand if, as in all the Present Appeals, the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. Assuming the Guidance itself is unimpugned (and in the Present Appeals there has been no attack on it), the imposition of an excessive or unjust penalty is likely to reflect some misapplication or misinterpretation of the Guidance.

Nature and seriousness of cover pricing - Step 1 starting point of 5%

78. The Present Appellants argue that the OFT has overstated the seriousness of "simple" cover pricing. Some of the arguments raised in this regard were directed at the OFT's Step 1 starting point of 5%; similar arguments were made in the context of Steps 3 and/or 4, or generally. The nature of the infringement is clearly a crucial factor in any penalty assessment and it is therefore appropriate that we should consider these arguments, at least at a general level, while looking at Step 1. Our observations here will be relevant when we come to look at other common issues, in particular the MDT applied at Step 3.

79. In essence the submission is that the OFT's general analysis of cover pricing set out in the Decision does not reflect the nature and impact of the relevant agreements, and that cover pricing is an infringement at the least serious end of the spectrum. It is argued that a company seeking a cover price has already independently decided that it will not compete to win the tender; so to save costs and time it seeks a cover price in order to generate a "near-miss" bid. Thus price information is disclosed to a party who has already decided to submit a losing bid. The only impact is that the party obtaining a cover price may achieve a closer "near-miss" than would otherwise be the case. Where there are other bidders also willing to submit competitive bids such conduct is unlikely ever to have any impact upon the price paid by the customer or upon the number of bidders seeking to win the contract or upon the outcome of the tender process. It is contended that in these circumstances the fact that the party giving a cover price determines its price in the knowledge that

the receiving party will not be submitting a competitive tender does not affect the level of price competition. The uncertainty of the outcome of a tender process is not reduced by cover pricing. It is still necessary for competitive bidders to submit the best possible bid in order to maximise their chances of winning. Therefore cover pricing does not have any appreciable effect on competition, and no finding of any such effect was made by the OFT. Indeed, in the Decision the OFT accepted that there may not have been a direct inflation of prices.

80. As for the OFT's reliance on the Tribunal's statement in *Apex Asphalt and Paving Co Ltd v Office of Fair Trading* [2005] CAT 4 that there is a rebuttable presumption that parties engaged in cover pricing have taken account of the information received when determining their own conduct, it was argued that this statement reflected the facts of that particular case and that in any event such presumption would be rebutted where there was evidence that the company providing the cover price was still submitting its keenest bid with a view to beating the opposition.

81. Thus, it is submitted, notwithstanding that these infringements are "by object", the lack of likely impact on competition is highly relevant when it comes to assessing seriousness. The OFT has failed to take proper account of this when setting the starting point percentage at Step 1, and generally.

82. Ms. Adkins for Thomas Vale described estimators as being generally backroom technicians who helped each other out as a matter of professional courtesy. They were not people who indulged in traditional cartel practices. The decision not to bid for work was an internal unilateral one, and only after it had been made did a contractor seek a cover price. Unlike normal cartel activity, cover pricing did not spill over into other collusive practices. Thomas Vale itself was a good example: 750 instances of cover pricing were the subject of its application for leniency whereas, despite the company's legal representatives' best endeavours to discover any other anti-competitive conduct (in order to support the leniency application), no trace of any other form of collusion was found. The reality was, she submitted, that the industry simply did not associate the widespread and endemic practice of cover pricing with hard core bid rigging. The OFT erroneously treated the two as equivalent, leading to a heavy-duty investigation and excessive fines.

83. Ms. Adkins pointed to what she submitted would have been more effective approaches. Instead of the huge enforcement exercise it had undertaken, the OFT could have conducted a market sector investigation, which would have addressed the issues holistically and in a far more timely manner than a six year investigation. Or the OFT could have taken the course it took in its investigation into an agreement between independent schools to exchange information about intended fee levels and reached an early settlement with alleged infringers on the basis of nominal fines.

84. Others underlined these points by referring to the fact that as late as 2004 leading textbooks on tendering in the construction industry were published which referred to the practice of cover pricing with apparent approval.

85. In its Consolidated Defence, in its various skeleton arguments and in the skilful oral submissions of Mr. David Unterhalter SC, the OFT took issue with these arguments and emphasised the seriousness of cover pricing.

86. The OFT argued that the two undertakings involved in such conduct choose to substitute practical co-operation for the risks of competition. One participant is afforded a credibility advantage and costs savings to which it is not entitled. The other participant benefits from the knowledge that there is one less competitive bid in the tendering exercise in question. A potential substitute tenderer is deprived of the opportunity to submit a competitive bid, and the client is deceived and possibly disadvantaged both as to the extent and source of the competition for his work, and as to the credibility of one of the bidders.

87. In the OFT's submission these factors can have a bearing both on the existing tender process and on invitations to bid for future work. Credibility of this kind can be an important aspect of competition between construction undertakings, and cover pricing therefore distorts this element of competition. The dynamics of competition are further affected because at least one tenderer knows that competition for the work will be less fierce than would otherwise be the case. In addition, the pervasive nature of cover pricing creates systemic conditions of co-operation between

competitors which in turn subverts the unilateral decision-making required to ensure efficient tendering processes.

88. Thus, whilst the OFT accepts that there may not have been a direct inflation of prices in any particular instance (and states that this has been taken into account in arriving at the starting point), this does not mean that cover pricing has no adverse effect on competition. The infringements in question are by object, and as such the OFT is not required to identify their effects on the market. The nature of the conduct was such as to reveal a sufficient degree of harm to competition without examining its consequences. Had the OFT reached conclusions as to the actual effects of the infringements, it might have been justified in setting higher starting points.

89. For these reasons the OFT considers "simple" cover pricing to be a serious infringement. The selected starting point took account of the fact that there was no evidence of a centrally-controlled, orchestrated, scheme and that each infringement was a discrete one relating to a single tender exercise. Had there been such a scheme the starting point would have been close to the maximum of 10% of relevant turnover.

90. In support of these submissions the OFT referred us to a number of its previous decisions, namely CA98/1/2004 West Midlands Flat Roofing; CA98/1/2005 Scottish Roofing; CA98/2/2005 North East Roofing; CA98/4/2005 Scottish Roofing; and CA98/01/2006 England and Scotland Flat Roofing. In those decisions the same two starting points (5% and 7%) were used for similar infringements. The OFT also prayed in aid the Tribunal's judgments in *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 and *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 which were appeals from those decisions. The OFT submitted that in *Apex* the Tribunal "upheld the starting point of 5% for cover bidding", and referred us to the following passage at paragraphs 250-1 of that judgment:

> "Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted

> practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.
>
> 251. We accept the submission of the OFT that submitting a cover-bid in these circumstances has an anti-competitive object or effect:
>
> (a) it reduces the number of competitive bids submitted in respect of that particular tender;
>
> (b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;
>
> (c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;
>
> (d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired."

91. The OFT submits that in the light of these decisions and judgments it would have been inconsistent to have employed lower starting points in the present cases without good reason and no such reason exists.

Tribunal's observations on "simple" cover pricing

92. As we said at the beginning of this section, our observations on the nature and seriousness of cover pricing are not aimed only at the OFT's approach at Step 1, but also have a bearing on the other steps of the process, and in particular on the fines ultimately imposed in the Decision.

93. Whilst most infringements of the Chapter I prohibition are likely to be regarded as serious, there are clearly degrees of seriousness which should be reflected in any penalty imposed. The non-statutory Step 1 range of 0-10% of relevant turnover, prescribed in the Guidance, has to cover all agreements or concerted practices sanctioned by the Chapter I prohibition. In determining the appropriate point on that scale account should be taken on a case by case basis of all the circumstances, including the nature of the offence, the harm done, and any mitigating or aggravating circumstances. It is common ground that hard-core bid rigging or price fixing agreements warrant penalties set at the upper end of the range. The OFT has characterised cover pricing as "bid rigging", but has settled on the middle of the

range, namely 5%, in view of the particular characteristics of the conduct in question.

94. There is no doubt that “simple” cover pricing constitutes an infringement of the Chapter I prohibition, but in our view the practice is materially distinct from “bid rigging” as ordinarily understood. Bid rigging implies an agreement or arrangement which determines, or assists in the determination of, the price which will actually be charged to the purchaser. Cover pricing is less serious than conduct of that kind.

95. In its previous case-law the Tribunal identified certain respects in which the practice of cover pricing is capable of distorting competition in relation to a tendering process. See, for example, the passages from *Apex* which we have set out above at paragraph 90. Whilst those comments were made in the context of the Tribunal’s deliberations on the question whether an *infringement* had been established, and were not specifically directed to the seriousness of cover pricing in relation to penalty, they do, of course, have a bearing on the latter.

96. Some of the effects there mentioned may also occur where an unwilling bidder, rather than requesting a cover price, simply decides to have a stab at formulating a bid which is sufficiently high to ensure that he does not win. Such a bid would hardly be regarded as truly “competitive”, and the anticipated number of competitive bids may therefore still not necessarily be received by the client even though no cover price has been provided. On the other hand, as the OFT points out, the bidder may risk losing credibility if his inflated bid is very out of line with other bids. Cover pricing therefore provides protection from that particular element of competition and is thereby capable of providing an illicit advantage in relation to future tendering exercises. In the absence of cover pricing, companies who were invited to bid but did not want the work would either have to take the credibility risk associated with an artificially inflated bid, or decline the invitation to tender at the appropriate time. In the latter case the client would normally be in a position to invite a substitute tenderer who might well be interested in obtaining the work, and would therefore submit a competitive bid.

97. There is also the risk, depending on the particular facts, that the tender process could be more directly compromised by cover pricing. For example it is possible to envisage a situation where the number of requests for cover prices is such that the provider of the covers becomes aware that he faces no real competition. If that were to be the case, the provider might well be tempted to inflate his own bid.

98. As to a possible spill-over effect into more serious cartel activities, we accept Ms Adkins' argument that extensive involvement in cover pricing does not necessarily have such result; this is evidenced by the fact that out of approximately 4,000 suspect tenders examined in the course of a broad and intensive inquiry, only 6 apparently involved collusion in the form of compensation payments. Nevertheless, there is force in the OFT submission that a culture of collusion between competitors as regards cover pricing may facilitate anti-competitive cooperation in other respects.

99. Therefore, cover pricing is certainly not an innocuous activity, as it was close to being portrayed in some of the submissions put before us. It is an unlawful practice which at the very least may deceive the customer about the source and extent of the competition which exists for the work in question, and which is capable of having anti-competitive effects on the particular tendering exercise and on future exercises. None of the Present Appellants has argued that it was not open to the OFT to visit such an infringement with a fine, whether or not it might instead have adopted one of the alternative courses of action identified by Ms Adkins. Her argument, based on proportionality, is expressly directed at the *level* of the penalty imposed and does not call into question the OFT's entitlement to impose a penalty at all (see for example paragraphs 5.2, 6.1, 6.3 and 6.8 of Thomas Vale's Notice of Appeal).

100. All that being said, it also needs to be recognised that "simple" cover pricing is a bilateral arrangement in the context of a multi-partite tendering exercise. Its purpose is not (as in a conventional price-fixing cartel) to prevent competition by agreeing the price which it is intended the client should pay. Indeed, its purpose is quite the reverse, namely to identify a price which the client will *not* be willing to pay. Nor is its purpose to reach an agreement that the recipient of the cover price will cease to be a contender – it is strongly argued by the Present Appellants, and not disputed by

the OFT, that in a case of "simple" cover pricing the recipient has already made its own unilateral decision not to compete for the work before the request for a cover price is made.

101. To the extent that cover pricing is capable of compromising the immediate tendering exercise, the most serious aspects are: the possible exclusion of a substitute tenderer in place of the one who has received a cover; and the risk that the whole tendering exercise may be subverted if a large number of covers are given. We consider it unlikely, although it is not inconceivable, that where some but not all competitors have been provided with covers, the cover provider may be encouraged to price his own tender a little higher on that account. The likelihood is that, even with the knowledge that only one genuine opponent remains, a tenderer who wishes to win will still put forward its keenest bid. It is therefore unsurprising that in none of the "simple" cover pricing infringements in the Present Appeals, indeed in none of infringements of that kind in the Decision, is there a case where the price paid by the customer was found, or even alleged, to have been directly affected by the infringement. It is also perhaps worth noting that it would be the receipt of a *request* for a cover which might embolden a tenderer, for that is the source of his knowledge that the requester does not wish to win the work and is not a serious contender. He has this knowledge whether or not he agrees to supply a cover price.

102. Although the possibility cannot be excluded that the endemic nature of simple cover pricing in the construction industry may sometimes have raised prices and harmed clients, the harm is likely to be small by comparison with hard-core cartels. The typical profit margins in the construction industry, said to be about 2%, do not support the existence of substantial overcharges. Moreover, to the extent that the adverse effects of cover pricing on competition are indirect and prospective rather than direct and immediate, they are likely to be more evident to those trained in competition law or economics than to the operators of construction companies.

103. The OFT accepted in the Decision that cover pricing was widely regarded as legitimate, and that the practice was long-standing, widespread and endemic throughout the industry. As explained above, by the autumn of 2006 the OFT had

evidence of cover pricing involving over 1,000 companies and over 4,000 tenders, and the sheer volume and extent of the practice led the OFT to limit the number of infringements which it would pursue. The OFT also accepted that a motivation for the conduct was a genuine and widespread perception within the industry that if a company did not participate in a tender process when invited to do so it ran the risk of exclusion from tender lists, and that in certain cases this risk had materialised. Nor does the OFT dispute that the conduct was aimed at saving the otherwise wasted costs of preparing tenders for work which is not wanted. (See for example Decision, IV.23, 44 and 48.)

104. The Decision sets out in some detail the references to cover pricing in textbooks and other material widely used in the training of industry participants. These publications (which include a textbook published as recently as 2004 and apparently still extant in 2006) give the impression that cover pricing is a normal and acceptable practice where an invitee does not wish to win the work. In 2006 the OFT felt it necessary to write to the publishers of the 2004 edition suggesting that the following text be amended because cover pricing was unlawful:

> "Degree of competition
>
> • How many contractors have been invited to tender?
>
> • Which contractors are on the tender list?
>
> • Obtain details of competitors by making contact with material suppliers or specialist subcontractors listed in the contract documents
>
> • Do we want the work or should we take a cover price (i.e. an arrangement whereby one contractor is given a price by another contractor which is then submitted as a tender offer. The price will be sufficiently realistic to look like a bona fide tender but high enough so as not to win the contract)."
>
> (*Construction Planning, Programming and Control* by Brian Cooke and Peter Williams, Blackwell Publishing 2004)
>
> (Decision, IV.19-23).

105. The argument that cover pricing was not generally perceived within the industry as amounting to "bid-rigging" as ordinarily understood, nor regarded as illegitimate, is consistent with the above.

106. When the OFT came to consider how, if at all, this uncertainty as to the legitimacy of cover pricing should be reflected in the penalties imposed in the Decision, it took the view that no discount should be given on that account, since the infringements were at the very least committed negligently; if those concerned were not aware that they were breaching the competition rules they ought to have so realised. Instead the OFT stated that it would give credit by not increasing either the Step 1 starting point or the applicable MDT above the levels applied in its earlier roofing decisions (see Decision, VI.44 and VI.333). In this respect the OFT was referring to those decisions, beginning with CA98/1/2004 West Midlands Flat Roofing, to which we have referred (paragraph 90 above). However, many of the infringements established in the Decision, and almost all those with which we are dealing in the Present Appeals, were committed prior to the earliest of the OFT's roofing decisions. Therefore those decisions would have provided rather shaky ground on which to base a general increase in the level of fines for cover pricing.

107. Whilst the industry's general perceptions and motivations as described above do not affect the unlawfulness of cover pricing, they do seem to us to have a bearing on the seriousness of the infringements in question, and to provide significantly more mitigation generally than has been recognised by the OFT in the Decision.

108. We consider that the final penalties imposed on the Present Appellants for "simple" cover pricing are excessive given in particular the nature of the infringement together with the harm it is likely to cause, and the general mitigation to which we have just referred. A major cause of the overall excessive penalty in most of the Present Appeals is the way in which the MDT has been calculated and applied at Step 3. Indeed, where the MDT is applicable to an infringement the Step 1 figure ceases to have any effect on the penalty for that infringement, which is thereafter determined on the basis of the MDT calculation. We will examine this and other aspects of the MDT later in this judgment. At this stage we need to consider whether the OFT's Step 1 starting point of 5% is justifiably criticised.

109. We would first observe that by using in the Guidance a starting range of 0% to 10% of relevant turnover, the OFT has confined itself quite narrowly. For example the EU Commission calculates the "basic amount of a fine" on up to 30% of the annual

sales in the relevant market (see paragraph 21 of the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2). A more generous range would obviously provide more headroom at the outset, and greater scope for reflecting the circumstances of individual cases, with the result that there may well be less call for substantial Step 3 adjustments of the kind which have assumed such significance in the Present Appeals. As and when the Guidance comes to be reviewed some modification of the Step 1 range may be worthy of consideration.

110. It is also worth noting that, quite apart from the starting point percentage used, the amount of the provisional penalty produced at Step 1 is very dependent on the relevant product market identified by the OFT. In the Decision the markets were, as Mr Unterhalter put it during one of the oral hearings, "extremely narrowly framed", both in product and geographical terms. Any indirect harm caused by cover pricing, of the kind discussed above, would be likely to occur not just in these very narrow markets, but more broadly across all activities affected by the practice. Therefore the narrowness of the definitions is likely to have created something of a mismatch between the Step 1 penalty and the harm done by cover pricing.

111. The limited scope of the selected markets also means that "relevant turnover" for the purposes of Step 1 is capable of differing dramatically depending on precisely which of the various categories of construction work was the subject of the specific tender, and how much of that type of work had been carried out by the company in the particular year of assessment used. Thus, it could make a huge difference that, in the relevant year, a company had built a school rather than a warehouse, for these buildings fall into different product markets. Examples of substantial fluctuations are legion: for instance, in the market for "distribution" in the East of England (as defined by the OFT), in 2001 Kier generated turnover of over £2 million. However, by 2004 Kier generated zero turnover in that market, before again generating sizeable turnover of nearly £3 million in 2008 but then only £21,000 in 2009.

112. As well as being liable to produce significant disparities between the penalties for different infringements and different infringers, a very narrow definition of relevant markets will tend to reduce the Step 1 penalty. In view of this it is perhaps

unsurprising that none of the Present Appellants has challenged the Decision on the ground that the market is too narrow. We deal later in this Judgment with submissions by Thomas Vale and Sisk that the definition was too *broad* and ought to have excluded non-tendered work.

113. As we have noted, the Guidance leaves ample scope for adjustment of the penalty at later stages, and some of the increases in penalty imposed at Step 3 by use of the MDT mechanism are strikingly large. The OFT itself recognised in the Decision that the frequent need for such uplifts to a level thought sufficient for deterrence was a product of the narrowness of the defined markets (Decision, VI.265). We would certainly agree that in the present case the Step 1 figure has to be looked at with special care and that a good deal of emphasis is likely to be placed on the Step 3 adjustment. To that extent the actual percentage applied to the relevant turnover may in practice be somewhat less significant than would otherwise be the case.

114. With that preamble the Tribunal considers that in a case of "simple" cover pricing 5% of relevant turnover is, in principle, too high a starting point where the current maximum for the most heinous infringements of the competition rules is 10%. In the light of all the factors discussed above, we consider that the appropriate level is lower than the mid point of that range, since the difference between 5% and 10% does not in our opinion adequately reflect the distinction in culpability between cover pricing as practised in the construction industry in the relevant period and, say, a multi-partite horizontal price fixing or market sharing cartel. Greater head-room is required to accommodate the latter type of offence within the range currently provided by Step 1 of the Guidance.

115. Therefore, approaching these cases on the basis of the OFT's Step 1 procedure, we would employ a starting point of 3.5% for "simple" cover pricing. In reaching this conclusion we have taken account of the mitigating effect of the general uncertainty and ambivalence as to the legitimacy of the practice, which admittedly existed from at least 2000 to 2004. It is emphasised that if cover pricing were to occur at a time when that mitigation was clearly no longer applicable, a higher starting point might well be appropriate.

116. We have not felt constrained to reach a different conclusion in the light of *Apex* or *Makers*. First, other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent. Second, in *Apex* the Tribunal was dealing with a submission that the OFT had failed to take account of the apparent lack of impact of the infringement on consumers. The OFT's answer to this was that it had done so in its selection of the 5% starting point at Step 1. The Tribunal accepted that the factor had been taken into account and there was no further discussion of the point. (See paragraphs 266 and 275 of the judgment.) In particular the Tribunal made no specific comment about the percentage chosen at Step 1. Its ultimate conclusion was that the actual fine imposed (about £35,000) was appropriate in all the circumstances and should not be reduced. The Consolidated Defence is therefore not strictly accurate in stating that "the Tribunal upheld the starting point of 5% for cover bidding" (paragraph 45). It would be more accurate to say that the Tribunal upheld the fine imposed in that case and in doing so made no adverse comment on the starting point adopted at Step 1. In the *Makers* appeal there was no challenge to the starting points of 5% or 7%, as the OFT accepts (Consolidated Defence paragraph 46).

117. Our conclusion as to the appropriate starting point does not specifically take into consideration the typical margins on turnover earned in the construction industry (save to the limited extent referred to in paragraph 102). However we will need to bear this factor in mind, not least in order to ensure that the ultimate penalty imposed on each of the Present Appellants represents both a condign penalty and a sufficient and proportionate deterrent. (See paragraphs 172 to 173 below.)

118. Our conclusions in respect of "simple" cover pricing do not have any bearing on penalties for infringements involving compensation payments. Of the Present Appellants only Bowmer was found to have committed an infringement of that kind. We deal with the specific points made by Bowmer in respect of that infringement when we come to the individual appeals.

Insufficient account taken at Step 1 of relative culpability

119. It is also argued that there was no evidence in the Decision of any attempt by the OFT to tailor the starting point at Step 1 to the seriousness of the specific infringements found against the Present Appellants; despite the differences between individual cases the OFT had applied the same starting point of 5% to all such infringements; this omission to take account of specific circumstances reflecting relative levels of culpability represented a fundamental error; an individual analysis was required, as highlighted at paragraph 2.9 of the Guidance. In this regard some pointed to the fact that the OFT failed to draw a distinction between parties who instigated anti-competitive behaviour by requesting a cover price and those who were merely respondents to a request. Similarly, some infringements only involved two out of a large number of bidders, whereas in other tenders a large proportion of the bidders were involved in cover pricing. These factors should have been taken into account, either in assessing the starting point percentage at Step 1 or as an aggravating or mitigating factor under Step 4.

120. In response the OFT submitted that it was right to take into account the broad similarities between the types of cases considered in the Decision when setting the same starting point of 5% for all infringements which did not involve compensation payments. There were not sufficient reasons to treat particular instances of each type of infringement as materially different. The infringements all involved similar conduct, were deleterious to competition for essentially the same reasons, and occurred in the same industry.

Tribunal's observations on relative culpability issue at Step 1

121. It is true that according to the Guidance the starting point is to be assessed case by case in the light of all the relevant circumstances of the infringement and the undertaking concerned. The application of the same starting point for all infringers indicates a robust approach to such an assessment. One can, however, readily appreciate the predicament the OFT found itself in as a result of the scale of the investigation it had undertaken, which ended up with 103 separate infringers and some 200 infringements (including the compensation cases). Whilst the scale of the

enterprise cannot relieve it of the obligation to take account of all relevant factors, the Guidance is sufficiently flexible to allow the OFT some discretion as to the stage at which specific circumstances are considered. There is force in the OFT's submission that at Step 1 it was acceptable to focus largely on the fact that the infringements involved essentially similar conduct, with similar effects on competition, in the same industry, and to treat factors such as whether an undertaking was the party requesting a cover or the party providing it, as insufficient to make a difference to the starting point. Therefore in our view the complaint that the OFT applied the same percentage starting point to all such infringements is not justified.

122. In any event, like the OFT, we do not consider that culpability is affected to any material extent by whether a company requested or provided the cover price.

Appropriate year for determining "relevant turnover"

123. Before leaving Step 1 we need to deal with another general issue which has been raised by some of the Present Appellants and which has also arisen in other appeals against the Decision. We have referred to the statement in the Guidance that "relevant turnover" is the "turnover of the undertaking in the relevant product market and relevant geographical market affected by the infringement in the undertaking's last business year", and to the OFT's interpretation of this as meaning the relevant turnover in the undertaking's last business year *prior to the Decision* i.e. in the present case 2008. (See paragraph 33 above.) This interpretation is said to be wrong and/or impermissible and it is argued that the relevant turnover should be identified by reference to a year which is more closely related to the infringement in question, in accordance with the Guidance and with the approach previously taken by the OFT.

124. A variety of arguments have been made. These include submissions that the OFT has impermissibly changed its practice without sufficient explanation in that there was no indication in the consultation prior to the publication of the 2004 version of the Guidance that the OFT's practice was being changed in this regard; that the use of turnover from the business year preceding the date of the Decision does not fulfil

the purpose of Step 1 of the Penalty Guidance; and that the OFT is free to, and should, depart from its practice where the circumstances of the particular appellant indicate that a departure is appropriate.

125. So far as the Present Appellants are concerned, Thomas Vale submitted that both the Original Turnover Order and the Amended Turnover Order (each of which is set out above at paragraph 28) provided for a statutory limit on penalties, pursuant to section 36(8) of the 1998 Act. The Amended Turnover Order therefore affected only Step 5 of the penalty calculation, and the OFT's application of the change also to Step 1 had resulted in a significant departure from the objectives of the legislation, and a significantly higher fine for Thomas Vale, whose selected "relevant turnover" base had increased a good deal over the 5 years or so since the time of the infringements. The OFT's approach had led to an "uncoupling" between the breach itself and the measure of seriousness reflected by the penalty.

126. Ballast, too, in the context of its specific challenge to the proxy applied to it at Step 1, argued that neither the Guidance nor the legislation nor any other factor obliged the OFT to base relevant turnover on the same year as the Amended Turnover Order, which applied only to the statutory limit at Step 5. In this regard Ballast referred to the European Commission's normal practice of using as its basis of assessment the last full business year of a company's participation in the infringement in question, and to *dicta* of the Court of Justice ("ECJ") highlighting the importance of taking into account "turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed." (See Case C-76/06P *Britannia Alloys v Commission* [2007] I-4405, at paragraph 25.) Ballast submitted that the OFT's use of a proxy figure rather than the actual relevant turnover figures for 2002, being Ballast's final year of trading, was wrong in a number of respects. In particular, the proxy, based on a proportion of Ballast's worldwide (and largely non-UK) turnover in 2008, was wholly unconnected with the infringements found to have been committed by Ballast in 2001, unlike the actual turnover in the relevant markets for 2002. This was contrary to the principles set out in the Guidance.

127. We are aware that in some of the related appeals (but not the Present Appeals) it has also been contended that Article 7 ECHR (given effect by the Human Rights Act 1998) precluded the OFT practice being changed with retrospective effect, so that in respect of infringements committed before the implementation of the change in 2004 a greater penalty could not be imposed than would have been imposed under the Guidance in its original form. Given our conclusions below, this issue would not make a difference to the outcome of the Present Appeals even if the point was a good one and applied in a specific appeal. As the point has been fully argued before a differently constituted panel of the Tribunal, we propose to say no more about it.

128. The OFT responds that there had been no change of policy from December 2004, and that its policy had always been to align the last financial/last business year under Step 1 with the corresponding definition in the subordinate legislation imposing the ultimate cap. Although the OFT was not bound to apply it, the policy represented a reasonable and rational approach. The OFT's interpretation of the Guidance flowed naturally from the ordinary meaning of the words "last business year" in paragraph 2.7. It was also consistent with the statutory hierarchy: the Guidance, to which the OFT is required by the statute to have regard, is an incident of the statutory framework, which is capped by the statutory limit in the legislation. It therefore made sense to understand the earlier stages of the penalty determination in the light of the ultimate cap. Further, this ensured that the starting point was within the statutory limit, and that the impact of the penalty, particularly the deterrent element, was calibrated to recent rather than historic levels of turnover. It also overcame any practical difficulties in obtaining turnover figures from several years ago.

129. The OFT accepts that with the benefit of hindsight it may have been prudent to make the change of approach clearer in the current version of the Guidance; nevertheless it submits that the absence of such text does not undermine the legality of the OFT's interpretation. The OFT points out that the Guidance in its current form specifically referred to the Amended Turnover Order, and that since the time of its publication the OFT had applied the new definition in its decisions, without challenge. Nor, it argues, is the OFT approach at odds with the aims of Step 1 of the Guidance: in particular it was erroneous to contend, as some appellants had, that the

purpose of identifying "relevant turnover" in Step 1 was to reflect the harm done by the infringement or the size of the market affected: that contention failed to appreciate that the present infringements are "by object", and that therefore the OFT is not required to identify their effect on the market. Further, the OFT was not required by section 60 of the 1998 Act to calculate penalties imposed under that Act in the same manner as penalties imposed by the Commission for infringements of the corresponding articles of the Treaty on the Functioning of the European Union ("TFEU"). Although the OFT took such matters into account when formulating the Guidance, once the latter was established the OFT's duty was to have regard to it.

Tribunal's observations: appropriate year for determining "relevant turnover"

130. It is common ground that neither in the consultation prior to publication of the Guidance nor in the Guidance itself did the OFT flag up that the amendment to the Original Turnover Order meant that the year on which the "relevant turnover" for the Step 1 starting point was based should also change, consistently with a policy the OFT had adopted. Indeed the OFT did not make any material change to the definition of "relevant turnover" in the Guidance, other than to substitute "last business year" for "last financial year" (paragraph 2.7). In contrast, under Step 5 – the Step whose main purpose is to ensure that the statutory maximum is not exceeded – it is explained that: "The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the OFT is taken, or, if figures are not available for that business year, the one immediately preceding it." (Paragraph 2.17.) Moreover, in the next paragraph express provision is made for an infringement which ends before the Amended Turnover Order came into force to be subject to the previous statutory maximum under the Original Turnover Order. This difference in approach would hardly serve to draw to the attention of the objective observer the OFT's policy of alignment of the Step 1 year with the Step 5 year. If anything, it would suggest that the year of assessment for Step 1 was unaffected save for the change from "financial" to "business".

131. Furthermore in our view retention of the Step 1 year of assessment as "*the year preceding the date when the infringement ended*" is consistent with other important aspects of the Guidance. For example, paragraphs 2.5, 2.7 and 2.9 state as follows:

> "2.5: When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.
>
> …
>
> 2.7: The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.
>
> …
>
> 2.9: Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition."

132. As these extracts show, the aim of the Guidance is to assess the Step 1 penalty by reference to *inter alia* the seriousness of the infringement which, in turn, is very closely related to its harmful effects (actual or potential) on the specific market and on competitors and consumers in that market. It is obvious that the longer the period between the actual infringement and the measurement of "relevant turnover", the more tenuous the connection is likely to be between them. There is a tension between the consideration of circumstances related closely in time to the infringement, and the use of turnover which could be wholly remote from those circumstances, and which could reflect many intervening and unconnected developments and changes in both the infringer's business and the market in question. Of course such changes may be limited if the infringement is established relatively soon after it is committed, but in practice there is often a substantial period between commission and the finding of infringement. In the present case quite a few of the infringements occurred as long as 8 or 9 years prior to the Decision.

133. The OFT's response is that, as the present infringements are "by object", it is not required to identify their effects on the market. This does not meet the point. Whilst

the characterisation of the infringement as “by object” means that effects need not be proved in order to establish the breach, this does not render irrelevant the likely effects to *penalty*. It is clearly necessary to take into account the effects (actual or potential) of an infringement when considering its seriousness, as the Guidance states in unequivocal terms. There is nothing in the Guidance which suggests that a different approach should be taken for infringements by object. Moreover the Decision itself emphasises the importance of “ensuring that there is a correlation between the penalty and the harm.” (Decision, VI.90.)

134. Further, even though it may be somewhat easier to obtain the turnover figures for a recent period than for several years ago, we do not consider that this point has much force. Nor in our view does the OFT’s current interpretation gain much if any support from the ordinary meaning of the words “last business year”; the equivalent words in the former guidance were obviously capable of bearing the meaning then attributed to them, in accordance with the OFT’s pre-2004 approach.

135. As for the argument based on consistency with the statutory hierarchy, in our view there is no obvious need for symmetry between the year used for assessing the starting point for the penalty, and the year used for identifying the overall statutory limit. The two categories of turnover (relevant turnover and total worldwide turnover) have different functions and are in most cases likely to be entirely different in any event.

136. Further, whilst it is certainly true that use of the later year ensures that the impact of the penalty is calibrated to recent rather than historic levels of turnover, that is simply another way of stating the feature to which objection is being taken. Nor is it an answer to that objection to refer to the need for a deterrent element in the penalty: for this assumes that the need cannot be satisfied if the earlier year is used, whereas in fact the provisional penalty at Step 1 is by no means certain to be lower in such circumstances. There will be cases where it would be higher. In any event a perceived shortfall in deterrence is expressly catered for at Step 3.

137. Therefore we have concluded that there is an inconsistency between the OFT’s current approach to the year of assessment at Step 1 and the purpose of that Step as

expressed in the Guidance, and that the Guidance should be interpreted as being unaltered, namely as referring to the business year preceding the date when the infringement came to an end. To the extent that the OFT wished to change the year of assessment it should first have consulted upon and sought approval for the change, including a corresponding revision of the current text of the Guidance, pursuant to subsections 38(2) to (7) of the 1998 Act. It follows that the Decision misinterpreted and misapplied the Guidance in this respect.

138. We also consider that as a matter of principle the OFT's former practice is preferable where one is seeking to arrive at a provisional penalty based on turnover in the market affected by the infringement. In this respect we cannot put the point more neatly than the ECJ when it emphasised the importance of taking into account "turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed." (See paragraph 126 above.) Similar sentiments appear to inform the Commission's current practice in relation to penalties imposed for breach of Articles 101 and 102 TFEU. The Guidance applies as much to penalties imposed by the OFT for breach of those Articles as it does to cases which involve only the domestic prohibitions.

139. We conclude by once more noting that whichever year or percentage is employed, there is an enhanced risk that the Step 1 figure will require substantial adjustment as a result of the narrowness of the defined markets used by the OFT at Step 1, and the scale of the dramatic variations in the Step 1 figures to which this narrowness can give rise. (See paragraph 111 above.)

The MDT applied at Step 3

140. It is not in dispute that any penalty imposed must comply with the principle of proportionality and should be no higher than is necessary to satisfy the twin objectives of punishment and deterrence. In essence all of the Present Appellants submitted that these requirements have not been respected so far as the MDT is concerned and that its nature and application have resulted in penalties which are excessive, disproportionate and unfair. In our discussion of issues touching on Step 1 we have already indicated that in our view the penalties actually imposed on the

Present Appellants are generally excessive given the inherent nature of cover pricing together with the long-standing perceptions and practices which obtained during the period when the infringements were committed. (See paragraphs 92 to 118 above.) Further, it is obvious, given the huge uplift in penalty which the MDT tended to produce, that a major cause of the excess was the way in which the MDT was constructed and applied by the OFT.

141. In their attack on the MDT the Present Appellants relied on a variety of grounds. Most of these grounds are sufficiently generic to make it appropriate to comment on them at this stage. By way of background we refer to paragraphs 44ff above, where we described the manner in which the OFT applied the MDT at Step 3 and its reasons for doing so. We now turn to consider the main issues.

142. Kier submitted that proportionality of the penalty must be assessed in part by reference to the nature and seriousness of the offence committed – there must be a reasonable connection between the deterrence and the culpability. Yet, it argued, the effect of the MDT was to sever the link between the assessment at Step 1 of the nature and seriousness of the infringement, and the penalty imposed for deterrence; by changing the basis of assessment to arrive at (in Kier's case) a 600% increase in the penalty at the Step 3 stage, the MDT rendered irrelevant the Step 1 assessment and all the mitigating factors which the OFT had taken into account in determining the Step 1 starting point. Removal of the link between culpability and a deterrent penalty offended the principle of proportionality.

143. Next Kier argued that the MDT looked exclusively at total worldwide turnover, whereas in order to ensure that the fine went no further than necessary for deterrence and did not have a disproportionate impact on the infringer, a cross-check using other financial measures should be carried out: the OFT should have applied the Guidance at paragraph 2.11 and looked at "the size and financial position of the undertaking in question." Referring to the ECJ's statement in Cases 100-103/80 *Musique Diffusion Francaise v Commission* [1983] ECR 1825, at paragraph 121, Kier submitted that the impact of a fine cannot be assessed by looking exclusively at turnover: regard must also be had to profit, which is clearly

an important part of the financial position of any undertaking. Although profits can fluctuate, the same applies to turnover.

144. To underline the need to include other financial measures in the assessment, Kier stated that the post-MDT penalty of nearly £19 million imposed on it for three individual instances of cover pricing was: four times the total operating profit of Kier in the three relevant markets over the previous nine years, more than the Group's total worldwide profit after tax for the financial year ended 30 June 2009, and 55% of the Group's nine year average annual total profits after tax. Some of the Present Appellants also emphasised the extremely slim margins in the construction industry, and the inclusion within turnover of monies which were simply re-directed to sub-contractors without any element of profit, as further indications of the inappropriateness of restricting the examination to turnover alone and of failing to have proper regard to the particular circumstances of individual companies. Thomas Vale submitted that as much as 60% of its turnover was accounted for by monies re-directed to sub-contractors, and that the MDT therefore had a greater impact on it than on many other companies. This was discriminatory and unfair.

145. Several of the Present Appellants submitted that the use at Step 3 of a fixed proportion of an infringer's total worldwide turnover, purportedly to ensure a sufficient deterrent effect, went considerably beyond any "adjustment" to the Step 1/Step 2 penalty reasonably envisaged in paragraphs 2.11 and 2.12 of the Guidance, and as such should have been the subject of consultation and approval by virtue of section 38 of the 1998 Act. Ballast additionally argues that the OFT's use of worldwide turnover in relation to infringements committed before the Amended Turnover Order came into force on 1 May 2004 was unlawful because before that date the statutory maximum was based purely on UK turnover and there was nothing in the pre-2004 version of the Guidance to suggest that the OFT would have regard to anything other than UK turnover. Therefore, it is submitted, as a matter of public law worldwide turnover is not a permissible consideration in determining fines for infringements committed prior to that date.

146. It was also argued that whereas paragraph 2.12 of the Guidance states that any adjustment at Step 3 "will be made on a case by case basis for each individual

infringing undertaking", the MDT was applied in a wholly mechanistic manner. The OFT had failed to take into account companies' individual circumstances, nor had it given any proper consideration to the level of deterrence actually required to discourage a practice such as cover pricing. In this regard factors such as the widespread uncertainty and ignorance as to the legitimacy of cover pricing should have led the OFT to conclude that the level of penalty required to stamp the practice out was considerably lower than implied by the OFT's approach to MDT. In effect, it was argued, the OFT had adopted an inappropriate "one size fits all" approach to the determination of fines, which was inconsistent with the Guidance, offended the principle of legal certainty as enshrined in Article 1 of Protocol 1 ECHR, and was liable to produce (and had in fact produced) grossly unfair and disproportionate results.

147. For example, where the OFT had addressed its infringement decision also to the ultimate parent of the main infringer on the basis that the latter was part of the same economic unit, the application of a fixed percentage MDT uplift to group worldwide turnover had resulted in a wholly disproportionate penalty for the infringement in question. The same was the case where the infringer's turnover in the relevant market represented a low proportion of its total turnover. In one such case (Bowmer) the MDT produced a tenfold increase in the penalty, from £845,229 after Step 2 to £9,296,027 after Step 3. Another of the Present Appellants, Corringway, complained that the effect of the MDT was to increase the penalty by a factor of 22 (from £70,307 to £1,541,828). It argued that such a massive uplift for deterrence was clearly disproportionate, not least because the company long ago ceased economic activity and was in members' voluntary liquidation. Sisk, whose penalty at Step 2 was increased by a factor of 14 after Step 3 (from £606,709 to £8,690,003), submitted that the inflexible nature of the MDT, together with the OFT's decision to apply it only once per infringer, produced a penalty in respect that company's single infringement which was virtually the same as that imposed on others who had committed numerous breaches. As well as being manifestly excessive and disproportionate, the penalty was discriminatory as a result of the OFT's failure to take account of individual circumstances, including the fact that unlike most of the companies concerned, Sisk had substantial overseas turnover.

Corringway, too, complained that the application of the MDT to only one infringement had a disproportionate and unfair impact in its case.

148. Nor, it was argued, could the Tribunal's judgment in *Makers UK Limited v OFT* [2007] CAT 11 be relied upon as having approved the levels (0.75% and 1.05%) of total turnover used for MDT, as in that case the OFT had not addressed the decision to Makers' ultimate parent and therefore had not included the group's worldwide turnover in the MDT calculation but had based the MDT merely on turnover generated by Makers in the UK. Had the present approach been taken in *Makers*, the penalty there would have been in the order of £5 million instead of about £520,000, which was the penalty upheld by the Tribunal.

149. Finally it was argued that in selecting a starting point of 5% for each infringement the OFT failed to take proper account of the impact on those who are subject to three penalties (the vast majority of cases), namely a cumulative starting point of 15%. This produced a significantly higher starting penalty than would have been assessed in respect of, for example, an orchestrated cartel covering all tenders in the market in question; such a cartel, although in a different league of gravity, could attract a Step 1 penalty of no more than 10%, that being the maximum. Therefore at some point in the 5 step process it was necessary for the OFT to apply what in the criminal context is called the "totality" principle to ensure that the accumulation of penalties did not result in an overall effect which was disproportionate.

150. In responding to these arguments the OFT again emphasised the widespread and endemic incidence of cover pricing practices in this industry, which in its view indicated that a large part of one of the UK's major industries had ignored what was a significant legislative change introducing the Chapter I and II prohibitions. The fact that large swathes of the industry thought the practice acceptable was not a reason for lower penalties – if anything higher penalties were required to root out the endemic culture. This justified a regime of penalties that would ensure an effective deterrent, both general and specific, pursuant to the objectives set out in the Guidance.

151. As to the argument that the MDT methodology broke the necessary link between the assessment of seriousness at Steps 1 and 2 and the ultimate penalty, and was liable on that account to offend proportionality principles, the OFT responded that the earlier steps pursue different policy objectives from Step 3, and no step is otiose. Factors relating to individual culpability did not just come into play at Steps 1 and 2: for example they produced upward or downward adjustments at Step 4. Further, the 0.75% and 1.05% levels used for MDT at Step 3 were in fact related to Step 1 in that they were the result of applying the Step 1 starting points (5% and 7%) to the OFT's assumption that an infringing undertaking generated 15% of its total turnover in the relevant market.

152. The OFT submitted that this approach to the MDT, and the uplift resulting from its application, were expressly approved by the Tribunal in the *Makers* appeal. The attempt to distinguish that case as turning on its own special facts should be rejected. That the turnover in the relevant market of the company concerned was very low in comparison with total turnover was the reason for applying the MDT to the infringers here, just as much as in *Makers*. Nor was there anything in the argument that Makers was different because the MDT was applied to Makers' turnover alone, and not also to that of its ultimate parent company: the important fact was that the undertaking to which the decision was addressed was Makers and not the parent. So too in the present cases, the MDT was applied to the turnover of the undertakings addressed by the Decision.

153. In relation to its alleged over-reliance on turnover for measuring the deterrent effect of a penalty, to the exclusion of other financial measures of the size and economic strength of an infringing company, such as profit, the OFT contended that several factors support the use of turnover. These factors, which apply as much at Step 3 as at Step 1, include the fact that: the maximum penalties under section 36(8) of the 1998 Act and Article 3 of the Amended Turnover Order use turnover; the Guidance applies turnover criteria; the standard financial measure of participation in a market must be transactions-based and hence related to turnover, which excludes variables such as costs; the European Commission uses turnover in its current fining methodology, and this is accepted by the Luxembourg courts; turnover is easily ascertainable and less subjective and susceptible to manipulation than other

measures, including profit. Further a profit-based approach would not provide an adequate deterrent: an undertaking's profits in any given year may well be a poor reflection of the company's scale and therefore of the impact of a particular penalty on both that undertaking and undertakings generally. Large companies often make a loss. Profits may vary widely from year to year, whereas turnover is relatively stable. Those who advocated the use of profit as a measure in addition to turnover were vague about how the two measures would interact. The OFT's approach was simpler and capable of consistent application to all the companies to whom the Decision was addressed.

154. Nor, in the OFT's submission, was it significant in this regard that turnover in this industry commonly included the value of work done by sub-contractors, on which no profit was earned by the main contractor. This was just another way of putting the argument that penalties should be based on margin rather than turnover, which the OFT rejected. Much the same applied to the argument that this industry was characterised by high turnover and slim margins.

155. The OFT denied that the MDT was an unauthorised alteration of the Guidance. On the contrary it was designed to give effect to the principles set out at Step 3, in particular it provided a means of considering whether an upward adjustment was required in order to achieve the objective of deterrence, both specific and general, having regard to the size of the undertaking being penalised. The MDT fulfilled this function in a way which was consistent *vis-à-vis* all parties subject to the Decision, and conformed with the OFT's approach in similar cases in the past. The OFT submitted that it had a broad discretion in relation to adjustments at Step 3 and the MDT fell within that discretion. There was no breach of legal certainty or Article 1, Protocol 1 ECHR in such circumstances.

156. As regards Ballast's contention that worldwide turnover was an impermissible consideration in respect of infringements committed before 1 May 2004, Mr Unterhalter relied upon the decision of the ECJ in Case C-397/03 P *Archer Daniels Midland Co and another v Commission* [2006] ECR I-4475. In the light of that decision he argued that when it comes to guidelines, as distinct from the underlying legal framework within which they operate, there was no legitimate expectation that

the guidelines in existence at the time of an infringement would always remain applicable to that infringement. It was reasonably foreseeable that such guidelines could change. Moreover, deterrence was intrinsically a forward-looking consideration, which militated against an expectation that past guidelines would apply in preference to current ones, given the aim of incentivising the infringer for the future. Therefore neither the principle of legitimate expectations nor that of non-retroactivity was engaged here so as to prevent the OFT taking account of Ballast's non-UK turnover.

157. The OFT also denied that the MDT was applied mechanistically and inconsistently with the Guidance's statement that an adjustment at Step 3 would be made "case by case". In its skeleton arguments the OFT pointed to the scale of the Decision and the number of parties involved, submitting that in these circumstances it was right to apply a consistent set of criteria to assess penalties, and that if it had instead sought to assess the penalty for each undertaking separately without reference to others it would have been vulnerable to allegations of inconsistency and discrimination. This was not to say that it had applied the criteria mechanistically: rather it had identified the features of the cases which were comparable and applied the penalty criteria fairly to all. Where factors were genuinely unique to an undertaking, such as financial hardship, they were taken into account in relation to that undertaking. Moreover the OFT emphasised that it carried out checks to ensure that the penalties being imposed did not fall outside "the central range" of penalties imposed under the Decision.

158. In the OFT's view a penalty set by reference to around 15% of an undertaking's total turnover was the minimum necessary to demonstrate to companies in this industry that the narrow market definitions adopted by the OFT did not mean that infringers would not risk a penalty with a significant impact on them. Thus, the MDT here had been "carefully tailored" to meet the OFT's deterrence objective in relation to the infringements in question, and in adopting the specific percentages used the OFT had been well aware, for example, that construction is a relatively low margin activity compared to some other sectors. In the future the OFT might select a different percentage depending on the characteristics of the particular industry.

159. The OFT did not accept that the application of the MDT to worldwide group turnover resulted in penalties which were disproportionate or excessive. It was important that a parent company's management had a strong incentive actively to discourage and prevent the managers of subsidiaries from cutting corners in relation to compliance training or procedures, or engaging in infringing conduct. The fines must be large enough to ensure that a culture of compliance is maintained across the corporate group which formed the relevant undertaking and was a single unit from an economic standpoint. Moreover, far from disproportionately affecting multi-company undertakings deriving a high proportion of turnover from outside the relevant market, the MDT helped to ensure that penalties are precisely proportionate to the relative sizes of the undertakings on which they were imposed. The policy objectives would not be achieved by looking at some subset of the undertaking's total turnover.

160. Corringway's argument that an MDT uplift from £70,000 to £1.5 million was disproportionate given that the company had long ceased trading, missed the point. The need for deterrence was not affected: one of the aims was general deterrence, so the right message must be sent to multi-market undertakings generally – not just those in liquidation. Further, companies must not be given the idea that their penalties would be reduced if they went into liquidation. Rather they needed to be encouraged to take account of the competition law risk to their investment value.

161. The OFT similarly rejected Sisk's contention that the application of the MDT only once per infringer meant that the company's single infringement was unfair and disproportionate because it attracted a penalty which was virtually the same as that imposed on others who had committed numerous breaches. There were cases where the penalties for second or third infringements would be very significant i.e. where the undertaking's relevant turnover was a high proportion of its total turnover. The OFT had decided that it was sufficient for deterrence to attach the MDT to at most one infringement per infringer. Had the OFT applied the MDT more widely some companies would have received more severe penalties than deterrence demanded. The main point was that Sisk received the penalty that was justified for the infringement in question. Without the MDT it would have been too low to satisfy the twin objectives.

162. The OFT likewise submitted that Corringway's complaint about the single application of the MDT was without merit. The penalty including the MDT for which Corringway was liable related to the undertaking which the company headed at the time of the relevant infringement, and was the appropriate penalty for that offence. It was irrelevant that after that time and while under different ownership the subsidiary committed a further infringement to which (as the third offence) no MDT was applicable. Corringway could have no legitimate expectation of a lower penalty than was justified by reference to its own infringement.

163. As for the "totality" principle, the OFT had no objection to the application of such an approach but considered that it added nothing to the requirement that the overall penalty imposed should not be excessive. In no case did the OFT accept that the penalties imposed in the Decision were in breach of that principle. Further, any comparison between the cumulative starting points for three separate infringements and that for a single continuous infringement was false. First, it was lawful, reasonable and consistent with the Penalty Guidance to set a starting point for each infringement separately. Secondly, in considering the proportionality of the overall penalty eventually imposed it was wrong to focus on the starting points, as they were subject to a number of checks and adjustments throughout the process to ensure the fairness of the final penalty. Thirdly, it was wrong to assume that the final penalty imposed on any undertaking for a single continuous infringement would have been lower than that cumulatively imposed for any three identified discrete infringements.

Tribunal's conclusions on the MDT applied at Step 3

164. One of the main criticisms in the Present Appeals is that the MDT was applied mechanistically according to a "one size fits all" approach instead of following the Guidance, which states that any adjustment at Step 3 would be made "case-by-case". Closely related to this complaint is the submission that the OFT failed to take into account other indicators of the likely impact of penalties on infringing undertakings and relied virtually exclusively on turnover. Despite the OFT's submissions to the contrary we are of the view that these complaints are justified.

165. In the Present Appeals the MDT has typically produced an enormous uplift from the Step 1 penalty. The scale of this uplift is the product of two factors: first, the MDT was applied to total worldwide turnover; second the MDT was applied at a rate of 0.75% of that turnover. As already explained, according to the OFT the latter percentage is the result of applying the 5% used at Step 1 to a figure of 15% and it is based on an assumption that each infringing undertaking generated 15% of its turnover in the "relevant" market i.e. in the market affected by the infringement. It is not entirely clear where the assumption comes from, other than that when used in certain previous investigations the penalties arrived at were judged by the OFT to act as a sufficient deterrent (see for example *Makers*, paragraph 132).

166. In any event, whatever the basis for the figure of 0.75%, it is not at all obvious why its use should produce a penalty with the minimum appropriate deterrent effect in each of these cases, as claimed by the OFT (see paragraph 110 of the Consolidated Defence). Moreover, the MDT mechanism calculates a figure *de novo* using a completely different base, namely total worldwide turnover, as distinct from "relevant turnover" in the market affected by the infringement, which is used at Step 1. Even if there is nothing inherently objectionable in using such a device as a provisional means of adjustment where the Step 1 figure is regarded as insufficient, such a mechanism is not a substitute for an individual assessment of the case. Nor should it be allowed to result in the imposition of a final penalty which is excessive and disproportionate. By whatever method the Step 3 adjustment is made, it is particularly important that at some stage the OFT should take a step back and ask itself whether in all the circumstances a penalty at the proposed level is necessary and proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further breaches of that kind.

167. In this regard the statement of the ECJ in Cases 100-103/80 *Musique Diffusion Francaise v Commission* (above) at paragraphs 120 and 121 is in point:

> "120. In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.

> 121. It follows that, on the one hand, it is permissible, for the purposes of fixing the fine to have regard both to total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and consequently, that *the fixing of an appropriate fine cannot be the result of a simple calculation based on total turnover*. That is particularly the case where the goods concerned account for only a small part of that figure. It is appropriate for the Court to bear in mind those considerations in its assessment, by virtue of its powers of unlimited jurisdiction, of the gravity of the infringement in question." (Emphasis added)

168. In these cases the OFT did not appear to stand back and look critically at the figure produced by the MDT, or carry out a cross-check by reference to other indicators of the company's size and financial position. Indeed, the OFT do not appear to have considered on a case-by-case basis whether the Step 1 penalty needed to be increased at all. Instead, where the criteria for applicability of the MDT were satisfied the mechanism was applied as a matter of course; the product of the formula was then in each case simply adopted by the OFT as the basis for the final penalty, subject to relatively small adjustments for certain mitigating factors and, of course, for leniency/FTO. It is true that the OFT identified "outliers" in terms of the scale of penalties, and also applied the 4.5% cap to which reference has been made (paragraph 51 above); however the outlier exercise involved only a comparison with other parties, and the cap was itself formulaic; neither individually nor cumulatively were these safeguards capable of providing the case by case assessment required.

169. We cannot accept that in these circumstances the MDT, or the ultimate penalties of which the MDT comprised such a substantial element, were "carefully tailored" to meet the OFT's deterrence objective in relation to the infringements in question, as the OFT submits. The assumption on which the 15% is based is far too blunt an instrument to come within that description. It is also liable to result in disproportionate figures. One need only recall the hypothetical example, put to Mr Unterhalter by the Tribunal in the course of one of the oral hearings, of the MDT being applied to the group turnover of a multi-national oil company which happened to have a UK subsidiary operating in the construction industry: in such a case the MDT would produce a penalty for a single cover pricing infringement

measured in hundreds of millions of pounds. Such a result would undeniably infringe proportionality principles, as Mr Unterhalter appeared to accept.

170. We agree with the Present Appellants that in relying to the extent it has on the product of the MDT mechanism the OFT has used total worldwide turnover as the sole indication of the size and financial position of a company and has largely left out of account other financial measures and indicators of the deterrent impact its penalties would have on the infringers and other companies. Turnover is of course an indication of the size and financial status of a commercial entity but it is not the only one, and it too can be subject to distortion – as asserted by some of the Present Appellants whose reported turnover was said to include invoiced amounts for sub-contract work simply passed on to the clients without the addition of any margin.

171. For most companies profit and cash flow rather than turnover are the key issues, and companies are primarily valued by financial markets, and their directors remunerated, by reference to profit, cash flow and dividend, with turnover being a secondary consideration. However, it has not been suggested by the Present Appellants that profit or profitability should replace turnover for present purposes, nor even that it should necessarily play as central a role. Nor is it denied that profit is a broad concept capable of being assessed in a variety of ways. It is simply that it would be wrong not to give consideration to such profit information as is available, along with other relevant factors, when deciding on the appropriate penalty.

172. Account should also be taken of the typical margin on turnover earned in the industry in question, in order to ensure that the ultimate penalty represents a proportionate and sufficient punishment and deterrent. This factor has an obvious bearing on the impact a penalty is likely to have, both on the infringer and on other companies engaged in similar commercial activities. It is self-evident that, for example, a penalty representing 5% of a company’s turnover is likely to have much less impact upon participants in an industry which typically achieves an average margin on turnover of 15% than upon those in an industry such as the construction sector where the profit margins achieved are said to be typically around 2%.

173. The OFT has acknowledged that "construction is a relatively low margin activity compared to some other industry sectors", and has stated that the OFT "was aware of this when it decided upon the MDT percentages that were used in the Decision" (see its skeleton argument in Kier's appeal, at paragraph 25). This is something less than an unambiguous assertion that the typically low margin in the construction industry was actually taken into consideration in the OFT's choice of 15% as the basis of the MDT assumption. If it was, there is little indication in the Decision itself or in the OFT's submissions that it has been attributed the importance it deserves.

174. Next we turn to the contention that there must be a link between culpability and the deterrent element in the penalty, and that the MDT severs this link.

175. It is a cardinal principle that the ultimate penalty imposed must satisfy the requirements of proportionality. Whilst deterrence is a relevant consideration when assessing proportionality in this context, so equally is the culpability of the offender/seriousness of the offence. If these two considerations pull in different directions, a fair balance should be sought. Where a provisional penalty at Step 1 is deemed insufficient for the purpose of deterrence (or for that matter does not properly reflect the seriousness of the offence) it is proper to increase it. But the culpability consideration must not be lost to view, and it may well impose some limit on the extent of any increase based purely on deterrence. Ultimately the question will be: is the final penalty reasonable and proportionate having regard to the twin objectives set out in paragraph 1.4 of the Guidance? We are not aware that any of the above is controversial.

176. The MDT had the effect of changing the basis of assessing a penalty from relevant turnover to total worldwide turnover. Wherever the MDT was applicable, it rendered the provisional assessment (designed primarily to reflect the seriousness of the infringement) considerably less relevant. It is true that 0.75% represents 5% of 15%, and that this 5% figure represents the OFT's assessment of the level of seriousness of the particular infringement; therefore the MDT percentage will increase in the case of a more serious offence; for example it becomes 1.05% for a compensation payment infringement: 7% x 15% = 1.05%. However, this does not

alter the fact that the 15% assumption and the basis of assessment (total worldwide turnover) are wholly specific to MDT at Step 3. If one is going to make such a significant change to the basis of assessment, on the ground that the penalty produced by the primary method is not considered to be appropriate for the infringement or infringer in question, then any alternative approach must respect proportionality and give proper consideration to all relevant factors, including seriousness and culpability, as well as deterrence, in order to ensure proportionate penalties are imposed. For the reasons already given, we do not consider that the way in which the MDT was applied in the Present Appeals satisfied these requirements.

177. Similarly, it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company, not just because its turnover in the market affected by the infringement is likely to be bigger, but also because the OFT is entitled to form the view that, having regard to its size and financial strength, such a company will require a larger fine to produce the desired deterrent effect than a smaller undertaking. However, this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed. As the multi-national oil company example demonstrates, it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter's turnover. Yet this was the effect of the MDT as applied in the Decision.

178. With regard to the reliance placed by the OFT upon the Tribunal's decision in *Makers*, our observations at paragraph 116 above as to the limited precedent value of other decisions on penalties are pertinent. Such cases are almost always fact specific. In *Makers* the Tribunal took the view that the MDT was "an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance." In that case the penalty at Step 1 had been only about £6,500, which the OFT and the Tribunal believed to be inadequate in the circumstances. The effect of the MDT was to increase it to over £500,000. However, the turnover to which the MDT was applied was restricted to that of the immediate infringing company, which operated exclusively in the UK. The OFT

had not in that case addressed its decision also to the infringer's ultimate parent company, in contrast to its approach in the case of several of the Present Appellants. Had the OFT done so, the resultant penalty in *Makers* would have been in the order of £5 million, i.e. about ten times as high as the actual penalty to which the Tribunal's comments were directed. Thus although on the facts of *Makers* the penalty produced by the MDT was found to be unobjectionable, that cannot determine the position in the different circumstances of the Present Appeals.

179. As to the argument that the OFT was wrong to apply the MDT only once in respect of each infringing undertaking, we will deal with those cases alleging resultant unfairness in the context of their individual appeals, since the substance of the alleged unfairness is specific to each case. The underlying problem facing the OFT (which it sought to solve by loading the main deterrent element onto just one of several offences) reflects the very unusual nature of the Decision. This was not a single multi-partite cartel, in respect of which a single fine would be meted out to each participant; rather it was a large collection of similar but entirely discrete breaches of the competition rules, from which a selection was made by the OFT up to a maximum of three convictions per undertaking. The decision to pursue three was also a matter of discretion: it could have been five or even just one. Had the OFT chosen to pursue just one, then the question of where to impose the MDT would not have arisen, but a successful appeal against liability would have enabled the undertaking to escape altogether. Yet to impose the MDT on more than one infringement would, in the OFT's view, have meant an excessive fine overall. Hence the solution adopted.

180. As a general rule the Tribunal considers that applying the MDT to only one infringement where the undertaking is being penalised for several more or less identical but unrelated offences, is capable of producing anomalous and unfair results. An obvious example would be where an appeal against liability succeeded in respect of the infringement whose penalty contained the MDT element: the remaining infringements would presumably be regarded as insufficiently penalised. A further example is the case of Corringway (see paragraph 293ff below). In any event it seems wrong in principle to impose a penalty of £16,618,350 for an offence committed in 2001 and a penalty of £129,675 for a more or less identical offence

committed in 2005, as in the case of Kier. If Mr Unterhalter's submission (made in the course of the Corringway hearing) is correct, that there is "no possibility of finding some distributive principle of deterrence by dividing the MDT into separate parts to be shared equally between each infringement", then that is a further reason to doubt the validity of the MDT mechanism. In our view, if more than one discrete infringement is being pursued then whatever deterrent element is appropriate for each infringement should be included in the specific penalty for it. This should not result in an excessive overall penalty provided that the "totality" principle is respected and any necessary adjustments are made to each separate penalty.

181. We were initially attracted by the argument that the MDT was too radical a departure from the Step 3 concept of an "adjustment" to be capable of being put into effect without formal consultation and ministerial approval under section 38 of the 1998 Act. On reflection we have come to the conclusion that the OFT is correct in its submission to the contrary. The MDT is certainly a significant, indeed probably the most significant, feature of the penalty calculation process used in the Decision. However it is probably going too far to say that the application of the MDT amounted to "alter[ation]" of the Guidance. The wording of paragraph 2.11 is very general and says nothing about the approach the OFT will use in deciding by how much the Step 1 penalty needs to be increased in order to deal with the factors to which Step 3 refers. Clearly therefore the Guidance assumes that flesh will need to be put on the bones of paragraph 2.11. There is nothing in Step 3 which precludes, or is inconsistent with, use of a mechanism to assist the OFT in making an appropriate adjustment, provided always that the resulting figures are subject to individual appraisal ensuring a proportionate penalty. The fact that, as already stated, the figures produced by the MDT were too readily adopted by the OFT as a basis for the ultimate penalty seems to us to be more a question of flawed *application* than alteration of the Guidance.

182. Nor do we agree with the submission of Ballast that worldwide turnover is an impermissible consideration when calculating the penalty for an infringement committed prior to the entry into force of the Amended Turnover Order on 1 May 2004. The function of the Amended Turnover Order and the Original Turnover Order is, and was, to determine the statutory maximum penalty, pursuant to section

36(8) of the 1998 Act. The fact that the maximum penalty under the Original Turnover Order was limited to a proportion of the infringing undertaking's turnover in the UK does not mean that the undertaking's total worldwide turnover could not be taken into consideration when assessing the penalty, even before the coming into force of the Amended Turnover Order. It is true that the original version of the Guidance does not expressly refer to turnover in markets beyond the boundaries of the UK. However, like the current Guidance, it includes deterrence as one of the main objectives of the policy on penalties; in these circumstances it is difficult to see why, in the absence of any express limitation, all aspects of the undertaking's size and financial position, including its total worldwide turnover, should not then have been relevant considerations.

183. If, however, there had been some limitation expressed in the original version of the Guidance to the effect that only UK turnover would be taken into consideration in assessing the penalty, then we doubt that the OFT's reliance upon the decision of the ECJ in *Archer Daniels* (paragraph 156 above) would have been well placed to defeat Ballast's objection. The removal of that original limitation may well have amounted to an alteration in the Guidance and therefore required consultation and approval under section 38. However that question does not arise in the light of our conclusion that no such limitation is to be found in the original Guidance.

184. As a final observation on the MDT, one does not perhaps have to look far to understand why in these cases the OFT has relied so heavily on this device, and on other similar mechanisms such as the overall cap. As the OFT itself has pointed out, the scale of its investigation and of the Decision, with so many parties and hundreds of separate infringements, created an enhanced risk of allegations of inconsistency and discrimination and a corresponding desire to apply a consistent set of criteria for the assessment of penalties. One is left with the impression that the OFT felt it would be less vulnerable to such challenges if the penalties emerged virtually automatically from the application of a formula which was applied universally. The problem with that approach is that it runs counter to the thrust of the Guidance and ordinary penal principles, which require a case-by-case analysis and assessment of the appropriate penalty. It also carries a danger, which in our view has materialised

in relation to the penalties imposed upon the Present Appellants, of excessive and disproportionate fines.

185. For these reasons we have concluded that the MDT was applied in a manner which was wrong in principle and was inconsistent with the Guidance. In particular the MDT was applied mechanistically and without giving proper consideration to the individual circumstances of each case. Being based exclusively on total worldwide turnover, the MDT automatically excluded any proper consideration of other measures of the size and financial position of the undertaking on which a penalty was being imposed. The assumption on which the MDT appears to have been based, namely that the minimum deterrent penalty was 0.75% (or 1.05% as the case may be) of the undertaking's total worldwide turnover, was liable to and did give rise to excessive and disproportionate penalties.

186. It is arguable that the need to carry out some such exercise as is described at the end of paragraph 166 above is already implicit in the Guidance. However, in our view it would be desirable to make it explicit, perhaps by incorporating the requirement into Step 3, or even making it a separate step.

Leniency versus FTO

187. In outlining the progress of the investigation we have already described how, having decided that it did not have the time or resources to investigate any new suspect tenders, on 22 March 2007 the OFT withdrew the availability of the leniency arrangements, and wrote offering the FTO to those under investigation who had not by then applied for leniency. Those companies that had successfully applied for leniency were granted discounts of between 35% and 65% on the penalties eventually imposed. However, acceptance of the FTO in relation to an infringement led to a discount of 25%. Some of the Present Appellants (Bowmer, Corringway and Sisk) argue that the OFT's approach was discriminatory, in that those who were "dawn-raided" were in effect notified of the investigation in time for them to claim leniency, whereas those who were not so notified knew nothing about it until they received the OFT's March 2007 letter informing them that leniency was being withdrawn, and leaving them with the less favourable option of

the FTO. In order to put this submission in context it is necessary to set out in a little more detail the background to the leniency arrangements and the FTO.

188. The OFT's approach to the offer of lenient treatment is set out in section 3 of the Guidance. Paragraph 3.2 provides:

> "The OFT considers that it is in the interest of the economy of the United Kingdom, and the European Community more generally, to have a policy of granting lenient treatment to undertakings which inform it of cartel activities and which then co-operate with it... It is the often secret nature of cartel activities which justifies such a policy. The interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which participate in cartel activities but which co-operate to a significant degree with the OFT…"

189. As a result of "dawn raids" and other inspections, by the beginning of 2007 the OFT had received a total of 37 applications for leniency. According to the Decision, and in line with section 3 of the Guidance, each party that applied for leniency benefited from a 100% reduction in the penalty for each infringement where it informed the OFT about that infringement before the OFT had been made aware of it from any other source. Where the OFT had learnt of the infringement from another source, leniency applicants received a penalty reduced by between 35% and 65%. The OFT states that the reduction percentage was decided on the basis of the overall value added by a leniency party to the investigation.

190. In each case the grant of leniency was subject to a number of conditions, including a duty of continuous and complete co-operation with the OFT throughout the Investigation and until the conclusion of any action taken by the OFT (see generally paragraphs 3.9 to 3.15 of the Guidance, provided at Part A of the Annex to this Judgment).

191. In the Decision (at II.1480) the OFT explains its reasons for terminating the leniency offer:

> "By the beginning of 2007 the OFT had… obtained evidence of bid rigging activities in relation to many thousands of tenders throughout England. The OFT needed to focus its resources in order to produce an outcome that would provide the most effective deterrent to all companies, in as short a time as possible. If other companies applied for leniency they would have been likely to have provided evidence not only in relation to the tenders that the OFT had decided to investigate

> further, but in relation to many other tenders and companies. It would not have been possible to progress the investigation in an efficient and sufficiently timely way due to the need to investigate all of these new tenders and make a fresh selection of tenders and companies for investigation. The OFT therefore decided that, at the same time as making the selection of tenders for investigation, it should close the door to further leniency applications in this case."

192. The OFT went on to explain that it would normally have sought to question those companies implicated in its investigation but which had not applied for leniency, and also to request interviews with their employees at the time of the alleged infringements. However, here such a course would have proved "too time-consuming" in view of the number of companies involved. The Decision continues:

> "Nevertheless, the OFT wanted to give these companies early warning that they were under investigation, to inform them of the Suspect Tenders in respect of which they were suspected of engaging in bid rigging activities, and as part of its ongoing investigation to give them an opportunity to admit to those bid rigging activities and make certain ancillary promises in exchange for a guarantee that they would be given a 25 per cent reduction of any financial penalty that the OFT ultimately imposed in respect of any Suspect Tenders for which admissions were received." (Decision, II.1481)

193. Therefore, simultaneously with its announcement that the option of applying for leniency was now removed, the OFT wrote the letter dated 22 March 2007 to the 85 parties that had not applied for leniency, setting out the terms of the FTO. The OFT provided each company with a list of between 5 and 20 tenders in respect of which it was suspected of engaging in cover pricing. No evidence was provided. In order to benefit from a 25% reduction in any penalty, the company had to agree to a number of conditions, including: admission of participation in the relevant suspect tender; confirmation of the identity of the other company or companies involved; and agreement to make no representations as to the company's participation in bid rigging activities in response to any statement of objections.

194. Of the 85 recipients of the FTO, 45 admitted engaging in cover pricing in respect of some or all of the identified tenders. None of the parties withdrew their acceptance of the FTO in response to the evidence presented with the Statement of Objections.

195. On becoming aware that a number of companies under investigation were, or had previously been, owned by parent companies, the OFT wrote to those parents in November 2007, setting out details of the FTO and inviting them to comment on

their subsidiaries' responses thereto, and acceptance or rejection thereof. The FTO was extended to these parent companies because the OFT intended to hold responsible also any parent company which at the time of an infringement formed part of the same "undertaking" as the infringing subsidiary.

196. Mr Sharpe QC appearing for Sisk and Bowmer submitted that as a result of the way in which the OFT conducted the Investigation, the opportunity to obtain leniency (and therefore a much more substantial reduction in the penalty than was available under the FTO) depended in practice exclusively on whether the OFT had carried out a dawn raid of that company. This was the only way, Mr Sharpe argued, that a party was made aware that it was under investigation, or that the subject-matter of the investigation was cover pricing rather than some other more serious form of bid-rigging. He pointed to the fact that each successful leniency applicant had been subject to a dawn raid and that no successful application for leniency was from any company which had not been so subject. Not until receipt of the FTO letter in March 2007, spelling out for the first time that they were under investigation for cover pricing, were companies such as Sisk in a position where they could realistically have made an informed decision about whether to seek leniency from the OFT. However at this stage the opportunity to apply for leniency was removed. The perverse outcome of the OFT's approach, according to Mr Sharpe, was that those companies that had committed the most numerous breaches of the 1998 Act were most likely to have been dawn raided and, consequently, more likely to have applied for leniency with a resulting reduction in penalty. The availability of leniency, he submitted, should not have depended solely upon the incidence of a dawn raid. It followed that his clients had been unfairly treated and should have received a higher discount than 25%.

197. Mr Harris, for Corringway, argued that for these reasons his client had been denied an opportunity to demonstrate that on the facts and circumstances of their case they were entitled to a greater discount than that subsequently allowed under the FTO. This, he submitted, was a breach of the principle of equal treatment under both European Union and national law; the only cure would be to allow the undertaking an equivalent opportunity to see if they were entitled to a higher discount than the 25% provided by the FTO.

Tribunal's observations: leniency versus FTO

198. It is true that being dawn-raided operated to the benefit of some of those who were subjected to such inspections, in that they thereby became alive to the fact that they were under investigation by the OFT at a time when it was still open to them to claim leniency. Those who were not alerted by this or by some other means were much less likely to apply for leniency, although if they happened to realise they were infringers there was no obstacle to their making a leniency application too. However it was clearly not incumbent upon the OFT to carry out dawn raids on all suspects, nor to inform all suspects by some other means that they were under investigation, before withdrawing leniency. Similarly we do not consider that the OFT was under an obligation to keep the leniency arrangements open beyond the time when it had all the information it needed about all the infringements it wished (or had the resources) to investigate. In our view it acted lawfully and reasonably in terminating leniency arrangements for the reasons stated in the Decision (see above). As Mr Unterhalter submitted, whether or not a suspect is dawn-raided is an incident of an investigation. If some incidental advantage accrues as a result, the investigator cannot be under a duty to replicate that advantage for all others. Leniency is not in the nature of an entitlement which must be afforded to all, come what may: it is a pragmatic inducement to provide information and to cooperate throughout an investigation. It operates under the discretion of the investigator, who must be entitled to decide at what point the need for further information and assistance is satisfied.

199. The only question is whether, by replacing leniency with the FTO, the OFT dealt unfairly or in a discriminatory manner with those suspects who were not informed of the position as a result of a dawn raid. In our view it did not. No longer being able to cope with evidence of additional cover pricing infringements, the OFT wished to focus its attention on seeking admissions and assistance in relation to the infringements it was already investigating and proposing to penalise. In these circumstances we consider that it was reasonable to make the FTO and to offer as a *quid pro quo* a discount of 25% per infringement on any penalty. While that discount was lower than the bottom rung of the leniency ladder (35%), the value to be placed upon the assistance provided to the OFT as a result of compliance with

the FTO is a matter within its discretion. Nor is there any breach of the principle of equal treatment in this regard: the situation where the OFT is seeking further evidence and information about already suspected and possible new infringements in order to assist its inquiries and leniency is still open, is different from the situation to which the FTO was addressed.

200. Finally, in the course of the hearing in Bowmer's appeal Mr Unterhalter drew our attention to the Decision, II.1452, which records that in the course of February and March 2006 (about 1 year before leniency was withdrawn) the premises of a number of companies including Bowmer were subject to entry and search under warrant pursuant to section 28 of the 1998 Act; several of those companies applied for leniency, although Bowmer did not. Therefore the factual basis upon which Bowmer claims to have been disadvantaged seems to be in doubt in any event.

VIII. THE INDIVIDUAL APPEALS

General observations

201. We now turn to consider the individual circumstances of the Present Appeals. In doing this we will apply the conclusions we have reached in relation to the recurring issues, as well as dealing with any remaining points specific to each appeal. In summary we have concluded that the OFT had formed a view of the "simple" cover price infringements which did not appropriately reflect their essential nature and underestimated the mitigation available to the Present Appellants in the context of these cases; this view was embodied in the penalties imposed on each of them, which are excessive to a significant degree; a major vehicle for the excess is the MDT, which was applied mechanistically and without proper and case by case consideration of all relevant factors.

202. Given those conclusions it is inevitable that the existing penalties will be varied in each case. When it comes to reassessing those penalties, although the Tribunal is not bound by the Guidance we see merit in approaching our task broadly by reference to its structure, whilst also having regard to the findings in this Judgment. We have observed that the range for a Step 1 penalty in the Guidance is somewhat

narrow (0% to 10% of relevant turnover), and have suggested that it might usefully be reviewed. However for present purposes we will apply it as well as the narrow markets as defined in the Decision. We recognise that as a result we too will need to make substantial adjustments at Step 3 in some cases in order to ensure that the twin objectives referred to in the Guidance are fulfilled in a manner which is just and proportionate having regard to the relevant features of each case.

Kier Group plc and Kier Regional Limited

203. Kier Group plc is the holding company for the Kier group of companies.

204. The Kier group is broken down into four main divisions: Construction, Support Services, Partnership Homes and Developments. The Construction division is further sub-divided into Kier Regional and Kier Construction. Kier Construction deals principally with the Group's infrastructure and overseas operations. Kier Regional Limited is a wholly-owned subsidiary of Kier Group plc and comprises a network of 11 regional contracting businesses, mainly focussed on projects in the UK.

205. We shall refer to the appellants, Kier Group plc and Kier Regional Limited, collectively as "Kier", unless the context requires otherwise.

206. In the financial year ending 30 June 2008 Kier Group plc's total turnover was £2,332,400,000, of which £1,462,400,000 was generated by Kier Regional Limited. In the following financial year (ending 30 June 2009), total turnover was £2,111,900,000, of which £1,258,500,000 was generated by Kier Regional Limited. Total group profit after tax of £48.2 million was generated in the financial year to 30 June 2008. In the year ending 30 June 2009, total group profit after tax was £16.9 million. Kier Regional Limited's "average margin on operating profit over the last 9 years" is said to be 1.4%.

207. In the Decision the OFT fined Kier a total of £17,894,438 for three "simple" cover pricing infringements, referred to in the Decision as Infringements 77, 162 and 235.

208. The total combined penalty for the three infringements arrived at after Step 2 was £2,667,750. This figure represented 5% of the turnover generated in the relevant markets in 2008. Following the Step 3 imposition of the MDT in respect of Infringement 77, committed in 2001, the total penalty was increased by £16,168,500, leading to a penalty of £18,836,250. This amount was reduced at Step 4 by 5% to take account of Kier's compliance programme. Thus the final penalty was **£17,894,438**. Further details of the individual infringements and the calculation of the penalty are provided at Part B of the Annex to this Judgment.

209. Kier challenges the penalty as being excessive and/or discriminatory on several grounds.

210. It has been pointed out by Kier that the fine would remove all Kier's profit after tax for the year ending 30 June 2009; that it would represent approximately 37 % of its profit after tax for the year ending June 2008, and 55% of its average annual profits after tax, averaged over the last 9 years. Kier also relies upon the fact that it would take 36 years to pay off the fine using only operating profits from the three relevant markets. According to the witness statement of Kier Group plc's Finance Director, Deena Mattar, the pre-MDT global penalty of £2,667,750 was an "exceptional item" for accounting purposes. In addition, that figure is said to account for almost 60% of the total estimated profit derived from the three relevant markets, as defined by the OFT, over the last nine years, and to represent four times the estimated operating profit on all the contracts in the relevant markets in 2008. These figures appear to reflect what are acknowledged to be the relatively low margins earned in this industry.

211. Kier argues that the uplift of £16,168,500, imposed at Step 3 on the ground that the composite Step 1 fine (£2,667,750) was insufficient for deterrence, took no account of the individual circumstances of the company or the specific infringement. As to the seriousness of the infringement, and the need for general deterrence, Kier referred to the mitigating factors which we have already discussed (paragraphs 92 to 118 above), and submitted that in those circumstances an uplift by a factor of 6 could not be justified in order to deter other companies. In relation to specific

deterrence, Kier argued that the uplift was out of all proportion to what was actually needed to deter this particular company.

212. In regard to the latter, the witness statement of Mr John Dodds, the Chief Executive of Kier Group, described how, within days of being informed of the alleged infringement, Kier implemented at the highest level within the company a comprehensive compliance programme, with memoranda being sent to all 91 directors of the various Kier boards and a letter explaining the compliance programme being sent to some 6,000 staff. The 5% reduction in penalty at Step 4, and after the huge Step 3 uplift, was in his view insufficient to reflect these factors.

213. Kier further submits that in addition to turnover the OFT should have had regard to the profits made by Kier, as a cross-check to determine the financial impact which any fine would have on the company. Finally, Kier contends that it admitted the infringements, or at the very least did not contest the facts, but did not receive any corresponding reduction in the penalties. In Kier's submission an admission should attract a discount of 15%, and a "non contest" merits a discount of 10%.

214. These submissions and the OFT's responses to them have for the most part already been considered in the general section of this judgment, and our conclusions are set out at paragraphs 92 to 118 and 164 to 186 above.

215. It remains to consider the reliance placed by Kier on its compliance programme and on its alleged admissions of liability.

216. As to the compliance programme, the debate between Kier and the OFT is not about whether there should be a discount for the steps taken by Kier's management to ensure compliance with the competition rules for the future, but as to the scale of the discount. The OFT accepts that the discount of 5% allowed at Step 4 for compliance was only one sixteenth of the MDT uplift at Step 3. Nevertheless, says the OFT, the discount amounted to £941,812. Moreover, while welcoming the post-infringement steps taken by Kier, the OFT submits that in order to achieve the ends of specific and general deterrence it is necessary for penalties to be seen to be sufficiently large to have a significant impact upon the infringing undertaking.

Deterrence is forward-looking and must secure ongoing incentives to comply. There is no guarantee that compliance measures will be faithfully maintained and updated going forward. Therefore the OFT was justified in allowing a comparatively modest discount for compliance which reversed the MDT uplift only to a small extent. In the OFT's submission the product was a penalty that was proportionate and sensible in all the circumstances.

217. Given our conclusions on the MDT and the disproportionate size of the overall penalty imposed on Kier, this is to some extent a sterile discussion. For absent the MDT much of Kier's criticism of the allowance for compliance measures falls away. As we have said, it is not disputed that some discount should be given for a post-infringement compliance programme. The reasons for a discount are obvious: it serves as an inducement to infringers to take appropriate steps to avoid infringing in the future, and reflects the mitigating circumstance that the infringer intends not to do so. Further, although the OFT is correct in saying that a compliance programme is not a substitute for a general or specific deterrent, the decision-maker should in our view take such a programme into account in assessing any deterrent element in the penalty. For it may well have a bearing on specific deterrence. We do not consider that the General Court in Case T-13/03 *Nintendo Co and another v Commission*, 2009 ECR II-947 was indicating otherwise in the passages of that judgment at paragraphs 72-74, referred to by the OFT in its Consolidated Defence (footnote 65). The General Court was simply pointing out that deterrence also includes what has been called *general* deterrent effect, and therefore the applicants in that case were in error in arguing that an increase for deterrence was only proportionate if there was a risk that the specific infringer might re-offend.

218. When considering the size of a discount for post-infringement compliance measures, much depends on the specific circumstances of the case, as always. However, in most cases it is likely to be relatively modest in relation to the overall fine. If the preference of the decision-maker is to express the discount in percentage terms, rather than building its mitigating effect into the original penalty, a discount of about 5% under this head would be unobjectionable as a general proposition.

219. Turning to the alleged admissions of liability by Kier, the OFT accepted in the Decision that admissions are helpful in the conduct of the investigation. Therefore the Decision states that where a party had made a clear admission of the facts, or alternatively a clear positive statement that it did not contest the facts, that party would receive a 10% discount at Step 4 of the penalty calculation. In addition, where a party had clearly admitted that its conduct constituted an infringement of the 1998 Act, that party would receive a further 5% discount, i.e. a 15% discount in total. These discounts are separate from that relating to the FTO, which Kier did not accept.

220. At the hearing, we were taken by both parties to a number of passages in Kier's response to the Statement of Objections, including the following:

> "[Paragraph 1.2] Having reviewed the SO, neither Kier [Regional] nor [Kier] Group wish to offer any comment on the allegations in the SO that Kier breached [the Chapter I prohibition]….
>
> …
>
> [Paragraph 2.1] Although Kier [Regional] and [Kier] Group do not wish to comment on the Alleged Infringements themselves, there are a number of comments….[they] wish to make in connection with the [Statement of Objections] and the case being brought by the OFT which should be taken into account by the OFT when calculating any penalty…..
>
> [Paragraph 2.2, third bullet point] … Kier [Regional] and [Kier] Group have a strong culture of compliance and would never have condoned unlawful behaviour. They now clearly understand that cover pricing is a breach of the law;
>
> …
>
> [Paragraph 2.3, third bullet point:] Kier [Regional] and [Kier] Group enforce a strong culture of compliance throughout their businesses. They now have a clear understanding of the fact that cover pricing infringes competition law and have put in place strict competition law compliance policies and procedures to ensure that they do not become involved in this practice or any other similar practices in the future….
>
> [Paragraph 2.4, first bullet point:] It was genuinely the case that none of those concerned in the Alleged Infringements thought that they were acting unlawfully….There is a strong compliance culture within all [Kier] Group businesses and no unlawful and questionable behaviour would have been tolerated;
>
> …
>
> [Paragraph 2.4, third bullet point:] Kier [Regional] and [Kier] Group have co-operated with the OFT in seeking an early end to this process. This has informed the decision to offer no comment on the allegations in the SO. To the extent that

> this absence of challenge facilitates the OFT's work, Kier must be given full credit by way of reduction of a financial penalty
>
> …
>
> [Paragraph 2.5:] Kier has already indicated to the OFT that it does not intend to ask for an oral hearing. It hopes that, in the light of the approach in this document, the OFT will quickly be able to bring this matter to a conclusion in a proportionate, non discriminatory and equitable manner.
>
> [Paragraph 3.5:] First, the Alleged Infringements are examples of cover pricing
>
> …
>
> [Paragraph 3.19:] ….whilst Kier takes no pride from the fact that it, along with others, misunderstood the law and therefore failed to ensure compliance, it would urge the OFT to assess the Alleged Infringements as mistakes based on ignorance of the law, rather than a conscious effort to subvert it."

221. Mr Brealey QC, who represented Kier, submitted that on the face of the document when read as a whole it was clear that Kier was admitting that its employees were involved in cover pricing and that cover pricing was unlawful. Kier should therefore have been given 15%, alternatively 10% discount.

222. Having read the whole document and re-read the above passages, the statements appear to us to have been carefully drafted and to be to some extent ambivalent. For example, the "no comment" passages together with the statement that "no unlawful and questionable behaviour would have been tolerated", and the reference throughout to "Alleged Infringements" (albeit this phraseology is also used in the Statement of Objections) are to be contrasted with the "absence of challenge" in paragraph 2.4 and the statements in paragraphs 3.5 and 3.19, which come close to being some kind of admission. The overall effect is of a document which is intended to create the impression of an admission or "no dispute" without actually saying so clearly and unequivocally. In short there appears to be some reservation of Kier's position. In these circumstances we agree with Mr Unterhalter that it does not strictly comply with the criteria set out in the Decision, which require a clear admission of the facts, or a clear positive statement that the facts are not contested, or an unequivocal admission that conduct constituted an infringement of the 1998 Act. It is true, as Mr Brealey pointed out, that those criteria were not set out in the Statement of Objections, and so respondents were not put on notice as to the form their responses should take in order to qualify for the discounts of 10% or 15%.

Nevertheless, the OFT was in our view entitled to take the view that it would only give the allowances in question to companies whose responses clearly complied with the criteria. It follows that we do not consider the complaint of discrimination to be justified. On the other hand the penalty imposed should take into account the extent to which Kier (who obtained no leniency or FTO discounts) did cooperate, as evidenced by this document.

Tribunal's assessment of penalty

223. Given our conclusion that the overall penalty of £17,894,438 imposed upon Kier is excessive the Tribunal proposes to vary the amount of the penalty pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act (set out above at paragraph 70).

224. As we have stated in paragraph 202, in re-assessing the penalties in this and all the Present Appeals we will do so broadly by reference to the structure of the Guidance. This raises an issue of principle in the present case.

225. In its Notice of Appeal Kier has expressly challenged neither the percentage which the OFT applied to the relevant turnover at Step 1 nor the year used to measure that turnover. Its attack has been mainly directed at the MDT and its effect on the proportionality of the ultimate fine. No application has been made by Kier to amend its Notice of Appeal. Yet, in its further written submission to us dated 3 August 2010 (filed after having sight of the transcripts of other appeal hearings) Kier contends that if, as is the case, we were to conclude that the fines imposed on Kier were excessive and that the relevant date for assessing turnover at Step 1 is by reference to the date of infringement, then in re-setting the fine we should do so on that basis. Kier refers to our unlimited jurisdiction in regard to penalties. Kier submits that in those circumstances the provisional composite fine for its infringements would be £341,650 at Step 1.

226. In its written submission dated 10 September 2010 the OFT noted that it did not intend to comment on the relevant turnover figures provided by Kier. The OFT did, however, make a number of points which in its view militate against Kier being allowed to ask the Tribunal at this late stage to recalculate its fine using turnover

from the year prior to the infringement. Its principal argument is that, as Kier had not originally raised the "relevant year" point as a ground of appeal, it could not now seek to have its appeal determined on some other basis.

227. We have considered carefully whether, notwithstanding that there is no express challenge in its Notice of Appeal to this aspect or to the Step 1 percentage, we should re-assess the penalties in the light of our conclusions on those issues. Where an appellant has not challenged the assessment year the reason may well be because, having done the maths, it has concluded that it is not in its interests to do so. In such a case it is likely to be fairer if the Tribunal has regard to the data derived from the (unchallenged) year used by the OFT. However, this is not the case so far as Kier is concerned, as the data for the "correct" year gives a provisional figure at Step 1 which is much more favourable to Kier.

228. The OFT's reaction to Kier's attempt to jump on the bandwagon in relation to the Step 1 year of assessment is understandable. We are also, of course, conscious of the statutory requirement that the Tribunal should decide the appeal "on the merits by reference to the grounds of appeal set out in the notice of appeal" (paragraph 3(1) of Schedule 8 to the 1998 Act). However, the essential ground of appeal of each of the Present Appellants is that the penalty imposed on it is excessive, disproportionate and unjust, albeit that a variety of points have been raised in support of that basic challenge. In addition, all the Present Appellants have in some way or another argued that in imposing the penalties in question the OFT has treated cover pricing as a more serious infringement than it is. We have upheld those contentions and have decided to vary the penalties accordingly. In those circumstances it is in our view open to the Tribunal to apply at Step 1 the percentage that we have concluded is appropriate for these infringements (namely 3.5%). It is also open to us to have regard to data for the year we have held to be the "correct" year of assessment under the Guidance, save where there is good reason not to do so (for example, because the "correct" year's data are *less* favourable to an appellant, or are not readily obtainable). We therefore propose to adopt this course in all the Present Appeals. In reaching that view we have been influenced by the likelihood that, had Kier applied to amend its Notice of Appeal to make these points

or to make them explicitly, the Tribunal would have allowed such amendments in the unusual circumstances of these cases.

229. In any event, the striking fluctuations in "relevant turnover" likely to occur from year to year and from "relevant market" to "relevant market" as a result of the very narrow market definitions, mean that whatever starting point percentage and whichever year of assessment are used in the Present Appeals, the Step 1 figures will almost certainly require much greater adjustment at Step 3 in order to arrive at an appropriate penalty than might have been the case if the markets had been defined more broadly. This is certainly the case in Kier's appeal, and all the more so in view of the scale of Kier's contracting business as compared with the narrowness of those markets.

230. Thus, applying 3.5% to the turnover in the "relevant markets" in the last business year prior to each of Kier's three infringements produces a global figure of about £240,000, made up of £125,650 for the breach in 2001, £96,000 for the one in 2003 and £17,500 for the one in 2005.

231. The next stage in the exercise, corresponding to Step 3 of the Guidance, is to consider whether any adjustment, upwards or downwards, to that provisional global penalty of £240,000 is required in order to satisfy the twin objectives of punishment and deterrence. For this purpose it is necessary to have regard to all relevant considerations, including the seriousness of the offence, and the mitigating factors discussed earlier in this judgment together with any other factors specific to Kier. The latter include its size and financial position. Account should also be taken of the typically slim margins on turnover in this industry.

232. Having regard to the above, and to the twin objectives of punishment and deterrence, the Tribunal considers that a penalty significantly higher than the provisional global figure of £240,000 is required in relation to Kier's three infringements. Kier is a very large undertaking with a substantial and continuing presence in the construction industry in the UK. The penalty must not only mark the seriousness of these violations but also be sufficient, consistently with justice and proportionality, to minimise the risk of the undertaking offending in a similar way

in the future, and to alert other companies to the importance of avoiding such conduct. In adjusting that sum we will continue to look at a global figure rather than three constituent fines, in order to respect the totality principle. On that basis we are of the view that £2,000,000 is the appropriate penalty. As it happens, this is in the same ballpark as the penalty which would have been produced at Step 1 on the basis of the more recent turnover used by the OFT (see paragraph 208 above). This is perhaps further evidence of the volatility in relevant turnover resulting from the extremely narrow market definitions.

233. Kier should be given credit for its early and extensive post-infringement compliance programme, and also for the extent to which it cooperated by acquiescing (albeit in somewhat equivocal terms) in the allegations contained in the Statement of Objections. In recognition of these two factors we propose to reduce the global penalty by 15% to £1,700,000. The final penalty for each infringement will be equal to one third of that amount. The existing penalties are varied accordingly.

Ballast Nedam N.V.

234. Ballast Nedam N.V. ("Ballast Nedam") is a public company registered in the Netherlands. At the time of the relevant infringements it was the ultimate parent company of Ballast plc ("Ballast"), a company registered in England and Wales. Ballast ceased trading in 2003 and was dissolved on 13 July 2006. At the time of the infringements Ballast was wholly owned by Ballast Nedam plc, a company registered in England and Wales and wholly owned by Ballast Nedam. Ballast Nedam plc was dissolved on 5 April 2005.

235. The OFT fined Ballast Nedam a total of £8,333,116 for three "simple" cover pricing infringements referred to in the Decision as Infringements 41, 47 and 48. All three were committed by the subsidiary, Ballast, in the early part of 2001.

236. The OFT considered that Ballast Nedam, as 100% indirect owner of Ballast, could be presumed to have exercised decisive influence over Ballast's commercial policy during the period of the relevant infringements. It therefore held Ballast Nedam

and Ballast to be part of the same "undertaking" and to be jointly and severally liable for the infringements and for payment of the penalties imposed. However, because the infringing UK subsidiary had ceased trading in 2003 the OFT was faced with a situation where the undertaking to whom the Decision was addressed had no turnover in any of the relevant markets in the last business year preceding the Decision (which was the year of assessment applied by the OFT in the Decision). This meant that all three penalties were zero after Step 2.

237. The OFT's solution in relation to Infringement 48 was to apply the MDT at Step 3 of its penalty calculation, arriving at a penalty of £8,516,215, calculated by reference to the parent's (Ballast Nedam's) total worldwide turnover in the last business year prior to the Decision. In that year Ballast Nedam generated worldwide turnover of over £1.1 billion, of which more than 99% was generated outside the UK.

238. In relation to Infringements 41 and 47 (to which the MDT was not applied) a proxy for the Step 1 penalty (5% of "relevant turnover") was used; the proxy was 0.14% of Ballast Nedam's total worldwide turnover for its most recent financial year. The rationale for use of the proxy and the way in which it was arrived at are explained at paragraph 50 above. This resulted in a penalty of £1,589,693 for each of Infringements 41 and 47, and a total combined penalty for all three infringements of £11,695,601 after Step 3. This was then reduced for compliance and acceptance of the FTO to reach a final combined penalty of **£8,333,116**. Further details of the infringements and the calculation of the penalties are provided at Part B of the Annex to this Judgment.

239. Ballast Nedam's appeal raises certain issues in respect of which all relevant arguments and counter arguments have already been discussed and dealt with in the general section of this Judgment. These issues include: the nature of cover pricing, its position in the hierarchy of anti-trust violations, its endemic and long-standing industry acceptance, the general uncertainty as to its unlawfulness prevailing at the time, the correct approach to the year of assessment of relevant turnover for the purposes of Step 1 of the Guidance, and the nature and application of the MDT. No

rehearsal of those arguments and the Tribunal's conclusions on them is therefore necessary.

240. Ballast Nedam argues that globally and individually the three fines imposed on it are unfair, excessive and disproportionate. It points to the fact that the final penalty in respect of Infringement 48 (to which the MDT was applied) on its own represented more than three quarters of Ballast Nedam's total group turnover in the UK in 2008, that the gross global penalty for the three infringements represented about 100% of that turnover, and 135% of the infringing UK subsidiary's turnover in the three affected markets in 2002, its final year before it ceased trading. Ballast Nedam submits that all the fines imposed on it are based exclusively on total worldwide group turnover, in circumstances where less than 1% of that turnover is generated in the UK, and that this is at odds with the principles in *Musique Diffusion Francaise* and the Guidance, and is obviously disproportionate and unfair.

241. Since the penalty imposed in respect of Infringement 48 was entirely the product of the MDT mechanism, nothing further needs to be said about the part of Ballast Nedam's challenge which concerns the MDT, as those issues have been dealt with in the earlier part of this Judgment.

242. As far as Infringements 41 and 47 are concerned, while not disputing the OFT's right to apply a proxy for "relevant turnover" in order to arrive at penalties for these infringements, Ballast Nedam challenges the method the OFT used, as well as the allegedly excessive penalties thereby produced.

243. In his submissions Mr Vajda QC, who represented Ballast Nedam, highlighted what he said were errors in the OFT's approach. First, the use of worldwide group turnover in 2008 for the purpose of calculating the proxy bore no relationship to any harm done or the turnover historically achieved by the subsidiary in either of the two "relevant markets", namely "defence" in the East Midlands (Infringement 41) and "public housing" in Yorkshire and Humberside (Infringement 47). In this regard, he argued, the OFT had ignored the methodology and purpose of Step 1 of the Guidance, which requires an assessment of turnover in the relevant market, and had also failed to have regard to the undertaking's individual situation.

244. Mr Vajda pointed to the fact that during the OFT's investigation Ballast Nedam had actually provided turnover figures for each of the relevant markets in relation to 2002, its subsidiary's final year of trading. Ballast Nedam submits that had the OFT used these 2002 figures (£2,718,000 for Infringement 41 and £420,000 for Infringement 47), it would have arrived at a combined penalty of £156,900 at the end of Step 2 for those two infringements. Instead the penalties for them based on the proxy amounted to well over £3 million, actually exceeding what Ballast Nedam estimated to be the relevant turnover in 2002. In this regard he pointed to the size of the disparity between that actual turnover in 2002 and the relevant turnover assumed by the proxy, namely some £31 million in each of the relevant markets in 2008. Therefore Ballast submits that the OFT should have fixed the penalties by reference to the turnover figures for 2002, a period which was also much closer to the infringements in question than Ballast Nedam's worldwide turnover six or seven years later. At the very least the OFT should have used the 2002 figures as a cross-check. Instead the OFT had simply ignored the 2002 data, making no reference to them in the Decision.

245. It is also submitted that basing the proxy on the median percentage of total turnover represented by the "relevant turnover" for all the infringements in the Decision, produced an unfair and discriminatory result in respect of Ballast Nedam. This was due to the fact that the undertaking's "relevant turnover" would (were it not in fact zero) have represented a much smaller percentage of its worldwide turnover than the corresponding proportion of most other parties' worldwide turnover, because unlike theirs nearly all Ballast Nedams's worldwide turnover was earned outside the UK. The OFT failed to recognise that in this respect Ballast was in an objectively different situation to other undertakings captured by the Decision, and infringed the principle of equal treatment.

246. Mr Vajda also argued that the proxy operated unfairly in that it produced a very much higher penalty for Ballast Nedam, whose turnover in each of the relevant markets was zero, than the penalties imposed on companies whose relevant turnover was not zero but very low.

247. At the hearing Mr Unterhalter, for the OFT, sought to cast doubt on the accuracy of the 2002 turnover figures provided by Ballast Nedam. He pointed out that the records were not complete and were reconstructed by Ballast Nedam some years after the subsidiary in question had ceased trading, and in such a way that the OFT could not know what level of accuracy or confidence it could attach to the exercise. There were likely to be significant gaps.

248. In relation to the apparently large disparity between the relevant turnover put forward for 2002 and that assumed by application of the proxy, Mr Unterhalter argued that it would only take a single sizeable project in one of the relevant product markets in order to generate turnover of the order assumed (£31 million). Although he acknowledged that mathematically this level of turnover in each of the more than 100 potential "relevant markets" would mean a total UK turnover measured in billions, he submitted that it was not being suggested that the subsidiary would operate in all those markets - it would operate selectively in different markets at different times. Variability in the number and size of tenders won and lost each year means that undertakings would not generate the same volume of business in each relevant market every year. Therefore the outcome assumed was not untenable. The subsidiary's UK turnover in 2000 had been £390 million and in 2002 £361 million. The OFT therefore disagreed with Ballast's suggestion that the proxy figures were unreasonable.

249. Further, it was argued, the proxy of 0.14% of total worldwide turnover was a meaningful one derived from the figures generated by way of relevant turnover of all parties to the Decision, and not one that is calculated solely by reference to total turnover, as alleged. Moreover, far from infringing the principle of equal treatment the approach adopted by the OFT had the virtue of consistency across all parties similarly affected. The proxy was in fact applied to more than 30 undertakings in the Decision. Any attempt to calculate a proxy utilising the 2002 figures provided by Ballast would inevitably lead to inconsistency. The OFT considered that the figures derived from the proxy were broadly in line with the seriousness of the infringements and the overall economic strength of the undertakings involved.

250. As regards the overall penalty imposed on Ballast Nedam, the OFT submits that it was the result of a consideration of a broad range of relevant factors, and was entirely consistent with the Court of Justice's judgment in *Musique Diffusion Francaise*. The particular proportion of Ballast Nedam's turnover generated within the UK is not relevant. The OFT did not set penalties by reference to the undertaking's UK-derived turnover, but rather in relation to turnover in the relevant market (or a proxy in this case), and where the MDT was applied, the undertaking's total turnover. The particular sources of each undertaking's turnover were not, in the OFT's view, relevant to the objective of deterrence, which had to be sufficient to act as an incentive upon those who manage the undertaking as a whole. The penalties were not excessive in light of the size of the undertaking and the seriousness of the infringements; they represented only 0.73% of Ballast Nedam's overall group turnover of over £1 billion. However, if the Tribunal were minded to recalculate the penalty by reference to Ballast Nedam's historical turnover figures, the OFT submits that there should be a requirement to prove the accuracy and reliability of those figures.

251. The arguments about the proxy appear now to be largely academic in Ballast Nedam's appeal, in the light of our conclusion about the year of assessment for the purposes of Step 1 of the Guidance. For the proxy came into play only because the relevant turnover in the year used by the OFT was zero. Although no turnover data for the subsidiary's activities in the relevant markets are available in respect of the "correct" year, some data are before us (as they were before the OFT) in respect of a year which is very proximate to that year. For reasons given below we consider this data to be viable for the purposes of Step 1. In these circumstances in deference to the arguments presented to us we express our views on Ballast Nedam's challenge to the OFT's proxy, but do so relatively briefly.

252. We do not consider that a median based on the Step 2 provisional penalties for all infringers in the Decision expressed as a percentage of worldwide turnover provides an appropriate basis for a proxy penalty in Ballast Nedam's case. As the Tribunal pointed out at the oral hearing, for many of the other undertakings non-UK turnover was minimal or zero, and in statistical terms the median was broadly reflective of those companies. Such methodology is not in the Tribunal's view sufficiently

robust to be applied to an undertaking which has less than 1% of its turnover in the UK. For cases where the Step 1 penalty was calculated as 5% of turnover in the relevant market, the proxy implies that 2.9% of the undertaking's total worldwide turnover is derived from the relevant market (Decision, V1.98). For Ballast Nedam this would result in £31.8m as being the turnover which might reasonably be expected to have arisen in each of the relevant markets in which the infringements were committed. We agree with Mr Vajda that that level of turnover is excessive, whether at the time of the infringements or at the time of the Decision. In the earlier period (2000 and 2002) the undertaking's total turnover in the UK was £390 million and £361 million respectively. This implies that typical turnover in any relevant market, of which there are well over 100, would be a good deal lower than £31 million. As to the later period (2008), a proxy based on an implication of 2.9% of worldwide turnover being earned in the "relevant market" is even less plausible, when the undertaking's turnover in the *whole* of the UK represents less than 1% of its worldwide turnover. Therefore, although we recognise the OFT's desire to find a consistent methodology which it could apply to all undertakings for whom a proxy was regarded as necessary, it seems to us that the application of this particular proxy to Ballast Nedam has resulted in unfairness.

253. In addition to these points, we are of the view that in the light of the principles set out in the case-law and in the Guidance itself it is undesirable that the penalty imposed on an undertaking should be based entirely on its total worldwide group turnover, with no reference to its actual turnover in the "relevant market" affected by the infringement. It may be different where there is no other possibility, but in Ballast Nedam's case that is not the position.

254. As to the actual level of the three penalties, in our view they are individually and collectively disproportionate and excessive having regard to all relevant considerations, including the nature of the violations, the general mitigation, the period when they were committed (all in early 2001), the typically slim margins on turnover in the industry, and the specific circumstances of the undertaking in question. In relation to the latter, when considering the need for specific deterrence (as distinct from general deterrence) it seems to us to be material that the infringing subsidiary ceased to trade as long ago as 2003, and that Ballast Nedam, although a

group of considerable substance, now has minimal business in the UK (with total UK turnover of some £11 million in 2008). In the light of this the risk of re-offending by this undertaking is rather small.

Tribunal's assessment of penalty

255. In the light of that conclusion the Tribunal proposes to vary the amount of the penalty pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act (set out above at paragraph 70).

256. We therefore begin by assessing "relevant turnover" for the purposes of arriving at a figure for Step 1. As mentioned earlier, Ballast Nedam attempted to identify turnover in the specific markets relevant to its infringements for around the time of those infringements. The data provided to the OFT by Ballast Nedam during the Investigation were not in respect of the "correct" year for this purpose, (which would have been the year 2000) but the year to December 2002, the infringing subsidiary's final year of trading. The turnover figures provided were as follows: Infringement 41: £2,718,000; Infringement 47: £420,000; Infringement 48: £4,998,000. Using our preferred percentage of 3.5%, these turnover amounts would result in a global penalty of about £285,000.

257. The OFT has criticised this data as incomplete and unreliable. It is clear that the exercise undertaken by Ballast Nedam was a difficult one and was based on imperfect information. On the other hand Mr Vajda submitted, and Mr Unterhalter was not really in a position to dispute, that the exercise was carried out carefully and the resultant figures represented Ballast Nedam's best efforts. Mr Vajda also made the point that if the OFT wished to criticise the figures, it should have put its concerns to Ballast Nedam before adopting the Decision. Mr Unterhalter did not suggest that this had been done.

258. In all the circumstances we consider that the historical turnover figures provided by Ballast Nedam in respect of 2002 represent a more reliable and fairer proxy for relevant turnover in the "correct" year than the methodology used by the OFT.

Unlike the proxy (or the MDT) they at least have some connection with the subsidiary's activities in the relevant markets at about the time that is pertinent. If the 2002 figures seem a little low in relation to Ballast's total UK turnover at about that time (some £390 million in 2000 and £361 million in 2002), that may be because the figures are incomplete, as the OFT submits, or because of the extremely narrow product and geographic markets used, or because of a combination of these factors. In any event at this stage it would not be appropriate to require Ballast Nedam to take further steps with a view to proving the accuracy and reliability of those figures, as the OFT suggests. Rather we will proceed to Step 3 of the Guidance on the basis of those provisional figures.

259. In accordance with Step 3, we next consider whether any adjustment, upwards or downwards, to the provisional global penalty of £285,000 is required in order fairly to satisfy the twin objectives of punishment and deterrence in all the relevant circumstances both general and specific to which reference has been made. We have, as before, taken the totality principle into account by considering primarily the global penalty.

260. Having regard to these considerations we are of the view that the Step 1 global penalty is insufficient. An adjustment is therefore necessary, and we would substitute a global figure of £750,000.

261. We should of course make due allowance for the discounts applied by the OFT in respect of Ballast Nedam's compliance programme (5% at Step 4), and its acceptance of the FTO (25% at Step 5). These discounts, which have not been challenged, result in a final global penalty of £534,375. The final penalty for each infringement is equal to one third of that amount and the original penalties are varied accordingly.

Bowmer and Kirkland Limited, B&K Property Services Limited

262. Bowmer and Kirkland Limited ("Bowmer") is a private company registered in England and Wales whose principal activities are building contracting, engineering and property development. B&K Property Services Limited ("BKPS") is a wholly-

owned subsidiary of Bowmer. At the time of issue of the Statement of Objections in June 2008, BKPS carried out refurbishment, alteration, extension, new build and planned maintenance projects. Bowmer, with a worldwide group turnover of over £885,000,000 in 2008, has another 35 subsidiaries, some of which carry out work outside the UK. However, the group's non-UK activity accounts for only a negligible proportion of its total turnover, some 1.5%. For convenience, we shall refer to these two appellants collectively as Bowmer, unless the context requires us to distinguish BKPS.

263. The OFT fined Bowmer a total of £7,574,736 for 3 infringements, referred to in the Decision as Infringements 18, 85 and 134. These were committed in 2000, 2001 and 2003 respectively. All 3 involved "simple" cover pricing, but Infringement 85 also involved a compensation payment by Bowmer (see paragraph 21 above).

264. Bowmer was the subject of an inspection by the OFT under section 28 of the 1998 Act on 7 March 2006 (Decision, II.1452). On 22 March 2007 the OFT wrote to those who were subject to its investigation but had not applied for leniency, setting out the terms of the FTO. The offer was sent to Bowmer but only accepted in respect of Infringement 134. However, in response to the OFT's Statement of Objections, Bowmer accepted that it had engaged in cover pricing in respect of the other two infringements set out in the Decision, namely Infringements 18 and 85.

265. The OFT found that Bowmer was liable for Infringements 18 and 85. Further, as 100% owner of BKPS and with certain common directors, Bowmer was presumed to have exercised decisive influence over the commercial policy of BKPS during the period relevant to Infringement 134. On that basis the OFT found that Bowmer and BKPS were jointly and severally liable in respect of that infringement.

266. As Infringement 85 involved the provision of a compensation payment, a Step 1 starting point of 7% of relevant turnover was adopted, while a starting point of 5% was used for Infringements 18 and 134. For the purpose of calculating the MDT at Step 3, the OFT used the higher rate of 1.05% of Bowmer's total worldwide turnover in 2008 but applied it to Infringement 134 rather than to the compensation payment violation. This was consistent with the OFT's practice of applying the

MDT to the infringement with the highest penalty after Step 2. It resulted in a lower overall penalty than would have been the case if the MDT had been applied to Infringement 85.

267. At Step 4 Bowmer was granted a 5% reduction in relation to all 3 infringements for compliance, and a further 15% reduction for cooperation in relation to Infringements 18 and 85. The undertaking also received a 25% reduction in relation to Infringement 134 for having accepted the FTO. The final overall penalty was **£7,574,736**.

268. Paradoxically, the infringement which the OFT regards as the most serious of the 3 offences received by far the lowest penalty (£298,789, as compared with £652,528 and £8,831,226 for the 2 “simple” cover pricing infringements). Further details of individual infringements and the calculation of the penalties are provided at Part B of the Annex to this Judgment.

269. In its appeal Bowmer’s overall submission is that the OFT has imposed an excessive, disproportionate and discriminatory penalty on it. In particular the undertaking challenges the 5% starting point at Step 1 used for Infringements 18 and 134, basing its case on the nature of “simple” cover pricing, its position in the hierarchy of anti-trust violations, its endemic and long-standing industry acceptance, and the general uncertainty as to its unlawfulness prevailing at the time. Bowmer also complains of the absence of any individual assessment of the starting point.

270. The 7% starting point used for Infringement 85 is attacked as well, on the ground that it was applied mechanistically and without reference to the actual facts. This aspect of the appeal is closely linked to Bowmer’s further contention that the OFT failed to reflect in the overall penalty that the compensation infringement was the result of the fraud of Bowmer’s employee, of which Bowmer was itself a victim. This contention is aimed particularly at the MDT uplift for deterrence and the higher percentage of worldwide turnover (1.05%) used in that regard. These measures are said to have been applied mechanistically, with no attempt being made

to tailor the penalties to Bowmer's actual circumstances, resulting in a disproportionate penalty.

271. Bowmer also contends that it did not have the same chance to apply for leniency as some other parties to the Decision and that this ought to have been reflected in the penalties imposed.

272. Thus the appeal raises a number of issues in respect of which all relevant arguments and counter arguments have already been discussed and dealt with in the first part of this Judgment. These issues include: the appropriate Step 1 percentage for "simple" cover pricing, and the nature and method of application of the MDT mechanism, including the use of total worldwide turnover as its base and the mechanistic approach to its application. Given the Tribunal's findings on these matters, together with the fact that nearly 90% of the global penalty imposed on Bowmer in the Decision is represented by the MDT element, the existing penalties cannot stand. In the Tribunal's view the overall level of those penalties is excessive and disproportionate. The Tribunal proposes to re-assess them.

273. Bowmer did not in its Notice of Appeal challenge the year of assessment of relevant turnover used by the OFT for the purposes of Step 1. However, in written submissions filed after the oral hearing, in September 2010, Bowmer, like Kier, has provided us with turnover figures relating to the year we consider to be the "correct" year by reference to the Guidance, and Bowmer requests the Tribunal to apply those figures in determining its appeal. The figures produce a lower overall penalty for Bowmer than the data used by the OFT. For the reasons set out above in relation to Kier's appeal (paragraphs 227 to 228), we will take account of the new figures in our re-assessment of Bowmer's penalties.

274. It remains to consider those aspects of Bowmer's appeal which have not already been determined and may have a bearing on the appropriate level of penalty. These mainly relate to the seriousness of Infringement 85, reflected in the 7% starting point, and the uplift in the MDT element. Although, for reasons explained at length, we do not propose to apply the MDT mechanism in re-assessing the fine, we still need to decide whether 7% of relevant turnover is appropriate as a starting point

and whether the resultant amount is sufficient, fair and proportionate punishment and deterrence in the present case.

275. Bowmer's main contention is that in applying a higher starting percentage and MDT rate the OFT failed to make proper allowance for Bowmer's position as a victim of fraud on the part of its employee and Herbert Baggaley. At the hearing Mr Sharpe QC, who appeared for Bowmer, focussed the majority of his submissions on that aspect, whilst emphasising that there was no challenge to the OFT's finding of liability for Infringement 85.

276. The following basic facts surrounding that infringement are not in dispute. In November 2001 the Derby Daily Telegraph sought tenders in relation to the construction of new press foundations and associated alteration works. Originally only Bowmer and Herbert Baggaley were invited to tender, both of which submitted bids by the deadline of 3 December 2001. A third company, Britcon Limited, was subsequently also requested to submit a bid by 21 December 2001. The contract was eventually awarded to Bowmer, even though it had put in a higher bid than Britcon Limited. During the course of its investigation, the OFT performed a search of the premises of Herbert Baggaley. The OFT obtained a handwritten record of tenders received, with the words "Cover Price" recorded next to the entry for this tender. Bowmer accepts that a cover price was provided to Herbert Baggaley by Bowmer.

277. As part of its leniency application Herbert Baggaley provided the OFT with an invoice made out to Bowmer for the payment of £9,792 plus VAT at 17.5%, totalling £11,505.60. The invoice was dated 12 November 2002, some 11 months after the contract was awarded. It was stated to be in relation to joinery works on the "New Press Foundations Derby Daily Telegraph" contract, was made out for the attention of "Paul Croft" and marked "Private & Confidential". In manuscript on the invoice are written the words "Ok to pay. Charge to CE 1163" and "MAT 169 CE1163A 04/03".

278. The addressee of the invoice at Bowmer is a Mr Paul Craft, not Croft. Mr Craft was at the time a commercial manager of the "Civils" division of Bowmer. Mr Craft had

provided the cover price in question to Herbert Baggaley. As part of his duties, Mr Craft had authority to sign off what are called "materials contracts", but had no authority to authorise payment for subcontracting works. Therefore despite the fact that the invoice was originally said to be in respect of joinery works, it was authorised by Mr Craft for payment as being in respect of materials supplied by Herbert Baggaley, that being the effect of the manuscript endorsement, which Mr Sharpe said appeared to have been written by Mr Craft. Bowmer in due course paid the invoiced amount to Herbert Baggaley, who had in fact provided neither joinery work nor materials to Bowmer.

279. Having interviewed personnel at both Bowmer and Herbert Baggaley, including Mr Craft, the OFT drew *inter alia* the following conclusions in the Decision: that Herbert Baggaley either was unable to submit a tender by the return date and/or did not want to win this tender; that the evidence was inconclusive as to which party initiated the compensation payment arrangement, and what the parties' motives were in making and accepting that payment. The OFT recorded that both parties maintained during the administrative procedure that Herbert Baggaley did not stand down from a job it would have otherwise pursued in return for the compensation payment, and that the payment was made to compensate Herbert Baggaley for tender costs incurred; and that the OFT made no finding in that respect (see Decision, IV.2506-2519).

280. This obviously leaves hanging the question what was the motivation for Mr Craft agreeing to make the payment to Herbert Baggaley, having provided the latter with a cover price. We note that Herbert Baggaley do not seem to have incurred much if anything in the way of estimating costs – an unenthusiastic site visit by Mr Roger Hayes, their chief estimator, apparently being the extent of their investigation of this tender. Further, Mr Unterhalter, appearing for the OFT, pointed out at the hearing that in its response to the Statement of Objections Bowmer put forward the following as "an explanation which [Bowmer] thinks is what is likely to have occurred":

> "Mr. Craft acted on his own in acceding to Herbert Baggaley's request for payment. He did not know that the Civils Division's future did not depend on winning the tender (as events proved) but he was prepared to assist in the process

> in the hope that it would help the Civils Division and him. If he had discussed this with Mr. Watson and other [Bowmer] management he would have been told that Herbert Baggaley would not have been regarded as serious competition …. and that [Bowmer] was …. in all probability the front-runner." (paragraph 54)

281. Be that as it may, we heard no evidence to throw any further light on the facts, and in our view Bowmer's penalty should be approached on the basis apparently adopted by the OFT in the Decision, that whatever Mr Craft's motives and belief may have been, it is not established that Herbert Baggaley withdrew as a result of the compensation arrangement.

282. Mr Sharpe did not dispute that in all relevant respects, including authorising payment of the invoice, Mr Craft was acting within the scope of his ostensible authority or the scope of his employment as commercial manager at Bowmer. Nor did he dispute that Bowmer was liable for the infringement. The thrust of his argument was that the mechanistic application by the OFT of the machinery of deterrence to a situation such as the present was needless and disproportionate, both in relation to specific and general deterrence. He questioned what level of compliance could be introduced to stop somebody defrauding. Fraud, as he put it, is a thing apart and a company such as Bowmer cannot guard against it; fraud unravels everything. Mr Sharpe said the same argument applied to the punishment aspect of the penalty: Bowmer was the victim of illegal activity and not the wrongdoer. He referred us to *HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, and certain comments of Lord Bingham at [15].

283. However, the *HIH Casualty* decision and the dictum relied upon provide no real assistance in the present situation. The case relates to the enforceability as against the insurer of an insurance policy which had been procured partly as a result of a fraudulent misrepresentation by the policyholder's agent. Their Lordships held that clear and unmistakeable contractual words are needed to protect the principal from the normal consequences of deceit by his agent. The discussion of fraud in that context has no bearing on the present case. We are not considering the contractual or tortious liability of a principal to a third party, but the appropriate financial penalty for an admitted infringement of a statutory prohibition by an undertaking.

284. In any event we consider that Mr Sharpe's reliance on the allegation of fraud is misplaced. Mr Craft was Bowmer's commercial manager; it was apparently through his agency that Bowmer committed the infringement for which the company has admitted liability. To say that in such circumstances the company is both victim and infringer seeks to prove too much and creates a tension with Bowmer's admission of responsibility. Corporate entities must always act through natural persons. To argue that the company's culpability is removed or reduced by the alleged fraud of its employee who was directly responsible for the infringement is to confuse its relationship with that employee with its external legal obligations. As far as any impact on the need for punishment and deterrence is concerned, it may be that as the Tribunal does not intend to utilise the MDT mechanism, Bowmer's major concerns are laid to rest. We should however say that, although in alighting upon a just penalty all the circumstances of the particular case should be taken into account, we do not accept the argument that the fraud of an employee in the present context of itself negates or reduces the need for punishment and deterrence. Although during the hearing Mr Sharpe hinted at the possibility of some more personal motive for Mr Craft's actions, there is no evidence before us to support a finding that he was acting in anything other than what he perceived (however misguidedly) to be the interests of his employer. That also appeared to be the considered view of Bowmer, at least at one point.

285. We also agree with Mr Unterhalter that if and in so far as Mr Craft may have flouted internal controls, this was likely to be a function of the fact that such controls as existed were inadequate. In assessing penalty, consideration should be given to what size of fine is required to motivate senior management, both specifically and generally, to take steps to minimise the risk of such infringements occurring.

286. As to the nature of the offence, we are of the view that for an infringement of this kind, involving an arrangement to provide a cover price and to make a compensation payment to the recipient of that cover, a Step 1 starting point of 7% is appropriate. The offence is significantly more serious than "simple" cover pricing. Any arrangement to make such a payment is particularly pernicious whether it is in fact operative in inducing withdrawal or whether the offeree has already decided he

does not want the job in any event. There is no feature of this appeal which makes it inappropriate to use that percentage at Step 1.

Tribunal's assessment of penalty

287. Having concluded that it is right for the Tribunal to vary the amount of the penalties imposed on Bowmer, pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act (set out above at paragraph 70), we begin by identifying "relevant turnover" for the purposes of arriving at Step 1 penalties. In its further written submission dated 9 September 2010, Bowmer provided us with the following figures for turnover in the relevant markets in the year prior to the infringements: Infringement 18: year ending August 1999: £18,224,877; Infringement 85: year ending August 2001: £9,246,775; Infringement 134: year ending August 2002: £61,031.

288. The OFT has not sought to comment on these figures.

289. Applying 3.5% to the undertaking's combined turnover in the markets affected by the "simple" cover pricing Infringements 18 and 134 produces a combined Step 1 penalty of about £640,000, of which all but about £2,130 relates to the first of those offences. However for present purposes we would not distinguish between the two and would allocate a provisional penalty of £320,000 for each. Applying 7% to the relevant turnover relating to Infringement 85 results in a Step 1 penalty of about £647,000 for that offence. On this basis the global penalty for all three infringements would be £1,287,000.

290. We must next consider whether any adjustment, upwards or downwards, to these provisional penalties is required in order to satisfy the twin objectives of punishment and deterrence in the case of this undertaking and these particular offences, whilst respecting the principles of fairness and proportionality. For this purpose it is necessary to have regard to all relevant considerations, both general and specific, to which reference has been made. We will also take account of the totality principle by looking at the combined penalties for Infringements 18 and 134, and then at the global penalty for all 3 infringements.

291. In the light of these considerations we see no reason to adjust the provisional penalties for the “simple” cover pricing infringements. We do however consider that the Step 1 penalty for the more serious compensation payment infringement is too low at £647,000. We propose to increase it to £1,300,000, making the gross global penalty £1,940,000.

292. We then give credit for the discounts allowed by the OFT in respect of Bowmer’s compliance programme (5% for each of the 3 infringements), and its cooperation during the Investigation (15% for each of Infringements 18 and 85). A further discount of 25% falls to be applied to the penalty for Infringement 134 to reflect acceptance of the FTO. Save for Bowmer’s unsuccessful contention that it was unfairly deprived of the chance to earn a higher discount than the 25% allowed in respect of the FTO (see paragraphs 198 to 199 above), these discounts have not been challenged. The resultant penalties are £256,000 and £1,040,000 respectively for Infringements 18 and 85, and £228,000 for Infringement 134. The original penalties are varied accordingly. The net global penalty is £1,524,000.

Corringway Conclusions plc

293. Until 5 November 1997 this appellant was called Haymills Contractors Holdings Limited. From that date until 28 July 2004 it was called Haymills plc. Since then it has been called Corringway Conclusions plc. We shall refer to the appellant as Corringway.

294. Until 27 July 2004 Corringway owned a subsidiary called Haymills (Contractors) Limited (“HCL”), a construction company based in the UK. On that date Corringway sold HCL to a third party, Haymills Group Limited (“Haymills”), as part of a management buy out. Four months after selling HCL, Corringway entered members’ voluntary liquidation and ceased carrying on any economic activity. The company is not insolvent and has considerable assets. It appears that the reason the company has not yet been wound up is the outstanding liability under the Decision. On 13 August 2009, both HCL and Haymills were placed into insolvent administration.

295. In the Decision the OFT made a finding that HCL committed 3 infringements - Infringements 103, 119 and 232 - on 16 April 2002, 16 September 2002 and 29 July 2005 respectively. Each of the infringements consisted of "simple" cover pricing.

296. The OFT concluded that Corringway, as 100% owner of HCL, could be presumed to have exercised decisive influence over HCL's commercial policy from 2000 until the subsidiary's sale in July 2004, with the result that during that period the two companies formed part of the same undertaking, and are jointly and severally liable for the two infringements committed by HCL in that period. The OFT reached the corresponding conclusion with respect to Haymills and HCL for the period after 27 July 2004, making those companies both liable for the third infringement in 2005. Corringway has not challenged these findings.

297. The OFT imposed penalties of £33,562 and £736,030 respectively for the two infringements for which Corringway and HCL are jointly and severally liable (Infringements 103 and 119) i.e. a combined penalty of **£769,592**. A penalty of £11,848 was imposed in respect of Infringement 232, for which Haymills and HCL are jointly and severally liable.

298. The MDT was applied to Infringement 119 alone, in accordance with the OFT's approach of applying to only one of the offences, and to the highest penalty at Step 1 or, in the event of a tie, to the more recent offence. In calculating the MDT-based penalty for Infringement 119 the OFT used the consolidated total worldwide turnover of Corringway and HCL. However, Corringway having ceased trading in 2004, the most recent turnover figures that it was able to provide to the OFT were in relation to the business year ending 31 March 2003. These figures were therefore used by the OFT as the Corringway element in the consolidated turnover. The penalty for Infringement 119 was therefore based on 0.75% of the combination of: HCL's total worldwide turnover for the business year ending 31 March 2008 and Corringway's total worldwide turnover for the business year ending 31 March 2003 (excluding HCL's contribution to Corringway's turnover).

299. Further details of the three infringements and the calculation of the penalties are provided at Part B of the Annex to this Judgment.

300. It appears to be common ground that, in view of the insolvency of HCL, most if not all of the burden of paying the penalties for which that company and Corringway are jointly and severally liable will fall on Corringway, and that although it is in members' voluntary liquidation Corringway has sufficient funds to pay the penalties.

301. Corringway's main ground of challenge to the Decision relates to the MDT. It is submitted that the MDT as applied to Corringway by the OFT is unlawful and/or disproportionate and/or discriminatory as between the parties to the Decision; in addition to other aspects of this ground, Corringway argues that by applying the MDT mechanism to only one of the relevant infringements, the penalty has had a disproportionate and discriminatory impact on Corringway. This is because Corringway happened to have been the ultimate parent of HCL at the time the subsidiary committed the infringement to which the MDT was applied. The unrelated successor parent company, Haymills, which is liable for HCL's other offence, has escaped the MDT entirely.

302. For the reasons set out in the first part of this Judgment we consider that the MDT mechanism and its mode of application are flawed and have produced penalties which are excessive and disproportionate, including in the present case. The penalty for Infringement 119 therefore falls to be reviewed by the Tribunal regardless of the additional point made by Mr Harris, who appeared for Corringway, that attaching the MDT to this infringement alone was unfair, in that Haymills escaped the MDT altogether. We do however agree that this results in injustice to Corringway, and is another illustration of the inappropriateness of imposing a loading for deterrence upon only one of a number of identical offences for which an undertaking is responsible. (See paragraph 180 above.)

303. For even if the penalty imposed for Infringement 119, looked at in isolation, were just and proportionate (which we do not consider to be the case), there would still in our view be unfairness to Corringway in Haymills'/HCL's penalty for Infringement 232 being calculated without concern for deterrence, resulting in a fine of only about £11,000, as compared with about £735,000 for Infringement 119. Complaints based on the different penalty calculations or different outcomes as between

individual undertakings will very often be without substance; a case by case approach to assessment of penalties will inevitably throw up many such differences. However the present case is distinct. Here there are in fact two differently constituted "undertakings" involved in the three infringements in question: HCL/Corringway and HCL/Haymills. Loading all the deterrence onto one of them is in our view a difference of treatment amounting to discrimination on the particular facts of this case.

304. Further, we do not agree with Mr Unterhalter's submission that the need for deterrence is not affected by the fact that Corringway has long ceased trading. It is true that one of the aims of a penalty is general deterrence, and that the right message should be sent to multi-market undertakings generally, and not just those in liquidation. We also agree with Mr Unterhalter that companies should not be given the idea that their penalties would be reduced if they went into liquidation, and that they needed to be encouraged to take account of the competition law risk to their investment value. However, none of this means that in determining the scale of deterrence which is appropriate and proportionate in a particular case the commercial dormancy of the company (for several years following the infringement and continuing) can properly be left out of account. The fact that a company has not traded for several years and that there is little prospect of it ever resuming commercial activity is clearly a relevant factor when considering the need for specific deterrence. Nor does there appear to be any reason to suppose that Corringway went into voluntary liquidation or ceased trading because of the risk of penalties: Corringway was apparently unaware of the OFT's investigation until November 2007 when it received the supplementary FTO letter, by which time it had already been inactive for over 3 years.

305. Corringway's other grounds of appeal include a complaint that the imposition of penalties without regard to evidence of the frequency and scale of an undertaking's infringements is unlawful; that the OFT ought to have further reduced the penalties on grounds of financial hardship; and that the OFT's withdrawal of leniency and replacement by the FTO was arbitrary and discriminatory.

306. The Tribunal finds little merit in Corringway's contention that the penalties imposed upon it were unlawful because the OFT did not have regard to the relative culpability of different undertakings in terms of the frequency and scale of each undertaking's infringements. For reasons which are explained at length in the Decision the OFT decided to limit the number of infringements per undertaking to a maximum of three. That aspect of the Decision has not been challenged by Corringway, or indeed by any of the Present Appellants. In those circumstances there is no real scope for the kind of relative assessment which Corringway proposes. In any event, the fact remains that Corringway is being penalised for two specific infringements and no more. It is not in our view a legitimate ground for complaint by Corringway that, if the OFT had decided to dig deeper and spend more time on this investigation it might have been able to pin a good deal more than three infringements on other companies. The Tribunal is not therefore attracted by Mr Harris' suggestion that the Tribunal should remit the matter back to the OFT so that it can determine such questions of relative culpability.

307. In relation to financial hardship, as previously noted the OFT reduced each of the penalties imposed on Corringway/HCL and Haymills/HCL at Step 3 by 33 % on the ground of HCL's and Haymills' insolvency. Corringway argues, however, that this reduction was insufficient to reflect that factor. Corringway points to other infringing undertakings as having received reductions for financial hardship ranging from 50% to 99.9% even though some of them were still trading, and submits that Corringway/HCL ought to have been afforded the same treatment, given that HCL has ceased trading and is insolvent.

308. Mr Harris emphasised in his submissions to us that Corringway had never sought relief on grounds of its own financial hardship, as distinct from HCL's. This does not seem to be correct. Corringway's case under this head has evolved to some extent. In its Notice of Appeal Corringway appears to pray in aid as pointing to financial hardship not just the insolvent administration of HCL but also the members' voluntary liquidation of Corringway. In the same pleading Corringway also asked the Tribunal to re-assess the penalties "by reference to the financial hardship of HCL *and the Appellant*" (the Tribunal's emphasis). (See paragraphs 77 and 79 of the Notice of Appeal). However, in Corringway's skeleton argument

reliance is no longer placed upon its own voluntary liquidation, and a footnote explains "In addressing this issue, the OFT's assessment properly focussed on the circumstances of HCL and Haymills Group, and not on the Appellant." In any event this was certainly the position which Corringway maintained at the hearing.

309. Therefore the argument is that notwithstanding the absence of any claim to financial hardship based on Corringway's own financial position, and despite its admitted ability to pay the penalty without resulting loss of viability (its viability not being an issue in view of its commercial inactivity), Corringway should benefit from whatever level of financial hardship affects HCL. This is not an attractive submission. In the Tribunal's view it would lead to results which are perverse and absurd. Where the infringing "undertaking" comprises more than one legal entity there is no reason in law or logic why financial hardship affecting one of them should automatically be attributable to the other as well. If a fine falls to be reduced on this ground for one entity but not the other then separate fines for differing amounts could be imposed on them. In practice this issue is not likely to arise except in cases such as the present where the two entities are former parent and former subsidiary. In the Decision the OFT preferred to give both entities the benefit of the hardship reduction even though it was based on the financial position of only one of them. We agree with Mr Unterhalter that this amounted to something of a windfall for Corringway. However, he indicated that the OFT was not seeking to remove the benefit of that windfall, and the Tribunal will bear this in mind when re-assessing the penalties. In the light of these conclusions we do not propose to examine Corringway's submission that the extent of the hardship allowance made to HCL was insufficient in the light of its situation and/or as compared with other parties to the Decision.

310. As for the contention that by reason of the OFT's withdrawal of leniency arrangements Corringway was unfairly deprived of the chance to earn a higher discount than the 25% allowed in respect of the FTO, this has been rejected by the Tribunal (see paragraphs 198 to 199 above).

Tribunal's assessment of penalty

311. In view of the Tribunal's conclusions in the first part of this judgment and above, the Tribunal proposes to reassess the penalties for Infringements 103 and 119.

312. For the purposes of Step 1 we will adopt the relevant turnover data used by the OFT in the Decision rather than data for HCL's relevant turnover in the year prior to the infringements. Corringway has not challenged the year used by the OFT for Step 1, and if we were to adopt the earlier data it would produce higher provisional penalties. In this respect we refer to the discussion at paragraph 227 to 228 above.

313. Applying a rate of 3.5% to the relevant turnover (£1,406,131) results in a Step 1 amount of £49,215 in respect of each of the two infringements. The next step is to consider whether any adjustment, upwards or downwards, to these provisional amounts is required in order to punish Corringway/HCL for these specific offences and deter those companies and others. For this purpose it is necessary to have regard to all relevant considerations, both general and specific to this company, including those to which reference has already been made. We take into account the fact that Corringway has not traded since 2003 and is unlikely ever to do so, and that HCL is in insolvent administration, and that virtually the whole burden of the final penalties is likely to fall upon Corringway with little or no contribution from its former subsidiary. We also take account of the totality principle.

314. For the sake of completeness we should also record that in assessing the appropriate level of penalty in this or the other related appeals we derived very little assistance from the level of fines imposed in the criminal cases shown to us, including *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586, which related to the Hatfield train disaster in which 102 passengers were injured and 4 lost their lives in 2000. The circumstances in such cases are so different from an infringement of the competition rules that any comparison is likely to lack substance.

315. In the light of all the circumstances the Tribunal considers that a global penalty greater than the combined Step 1 figure of £98,430 is required for the two

infringements. We would replace that sum with a penalty of £250,000. Notwithstanding the reduced penalty we have decided to maintain the reduction Corringway received for financial hardship; we do not consider that it would serve the interests of justice to re-open this aspect now. Therefore, applying the 33% financial hardship reduction originally allowed by the OFT results in a total of £167,500 for the two penalties. There is a further reduction of 5% at Step 4 to reflect the undertaking's compliance, and then a final discount of 25% to reflect acceptance of the FTO. The final global penalty for the two infringements is £119,344. It follows that the penalties for Infringements 103 and 119 are varied to £59,672 in each case.

Thomas Vale Holdings Limited and Thomas Vale Construction Limited

316. These two appellants are Thomas Vale Construction plc and Thomas Vale Holdings Limited. The former is a public company registered in England and Wales which carries out construction work in sectors such as housing, education, healthcare, retail, commercial, infrastructure and industrial. At the time of the Decision it was a wholly-owned subsidiary of Thomas Vale Holdings Limited, a private limited company, now known as Amelia Investments (1869) Limited. We shall refer to these two appellants collectively as Thomas Vale, unless the context requires otherwise, in which case we will call the parent Holdings and the subsidiary Construction. Construction is the core business within the group. Its turnover, which is earned entirely in the UK, has increased from about £35-45 million per annum in the early years of the new millennium, to about £165 million in the year ended 31 March 2008. It reached about £180 million in the year 2008-9, representing some 80% of the group turnover.

317. In the Decision the OFT found that Holdings, as 100% owner of Construction and with certain directors in common, could be presumed to have exercised decisive influence over the latter's commercial policy during the period when the infringements in question were committed. The OFT therefore held that the companies formed part of the same economic entity, and were jointly and severally liable for the penalties imposed. This aspect of the Decision has not been challenged by Thomas Vale.

318. Thomas Vale was found to have committed three “simple” cover pricing infringements committed on 24 November 2000, 29 April 2002, and 7 July 2004 (Infringements 30, 107 and 197). For these the penalties after Step 2, based on a rate of 5% of relevant turnover, were respectively £165,282, £1,507,063 and £362,464. Because the penalty for Infringement 107 already represented 0.7 % of Thomas Vale’s total worldwide turnover, the increase in that penalty by reason of the application of the MDT at Step 3 was relatively modest, taking it up to £1,620,617, and the global amount to £2,148,363. After a 5% discount for compliance the total was reduced to £2,040,945, and as a result of an application for leniency a further reduction of 50% was applied, resulting in a final global penalty of **£1,020,473**. This was made up of individual penalties of £78,509, £769,793 and £172,171. Further details of the individual infringements and the calculation of the penalties are set out in Part B of the Annex to this Judgment.

319. Thomas Vale attacks the penalty on a number of grounds, most of which are by now familiar. It alleges that the penalty imposed is unfair and disproportionate considering the exceptional nature of the case; that the OFT adopted the wrong year for assessing relevant turnover for the purposes of Step 1; that the OFT ought to have excluded framework and negotiated agreements (procurement methods that do not involve a competitive tender process based on the lowest price normally wins) in determining the relevant product market for Step 1; that the MDT produced a discriminatory and excessive penalty; and that the OFT should have taken into account as mitigation the general lack of awareness that “simple” cover pricing was an infringement of the Chapter I prohibition.

320. With the exception of Thomas Vale’s challenge to the OFT’s market definition, all these grounds have been considered in the first part of this Judgment. The Tribunal’s conclusions in respect of: the nature of cover pricing, its position in the hierarchy of anti-trust violations, its endemic and long-standing industry acceptance, the general uncertainty as to its unlawfulness prevailing at the time, the correct approach to the year of assessment of relevant turnover for the purposes of Step 1 of the Guidance, and the nature and application of the MDT, mean that the Tribunal must review the penalties imposed on Thomas Vale.

321. It is not necessary for the Tribunal to deal with the market definition argument raised by Thomas Vale, as that issue is rendered moot by our conclusion that the appropriate year of assessment of relevant turnover is the last business year prior to the date of the infringement. For Thomas Vale generated zero turnover in the relevant markets in the business years preceding two of the infringements: Infringement 30 (year to 31 March 2000; Public Housing, East Midlands); and Infringement 197 (year to 31 March 2004; Police/Fire & Rescue, West Midlands). In fact Thomas Vale appears to have had no turnover in either of those two relevant markets until the year ended 31 March 2005. As for the remaining infringement (Infringement 107), although turnover was generated in the relevant market in the year prior to the infringement (£7,260,536 in the year to 31 March 2002; Education, West Midlands) all that turnover was for *tendered* work, and none related to negotiated or framework contracts. (See the accounts submitted to OFT by Thomas Vale's legal representatives at page 200 of the Schedule of Documents attached to the Notice of Appeal.) Therefore the exclusion of negotiated or framework contract turnover cannot directly disadvantage Thomas Vale.

Tribunal's assessment of penalty

322. Accordingly, using a rate of 3.5% the Step 1 penalties for Infringements 30, 107 and 197 would be respectively: £0.00, £254,119, and £0.00. It is undesirable that two of the three offences should go without substantive penalties, particularly since the risk of zero or very low turnover is enhanced by the extremely narrow market definitions adopted in the Decision. We therefore propose to impose penalties also in respect of Infringements 30 and 197.

323. In order to arrive at possible proxy turnover figures for the purposes of Step 1 it is reasonable to see what percentage of Holdings' total turnover is represented by turnover in the relevant markets in more recent years; this percentage can then be applied to the total turnover for the years prior to the infringements in question. Thus, in the year to 31 March 2009 total group turnover was about £216,185,000, of which about 1.52% was generated in the market relevant to Infringement 30 (Public Housing, East Midlands) and about 3.35% in the market relevant to Infringement 197 (Police/Fire & Rescue, West Midlands). Applying those percentages to the total

group turnover in the years prior to the infringements in question produces the following proxy figures for turnover in the relevant markets: Infringement 30: Year to 31 March 2000: 1.52% x £46,073,000[1] = £700,310 relevant turnover. Infringement 197: Year to 31 March 2004: 3.35% x £85,142,000 = £2,852,257 relevant turnover. These figures would produce Step 1 penalties of about £25,000 and £100,000 respectively. If the exercise is repeated using data for the year to 31 March 2008 rather than 2009 in order to arrive at the percentages to be used, the penalties would be about £40,000 and £46,000 respectively for Infringements 30 and 197.[2] The average of these four penalties is £52,750. We propose to use this amount as a Step 1 proxy for each of these two infringements, making the global penalty for all three offences about £360,000 after Step 2.

324. The next question is whether overall this represents a sufficient penalty to satisfy the twin objectives of punishment and deterrence for these infringements, having regard to all relevant circumstances including the totality principle. In our view it does. This penalty falls to be reduced by 5% for Thomas Vale's compliance. The resultant amount is further reduced by 50% to reflect the leniency discount allowed by the OFT, making the final global penalty £171,000. The penalty for each of the three infringements is varied to an amount equal to one third of that figure.

John Sisk & Son Limited and Sicon Limited

325. John Sisk & Son Limited ("John Sisk") is a private company registered in England and Wales. It is involved in the construction industry, with expertise in sectors such as hotel and leisure, industrial, commercial, residential apartments and rail infrastructure. John Sisk is, through a number of intermediary companies, ultimately wholly-owned by Sicon Limited ("Sicon"), a private limited company registered in Ireland. Sicon conducts the majority of its business outside the UK. For convenience, we shall refer to these two appellants collectively as Sisk, unless the context requires otherwise.

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[1] The actual total turnover figure available is £57,592,262 for a 15 month period. The figure in the text is the result of dividing that figure by 15 and multiplying by 12, and rounding down for convenience.

[2] On this basis the calculations become: 2.5% x £46,073,000 = £1,152,000 x 3.5% = £40,320 Step 1 penalty for Infringement 30; and 1.56% x £85,142,000 = £1,328,000 x 3.5% = £46,480 Step 1 penalty for Infringement 197.

326. The OFT fined Sisk for one "simple" cover pricing infringement committed by John Sisk on 1 October 2003. This is referred to in the Decision as Infringement 166. It concerned a tender exercise for conversion of an industrial unit into offices, and Sisk won the contact with a bid in the region of £2.7 million.

327. The OFT considered that Sicon, as 100% indirect owner of John Sisk, should be presumed to have exercised decisive influence over the commercial policy of John Sisk at the material time, and that the two companies were part of a single undertaking for this purpose. As a result they were held to be jointly and severally liable for Infringement 166 and for the penalty imposed in respect of it. Sisk has not challenged that finding.

328. The OFT's Step 1 starting point was 5% of John Sisk's turnover in the relevant market (Office, West Midlands) for the year ending 31 December 2008. This resulted in a provisional fine of £606,709. The OFT then calculated the MDT at Step 3 using Sicon's total worldwide turnover in 2008 (£1,158,667,028). As a result the penalty rose by a factor of 14 to £8,690,003. Sisk was then granted a 5% reduction at Step 4 for compliance, and a further 25% discount at Step 5 for having accepted the FTO. The final penalty was **£6,191,627**. Further details of the infringement and the calculation of the penalty are provided at Part B of the Annex to this Judgment.

329. Sisk argues that this penalty for a single cover pricing infringement is disproportionate, excessive and/or discriminatory. It points to the fact that the penalty before the application of the FTO discount (i.e. some £8.25 million) was in excess of 100% of Sisk's total turnover in the relevant market in the year of the infringement. The figure also represented nine years' worth of Sisk's profits from all its UK business.

330. The main contentions in support of Sisk's challenge are: that by applying a starting point percentage of 5% at Step 1 the OFT exaggerated the seriousness of cover pricing and failed to take account of individual circumstances; and that the mechanistic application of the MDT to worldwide turnover had resulted in the imposition of a disproportionate and discriminatory penalty on Sisk, given in

particular its substantial non-UK turnover and its single offence. In his submissions on the MDT Mr Sharpe QC for Sisk argued that, as Sisk was found to have committed only a single infringement, the undertaking could not be said to have followed a "settled practice" of anti-competitive behaviour such as the OFT found to be the case with the vast majority of those investigated, who had three proven instances of cover pricing. Yet the penalty methodology applied by the OFT, and in particular the MDT which accounted for 93% of Sisk's pre-FTO penalty, meant that Sisk with a single infringement could be penalised as much or even more than a party with hundreds of offences. Sisk also complained that the OFT's approach to leniency was unfair to the company, as it had not had the same opportunity to apply for leniency as those who had been "dawn-raided".

331. In an additional written submission dated 9 September 2010 produced following sight of the transcripts of the other construction appeal hearings, Sisk asks the Tribunal to take account of a number of further points. These include: that the construction industry is generally characterised by low margin/high turnover, and that the relevant year for assessing turnover at Step 1 should be closely related to the date of infringement and not the Decision.

332. All these grounds together with the OFT's responses to them have been considered in earlier parts of this judgment. In particular, the Tribunal has already expressed its conclusions on the 5% starting point, the relevance of low margins in this industry, the "correct" year for assessing relevant turnover, the nature of the MDT and its mechanistic application, and the fairness of the OFT's approach to leniency versus the FTO.

333. Although the question of the year for assessing relevant turnover was not raised in Sisk's Notice of Appeal, we will give Sisk the benefit of our conclusion on the point for the reasons set out above in the section relating to Kier's appeal (see paragraphs 227 to 228).

334. Sisk's September submission also states that its turnover in the relevant market includes non-tendered work, obtained through a negotiated process. On this Sisk's primary contention is not that the OFT should have further sub-divided the relevant

market, but that it should have adopted a lower Step 1 percentage and a lower MDT for Sisk, to reflect the fact that the vast majority of Sisk's turnover in the relevant market, whether tendered or non-tendered, was unaffected by cover pricing. Only in the alternative does Sisk ask for re-definition of the market to exclude non-tendered turnover.

335. Given our conclusions on the issues to which Sisk's "primary" contention is directed, this new market definition point does not arise. In any event we doubt that it is appropriate to seek to raise a matter of this kind for the first time by way of a supplementary submission after the hearing. Market definition is very much a question of fact, and is in a different category from, for example, questions relating to the interpretation of the Guidance such as the issue as to the correct year for assessing relevant turnover.

336. In the light of the above, and notwithstanding Mr Unterhalter's valiant arguments, we consider that the penalty of £6,191,627 imposed upon Sisk in respect of a single instance of cover pricing committed in 2003 is manifestly disproportionate and excessive. It follows that the penalty cannot stand and should be re-assessed by the Tribunal pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act.

Tribunal's assessment of the penalty

337. In accordance with the approach we have adopted in all the other Present Appeals, we first arrive at a Step 1 provisional penalty by applying 3.5% to the undertaking's turnover in the relevant market for the last business year prior to the date of the infringement. Sisk's turnover in the West Midlands Office sector in that year was £8,420,091. This figure, which has not been disputed by the OFT, produces a Step 1 penalty of £294,703.

338. We must next consider whether any adjustment, upwards or downwards, is required in order to punish this undertaking and to deter it and others from committing infringements of this kind, whilst respecting the principles of fairness and proportionality. In this respect, it is necessary to have regard to all relevant considerations, both general and specific.

339. As seen, much emphasis has been placed by Sisk on there being but a single infringement. The undertaking was included within the scope of the OFT's investigation by virtue of having been originally suspected of having committed six infringements, which were subsequently admitted by Sisk as a *quid pro quo* for benefiting from the terms of the FTO. Following further investigation by the OFT the number of alleged infringements was reduced to two in the Statement of Objections, and finally to the single infringement found in the Decision. We are simply not in a position to judge whether or not Sisk was more heavily involved in cover pricing than this single instance. Nor should we attempt to make any such judgment. It was emphasised by Sisk at the hearing that any concessions to the OFT were made as a matter of convenience and pragmatism in the context of the FTO. The fact is that the undertaking has been held responsible, and falls to be penalised, for one infringement and one infringement alone.

340. We are told that at the time of the infringement in 2003 Sisk's total worldwide turnover was £543,917,000 of which £109,539,000 (or about 20%) was in the UK. The corresponding figures for 2008 are: £1,158,667,000 and £262,454,000 (about 22.5%). Thus over three quarters of the undertaking's turnover in both 2003 and 2008 was generated outside the UK. We are also told that the vast majority of the UK element of the turnover is in construction. Therefore the undertaking is of considerable size and has a substantial and continuing presence in the construction industry in the UK.

341. In all the circumstances, we consider that the sum of £294,703 is insufficient in order to fulfil the twin objectives. We propose to increase that sum to £500,000 at Step 3. Giving credit for the discounts allowed for in the Decision, namely a reduction of 5% for compliance and a further 25% for acceptance of the FTO, this results in a final sum of £356,250. The original penalty is varied accordingly.

IX. CONCLUSION

342. In the light of the above, the Tribunal unanimously varies the penalties imposed on the Present Appellants as follows:

Kier Group plc and Kier Regional Limited	Infringement 77: £566,667 Infringement 162: £566,667 Infringement 235: £566,667

The original total penalty of £17,894,438 is therefore varied to £1,700,000.

Ballast Nedam N.V.	Infringement 41: £178,125 Infringement 47: £178,125 Infringement 48: £178,125

The original total penalty of £8,333,116 is therefore varied to £534,375.

Bowmer and Kirkland Limited, B&K Property Services Limited	Infringement 18: £256,000 Infringement 85: £1,040,000 Infringement 134: £228,000

The original total penalty of £7,574,736 is therefore varied to £1,524,000.

Corringway Conclusions plc	Infringement 103: £59,672 Infringement 119: £59,672

The original total penalty of £769,592 is therefore varied to £119,344.

Thomas Vale Holdings Limited and Thomas Vale Construction Limited	Infringement 30: £57,000 Infringement 107: £57,000 Infringement 197: £57,000

The original total penalty of £1,020,473 is therefore varied to £171,000.

John Sisk & Son Limited and Sicon Limited	Infringement 166: £356,250

The original total penalty of £6,191,627 is therefore varied to £356,250.

343. Subject to any representations by the parties each of these penalties will be subject to interest at 1% above Bank of England base rate from 24 November 2009 to the date of payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the 1998 Act.

The President	Andrew Bain	Peter Clayton

Charles Dhanowa
Registrar

Date: 11 March 2011