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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1131/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 June 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

PROFESSOR PETER GRINYER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ROBERT WOODHEAD (HOLDINGS) LIMITED
(2) ROBERT WOODHEAD LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. George Peretz (instructed by DLA Piper UK LLP) appeared on behalf of the Appellants.

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

1 THE CHAIRMAN: Yes.

2 MR. PERETZ: Sir, I am now appearing for Robert Woodhead (Holdings) Limited and Robert
3 Woodhead Limited. As this morning, the Office of Fair Trading is represented by Mr.
4 Beard and Mr. Woolfe. As you know, sir, Woodhead's grounds of appeal and skeleton
5 argument adopt and repeat the submissions of Renew in relation to the year of turnover
6 issue. Fortunately, that does not mean that I have to repeat what I said this morning about
7 that issue.

8 That is subject to just one minor point arising, which is the position of the Commission in
9 relation to its practice of choice of year of turnover. The position, in a nutshell, is this.

10 Before 1998 the Commission's practice (certainly up until 1998) had been to take as a
11 starting point of the methodology it tended to use the turnover in the relevant market either
12 at the time of the infringements, or the closing year of the infringements. An example of
13 that is a case we are going to come to in any event later. It is a case called *Boël v*

14 *Commission* at tab 74 in volume 5 of the authorities bundle, which is a 1989 case. I do not
15 know if the Tribunal wants to go to it or not, but the short point is that there you have an
16 infringement that lasted between 1980 and 1985, (and we will come to the relevant
17 paragraph later in a different context), the choice of reference year was 1985, so it was the
18 last year of the infringement. The decision, as one can tell from the case number because of
19 course the appeal was the same time as the decision, was 1989, some years later. That is the
20 Commission's pre-1998 practice. We are all agreed as to what the post-2006 practice is
21 because it is all in the 2006 guidelines.

22 Between 1998 and 2006 the position is a bit more complicated, and that is because under
23 the 1998 guidance (as I have said this morning) the Commission proceeded by taking a
24 lump sum of so many million Euros as a starting point. If one reads the guidance, that is
25 what emerges from it.

26 What actually happened in the period 1998-2006 is that the Commission, in cartel cases,
27 tended to differentiate undertakings, when there were a number of cartels, into different
28 groups. It had a higher starting point for undertakings in one group than it did for another.
29 The basis upon which it assigned undertakings to different groups fluctuated a bit in the
30 period after 1998, but by 2004 (which is where we are looking at) the practice had pretty
31 well settled down. The Commission started by looking at relevant turnover in the market at
32 the date of the infringement. The case that I referred to, that I don't have in front of me, was
33 the *Industrial Threads* cartel decision which was taken in September 2005 (from memory).

34 We will send a copy of that to the Tribunal. I know about that because I was involved in

1 the appeal against that decision. In that case, it is pretty clear when one sees the decision,
2 what the Commission was doing. It assigned the undertakings to various groups by
3 reference to relevant turnover and infringement. That reflects practice that had built up over
4 the previous few years.

5 What one can say is that in 2004 a competition lawyer reading the OFT's guidance and the
6 consultation document would have come from a background where it was fairly settled.
7 The way the Commission went about things was to look at relevant turnover in the relevant
8 market at about the time of the infringement. The short point one can make is given what
9 the OFT now says the guidance meant involved, on any view, a departure from what the
10 Commission has been doing since 2006, was in fact doing in practice in the period before
11 2006 and had definitely been doing before 1998 in terms of choice of reference year, one
12 would have expected that to be highlighted to the competition law community as a distinct
13 difference from what the Commission was doing. Of course, it is somewhat odd that the
14 OFT should take a rather different approach from the Commission here. One rather
15 struggles to find any reason why they appear to be different, particularly in the context of
16 the modernisation regime the general purpose of which was to try to harmonise the
17 approach to these things rather than create differences. That finishes off the year of
18 turnover point.

19 I now turn to the particular situation of Robert Woodhead. I have called both companies
20 together "Woodhead" for convenience. There are again three infringements, three separate
21 tenders. As it happened, Woodhead was unsuccessful in relation to all these tenders. No
22 compensation payments. Woodhead received cover pricing in all of the cases. This is not a
23 case where it gave a cover price.

24 Woodhead is an SME in the jargon, a small/medium sized enterprise, a small company. It
25 is a local construction firm based in Newark in the centre of the East Midlands. That is
26 unfortunate for Woodhead, and I say it is unfortunate for Woodhead because as a result, all
27 its turnover in the relevant product market falls within the relevant geographic market
28 defined by the OFT, namely the East Midlands. Newark is right in the centre of that. Had
29 Woodhead had the foresight to locate itself in Buxton or Derby, at the edges of the East
30 Midlands, where a lot of its turnover would have been outside the East Midlands,
31 it would have been treated rather less harshly.

32 The infringements are summarised in paragraph 8 in the Notice of Appeal and I do not
33 really need to go to those. For the Tribunal's note the penalty calculation is at tab 6 of the

1 Notice of Appeal. Woodhead is not an MDT case, so the MDT point that I was arguing this
2 morning in relation to Renew does not apply to Woodhead.

3 Apart from the points I was just making about year of turnover, there is a further aspect of
4 Woodhead's position which conveniently allows me to develop the year of turnover point in
5 a particular way of applicability to Woodhead. It goes on to a rather wider point that I am
6 going to make. That is what I call the "spike point" if OFT's choice of year happens to fall
7 in a year which is rather untypically spiked in turnover.

8 The OFT's approach that is adopted means that where turnover goes up and down from year
9 to year the amount of the penalty that you will actually pay, the crucial input that goes into
10 what Mr. Thompson in a different skeleton calls the OFT's "fining machine", the input into
11 the fining machine critically depends on exactly when the OFT gets round to taking its
12 decision, which was never anything that was in Woodhead's hands and, to some extent, not
13 in the OFT's hands either.

14 If the OFT is blown off course, a crucial member of its team resigns, or there is a judicial
15 review that slows things up, the consequences (because turnover then falls in a different
16 year) can be quite radically different penalties as far as undertakings whose turnover is quite
17 variable is concerned. Of course, in the construction industry, particularly in a small
18 company like Woodhead which occasionally wins quite large contracts, turnover can vary
19 quite a lot from year to year, particularly when you start breaking it down into particular
20 sectors as the OFT has done.

21 If you go to paragraph 47 page 14 of our Notice of Appeal you can see the effect of this as
22 far as Woodhead is concerned. These figures are, I think, (and Mr. Beard will stand up if I
23 am wrong) correct. We understand that none of the particulars here are in dispute. In fact, I
24 understand that the figures were in front of the OFT in one way or another at the time it
25 took its decision. Again, Mr. Beard will correct me if I am wrong. What you have is the
26 2006, 2007, 2008, 2009 figures. One can see, if one looks at the left hand column, if the
27 OFT had taken in 2006 the consequence in penalty in the right hand column in the right
28 hand is just over £300,000. Similarly in 2007 and 2008. Because the OFT took its decision
29 in 2009, the penalty after steps 1 and 2 is almost twice as high as in the previous years.
30 That is because of the way that various contracts and projects panned out. Woodhead's
31 turnover in the relevant sectors in that year was rather higher than it had been in the
32 previous years.

1 It is not in dispute that that is not taken into account at all in the OFT's decision. In fact, I
2 am told that the reason for the high figure in public housing, which is one of the sectors, is
3 that there was a particularly large project in public housing in that year.

4 The first point one can make about that is it is an aspect of showing that the pre-decision
5 turnover approach is misguided because it risks fixing penalty by relation to an untypical
6 year which is far removed from the time of the infringement, many years later. To put it
7 another way, I think at one point the OFT tried to defend its approach in terms of
8 crystallising gain obtained from the infringement. Somehow the later the year the pre-
9 decision turnover was likely to incorporate any gain. If that is right, the OFT's suggestion
10 must be somehow that Woodhead's gain in 2009 is twice what it would have been in 2008.
11 That is bizarre.

12 In any event, even if the OFT gets away with the year of turnover approach as a matter of
13 principle, it should have stood back and looked at the consequences of that approach in
14 Woodhead's case. It should not have adopted blinkers and simply looked only at the 2008
15 figure and not at the previous years' figures that it had.

16 What the OFT says in response to that (reference footnote 31 to paragraph 61 of the
17 defence) is essentially that it had to put blinkers on because to take the blinkers off would
18 have contravened the principle of equal treatment. But it is fairly trite that the principle of
19 equal treatment does not require you to put blinkers on. Unsurprisingly, we say: you take
20 the blinkers off and you look at all the relevant circumstances in the round.

21 A number of very skilled advocates in these appeals have made that point in all sorts of
22 different ways. That is the essence of the points just made, by me and by a lot of other
23 people. The fact is that Woodhead is simply not in the same position as an undertaking that
24 routinely turned over £11 million a year in the affected sectors instead of just on a one-off
25 occasion in 2008, having a relevant turnover of £11 million. The OFT should have taken a
26 rather wider view.

27 THE CHAIRMAN: Just remind us how this spike was drawn to the attention of the OFT.

28 MR. PERETZ: What I have been told is that the OFT had the relevant figures, but I cannot
29 remember off the top of my head whether we made a submission on that. Yes we did. I am
30 told that the point was made. I was not involved in the case at that time. I am told by those
31 who were that that is the position.

32 If one accepts some of the OFT's logic in defence of its approach, then why did it not look
33 at the 2006 and 2007 figures? If it is right that an infringement causes a gain which is likely
34 to be reflected over time, then the 2006/2007 figures are of equal relevance to the 2008

1 figures. Similarly, if the pre-decision turnover approach is defended on the basis that it will
2 reflect far more gains from infringement, then equally the 2005, 2006, 2007 figures are
3 going to be quite as relevant as 2008 figures. So we simply do not understand why the OFT
4 says that it could only look at one year's figures.

5 That is particularly so and in another context you will see that there is a discussion about
6 this in the skeleton arguments, when the OFT came to look at, for example, hardship, the
7 OFT did stand back and take a three year approach. So it did not just go for one year's
8 figures. It sensibly took the view that you had to look at a performance of an undertaking
9 over time.

10 The other response of the OFT to this line of appeal, apart from the invocation of the
11 principle of equal treatment, has been that by running this line of attack we are focusing too
12 much on steps 1 and 2 and ignoring other later steps in the calculation. The problem with
13 that argument is that the OFT simply has not done anything to correct the distortions caused
14 by the choice of an untypical year. If one looks at the scheme of calculation, leaving out the
15 MDT cases, the starting point is based on turnover in a particular year, and only that year.
16 At step 3 nothing happens so there is no MDT. At step 4 there are a few adjustments up and
17 down to reflect directors' involvement, cooperation and so on. Then the machine has
18 churned out the penalty. The OFT simply does not do anything else to correct the results in
19 virtually all cases. In very marginal cases, right at the extremes where one suspects the
20 OFT has realised that the approach that is adopted has produced extremely odd results, an
21 attempt was made round the edges to clip back a bit. So you have the overall cap on fine
22 that nobody is going to be made to pay more than 4.5 per cent of worldwide turnover and
23 that is applied to a few undertakings. You have provision for undertakings with hardship
24 and that sort of thing.

25 So one gets the sense that the OFT realised that its method could produce very problematic
26 results, but apart from a bit of fiddling round the margins in a few cases it has not stood
27 back, looked at the results produced by its fining machine and tried to work out, in the
28 context of particular undertakings, whether the result makes sense. A phrase used by Mr.
29 Swift QC and Ms. Smith in their skeleton argument (and they will probably develop before
30 you on Friday) is that the OFT simply did not stop and conduct a sense check to see whether
31 the outcome of its fining machine made sense in the overall context. Certainly (I think it is
32 beyond dispute) nothing was done to deal with the spike point.

33 In the skeleton arguments there is discussion of two relevant cases in the Community
34 Courts: *Boël* in the CFI and *Fiskeby* in the ECJ. We have already had a look at *Boël*, but if

1 we go back to that case at tab 74 the relevant passage is at page 911 of the report numbering
2 and paragraph 133. I would invite the Tribunal to read that. (Pause)

3 I do not think the OFT really disputes this. What one sees there is the Court of First
4 Instance looked at the position and it said the Commission should have taken into account
5 the fact that for *Boël* the choice of 1985 as a reference here had a particularly disparate
6 impact on it because its turnover in the relevant market at that time was high compared with
7 other undertakings. The CFI says that the Commission should have accepted that, and its
8 failure to do so called for a reduction in penalty. *Fiskeby* is broadly to the same effect.
9 Obviously, there are certain differences to procedural context, but that is what the
10 community courts are saying.

11 Of course, it is not always true that one has to look at a number of years' turnover. There
12 are clearly cases where it is entirely appropriate just to take one year and ignore any minor
13 differences there may be across years. In a situation like this one where there is quite a
14 difference for a small company between 2008 and the previous years' figures, the OFT
15 should have stopped and conducted a sense check. It is not part of the OFT's case that it
16 ever did that.

17 THE CHAIRMAN: Your contention is that in this case, because it was drawn to the attention of
18 the OFT that there was a spike, they should have been prepared to look either at a different
19 year, or at an average of years?

20 MR. PERETZ: Yes, they could have done either of those. It could either have taken an average –
21 taking a different year might not have been the right thing to do. Probably the right thing to
22 do would have been to take an average. One accepts that there may be a rather rough and
23 ready element in this. One was not expecting absolute numerical precision. They should
24 simply have looked at it, said does this make sense, and knocked it down either by taking an
25 average or in some other rough and ready method and made a reduction accordingly.
26 The point does not actually depend on what the OFT happened to know, of course, because
27 this Tribunal has unlimited jurisdiction. In fact, the OFT did know and so I can put it as a
28 criticism of the OFT that it did know and did not take it into account. Of course, it is
29 entirely open to this Tribunal to say, even if for some reason we had not told the OFT about
30 it, when confronted with the figures that this is a fair point and we are going to reduce the
31 penalty on Woodhead accordingly.

32 THE CHAIRMAN: Just looking at the OFT for the moment, had the OFT, say, applied the total
33 turnover in the three relevant sectors for 2008, which was not much more than a third of the
34 equivalent figure for 2009. To what extent would that have permitted other undertakings to

1 complain that they had not had equal treatment because, in the case of Robert Woodhead
2 the OFT had allowed the company to choose a year?

3 MR. PERETZ: That is one reason why I was slightly hesitant about saying that the right thing to
4 do would have been to choose a year. One can see that it is not the right approach for an
5 undertaking to be given the opportunity to choose their best year out of several. But my
6 response to the rather broader point is that I think you are making is simply that if other
7 undertakings were in an equivalent situation they too could have (perhaps did, we do not
8 know) draw that to the attention of the OFT. If the point is good for Woodhead, it would be
9 good for those other undertakings too. I am not arguing that Woodhead should be treated
10 any more favourably than anybody else in a similar situation. I simply do not see that there
11 is any equal treatment issue here. It may be, I do not know, that Woodhead was the only
12 undertaking that spotted the point and made it to the OFT. That may be a criticism of the
13 advisers of those other companies, I simply do not know.

14 Taking the point now more broadly, we have put the appeal on the basis that the overall
15 treatment of Woodhead has been unfair and discriminatory in a number of respects, and we
16 make it clear what we mean by that in our skeleton argument which makes what we call the
17 central point. What has happened here is that the OFT's fining machine has had a
18 disproportionate effect on Woodhead because of where it is and also the choice of year of
19 turnover. To put it bluntly, Woodhead was in the wrong place and the turnover was at the
20 wrong time. As a result, it has had particularly harsh treatment. It had turnover that was
21 particularly high in 2008 and because it was based in Newark and was a small company, all
22 its turnover was in the region chosen by the OFT as the relevant geographic market. It has
23 drawn a series of short straws as far as the OFT's methodology is concerned. The result is
24 that Woodhead finds itself, when you look at the penalty by reference to overall turnover, in
25 the top bracket. From recollection, there are 69 other companies in a lower bracket in those
26 terms, and only 27 above Woodhead.

27 That is a direct and inevitable consequence of two things. The first is that the inputs that the
28 OFT puts into its fining machine are turnover achieved in somewhat arbitrarily defined
29 product markets, somewhat arbitrarily defined geographic markets, an arbitrary number of
30 years after the infringement. I made this point this morning. The choice of base simply
31 does not produce a result which correlates with harm or seriousness or deterrence or
32 anything else. It is simply decoupled from an assessment of harm because it does not look
33 at the position of the undertaking on the relevant market at the time of the infringement.

34 And it is decoupled from an assessment of deterrence because it does not look at the overall

1 size of the undertaking and leads companies like Woodhead, which have a
2 disproportionately high proportion of their turnover in the relevant market, to unduly harsh
3 treatment.

4 I cannot, at this point, resist quoting what the OFT says about these points at paragraph 42
5 of its skeleton in Woodhead. What it says is:

6 “... the OFT does not argue that there is a necessary correlation between the
7 seriousness of the infringements and Woodhead’s turnover in the year prior to the
8 Decision; [we agree with that, but add there is no reason to suppose there is any
9 correlation at all] it does however, contend that applying a percentage starting
10 point to recent rather than historic turnover, ensured that there would be a broad
11 correlation between the seriousness of the infringements and the impact of the
12 penalties imposed upon Woodhead.”

13 I tell the Tribunal that I struggled rather hard with this rather Delphic utterance, but I simply
14 cannot work out what it means. I rather wait with interest for Mr. Beard to tell me in plain
15 English what on earth the OFT is trying to say here.

16 The first problem so far as Woodhead is concerned is that the input put into the fining
17 machine results in Woodhead’s unduly harsh treatment. The second problem is that within
18 the fining machine, once the fining machine fires up and gets going it produces its
19 calculations and out comes a number at the other end. Another simile used for this process
20 is the "Procrustean bed", which simile struck not just me but other advocates with a
21 Classical background perhaps. It simply treats everybody the same without regard to the
22 relevant differences between them. Numbers put in, machine churns away and out come
23 numbers at the other end which are simply then not subject to any form of sense check.
24 So the end result, as we pointed out at paragraph 5.9 of our skeleton and paragraph 39 of
25 our Notice of Appeal, is that Woodhead has to pay fines that, judged by reference to a
26 number of criteria including percentage of its total turnover, by reference to its profitability,
27 by reference to its asset based, are much higher than other undertakings. What is
28 particularly striking is that the result is that Woodhead is having to pay fines a percentage of
29 its total turnover which are much higher than imposed on other undertakings that were
30 involved in compensation payments, which the OFT rightly regards as far more serious.
31 The comparison we make there is with Baggaley.

32 In our skeleton we make a number of comparisons with other companies on a whole range
33 of different bases to show that if you cut the cake in a number of ways, Woodhead appears
34 to have been fairly harshly treated. I also accept and entirely adopt the point made by Mr.

1 Thompson in his skeleton for North Midland paragraph 56 that as far as Woodhead is
2 concerned what one ends up with is a penalty of several hundred thousands pounds, and that
3 is a range which Mr. Thompson points out is, in the criminal context, regarded as
4 appropriate for serious health and safety offences resulting in death. For a small company
5 involved in three one-off infringements, each of which essentially consisted of receiving an
6 ill-advised fax, not only killed no-one but cannot be shown even to have hurt anyone even
7 financially, this is grotesque.

8 The OFT in its skeleton has been rude about a number of the ways in which we show that
9 Woodhead has been harshly treated in comparison with others. Relatively few of those
10 comparisons have been disputed on the facts. Of course, a single comparison against a
11 particular measure of financial strength does not, on its own, show very much. But what we
12 are trying to do – and one has to be a bit selective, otherwise the exercise goes on to fill the
13 Royal Albert Hall – is look at a number of ways in which Woodhead have drawn the short
14 straw and been treated harshly compared to others. It is all an inevitable consequence of the
15 peculiar methodology adopted by the OFT.

16 At one point in its skeleton the OFT accuses us of asking a silly question and getting a silly
17 answer. Our response to that is if you use a silly methodology you get a silly result.
18 What should the Tribunal do about it? The Tribunal is plainly not in a position to come up
19 with a fresh methodology of its own. What we suggest is that the Tribunal exercise the
20 jurisdiction that the Court of Appeal says it has at paragraph 231 of *Toys and Games* which
21 we quote in full at paragraph 5.18 of our skeleton.

22 In essence, when a Tribunal takes the view that the penalty imposed is well above that
23 needed for deterrence (and it is relevant to bear in mind at that point that the OFT thinks
24 that 0.75 per cent of worldwide turnover is enough to satisfy the need for deterrence) and
25 generally too high, the CAT should step in with its own broad assessment of a fair penalty.
26 That is what we ask it to do in this case. Those are my submissions.

27 THE CHAIRMAN: I was just looking at the starting point. Do you have anything to say about
28 the starting point? One of the things that has struck us in looking at these cases we have
29 heard is that the 5 per cent starting point, and in relation to infringement 78 the 7 per cent
30 starting point, seem to be accepted.

31 MR. PERETZ: Of the assessment of seriousness?

32 THE CHAIRMAN: Yes.

33 MR. PERETZ: We are not taking as a point the 5 per cent as such. The problem is the 5 per cent
34 as applied to a rather daft figure, and that produces a result that is disproportionate.

1 THE CHAIRMAN: Of course, if a lower percentage had been applied to the same figure, there
2 would have been a different result.

3 MR. PERETZ: Yes. I find it difficult to conceptualise quite how this would have been done, but
4 if the OFT had produced its calculation and stood back and said: well, this looks rather high,
5 let us go back and change the percentage up and down a bit so as to produce a result that
6 looks rather more just, then that might have been a way of dealing with the situation. I am
7 not sure it is the most obvious way of dealing with it, but it might have been a way of
8 dealing with it.

9 THE CHAIRMAN: We are faced with a differing approach in differing cases from differing
10 groups of lawyers, which is perfectly normal and no complaint about it. But in some cases
11 the starting point is being questioned. The reason I raise it with you, Mr. Peretz, is you said
12 at the beginning of your submissions this afternoon that they did not obtain any of the
13 tenders?

14 MR. PERETZ: Yes.

15 THE CHAIRMAN: There is, as far as we are aware, no evidence of any advantage gained from
16 cover pricing in relation to Woodhead, and we are aware, on the evidence we have heard in
17 a number of cases, that it was a practice that was followed by quite a number of firms. Five
18 per cent – 7 per cent more strikingly so – is at a particular point in a scale of 0-10 in terms
19 of seriousness.

20 MR. PERETZ: We are not putting this as a challenge to the 5 per cent figure. It is an element of
21 the assessment which the Tribunal has to make, whether the penalty is just too high (words
22 used by the Court of Appeal). I do not put it as a self standing point that the 5 per cent
23 figure is wrong. What I do say is that when one stands back and looks at the fact that
24 Woodhead is having to pay a penalty of many hundreds of thousands of pounds, it is an
25 element in the assessment. The background points about the infringement are part of that
26 mix.

27 THE CHAIRMAN: I said in infringement 78 it was 7 per cent, that was because I had a misprint
28 in one of the documents in front of me. It is 5 per cent.

29 MR. PERETZ: I hesitated.

30 THE CHAIRMAN: That is why I started to raise it, because I was puzzled by that, but even so,
31 what you are saying is that even if we were of the view that the OFT had got it right in
32 terms of its starting point for all the other issues you were not contesting the 5 per cent, as
33 you are not, nevertheless we can come to the conclusion that although they have got
34 everything else right, the figure of £411,000 is just too high and we have to correct it?

1 MR. PERETZ: Yes.

2 THE CHAIRMAN: On the grounds that it is just too high, even if they have got everything else
3 right?

4 MR. PERETZ: Yes.

5 THE CHAIRMAN: It is not very satisfactory.

6 MR. PERETZ: I am not going to lie awake at night and worry about it, because I do not think it is
7 a likely conclusion, but in that unlikely situation I suppose it is what I am saying.

8 THE CHAIRMAN: Right. Thank you very much. Mr. Beard. I should say that we have a
9 navigation table from this morning's case that was handed to us. It has a bit of Miss
10 Bacon's mark over it, but maybe she learned about this from you.

11 MR. BEARD: Oh dear! I do not think Miss Bacon is to be blamed for that one. We did have
12 another navigation table for now, if that is of assistance. We do not know quite what you
13 mean by the signature of Miss Bacon.

14 THE CHAIRMAN: It might be a house style. (Handed)

15 MR. BEARD: As I say, they flow on from the tables that were at the back of the consolidated
16 defence. Sadly it does not vary with different versions of skeletons.

17 Before I turn to deal with last business year, just to pick up on Mr. Peretz wonderful
18 example of fining practice in the Commission since perhaps the early 1970s, there is a
19 degree of concern that actually that is not an accurate approach and assessment of what was
20 going on in Commission fining practice prior to 1998.

21 One learned commentator, Mr. Van Bael, in 1995 wrote in the European Competition Law
22 Review (ECLR) Vol 4 page 237:

23 "The fining procedure before the Commission resembled a lottery with random
24 figures simply magically appearing at the end of a decision."

25 There was no guidance prior to 1998. All there was was regulation 17/62 and Article 15/2
26 thereof, which placed a cap on the maximum penalty that could be imposed. As has been
27 referred to before, this was at a time when strange notions of units of accounting were used.
28 So:

29 "The Commission may, by decision, impose on undertakings or association of
30 undertakings, fines from a thousand to a million units of accounting, or in excess
31 thereof, but not exceeding 10 per cent of the turnover in the preceding business
32 year of each of the undertakings participating in the infringement."

33 So that was the only constraint. One of the systematic complaints about the way that the
34 Commission operated through the 70s, 80s and 90s was that that operated, even subject to

1 the constraints of the court building up jurisprudence about reasons having to be given to
2 some degree, as meaning that there was a great looseness in the way that the Commission
3 dealt with matters and which figures it used and when. In the circumstances, this Tribunal
4 really should not take as given the idea that there was a systematic approach to using a year
5 of turnover prior to the infringement, or the year most immediately prior to the culmination
6 of an infringement if it was a long running infringement, as being the consistent and
7 unimpeached basis on which it was applied in many cases.

8 I will come on to *Boël* itself, but I think that the footprints in *Boël* do suggest that 1985 was
9 the business year of turnover. It is right that the infringement ended at the end of 1995. Of
10 course, it goes without saying that if you were taking last business year, or your last
11 financial year, prior to the culmination of an infringement, it would not actually be 1985
12 ordinarily that you would take in those circumstances. It would be the 1984/1985 period.
13 So that sort of systematic approach does appear to have been absent.

14 Then we move to the situation under the 1998 guidelines which are in the bundle, the first
15 Commission guidelines that were in place. You have this vastly different structure to
16 which Mr. Peretz has already referred whereby you identify in broad term where someone
17 fell in one of three categories and Mr. Peretz is right that then relevant market turnover
18 might have been used and the periods used could be those preceding infringement decisions.
19 But to suggest that that was definitely the way that it was always applied I think would go
20 too far in those circumstances. Evidence from the Bar as to the opinion that would be
21 brought to bear on any interpretation by the notional objective competition lawyer (if such a
22 thing exists) is a piece of evidence that this Tribunal should be extremely slow to accept.
23 With those points made – because they are only in relation to the Commission approach and
24 are therefore to some extent a side issue – I turn briefly to the last business year. Given the
25 way that Mr. Peretz has dealt with this there is little for the OFT to add in relation to how
26 the guidance is to be interpreted. Those points were made this morning. I dealt with Mr.
27 Peretz's arguments then.

28 The only point that I cannot resist making and goes to the second set of arguments
29 concerned with Woodhead, is of course that Mr. Peretz laboured the fact that the guidance
30 was binding, and the guidance had to be properly applied, and at step 1 he urged this
31 Tribunal that there was no other interpretation of that guidance but that the year of turnover
32 prior to infringement was the one that should be used at step 1. His case this afternoon is
33 that some sort of aggregated system should be used at step 1. He goes on and has an
34 additional submission that you should think about these things at the end of the process in

1 the round, but his preliminary submission was that you could take these matters into
2 account and actually the OFT had been illegitimately applying blinkers in this regard.
3 Of course, those two submissions are completely incompatible. We say he is wrong about
4 the interpretation of step 1 and that it is not the year of turnover prior to infringement. We
5 say the interpretation is clear. But we do say that it is a year, and that is what “last business
6 year” clearly does mean. It means a year in the terms of the guidance. We do accept that
7 we should apply that. Therefore, his idea is that we should be adopting alternative years, a
8 blend of years, a mix of years, however he wants to put it. As, Mr. Chairman, you
9 suggested, the difficulties or alluded to the potential difficulties of working out how you
10 pick these things, particularly when you are talking about a large cohort of undertakings, as
11 you do in this decision, what mechanism you pick and how you do it fairly at that step is a
12 separate issue entirely. Nonetheless, that blended approach does not fit at all with the
13 language of the guidance.

14 I turn to the points about Woodhead having an unduly high penalty because it achieved a
15 very high turnover in the year prior to the decision. The OFT’s decision to apply the same
16 approach to Woodhead as it did to other undertakings was to ensure that there was
17 consistency. The idea that this amounts to a breach of the principle of equal treatment is
18 quite remarkable. Of course, Mr. Peretz says that the method adopted by the OFT was
19 “mechanistic” or “Procrustean”. Mechanistic is wrong. For reasons that have been
20 adumbrated in previous hearings, the OFT considered whether there were relevant
21 differences to be taken into account when it came to consider each of the steps, and decided
22 that, subject to certain alterations, such as MDT and the penalty capping mechanism, there
23 was not good reason to treat these cases differently.

24 As for Procrustean, whilst it is an elegant piece of classical criticism, it is just worth
25 remembering what happened with Procrustes. He was a terribly hospitable chap. He kept a
26 house by the roadside where he offered hospitality to passing strangers who were invited for
27 a pleasant meal and a night’s rest in his remarkable unique bed. Procrustes described it as
28 having the unique property that its length exactly matched whomsoever lay upon it. What
29 Procrustes did not volunteer to the passing travellers was the method by which his one size
30 fits all was achieved. As soon as the guests lay down Procrustes went to work on him,
31 stretching him on the rack if he was too short for the bed or hacking off his legs if he was
32 too long, one way or another the guest was fitted to the bed.

33 Of course, that is not the case here. The OFT takes measurements. It takes recent
34 measurements of the company and then, using its guidance process, builds the penalty bed

1 for the appellant to lie in. The measurement it uses is actually the total size of the company,
2 the turnover, the height of the guest in Procrustean terms. What more considerate host
3 could there be, that we tailor the size of the bed to the most recent measurements of height
4 of the guest who is passing by.

5 So the criticism that we are Procrustean is just plain wrong. The OFT methodology had the
6 effect of calibrating the effect of the fine on the undertaking according to the scale of its
7 presence on the relevant market and, in broad terms, its scale prior to the decision. That is a
8 reasonable approach for the OFT to adopt.

9 The OFT freely acknowledges that step 1 of its methodology considered in isolation was,
10 insufficient to take account of all relevant differences between different undertakings.

11 Indeed, if the OFT considered that a simple one step methodology was sufficient to do so, it
12 could apply it. It would apply it, it would make the whole process a lot simpler. The OFT
13 considers, however, that the full five step methodology which it is required to have regard
14 to and as consulted on, as set out in the penalty guidance and as applied with the relevant
15 discretion to the various steps, is a sufficient way of dealing with these matters.

16 So in so far as Woodhead's point is simply that its penalty was higher than it would have
17 been had the OFT applied the same percentage to Woodhead's turnover in the year prior to
18 infringement, the OFT acknowledges that such an approach has the effect of imposing
19 larger fines in absolute terms on undertakings that have increased their turnover, as
20 compared with those that have decreased turnover. Where an undertaking is larger, a larger
21 fine is necessary to have the same effect on it in proportion to its ability to pay.

22 I understand that yesterday Mr. Robertson QC suggested that all parties, or at least
23 appellants, were made worse off by using the year before decision turnover methodology.
24 That is not correct. I understand from the Office that there are a number of circumstances
25 where earlier turnover, if you had used the turnover in the year prior to infringement, would
26 indeed have been higher than the relevant turnover and total turnover that was applied in the
27 decision itself.

28 So it goes to the point that there are all sorts of variations and some people are winners and
29 some people are losers where you use a consistent approach. We accept that, but it is
30 consistent with our policy objectives that this methodology is used. The step 1 process
31 focusing on seriousness, using a consistent method of identifying the relevant turnover to
32 which the calibrated scale, which is not challenged, the setting of that scale, is applied, and
33 in addition the final turnover maximum being by reference to turnover prior to decision is
34 important in ensuring that deterrence as a policy is also being met.

1 THE CHAIRMAN: I understand Mr. Peretz to be saying that in this case it was so obvious that
2 Woodhead's legs dangled far over the edge of the bed, taking that particular year of
3 turnover, that the OFT should have considered it to produce a more, shall we call it,
4 Procrustean solution.

5 MR. BEARD: It is a strange road to having your legs lopped off ----

6 THE CHAIRMAN: I think we have flogged this metaphor to death.

7 MR. BEARD: I do not if the Tribunal actually has the full copy of the defence with the attached
8 annexes anywhere.

9 THE CHAIRMAN: Yes, we do.

10 MR. BEARD: It might be worth pausing here. Although Mr. Peretz seeks to criticise the Office
11 for its use of the capping mechanism, and indeed the financial hardship mechanism as being
12 wholly inadequate, actually what those mechanisms did was ensure that there was a broad
13 band within which all the penalties fell by reference to a percentage of global turnover.
14 The annexe I was going to take the Tribunal to was annex B. The tables in the back of the
15 defence look something like this.

16 THE CHAIRMAN: Just pass one up and we will share it.

17 MR. PERETZ: I have got a helpful DLA A5 reduction, which I am afraid does cause a bit of
18 eyestrain.

19 THE CHAIRMAN: That is very helpful. Can you just tell me where Woodheads in the otherwise
20 illegible writing. I have got it underneath Robinson, above Richardson Projects. It is a
21 percentage of what?

22 MR. BEARD: What this is is a percentage of total turnover, and you will see that each of the
23 companies in question, or the undertakings in question, what you have is a left hand bar
24 which is the penalty calculation after step 3 after adjustments, and the penalty at step 3
25 before the capping mechanism.

26 THE CHAIRMAN: It does not make any difference in this case.

27 MR. BEARD: No, it does not make any difference in this case. The point I am making here is
28 that what one can see from this is overall a number of spikes. Those spikes only relate to
29 the penalty after step 3 before the capping mechanism. So the effect of the capping
30 mechanism was to draw those spikes down. What you get is a situation whereby all of the
31 penalties fall within a broad similar spectrum. That illustrated perhaps clearly there if one
32 turns on to annex C.

33 THE CHAIRMAN: It is just over 2 per cent of what?

34 MR. BEARD: That is global turnover.

1 THE CHAIRMAN: Of global turnover in the year chosen?

2 MR. BEARD: Yes, it is measured against the absolute maximum. If one turns on to annex C,
3 what we have here is the pre-leniency or FTO discount penalty. This the penalties when the
4 capping mechanism has been applied and adjustments, for instance, for director
5 involvement, increasing a penalty, co-operation, reducing a penalty. What one can see there
6 is about 20 down, again between Robinson and Richardson is Robert Woodhead. Mr.
7 Peretz is saying that the outturns that come in Robert Woodhead's case is an outlier, this is
8 extreme because of the way in which we have calculated this. As is evident from this, the
9 outturn in the Robert Woodhead case is not an outlier at all. It falls well within the broad
10 scope of overall percentage of global turnover that was the outturn penalty in a number of
11 these cases.

12 THE CHAIRMAN: This is 2 per entire plus a little bit of the global turnover for that year, for the
13 chosen year?

14 MR. BEARD: Yes.

15 THE CHAIRMAN: If another year was chosen it might be a higher percentage of a lower
16 turnover.

17 MR. BEARD: It may well be.

18 THE CHAIRMAN: So it might be less net money.

19 MR. BEARD: It might be less net money, that is obviously true, but if one is looking at this by
20 trying to identify the metric, one can see at the top of annex C the statutory fine cap at 10
21 per cent. Do you see the red line?

22 THE CHAIRMAN: Yes.

23 MR. BEARD: That is the statutory fine cap, and the penalties attributed are all well below that.
24 The relevant comparator, if you are doing any sort of broad comparison, it must at that
25 point, at the time when you are considering outturn penalties, be on that basis. Although
26 Mr. Peretz says you can smell the injustice of using a particular year because the absolute
27 level comes out higher than would otherwise be the case if you used a different year of
28 turnover or a different blended year of turnover, those are not relevant comparators.

29 MR. PROSSER: What this does not show is the relevant market. As in the SME the relevant
30 market being the regional market, they are all in the regional market, whereas a larger
31 company, it is only a smaller part of their total turnover, is it not? Do you get the point I am
32 trying to make?

33 MR. BEARD: It depends. It depends on the diversification. It is not necessarily the scale of the
34 company. If you had a company that specialised in major construction work in London, for

1 example, then the geographical market would not mean that that company was somehow
2 being dealt with differently. It is a question of the diversification, both across geographic
3 and product markets, that is absolutely right.

4 MR. PROSSER: Yes, but a lot of the smaller companies, their geographic market has become
5 their total market, has it not? In other words, if you take something like Kier, which is a
6 national company, a company like Woodheads is a regional company and it is their whole
7 market. These charts that you are showing us do not bring that out, do they?

8 MR. BEARD: No, these are the outturn, the later stage analysis, to show when you are
9 considering the exercise in the round what are the sort of penalties you are getting out at the
10 end of the whole process. That seems to be the only sensible way you can do it. You
11 cannot begin to carry out comparisons at part stages when mechanisms of adjustment will
12 be brought to bear at later stages. So whilst it may be possible to produce those figures,
13 they do not provide any sort of indication of the methodology that might indicate a sensible
14 comparison by any manner of means at all.

15 It should be noted that this is prior to leniency and FTO discounts as well. There is an
16 argument that you should actually be looking at these things with the leniency and FTO
17 discounts included as well, but we have not done that. It is merely for illustrative purposes
18 to show how it works.

19 Just going back to the relevant market point, the relevant market is not some sort of abstract
20 construct that is just randomly picked. As has been noted in previous submissions, although
21 Mr. Peretz likes to refer to it as “arbitrary”, it is nothing of the sort. Whilst the Office is
22 permitted by reference to the relevant case law not to go into all the full detail of a full
23 market analysis, actually if one looks at p.288 through to 338 of the decision – so a
24 substantial chunk of the decision – it is reasoning through why, for economic purposes, the
25 market definitions that have been adopted are the relevant turnover criteria. No one
26 disputes that when you are talking about relevant turnover at step 1 you are talking about
27 relevant market turnover. Those are the turnovers to be adopted.

28 I think, as was pointed out in one of the cases on Monday, there is a degree of selective
29 blindness here in the sense that the market definition was drawn more narrowly, which
30 generally will assist companies, because where a cautious approach to market definition is
31 defined, it is likely that overall they are going to have less turnover in it. It is true that if
32 you are a small company that has a very localised business and all of your turnover is
33 captured in that relevant market it is going to mean that the adjustment at step 3 for
34 deterrence is unlikely to be necessary in your sort of case. That does not render improper or

1 wrong the analysis that you are carrying out by reference to a sensible economic concept at
2 step 1 using a parameter of percentage that is not challenged at step 1.

3 So the idea that this is somehow discriminatory in relation to SMEs is quite wrong. Mr.
4 Peretz says, "We were in the wrong place at the wrong time and if we had been located in
5 Buxton and therefore trading across two geographical areas the outcome would have been
6 different, we would have had a lower relevant market turnover". If we had some eggs we
7 could have some eggs and bacon if we had some bacon. The situation here is that if the
8 infringements had been committed in different areas, if you had been based in a different
9 place and therefore your infringements picked up turnover in different geographical areas,
10 actually you would be potentially worse off, depending on where that turnover was located.
11 You cannot assume that everything else remains equal and you merely relocate yourself to a
12 different place. It depends on where the infringements occurred, which geographic markets
13 they were in, which product markets they were in and how the relevant turnover was then
14 calculated.

15 It is also worth bearing in mind in this argument relating to some sort of discrimination
16 against SMEs that the MDT mechanism was a way of ensuring that where you had a
17 diversified company that happened to have low turnover in a particular market that had been
18 cautiously drawn, in those circumstances there was an uplift in its penalty to ensure that
19 there was sufficient deterrence. The fact that the MDT moves penalties up in relation to
20 those larger diversified companies does not mean that penalties established at step 1 and
21 step 2 by reference to the rational approach to relevant market definition and the adoption of
22 a penalty should somehow be moved down. It is a minimum deterrence threshold. In those
23 circumstances, the fact that some of these cases throw up higher outturn penalties as a
24 percentage of total turnover than others is neither here nor there. The fact that certain years,
25 if they are used as the purpose of turnover, give higher outturn penalties than others is
26 neither here nor there, particularly in circumstances where the guidance clearly says that
27 you should be using that year before decision in order to capture the relevant turnover for
28 step 1 and the total turnover that is used subsequently in step 5 and in relation to the
29 adjustments.

30 THE CHAIRMAN: Supposing you are right in your step by step analysis, but the Tribunal comes
31 to the conclusion to adopt Mr. Peretz's, shall I call it, last throw, and let us say that in rough
32 figures 1.6 per cent of global turnover is just too much, what conclusion should we reach?

33 MR. BEARD: The interim conclusion I imagine you will reach is that it will be extremely
34 difficult to write a judgment that is reasoned as to the basis for dialling the outturn penalty

1 that has been achieved, through the OFT's process, downwards, because if you cannot
2 identify a flaw in the process it is very difficult to see on what possible basis this Tribunal
3 says, "Never mind, we have got these policy considerations, the OFT has applied them, it
4 has applied its guidance, we accept it should apply its guidance, its discretion was exercised
5 reasonably, but nonetheless we just feel it is a bit too high".

6 THE CHAIRMAN: I thought you might give a helpful answer like that, Mr. Beard!

7 MR. BEARD: I am sorry, I struggle to be of assistance because it is clearly, in the OFT's view,
8 the wrong approach to this analysis.

9 The other matters that Mr. Peretz prays in aid of the approach that says that you could
10 introduce a variation, apart from saying that our capping mechanism is inadequate, whereas,
11 as I have shown in relation to those graphs, the capping mechanism was doing precisely the
12 sort of thing that Mr. Peretz says the OFT should always have in the back of its mind. If
13 there are real outliers you should look again and see whether or not an adjustment should
14 be made, and we did.

15 Then he also holds against us the hardship approach. He held it against us in two ways.
16 One is he says that shows that we can offer a degree of flexibility in how we set penalties
17 and where the justice lies. Without wanting to repeat the jurisprudence that is set out in
18 *Sepia Logistics*, as is very clear, the approach to financial hardship submissions is that it is a
19 high threshold to get over and it is not a matter that should just be fed back willy-nilly into
20 the way in which the process of the OFT in setting penalties was adopted.

21 Furthermore, he says the financial hardship assessment was a multi-year assessment and
22 that means you should be able take into account multi-year turnover, multi-year whatever
23 else. No, if one recalls, the multi-year aspect of the financial hardship thresholds that were
24 used as guidelines by the OFT in assessing whether or not any reduction for financial
25 hardship should be given, the first of those was whether or not the penalty exceeded 150 per
26 cent of profit. What was thought of then was that given that you will have three years to
27 pay because that is one of the discretions the OFT relatively readily exercises in relation to
28 penalties, what you would then be looking at would be 50 per cent of your current profit
29 being payable each year. To suggest that that is talking about some aggregated analysis of
30 turnover or profit or any other financial measure that should be fed back into the process is
31 again a non-sequitur and it does not assist him to criticise the OFT for showing a degree of
32 flexibility in these regards. It indicates the OFT did direct its mind to whether or not there
33 were special circumstances, but decided that, given the guidance instruction process, the
34 particular points being made were insufficient.

1 It is worth noting, just for your notes, paragraph of the decision VI-89. There were various
2 parties, and although Robert Woodhead is not referred to, we can check the extent to which
3 they made specific submissions, but there all sorts of representations saying, “This year is
4 wrong, this year is too high, another year would have been better”. Those submissions were
5 often saying that 2007 was too high, not 2008. Contrary to the impression that we may
6 have taken from Mr. Peretz that it would be good if the OFT could have done this decision
7 more quickly, ironically, a number of these submissions suggested that it would actually be
8 better if they had done it a little more slowly because turnover was going to decline in the
9 coming year, and therefore if the OFT held off and used a later year of turnover that would
10 actually be a better and fairer measure. Rhetorically, how on earth is the OFT supposed to
11 make a call as to which year is used for which party in those circumstances.

12 Then to deal the case of *Boël*, the first point to make in relation to *Boël* is the point that I
13 have already adverted to, that trying to read from *Boël* a detailed approach to fining policy
14 in the Commission, and therefore treating the comments made by the court in criticising the
15 Commission as authority for any analysis of how the guidance should be applied in this
16 case, or indeed in relation to any of these cases under the decision, we say is an ambitious
17 one in the extreme.

18 *Boël* itself is at tab 74 of bundle 5. This was a case involving one appellant in relation to a
19 multi-handed cartel in relation to welded steel mesh. In fact, a number of the parties
20 appealed but they were dealt with in separate judgments. We have actually tried to have to
21 look to see whether or not the relevant turnover used was 1985 in any of the cases apart
22 from *Boël*, just to get a feel for whether or not Mr. Peretz’s submission in relation to this is
23 right. So far as we could see from the judgments of the court there was no indication.

24 When one digs out the actual decision, although we have not provided a copy, it is merely
25 because it is quite impossible to work out what years of turnover were used from the
26 decision itself. It very much fits into the pattern which Mr. Van Bael described as being a
27 “magical emergence of figures in relation to penalty”. It was against that background that
28 the appeal was brought by *Boël*. The relevant section that Mr. Peretz relies upon really
29 begins at II-908, bottom left hand corner page numbering:

30 “At the hearing, the applicant claimed, first, that seen as a percentage of its
31 turnover (3%), the fine imposed on it seemed disproportionate ...”

32 As compared to other undertakings fined, in particular it compared itself against *BStG* - I
33 am sorry, I have forgotten which of the particular infringers that is an abbreviation for. Be
34 that as it may, *BStG* 3.15 per cent, 3.6 per cent in the case of *Tréfilunion*, because they had

1 fulfilled an influential role in the agreements, whereas that aggravating factor could not be
2 applied to Boël:

3 “Furthermore, the Commission failed to take account of the fact that it does not
4 belong to a powerful economic entity, being an independent, unsubsidized family
5 undertaking.”

6 So what was being done here was consideration of a very broad sort of grouping that had
7 been undertaken by the Commission in the period where there was no fining guidance, but
8 the Commission was attaching broad penalty percentages to people by reason of whether
9 they were powerful economic entities, less powerful, not powerful, and the extent to which
10 they were aggravating their infringement because of the extent to which they played an
11 influential role in the particular case.

12 The findings of the court are at para.128 onwards, and the first finding at para.128 is a
13 slightly odd finding that says it is not right to say that Boël has been treated with greater
14 severity than BStG and ----

15 THE CHAIRMAN: It is Baustahlgewebe, it is a German company.

16 MR. BEARD: I thought it was French, thank you very much.

17 THE CHAIRMAN: You were thinking of your watering holes on the Boulevard St. Germain,
18 Mr. Beard!

19 MR. BEARD: It was actually Saint Gobain that I was thinking of, that it was going to be one of
20 those grand commodity producers, but it is not glass here, it is welded steel mesh.

21 Nonetheless, it was not treated with any great severity so the aggravating influential effect
22 analysis, which was appealed against was rejected, and that left the question of whether or
23 not it had been rightly categorised as a “powerful economic entity”. The court went on to
24 say, if this is the way the Commission is going about it, then we look at the features that are
25 being considered here and we decide that actually, as is set out in 131:

26 “Boël does not belong to a powerful economic entity any more than Sotralentz or
27 ILRO ...”

28 In other words, there were other similar undertakings that had been differently categorised
29 by the Commission in these different bands and Boël did not fall within it.

30 It is right that the cartel in question, or different aspects of the cartel, did run from 1980 to
31 1985, although different bits of the cartel did not, particularly in relation to the French
32 market. It only ran from 1981 to 1982 and then separately from 1983 to 1984. There is
33 clearly some sort of very, very rough and ready approach going on.

1 The termination of the cartel, as I have said, was in November 1985, or was treated as such,
2 because that is when the Commission investigation approach began. What was concluded
3 in paras.132 and 133 on which Mr. Peretz relied is that the conclusion that Boël is not really
4 part of the powerful undertaking analysis, means that the 3 per cent of its turnover in
5 welded steel mesh for 1985 was too high because that is how the categorisation turned out
6 for it.

7 Then, as regards the choice of 1985 for the reference year for determination in the
8 applicant's turnover, it should be noted that the applicant asserts, without having been
9 contradicted by the Commission, that that was the year in which its deliveries of welded
10 steel mesh were highest, whereas for most of the other producers it was in the year in which
11 their deliveries were lowest, and consequently the choice of year, which was not disclosed
12 until after the adoption of the decision, which again reinforces the magic numbers
13 phenomenon here, merely exacerbated the disproportionate nature of the fine imposed on
14 the applicant. The figure of 3 per cent of the 1985 turnover resulted in a more substantial
15 fine for the applicant than that imposed on the other producers. So it is not saying it could
16 not use the 1985 figures, or that it had to use the 1985 figures, or it had to use figures at any
17 particular time. What it is saying is, "You, Commission, made an error of categorisation
18 and you exacerbated it by using the highest level of turnover in the period that was
19 considered that the time".

20 That does not tell you anything about whether or not this guidance should somehow be *ad*
21 *hoc* modified in relation to particular turnover which particular undertakings come along
22 and say, "This year it is rather high for us", it certainly, in the context of a decision making
23 process with no guidance attached, does not provide you with any such authority, and nor
24 was the General Court, or the CFI, as it was then was, seeking to make such a statement in
25 133.

26 So *Boël* takes Mr. Peretz nowhere in this regard. The court was specifically refusing to give
27 any special significance to any particular year.

28 We are then left with the sense that the penalty is somehow broadly disproportionate. These
29 are matters which I have already traversed to some degree. Woodhead has contended there
30 is no reason to suppose that the seriousness of the infringements correlate to the turnover
31 figure chosen by the OFT. Mr. Peretz was troubled by the extent to which the OFT talks
32 about the fact that there is not a necessary correlation between the seriousness of the
33 infringements and Woodhead's turnover in the year prior to the decision, but the OFT does
34 contend that applying a percentage starting point to recent rather than historic turnovers

1 ensured there was some broad correlation between the seriousness of infringements and the
2 impact of penalties upon Woodhead. If it assists all that is being said there, as I understand
3 it, is merely that by using relevant turnover what you are doing is using some sort of broad
4 measure that, when linked to the percentage assessment of seriousness, you get a starting
5 point that has some sort of broad correlation to the infringement – no more and no less than
6 that.

7 The second argument is that the OFT has assessed a level of penalty which it considers the
8 minimum necessary to ensure deterrence, any penalty in excess of that is disproportionate to
9 the need for deterrence. This is just a reiteration of everything should be dialled down to
10 the MDT, the MDT becomes the focal point. This morning there was a criticism that the
11 MDT wiped the slate clean. That was not right. Now the argument is effectively that the
12 MDT should wipe the slate clean. That is also not right. In those circumstances you have
13 got a situation where the two appeals that are being heard illustrate how the different
14 components of the different stages of the penalty process can have different impacts, and
15 there is nothing wrong with that. One should not be a total trump on the other. It depends
16 on all the circumstances of each case. I have already dealt with the submissions that
17 suggest that a cap of 4.5 per cent of total turnover is somehow to be used against the OFT.
18 As I have indicated, it is somewhat strange to argue that if the methodology overall lacked a
19 particular step it would be unfair, but when that step is taken, albeit not as Mr. Peretz would
20 like it, the process is not fair nonetheless.

21 Woodhead seek to bend the fact that the OFT has carefully considered whether the penalty
22 would threaten the viability of the undertaking to support its contention that the penalty is
23 disproportionate. That is just a reiteration of the financial hardship argument with which I
24 have already dealt.

25 The various sorts of comparisons with other undertakings that Woodhead seeks to draw, to
26 Mr. Peretz's credit he said you have to be selective because if you started to draw out all the
27 different sorts of comparators you could fill the Albert Hall. One is somehow reminded of
28 all the holes that were calculated in the Beatles' song. What you have is a situation where
29 there may be an infinite number of permutations of comparisons that can be drawn. Indeed,
30 the creativity of lawyers in coming forward to the Office and making suggestions as to why
31 a case is special, whether or not it is because it is in a narrow market, because it is a small
32 company, because it has remarkable turnover in one year and not the next year, because it
33 has grown by acquisition rather than organic growth, because it has shrunk, because it has
34 sold a company – the list is endless as to the various different permutations of what makes

1 someone special and why it is that the outturn penalty is unjust. It is not right that the OFT
2 ignored all these matters. They considered whether or not any of them constituted a basis
3 for diverging from the decisions it had taken along the course of the penalty process it had
4 undertaken. In relation to those particular factors it decided not, those were legitimate,
5 proper and fair decisions.

6 In the circumstances, the selected alternative comparisons are not illuminating, and
7 certainly the comparisons with Kier and Stainforth are not illuminating. The comparisons
8 with JH Hallam are not only illuminating in the skeleton, but they are plainly wrong, and
9 wrong comparators, apples and pears are compared. Comparison is drawn in the skeleton
10 between the ratio of JH Hallam's penalty to its assets, which was 56 per cent. Those were
11 its net assets, and if you remember from the appeal on Monday afternoon, it was actually a
12 50 per cent reduction for hardship in that case. There was not any in relation to Woodhead,
13 it did not get close to those ratios. The ratio of 57 per cent that Woodhead refers to in its
14 skeleton is based on gross penalty not net penalty. Of course the hardship criteria were used
15 only in relation to net penalty after any reductions that had been put in place. Of course,
16 that is a logical way of dealing with these things because those assessment guidelines were
17 only being used in relation to financial viability. You only assess viability when you are
18 looking at the outturn. In the circumstances, those comparators do not assist, and of course
19 there is not any appeal against the rejection of any financial hardship submissions *per se* in
20 this case.

21 Unless I can assist the Tribunal further, those are my submissions.

22 THE CHAIRMAN: Thank you, Mr. Beard. Yes, Mr. Peretz?

23 MR. PERETZ: I have just a few points. Mr. Beard complained that, on the one hand, we were
24 submitting that the OFT was bound by guidance; on the other hand, we were saying that it
25 should have departed from it. That is not the case. As the Tribunal and the Court of Appeal
26 have emphasised, guidance is guidance. It has to make allowance for circumstances.
27 Collins J. in *Royal Mail* recognises that circumstances are exceptional and unusual. We
28 entirely accept that the guidance is based on one year's calculation. In the typical case,
29 most undertakings, most situations, have a similar turnover year on year, or within one or
30 two year's margins. If you are in a situation where there is a spike that is an unusual
31 situation and it justifies a departure from the guidance. The OFT is perfectly entitled to
32 depart from its guidance in a situation where it gives proper reasons for doing so and a
33 situation is exceptional.

34 I do not want to labour the Procrustean metaphor any further, but to put it very bluntly ----

1 THE CHAIRMAN: No, please do not.

2 MR. PERETZ: I am just going to say this because I cannot resist it: Mr. Beard said that the OFT
3 tried to correlate bed length to the height of the undertaking, it has not done that, it is
4 correlated it to shoe size. It simply used a measurement, turnover in relevant markets, many
5 years after the infringement that just has no correlation to anything useful at all. Mr. Beard
6 tried to explain again – I am afraid I did not get a full note of it – orally exactly what it was
7 the OFT was saying about turnover in the relevant market in 2008, what correlation that had
8 with anything. I am afraid I still do not understand it. At the end of the day, the relevant
9 considerations here, the potentially relevant considerations, are either deterrence in which
10 case it is impossible to see why turnover just in the relevant market and not overall turnover
11 has any relevance to anything; or it is about seriousness of the infringements which must be
12 looked at at the time of the infringements, and it is impossible to see how turnover many,
13 many years after the event has any relationship to that. That is, at the end of the day, the
14 OFT's problem, and I simply have not heard an answer to that which carries any weight at
15 all.

16 Mr. Beard accused me of saying that Woodhead was an "outlier". I think the word "outlier"
17 has not passed my lips. I am not saying that it was an outlier. What I did say, and the OFT
18 can check this, I do not think it is in dispute, is that, out of 100 odd companies, around 69 in
19 terms of percentage, in terms of percentage of total turnover were lower than Woodhead
20 and about 27 higher. That is how I put it. I do not think there is any dispute between us as
21 to how that has happened, the reason for that is that Woodhead is a small company whose
22 turnover is perhaps located in the middle of what the OFT have chosen to be the relevant
23 geographical market, and, as a result, a very high percentage of its turnover has gone into
24 the OFT's fining machine, whereas for other companies that is not true because they have
25 more dispersed turnovers.

26 Mr. Beard made the point that some of those will then have had the MDT. That is true for
27 some of them, but not for all of them. I do not know whether a company happens to fall
28 within this category or not, but it is certainly a possibility. If an undertaking had a penalty
29 as a percentage of its overall turnover of 0.76 per cent the MDT would not have been
30 applied to it, yet it has been treated in terms of a percentage of total turnover much more
31 generously than it would where the percentage is much higher than 0.76 per cent. That is
32 the root of the problem that Woodhead has in this case.

33 Unless you have any further questions those are my submissions.

34 THE CHAIRMAN: No, thank you very much, Mr. Peretz.

1 | Thank you for your conciseness and keeping to time, both of you, and I wish you a good
2 | evening and a non-Procrustean bed, especially one made to measure for your learned friend
3 | Mr. Vajda perhaps!

4 | _____