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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 July 2010

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– and –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

HEARING
DAY FOUR

APPEARANCES

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

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

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

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

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

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

6 THE CHAIRMAN: Yes.

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

14 Could I start off with net fees, that is tab 1? Just to give the structure of this document,
15 essentially the first seven pages follow broadly the submissions I made in opening. Then at
16 annex A and B (annex A starts at p.8) we set out the evidence that we say applies to the type
17 of services that we are providing, and then annex B (p.16) is the relevant financial metric.
18 If in the next 15 minutes I go through this document, as I am sure you are aware now, Sir,
19 and Members of the Tribunal, we set out our case at p.2, the object of identifying relevant
20 turnover. Then we have tried to set out what are the relevant activities – what actually is the
21 service that is being provided. I summarise it at para. 6, but the argument that appears to be
22 advanced by the OFT now, but one cannot really see it from the Decision, is that Hays
23 provides the temporary workers' services to the client. In other words, there appear to be
24 two bilateral relationships, and not what we call a triangular relationship. We will come on
25 to the *Muscat* case that Mr. Harris handed up yesterday. There the Court of Appeal
26 describes the service we are providing as a triangular relationship.

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

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

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

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

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

27 The word "supply", when we look at the decision the OFT uses the word "supply" in the
28 context of permanent workers and temporary workers, there is no difference, it is a supplier.
29 Clause 1.2 is quite clear and, Sir, you referred to this during the cross-examination. Clause
30 1.2:

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

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

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

2 “The Temporary Worker has been engaged by the Employment Business under a
3 contract for services. The Temporary Worker is deemed to be under the
4 supervision, direction and control of the Client ...”

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

6 “The Client agrees to be responsible for all acts, errors and omissions of the
7 Temporary Worker as though the Temporary Worker is an employee of the
8 Client.”

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

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

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

17 MR. BREALEY: Here it refers to “Assignment”:

18 “*Assignment* means the assignment of the Temporary Worker ...”

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

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

22 “*Assignment* means the assignment of the Temporary Worker by the Employment
23 Business to a Client ...”

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

25 “... in the relevant Assignment Confirmation Letter ...”

26 THE CHAIRMAN: Is that what you have given us?

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

31 “You must submit your time sheets and the client for whom you are working will
32 authorise the time worked ...”

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

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

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

8 THE CHAIRMAN: What are the “services” that the temporary worker is supplying to Hays?

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

11 THE CHAIRMAN: Legal services?

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

15 THE CHAIRMAN: You say it is “will supply”, so, “I will supply my engineering services to
16 Hays”?

17 MR. BREALEY: Yes.

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

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

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

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

23 THE CHAIRMAN: How do you read it?

24 MR. BREALEY: Making the services available.

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

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

30 THE CHAIRMAN: The temporary assignment confirmation is time sheets.

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

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

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

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

10 THE CHAIRMAN: The client gets the benefit.

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

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

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

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

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

29 THE CHAIRMAN: Yes.

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

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

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

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

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

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

14 THE CHAIRMAN: I think we have the point.

15 MR. BREALEY: It is making themselves available to provide a service, a contract for service.

16 We have seen the factual evidence, we have seen the contracts.

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

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

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

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

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

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

11 THE CHAIRMAN: Yes, so had no employment rights.

12 MR. BREALEY: Yes.

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

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

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

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

24 THE CHAIRMAN: Because of the contract ----

25 MR. BREALEY: Service, yes.

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

28 MR. DAVEY: No, she was not.

29 THE CHAIRMAN: In the end.

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

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

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

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

7 MR. BREALEY: Absolutely.

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

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

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

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

13 THE CHAIRMAN: But your question is “to whom?”

14 MR. BREALEY: When it says “accountancy” it is a job title.

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

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

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

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

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

34 MR. BREALEY: And vice-versa.

1 THE CHAIRMAN: And vice-versa.

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

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

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

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

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

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

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

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

25 MR. BREALEY: The factual evidence was set out, the first witness statement of Paul Venables,
26 p.19, witness statement of Mark Shepperd again was unchallenged, on net fees, and then we
27 have the expert evidence, and again I do emphasise for the purposes of our ground 1 the
28 acceptance by Mr. Allen that due to the characteristics of the recruitment industry, the very
29 last paragraph on p.22:
30 “ . . . the market considers the Net Fees figure to be the equivalent of the turnover
31 figure for most other industries.”
32 and I would ask the Tribunal to accept that. In this industry, the net fees figure is the
33 equivalent of the turnover figure. Why is that relevant? It is relevant because, as I
34 submitted in opening, and I we repeat in the first part of this submission – I am looking at

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

6 Those are my submissions on ground 1. I have five minutes really to do the rest.

7 Seriousness we have set out at tab 2. We emphasise that the scale of the agreement was just
8 over one year.

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

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

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

16 MR. BREALEY: Like tomorrow. (Laughter).

17 THE CHAIRMAN: I hope not tomorrow!

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

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

22 MR. BREALEY: It was ineffective.

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

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

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

28 MR. BREALEY: Of all of them.

29 THE CHAIRMAN: -- how is that calculated?

30 MR. BREALEY: That is by turnover?

31 THE CHAIRMAN: Turnover?

32 MR. BREALEY: Yes.

33 THE CHAIRMAN: Gross turnover?

34 MR. BREALEY: Yes.

1 THE CHAIRMAN: But I thought that is not the relevant metric?
2 MR. BREALEY: It is not.
3 THE CHAIRMAN: So why are you using it?
4 MR. BREALEY: That is the OFT's position.
5 THE CHAIRMAN: But you do not accept that.
6 MR. BREALEY: No, I do not, but ----
7 THE CHAIRMAN: So what is it on net fees?
8 MR. BREALEY: I can give the Tribunal the figure. We will do that ----
9 THE CHAIRMAN: You have not got it at the moment.
10 MR. BREALEY: I do not have it to hand, no. We are taking the OFT's case at its highest.
11 THE CHAIRMAN: Yes, but you are asking us to cast that aside.
12 MR. BREALEY: I am.
13 THE CHAIRMAN: You cannot then say, "And it is only a small part of the market", saying we
14 should look at the market differently, on a different metric.
15 MR. BREALEY: With respect, I should be able to do, because I am saying it is wrong. We will
16 give you the figure.
17 THE CHAIRMAN: You will get us the net fees.
18 MR. BREALEY: We will. I am informed that we may not have those figures. This is the OFT's
19 case against us and they say, "You have a 13.6 per cent market share", and we say, "If that
20 is the case that is not the sort of market share that should attract 9 per cent". That is our
21 case. The ball is being thrown at us by the OFT and we are trying to bat it back. We are
22 saying, "On your case, all the participants have a 13.6 per cent market share, and if you are
23 right on the market share that is not sufficient for 9 per cent". The point is as simple as that.
24 I do emphasise, if one goes back a page, that there is no evidence of any impact on
25 consumers. In its Guidance the OFT says that is an important factor.
26 That is seriousness. On the schedule that has been handed up by the OFT, we are still
27 looking at that, Sir. We are unclear whether that is truly representative of all the cases.
28 THE CHAIRMAN: When you say "representative", we understood, and hoped, that it was not
29 just representative, but complete.
30 MR. BREALEY: So did we. It may well be that some cases are missing. It may well be that
31 some of the information on the schedule is incomplete. The reason I say that is that certain
32 members in this room have appeared in some of these cases. They are confidential. It may
33 well be that the people in this room that have appeared will have to submit in confidence to
34 the Tribunal.

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

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

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

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

12 THE CHAIRMAN: In the course of next week.

13 MR. BREALEY: Yes.

14 THE CHAIRMAN: Thank you.

15 MR. BREALEY: Very quickly, senior management. We have set it out in writing. I would urge
16 the Tribunal – although this note is attached, it is not actually, but it is at NCB 3, volume 1,
17 and I am looking at para.6 of tab 3 of the note handed up this morning. Paragraph 6, tab 3,
18 senior management. There is a table or a chart, whatever one calls it. It is p.336 of NCB 3,
19 volume 1. There we try and show that there was Mr. Simon Cheshire. He was on the C&P
20 board. The blue is what we would call the senior management. How senior do you have to
21 be before you are going to attract a 10 per cent increase. He is not sufficiently senior.
22 I would just emphasise two further points, which we make in the note. The first is that the
23 only evidence is that he was acting on his own. So, yes, he was on that C&P operations
24 board, but he was acting on his own. So there is no suggestion, although at times
25 Mr. Unterhalter tried to make the suggestion, there is no finding that collectively that C&P
26 board was guilty of the infringement.

27 THE CHAIRMAN: That is correct, yes.

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

34 THE CHAIRMAN: That is because of MDT.

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

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

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

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

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

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

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

19 THE CHAIRMAN: Yes, Mr. Harris?

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

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

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

34 THE CHAIRMAN: A compliance policy?

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

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

14 THE CHAIRMAN: We understand that.

15 MR. HARRIS: I will move on. That is topic number two. Topic number three will detain us for
16 just a few minutes longer. It is a discrete topic to Eden Brown. It is the question of the
17 correct year of relevant turnover at Step 1 of the fining process. Again, this argument is
18 very fully argued out in the skeleton so I do not propose to traverse the way in which it is
19 set out in the notice of appeal, the defence and the respective skeletons. It is, if I may say
20 so, extremely clear. What I do propose to do is just deal briefly with the three points that
21 are put against me in the OFT's skeleton, which currently is the last word on the topic. In a
22 nutshell, as I said in opening, the dispute is not just discrete, but very short and simple.
23 What we say is that the phrase "last business year" at Step 1, that means, properly
24 interpreted, the last business preceding the end of the infringement. In contrast, the OFT
25 says the words "last business year" mean the last business year preceding the decision. The
26 point I made in opening remains good, which is that of these competing interpretations – it
27 is common ground that this is an interpretation argument, as a matter of law – certainly the
28 interpretation that I advance is capable of being correct because it is the very interpretation
29 that for many years the OFT itself used to adopt.

30 The OFT has changed its interpretation. That alone, we respectfully submit, ought to set the
31 alarm bells ringing since the words have not changed, but be that as it may the OFT now in
32 its skeleton argument puts forward three responses to my suggestion that they should not
33 have changed and the interpretation has not changed. The first is at CB2, tab 11, pp. 350-
34 351, paras.15 and 16 of their skeleton argument ----

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

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

3 THE CHAIRMAN: You say it is paragraph?

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

5 THE CHAIRMAN: Page 350, para.15.

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

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

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

28 That is my response to the OFT’s first point.

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

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

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

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

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

7 THE CHAIRMAN: The three appellants here?

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

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

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

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

33 “... is ‘calibrated to the seriousness of the infringement ...’”

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

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

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

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

1 THE CHAIRMAN: In your notice of appeal, which is in this bundle at tab.4, you deal with this
2 (it is ground 4, starting at p.172, section 7). That is where you make this point.
3 MR. HARRIS: Yes.
4 THE CHAIRMAN: And then at the end of that, at 7.16, you give the confidential figures that
5 would apply for what you say is the year that should have been used. That is right, as
6 opposed to the ones the OFT used.
7 MR. HARRIS: Yes, I believe so. And I have just been prompted about this – my instructions are
8 that the OFT have never denied our submission about the the figures.
9 THE CHAIRMAN: No, I do not think the figures are in issue. Those figures are gross turnover.
10 MR. HARRIS: Yes.
11 THE CHAIRMAN: If we were with you on your ground 1, I do not know if it is your ground 1,
12 but on the net fees issue.
13 MR. HARRIS: Yes.
14 THE CHAIRMAN: Of course the relevant year is the separate point – have you given us the net
15 fees figure for what you say is the right year, namely the year ending March 2005?
16 MR. HARRIS: I believe that that will be part of the table that I was going to hand in for the
17 relevant year, if we win.
18 THE CHAIRMAN: Yes.
19 MR. HARRIS: Yes, so the table I hand in at the end does include the net fees figure for 2004-
20 2005.
21 THE CHAIRMAN: Right. That was my question. So we will get ----
22 MR. HARRIS: Yes, I will deal with that briefly at the end.
23 THE CHAIRMAN: Yes. That is just getting the figures, that would be helpful.
24 MR. HARRIS: Yes, I am grateful.
25 THE CHAIRMAN: Also, if you are, if you have finished with this point.
26 MR. HARRIS: Yes.
27 THE CHAIRMAN: Mr Harris, you appear not only for Eden Brown but I think also for Hays.
28 MR. HARRIS: Yes, sir.
29 THE CHAIRMAN: Do you, wearing your Hays hat, adopt for Hays the argument you have just
30 presented, wearing your Eden Brown hat?
31 MR. HARRIS: No, sir, no. This is a discrete argument advanced by Eden Brown, and Eden
32 Brown alone.
33 THE CHAIRMAN: But, do you then, wearing your Hays hat, disagree with it?

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

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

13 MR. BREALEY: I do apologise.

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

20 MR. BREALEY: Can I -----

21 THE CHAIRMAN: Can you take instructions?

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

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

24 THE CHAIRMAN: Well, no -----

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

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

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

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

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

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

6 THE CHAIRMAN: Yes.

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

8 THE CHAIRMAN: Yes.

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

12 THE CHAIRMAN: Yes.

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

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

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

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

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

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

29 MR. UNTERHALTER: Indeed.

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

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

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

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

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

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

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

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

9 THE CHAIRMAN: Yes.

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

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

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

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

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

9 “(i) that the servant agreed in consideration of remuneration to provide his own
10 work or skill in performance of service for the master”.

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

16 “providing his own work or skill in the performance of service for the master”.

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

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

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

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

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

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

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

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

29 THE CHAIRMAN: Yes.

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

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

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

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

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

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

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

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

24 THE CHAIRMAN: Well they are quite historic.

25 MR. HARRIS: Perhaps I will just take instructions on that. Can I give you the reference for the
26 turnover figure at the top of the right hand column? No, Sir, they are not confidential. The
27 relevant net fees figure for financial year 2004/05 is taken from the spreadsheet which
28 appears at Michael Sterling 2, it is an exhibit to Michael Sterling's second witness
29 statement, and I will provide in due course the precise page reference (NCB3, tab 10, page
30 758).

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

33 THE CHAIRMAN: Yes.

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

10 THE CHAIRMAN: As Step 3 is looking at deterrence, your current position is important. You
11 made the point when addressing us on the relevant year to be used at Step 1 saying that Step
12 1 is not concerned with deterrence, and you criticised that part of the OFT's skeleton, where
13 they said one reason for using the most recent year's deterrence and you made the point,
14 "No, that is not part of the Step 1 exercise". The Step 3 exercise, which is deterrence, the
15 current year, the most recent year would be relevant, would it not?

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

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

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

21 THE CHAIRMAN: The future, forward looking.

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

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

32 Those are my submissions unless I can assist further.

33 THE CHAIRMAN: Thank you. Yes, Miss Kreisberger?

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

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

10 Dealing first with purpose, just to develop some comments which I made in opening. We
11 say in fixing the amount of the fine it is not permissible to lose sight of the purpose and the
12 objectives for which the fine is fixed, and if I may just take the Tribunal to *Britannia Alloys*
13 briefly, and that is at authorities bundle 2, tab 32 and p.4456 of the judgment. This is the
14 case I had in mind on reference year, although that is not the point I am addressing here.

15 You will see at para. 20, it was an issue between the parties as to how to determine the
16 concept of “preceding business year”, and in that case it was because there had been
17 substantial changes in the economic situation of the undertaking between the infringement
18 having been committed and the Commission’s decision. The Court of Justice held at
19 para.21 that it should be pointed out according to settled case-law that it is necessary:

20 “ . . . in interpreting a provision of Community law to consider not only its wording
21 but its context and the objectives pursued by the rules.”

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

24 “. . . the Commission is required to take into account the gravity and the duration
25 of the infringement . . .”

26 In the light of those factors, the Court has stated that the limit relating to turnover
27 . . . seeks to prevent fines imposed . . . from being disproportionate in relation to
28 the size of the undertaking concerned.”

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

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

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

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

4 MISS KREISBERGER: That is correct.

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

6 MISS KREISBERGER: Exactly.

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

8 MISS KREISBERGER: It does, it does. We do not rely on it for the specific point of the

9 reference year, we rely on the approach that the Court of Justice confirms as to the

10 interpretation of provisions. We also rely on it as to the need for individualised

11 consideration on which Lord Pannick has addressed you, and I also suggest the Tribunal

12 there turns up para.44, perhaps we need not look at it now, but for the note it refers to the

13 need for the differentiated treatment of undertakings concerned.

14 I should say on the point of reference year, the Tribunal would need to be in a position to

15 take a decision on the facts so it is a matter for the Tribunal as to whether it can take a

16 different decision from the OFT not having heard argument on this particular point, but the

17 point made at para. 44 is it is always a question of individualised treatment. That is true for

18 reference year, it is true for turnover, and it is true for the other aspects of penalty

19 assessment. It is a fundamental precept of fining.

20 Coming back to the issue here, we say that the purpose of setting fines by reference to

21 affected turnover is to give an indication of the scale of the infringement. I do not need to

22 take the Tribunal to this, and Lord Pannick took the Tribunal, I think yesterday, to para. 121

23 of *Musique Diffusion française*?

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

25 MISS KREISBERGER: He quoted, but the relevant wording is an indication of the scale of the

26 infringement, that is why one looks at affected turnover, turnover in the services which were

27 the subject of the infringement. For the note, Sir, that is authorities 4, tab 57, p.1909 at

28 para. 121.

29 As I mentioned in opening, that is also reflected at para. 2.9 of the penalty Guidance.

30 Again, I do not suggest the Tribunal turn it up now. The reference is authorities 1, tab 15,

31 p.9, but para. 2.9 says: “Where an infringement involves several undertakings ...” the

32 starting point is assessed for each one individually “... in order to take account of the real

33 impact of the infringing activity of each undertaking on competition.”, that is the point.

34 That is why a careful assessment needs to be taken of relevant turnover at Step 1, that is

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

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

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

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

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

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

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

1 We say it is perfectly proper and in line with the requirements of fairness to treat
2 AndersElite for these purposes as an intermediary, and that is where I will turn to the case
3 because we say that the Tribunal, in our respectful submission, should have regard to the
4 Commission practice in the context of mergers for the assessment of turnover.
5 Could I ask the Tribunal to turn up, first, the Commission Notice, which is authorities
6 bundle 1, tab 19, p.35. The Tribunal will be familiar with these paragraphs. We had a
7 rather creative interpretation, I would suggest, from Mr. Allen, the OFT's expert, but he
8 effectively resiled from that yesterday. My submission is that if one looks at the wording,
9 just going through it, para.157 begins by saying that the concept of turnover is usually sales,
10 the figure that appears under sales in the accounts. At 158 they say that is normally the
11 right approach for services as well, but things may be a little more complex for services. It
12 is straightforward where you have one undertaking providing the entire service to the
13 customer, but in other areas, such as package holidays and advertising – that is the example
14 given at 159 – the service may be sold through intermediaries, even if the intermediary
15 invoices the entire amount to the final customer, the turnover of the intermediary consists
16 solely of the amount of its commission. Then an important paragraph at 160:

17 “The examples mentioned ...”

18 travel agents, media agencies –

19 “... show that, due to the diversity of services, many different situations may arise
20 and the underlying legal and economic relations have to be carefully analysed.”

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

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

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

30 “... it should be noted first of all that ... the concept of ‘turnover’ ... refers
31 explicitly to ‘the amounts derived from the sale of products and the provision of
32 services’. ‘Sale’ as a reflection of the undertaking’s activity is thus the essential
33 criterion for the calculation of turnover, whether for products or the provision of
34 services.

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

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

11 “... envisaged the possibility, in certain circumstances, of calculating the turnover
12 in a different way than by reference to the aggregate of sales of products or the
13 provision of services.”

14 Then they quote the notice.

15 THE CHAIRMAN: It is the earlier version.

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

17 THE CHAIRMAN: Is it effectively the same?

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

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

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

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

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

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

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

5 “In addition, in the absence of any evidence of a legal nature put forward by
6 Endesa to the contrary, the legal relationship existing between Endesa and the end
7 customers must be regarded as a contract for the sale of electricity. Such a sale is a
8 commercial act which involves the transfer of ownership.

9 The same applies as regards the legal relationship existing between Endesa and the
10 electricity generator providing electricity ...”

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

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

18 So it is not an intermediary for that reason.

19 “Endesa cannot therefore from a legal point of view be regarded as a mere
20 intermediary ...”

21 and it does not fall within the exception.

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

24 “An undertaking will normally not act as an intermediary if it sells products via a
25 commercial act which involves a transfer of ownership.”

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

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

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

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

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

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

9 MISS KREISBERGER: Yes, I will

10 THE CHAIRMAN: This is your chance.

11 MISS KREISBERGER: Yes, I will now, I am about to. I would like to make one little point
12 before I do, which is what the Commission and the Court of First Instance did not do in
13 *Endesa* is say, “The answer lies in the accounts, and we do not need to make any
14 investigation”. They did what para.160 of the Commission Notice says they should do.
15 Taking my opportunity to take a shot at this, the main point the OFT takes here is that
16 *Endesa* bears the risk of non-payment, and that starts at para.223 and the conclusion is at
17 226. They conclude that on the facts *Endesa* carried the credit risk, and that was a factor
18 which also pointed against *Endesa* being an intermediary. We do not shy away from this
19 but, first of all, the court looked at this after the issue of the transfer of ownership point.
20 The question became whether, notwithstanding that there is a transfer of ownership in a
21 good, could *Endesa*’s challenge be saved by the fact that it did not bear the risk of non-
22 payment. The answer to that from the report was, no, it could not.
23 Perhaps a more fundamental point is again coming back to the Commission’s indication at
24 160. You have got to form a view on the basis of the legal and economic relations. You
25 have to look at matters in the round. The answer does not lie in a single indicator.
26 Can I come on now to discuss the considerations which we say point firmly in favour of
27 *AndersElite* being an intermediary and why a different conclusion from that reached in
28 *Endesa* should apply here, but one factor does not tell you anything in itself.

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

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

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

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

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

15 “... relevant turnover for the purposes of the imposition of financial penalties
16 relates to the supply, by Recruitment Agencies, of Candidates with professional,
17 managerial, trade and labour skills required by the Construction Industry in the
18 UK.”

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

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

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

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

30 THE CHAIRMAN: Tab 14, you say.

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

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

3 THE CHAIRMAN: Yes.

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

7 THE CHAIRMAN: We will look it up.

8 MISS KREISBERGER: I am grateful, sir.

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

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

16 “We have seven clerical employees, we’ve outsourced it to India and [the seven
17 clerical employees] working in India provide the payrolling services for the
18 contractors ... It costs some tens of thousands of pounds. I’m not sure of the exact
19 number, but it’s in the tens of thousands of pounds.”

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

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

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

32 THE CHAIRMAN: Right at the end.

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

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

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

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

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

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

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

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

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

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

29 THE CHAIRMAN: Yes.

30 MISS KREISBERGER: -- and CDI contracts for the provision of what is referred to in the Form
31 10K as "a deliverable". So, a product for a service. And whilst you have the T&Cs open
32 there, I would also just ask the Tribunal to take account of paras.13.3-13.4 under the
33 heading "Liability", under which ----

34 THE CHAIRMAN: This is in?

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

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

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

10 THE CHAIRMAN: Yes.

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

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

1 framework. So, to conclude on this ground, we say it is a manifest failing that the OFT
2 refused to look beyond the accounts and closed its mind to commercial reality. We say this
3 is a serious error of approach. We say the small differences which exist in the arrangement
4 between temps and perms which arises through operation of law for the protection of the
5 temporary worker do not justify the treatment of turnover resulting in a fine at Step 1 of
6 almost five times greater than it would otherwise be, £8.3 million to what we say should be
7 £1.8 million. And we say this could at any step have been cured by the OFT stepping back
8 and effecting a downward adjustment of the fine to reflect that commercial reality and to
9 comply with the requirements of fairness. So, those are my submissions on ground 1.
10 Perhaps if the Tribunal has any questions on that ground?

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

13 THE CHAIRMAN: Yes.

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

21 THE CHAIRMAN: Yes.

22 MISS KREISBERGER: Again, those are confidential figures.

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

24 MISS KREISBERGER: Yes, sir.

25 THE CHAIRMAN: With the grounds for adjustment.

26 MISS KREISBERGER: Precisely. That appears on the table as “Less net ground for
27 exclusions”.

28 THE CHAIRMAN: Yes.

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

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

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

32 THE CHAIRMAN: It is in your notice of appeal.

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

1 THE CHAIRMAN: Yes.

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

4 THE CHAIRMAN: This is from Makers?

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

8 THE CHAIRMAN: Yes.

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

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

12 (Adjourned for a short time)

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

14 THE CHAIRMAN: Yes.

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

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

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

24 THE CHAIRMAN: Yes.

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

27 THE CHAIRMAN: It does not actually say when you did it, but presumably you did it in mid-
28 2008, early 2008?

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

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

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

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

11 THE CHAIRMAN: Yes.

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

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

18 THE CHAIRMAN: That is in which year?

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

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

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

23 THE CHAIRMAN: Another way possibly, because I appreciate what you have shown us at para.
24 68, I think without turning it up that the accounts break down the net fees by sector. Indeed,
25 you made use of that in cross-examining Mr. Allen.

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

27 THE CHAIRMAN: Just to finish, you know where I am going, I think, that one could look at the
28 construction sector in 2008/09 and look at what proportion of that is the £33 million,
29 namely what percentage had to be stripped out and then if one had the construction sector in
30 2004/05 one could say on a broad brush basis probably the same proportion would be
31 stripped out and that would be a simple way of doing it and clearly a little bit more refined
32 because the total net fees cover all other sectors where the performance may have changed.

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

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

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

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

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

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

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

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

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

14 MR. BREALEY: Yes, it is.

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

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

18 THE CHAIRMAN: That is worldwide, is it not?

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

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

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

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

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

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

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

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

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

3 THE CHAIRMAN: Is that UK and Ireland.

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

5 THE CHAIRMAN: So the equivalent, what was £75.7 million in 2008/09 was £97 million in
6 2004/05.

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

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

11 MR. BREALEY: Or can do the work.

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

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

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

21 MR. BREALEY: But one just does not know.

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

25 MR. BREALEY: Those are my instructions.

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

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

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

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

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

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

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

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

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

5 MR. BREALEY: I take your point.

6 THE CHAIRMAN: Yes, Mr. Unterhalter?

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

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

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

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

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

27 THE CHAIRMAN: Yes.

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

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

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

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

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

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

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

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

11 THE CHAIRMAN: Step 2 is duration.

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

15 In our submission, that is a very bad indicator in many circumstances for the purposes of
16 doing the work of deterrence. We say that precisely for the reason that the MDT has been
17 created, which is that a very large undertaking that operates in many markets and has the
18 ability and potential to do very considerable harm across a range of economic activities, it is
19 that kind of undertaking that must be deterred, at least by way of specific deterrence. If
20 such an entity has a relatively small turnover in the relevant market, it seems to be an
21 altogether counter-indicator to use that relatively small amount of turnover in the relevant
22 market as the conceptually right basis for deciding how to deter a very large undertaking.
23 That is the central proposition about MDT. MDT is not of invariable application. MDT is
24 of application in the case where the margin of deterrence will not be great enough because
25 the participation of the undertaking in the relevant market is too small relevant to its overall
26 size.

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

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

