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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 July 2010

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

DURKAN HOLDINGS LIMITED
DURKAN LIMITED
CONCENTRA LIMITED
(formerly known as Durkan Pudelek Ltd. in administration)

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING
(DAY TWO)

APPEARANCES

Mr. Mark Hoskins Q.C. (instructed by Jones Day LLP) appeared on behalf of the Appellants.

Ms Kelyn Bacon, Mr. Daniel Beard and Mr. Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

1 THE CHAIRMAN: Yes, Mr. Hoskins.

2 MR. HOSKINS: Unless you have any comments you would wish to make I would like to call
3 Mr. Alan Fraher, please.

4 Mr. ALAN FRAHER

5 Examined by MR HOSKINS

6 Q Thank you, Mr. Fraher, can you please state your full name?

7 A My name is Alan Fraher.

8 Q You should have some bundles beside you, one of which should be bundle 2A, the Control
9 Issue, could you turn to tab 3 of that, please. It should be the “witness statement of Alan
10 Fraher”; this is your first witness statement?

11 A That’s correct.

12 Q Can you turn to p.6, please, of that statement?

13 A Yes.

14 Q Can you confirm that is your signature?

15 A It is my signature.

16 Q Can you confirm that the contents of the witness statement are true?

17 A I confirm they are true.

18 Q Then the same exercise at tab 7, please, you should have your second witness statement?

19 A Yes.

20 Q Then at p.12?

21 A Yes.

22 Q Is that your signature?

23 A It is my signature.

24 Q Can you confirm the contents of that witness statement are true?

25 A I confirm it is true.

26 Q Thank you very much.

27 THE CHAIRMAN: You are going to need to speak up a little bit and particularly into the
28 microphone because we have a transcript being prepared and it is important that the
29 transcribers hear what you say, and that the Panel hears what you say as well.

30 Cross-examined by Miss BACON

31 Q Madam, I think I am going to be most or all of the morning with Mr. Fraher, and I
32 wondered if it would be convenient if we took a 10 minute break at some point between half
33 past 11 and 12 so that Mr. Fraher and everyone else can stretch their legs.

34 THE CHAIRMAN: Yes.

1 MISS BACON: If I do not remember I am sure someone will remind me. Mr. Fraher, I
2 understand that you have been the finance director of Durkan Holdings since around 1998?
3 A That's correct.
4 Q Also its Company Secretary since 1993?
5 A That's correct.
6 Q I also understand you are the Company Secretary of Durkan Limited?
7 A That's correct.
8 Q Since when?
9 A Probably about 1993.
10 Q And are you also the finance director of Durkan Limited?
11 A I am.
12 Q And again, since when?
13 A Probably 1993.
14 Q And you are also the Company Secretary and Finance Director at Durkan Pudelek?
15 A I was the Company Secretary of Durkan Pudelek, I had the title of "finance director" of
16 Durkan Pudelek.
17 Q And that was from the time that it was incorporated in 1992 until the management buy out?
18 A That is correct.
19 Q You say that you are also a Chartered Accountant?
20 A I am.
21 Q Do you agree that as the finance director of the DP and a Chartered Accountant, your
22 responsibility was to ensure that DP's budgets and accounts were managed properly and in
23 compliance with all relevant accounting standards?
24 A Whilst I was entitled the "finance director" of Durkan Pudelek, I didn't prepare the budgets
25 for Durkan Pudelek, any information I prepared for Durkan Pudelek was based on
26 information that was given to me by the Executive Board of Durkan Pudelek. There was
27 very little information that I prepared of my own volition on behalf of Durkan Pudelek,
28 certainly in my capacity as a Chartered Accountant. Certain information that would have
29 been given to me by the operational board of Durkan Pudelek I may have reformatted that
30 into what I deemed appropriate as a Chartered Accountant. In simple terms, much of the
31 information I got from Durkan Pudelek from the operational board was a bit like a jigsaw. I
32 put it together in a format that I believed was in chartered accountant's terms. There were
33 many reasons why I would have done that, not least of which would have been ultimately it
34 was intended to sell the investment in Durkan Pudelek.

1 THE CHAIRMAN: Let us get on to that. Do try and keep your answers quite short because I am
2 sure these other issues will be explored in due course.

3 MISS BACON: I am grateful, Madam. Did you attend all of the board meetings of Durkan
4 Pudelek?

5 A I would say 99.9 per cent, yes.

6 Q Mr. Durkan was asked yesterday when you started doing the minutes of those meetings.
7 Can I ask you to turn up bundle 2b. Can you take up tab 28, which is the minute of the
8 meeting held on 26th January 1995. You will see at the start there that the chairman, I
9 presume that was Mr. William Durkan, suggested that it would be a good idea if Alan
10 Fraher, Company Secretary, took the minutes of the meeting and distributed same within
11 seven days of the meeting. This was, you will see, in January 1995. Would that have been
12 the time when you started to take the minutes of the board meetings?

13 A Certainly, Mr. Durkan asked me to take them at that stage. I suspect I may have taken them
14 pretty soon thereafter. I can generally tell by the typeface as to whether or not they were
15 done by somebody in the Durkan Limited team rather than somebody in the Durkan
16 Pudelek team because Mike Pudelek had his own PA and he did his minutes originally. I
17 would never have used anybody within DP; I would have used somebody within Durkan
18 Limited. So I can generally tell by the typeface.

19 Q So are you saying that if the minutes were in "Times", which this looks like, it was one of
20 your sets of minutes, and if you look at tab 31 it is in a different typeface which looks like
21 "Arial", would that have been taken by someone else? Is that what you are saying?

22 A That doesn't look like mine either.

23 Q Are the minutes at tab 28 which you have been asked to take, are they yours, does it look
24 like yours?

25 A At 28, no.

26 Q And 29?

27 A I doubt that 29 are. They could be, but I'm not 100 per cent sure in my mind. I would have
28 used a different style of language in my board report as distinct from Mike Pudelek's.

29 Q So can we at least agree that it was somewhere around this time that you started taking the
30 minutes?

31 A Yes, I agree.

32 Q You carried on doing the minutes, in most cases, until the end, is that right?

33 A Yes, that's correct.

1 Q Can I ask you to talk us through one of your cash management reports. In the top row
2 behind you will see a bundle labelled 3a. This was the one that, as you see, I took Mr.
3 Daniel Durkan to yesterday. If you turn up tab 1 and go through until you get to the green
4 divider which is entitled “Cash Management” – it is the one that I did not ask him about
5 because it was yours. I understand that you presented these cash management reports at
6 every board meeting, is that right?

7 A That is correct.

8 THE CHAIRMAN: I am lost as to where we are.

9 MISS BACON: It is 5.2 behind tab 1 in bundle 3a. It is green divider 5.2.

10 THE CHAIRMAN: Cash management, yes.

11 MISS BACON: Mr. Fraher was just confirming that this was the type of report that he produced
12 at every board meeting. So this lists trade debtors overdue by more than ten days. Was this
13 the standard format of your cash management reports?

14 A It was. I probably expanded upon it later on, but that was basically the format.

15 Q So you were reporting quite carefully to the board on the debts to the company that were
16 overdue by more than ten days?

17 A What I was doing here, I was expecting – pressing a button, pressing a button on 29th
18 January 2003 to get the debtors list from the accounting system. From that it was quite easy
19 to see what the age and amount of debtors was. I extracted the ones over ten days to make
20 the board aware, and more importantly to make the Durkan representatives aware of levels
21 overdue by more than ten days. Can I emphasise overdue by more than ten days, i.e. there
22 could be slight problems.

23 Q There was not any financial cut off, was there, because you have got some debts that are
24 quite small, £587, and then some debts that are quite large, say £49,000, so it does not look
25 like you only reported on, say, debts of a particular size?

26 A Well, what actually happened was that a colleague of mine, a bookkeeper basically, would
27 give me the list and I would stick it on a full page basically.

28 Q Would you have issued the original invoices for the debts?

29 A Well, I wouldn't have, but the bookkeeper would have.

30 Q So the bookkeeper would issue the invoice when told to do so by perhaps Mr. Pudelek or
31 Mr. Simmons. Then they would have waited for payments. Then when the debt was more
32 than ten days overdue it would have popped up on their system and you put it on your list?

33 A No, what would happen, my role within Durkan Limited, as a service provider to all the
34 companies within the Group, was to run the accounting system. It was important that when

1 something was overdue I should tell the directors of the various companies. This wouldn't
2 have been the first time they were told this. Don't forget, these board meetings only took
3 place every two months. On a weekly basis, my colleague, it would have to be Michael
4 Lawlor, would have sent the same list to Colin Simmons in advance of the Monday morning
5 prayer meeting, saying, "Look, here's the overdue list", more or less, "There's the list, do
6 what you will with it", but it was quite obvious what he should do with it. He should chase
7 them up, because our role was to chase the client within terms. If it was an ordinary
8 account we would expect it to come within the month. If it didn't come in during the
9 month, my colleague, Michael Lawlor, would chase the payment on the due dates. When it
10 was overdue it would be passed back to Pudelek to sort out the client basically. We had no
11 liaison with the clients of Durkan Pudelek. We were providing bureau accounting services
12 for DP.

13 Q Mr. Fraher, I think you are agreeing with what I have just said, that they would issue the
14 invoice, you would wait for payment, if it became overdue then you would put it on your
15 list and report on it at the board meetings?

16 A That's correct.

17 Q I asked Mr. Durkan yesterday about who was the Durkan nominated signatory for cheques
18 over £2,000 – do you remember that?

19 A I do.

20 Q Do you remember whether you were the signatory for cheques of that nature?

21 A I know exactly what the procedure was. Under the shareholders' agreement any cheques
22 over £2,000 required a signature of a Durkan Pudelek representative and a Durkan Holdings
23 representative. The way that was put into effect was the bank mandate with A signatories
24 and B signatories. Anything over £2,000 required one A and one B signatory.

25 Q Were you one of the signatories – I do not know whether it was an A or a B, but were you
26 one of the Durkan signatories?

27 A I was probably one of four A signatories.

28 Q So did you frequently sign cheques for amounts over £2,000 then if you had to be one of the
29 signatories?

30 A Invariably I signed the cheques.

31 Q That is all I wanted to establish, because Mr. Durkan said yesterday it was not normally
32 him. Can you turn up the shareholders' agreement.

33 THE CHAIRMAN: The category A, was that Durkan Holdings?

34 A That's Durkan Holdings, yes, madam.

1 MISS BACON: Can you turn up bundle 2A and go to tab 9. You will see that this is the
2 shareholders' agreement that you have just referred to Mr. Fraher?

3 A Yes.

4 Q You say in your second witness statement that one of your roles as finance director of DP
5 was to keep track of the contributions owed by DP to DH for the shared services?

6 A Again, if you're talking about the fact that I had the title of finance director, but I was
7 actually working for Durkan Limited, but notwithstanding that I can answer the question.

8 Q Can you turn up clause 7.3, which provides for payment for those services. I am afraid we
9 have not managed to get a more legible copy of this, but I will read out what I think it says,
10 and Mr. Hoskins will correct me if I am wrong. So this says at 7.3:

11 "Durkan shall provide to the company these services at no cost up to 1st October
12 1993 and thereafter at an annual cost of a sum equal to 5 per cent of the gross
13 turnover of the company unless otherwise agreed by the shareholders. Such costs
14 to be paid in quarterly instalments in arrears."

15 So that was the provision in the Shareholders Agreement specifying that the services – we
16 have discussed with Mr. Durkan yesterday what those services were – the services were to
17 be provided at no cost until 1st October 1993 and after that the Shareholders Agreement
18 specified a contribution of 5 per cent of the gross turnover.

19 Can I ask you, having seen that, to turn up bundle 2B, tab 27. You will see this is the
20 Minutes of the Board of Directors Meeting on 15th November 1994, so a little more than a
21 year after the services were supposed to be paid for by Durkan Pudelek under clause. 7.3
22 after payment kicked in, which was October 1993. Turn over the page to p.2 and look at
23 para. 3.06 which reads: "The Chairman asked if the overheads remained within budget."
24 Would that have been Mr. William Durkan?

25 A I suspect that might have been Mike Pudelek who asked that particular question.

26 Q "AF confirmed this to be the case but advised that the group contribution should be
27 greater", and then there is a handwritten annotation "Zero" "No". You said in your second
28 witness statement that this is your handwriting, is that right?

29 A That is my handwriting, yes.

30 Q This was your set of minutes. This was a set of minutes on which you had marked up your
31 notations?

32 A They are the set of minutes I am quite happy to say they are the minutes of the meeting, in
33 fact they weren't typed by anybody in my department because they're actually on Durkan
34 Pudelek paper, and nobody in Durkan Pudelek every typed, I believe, anything for me, so

1 these are more than likely Mike Pudelek's minutes, I have no reason to believe that they are
2 not correct.

3 Q The handwriting you say is yours?

4 A That handwriting is definitely mine.

5 Q So are you recording that what happened at this meeting was that you advised the group
6 contribution should be greater and Mike and Colin thought it should be zero?

7 A No. What I'm saying is that Durkan Pudelek hadn't actually paid any overheads as at this
8 point in time. Bearing in mind that probably November 1994 the turnover of the company
9 was probably £2 million per annum, it was pretty small. At this stage we were just bedding
10 in if you like – don't forget they only started in October 1992, but two years down the road,
11 I believe in the first year of accounts they turned over £1.1 million and probably £2 million
12 in the second year, so we are talking about small beer here in the scale of things. But as
13 Mike and Colin had agreed, they received no remuneration up to 31st July 1993 and we
14 weren't entitled to any overheads for the first year. As it was we got no contribution to
15 overheads here, despite the fact that the agreement said we would be entitled to it. Similarly
16 Mike and Colin, who were entitled to no salary up to July 1993, extended that for a further
17 period of three months because there was there wasn't a whole load of cash around. So we
18 had a bit of an argument at that point in time, and I was making the point that under the
19 agreement we were entitled to something where we actually received nothing.

20 Q And that is recorded in the next minute. So what you are doing is making a handwritten
21 annotation that the minute is incorrect, and then if you go to tab 28 and look at point 2, this
22 is your correction of this minute at the next meeting. "Alan Fraher referred to the fact that
23 there was a nil contribution towards group overheads" so that explains what you have just
24 said, that there was no contribution at that point of time, and you had had a bit of an
25 argument with Mike and Colin?

26 A Sorry, would you mind just referring to that point? What tab was that again?

27 Q Tab 28, the next minute.?

28 A And point number?

29 Q 2. So what you are doing is at the next meeting you are coming along and you are
30 correcting a previous minute and said "Actually, there had not been any payment"?

31 A That's correct.

32 Q So as at the end of 1994 DP had not paid anything of its 5 per cent turnover contribution?

33 A I believe that to be correct.

1 Q Effectively up until that point Durkan Holdings and Durkan Limited have been subsidising
2 DP?

3 A That isn't necessarily correct, because similarly Mike and Colin did not receive any
4 remuneration for three months forward. If I just elaborate on that, what actually happened
5 thereafter, this was the bedding in of a new Co., a major organisation. At this stage we
6 sorted things out; we then had an agreement, as it says in the Shareholders Agreement it
7 shall be 5 per cent of turnover. In fact, they never paid 5 per cent of turnover. Immediately
8 thereafter we negotiated based on the actual services that were to be provided. It turned out
9 to be significantly less than 5 per cent, the Shareholders Agreement actually said "5 per cent
10 of gross turnover". In the services it also makes reference to "complex management" and
11 things that would normally be job costed. I wasn't instrumental in the fine detail of this
12 agreement but the idea was that it would be 5 per cent towards the overheads, well as Mike
13 and Colin pointed out to me when we had an argument, on that basis you are entitled then to
14 also pay for copious managers, surveyors and people who would normally be job costed, the
15 intent was that they would pay a contribution towards the shared services.

16 THE CHAIRMAN: If you can look further down that page at para.3.00 and then "3", what is said
17 here is:

18 "The overhead budget for 1995 indicates a figure of £107,819 in respect of
19 indirect overheads/group charge as a contribution towards the overheads borne by
20 Durkan Holdings Limited."

21 So you are saying there has been nothing paid so far. The budget for the coming year, the
22 tax year, or financial year ended '96 indicates a figure of this. Over the page, if you look at
23 para. 4:

24 "In relation to the year ended 31 January 1995 the meeting was advised that there would be
25 no contribution paid to Durkan Holdings Limited. The meeting was advised by Alan Fraher
26 that on the basis of the overhead budget for the year ending 31 January 1996 it was quite
27 possible to allocate a figure in the order of £175,000".

28 So what you are saying is the budgeted figure was £107,000 but it ought to be £175,000
29 based on turnover?

30 A That's correct. This is going back to the 5 per cent of turnover, presumably the £175,000
31 probably represents 5 per cent of the year to 31st January 2006. Later on in that minute it
32 says I was then to go and negotiate the position with Colin Simmons and Mike Pudelek. As
33 it turned out I had a fairly long and heated discussion with Colin Simmons as to exactly
34 what they would pay for, and basically, also what services they would require, because at

1 this stage we are now into January 1995 and the business was bedding down somewhat. So
2 some of the original services Pudelek may have required, i.e. there was a reference to
3 estimating services which they took for three or four months because they weren't doing so
4 much turnover. Colin is an estimator, he's a surveyor, he is well capable of doing it, as
5 indeed Mike Pudelek is. So some of the originally envisaged services, they fell away
6 almost immediately.

7 Q If you read the rest of that paragraph, this is saying:

8 "From the Durkan perspective it was felt somewhat inequitable that Durkan Brothers
9 Limited should bear these costs without some assurance . . ."

10 And so on. So that is why you were having this somewhat heated discussion with Mike
11 and Colin because you were feeling it was inequitable that nothing had been paid up to that
12 point, but you had to reach some kind of consensus with them going forward, because you
13 were having a continual working relationship with them?

14 A Precisely, and more the point of view of there was no question of paying dividends, in fact
15 it was very early on. When I look at this here there was also provision under the
16 Shareholders Agreement that no dividends would be paid before 1997 anyway. We were
17 rattling our sword basically trying to sort things out between us because it was quite
18 obvious that Durkan Pudelek was going to be a relatively successful business. Don't forget
19 the Shareholders Agreement actually said that Durkan Holdings could call on Durkan
20 Pudelek to abort the entire transaction if they hadn't reached their targets by July 1993. At
21 this stage it was quite clear that the business was progressing, it was no longer an infant it
22 was becoming a baby and it was time to sort things out between us.

23 Q Thank you. Following that discussion can you tell us whether anything was actually paid
24 during the year ended January 1996?

25 A Off the top of my head I would suggest it was, and based on the discussions that I'd had
26 with Colin Simmons and the agreement we actually reached in relation to the level of the
27 services and precisely what they should pay.

28 Q Can you turn to the financial statements for the next year which are at tab 93 and if you go
29 to the last page of those financial statements – this is the following year ended 31st January
30 1997 (I will take you back to this in a minute but I just want you to see how it is set out) –
31 you have got a related party transaction set out there which shows the management charges
32 of £146,605 paid to Durkan Limited. If you turn back to the statement at tab 92 there is no
33 similar statement there of management charges being paid, is there? If you look at the end
34 on p.12 you have got post balance sheet events and parent undertaking. You do not have

1 anything indicating related party transactions, so that seems to indicate that there was still
2 nothing being paid in this financial year?

3 A That may well be the case, but not necessarily the case. The note we're referring to here on
4 the 1997 accounts is called a related party transaction. Now, off the top of my head I can't
5 remember when accounting standards said that you had to disclose these party transactions.
6 It may have been in 1997, but it could have been earlier in 1996. I couldn't swear to it. But
7 as far as I'm concerned, from the day I negotiated with Colin Simmons, and Colin Simmons
8 negotiated fairly aggressively with me, they paid the service charges. There was no
9 question of Durkan Limited being short changed in the recovery of its overhead
10 contribution from any group company.

11 Q Can you then look at the 1997 financial statements at tab 93. This is the first of the
12 financial statement which record a management charge being paid. That is £146,605. By
13 my calculation that is a little over one per cent of Durkan Pudelek's gross turnover for that
14 year. Then if you look at the next year, at tab 94, that shows management charges of
15 £221,836. Again, by my calculation that is a little over one per cent of Durkan Pudelek's
16 gross turnover. Can you tell the Tribunal what the basis was for the calculation, and why
17 you dropped so dramatically from 5 per cent to one per cent? I understand that you say
18 some services were not being provided, but it is a very big drop from what was specified in
19 the shareholders' agreement. Was there some formula that you used?

20 A There was a formula that we used. If I could elaborate on exactly what happened here?

21 Q Yes.

22 A From the second you walk inside the door of Durkan House there is a receptionist. That
23 receptionist services Pudelek, New Homes, Durkan Limited. There is a basis allocation of a
24 cost of that receptionist. If Durkan Pudelek turned over £5 million, Durkan Limited £20
25 million and Durkan Estates £25 million, the costs of the reception would be split in
26 proportion to turnover because that is a reasonable basis of allocation of apportionment.
27 Most of the overheads were based on relative turnover of each company within the group of
28 the common costs. Now, with other things, if we had that lady sat at reception, she had the
29 phone, there was the depreciation of the PABX system that there probably was at the time,
30 but every conceivable common cost was shared between every group company.

31 Q Did you say that you did manual reconciliation of all the common costs and then split it
32 between the Durkan Group companies?

33 A No, we did it beforehand. When the budgets were set at the beginning of the year. If, for
34 example, Durkan Pudelek said we're going to do £10 million, Durkan Limited would do

1 £20 million and another company would do £30 million, Durkan Pudelek would bear one
2 sixth of those common costs. So the first year or two we then did a reallocation at the end
3 of the year to what the actual turnover was. But that happened for a couple of years.
4 Thereafter it seemed only fair and equitable that if somebody said: I am going to do £20
5 million, someone else is going to do £30 million and someone else is going to do £40
6 million, you're locked into that at the beginning of the year because as a company we would
7 make commitments. As the group was expanding we may well have had two receptionists.

8 Q I am sorry to interrupt. There was a common set of costs, you had a prescribed formula
9 dividing it up between the different group companies?

10 A That's correct.

11 Q On the basis of turnover at the start of the year. That is all I wanted to establish. Can you
12 now look at tab 97. If you go to the last page of that, p.13, this showed under related party
13 transactions in 2001 £907,000 to Durkan Limited. That presumably was on the basis of the
14 formula that you have just explained to the Tribunal. Underneath that, Durkan New Homes
15 Limited. Can you explain what the payment to Durkan New Homes Limited, which is
16 listed as a management charge, was actually for?

17 A Sorry, for Durkan New Homes?

18 Q Yes.

19 A A similar basis, but it may include a figure for Daniel Durkan. Daniel Durkan was the chief
20 executive of Durkan New Homes. For efficiency he may well have been paid through the
21 payroll of Durkan Limited because they had one payroll up to a certain point for Durkan
22 Limited and Durkan Estates. Daniel Durkan's time would be apportioned between Durkan
23 Limited and Durkan Estates. I would suspect the majority of his costs would be to Durkan
24 New Homes Limited.

25 Q I am sorry to interrupt, but are you saying that these figures include an apportionment of
26 Daniel Durkan's time?

27 A Only for Durkan New Homes, because he was actually paid through Durkan Limited.

28 Q So you are saying that the £279,000 included your contribution to Daniel Durkan's
29 remuneration, but it was paid through Durkan New Homes? That is what I thought you
30 said.

31 A I am sorry, I looked at the wrong numbers here. Bear with me one second, please.

32 Q We are at tab 97 p.13 the highlighted section: related party transactions. We have got
33 management charges, and you just explained the basis of the management charges that are
34 paid to Durkan Limited for the shared overheads. That was presumably the £907,000. We

1 then have a figure of £279,371 paid to Durkan New Homes which appears for the first time
2 in this financial statement. You have not made a management charge to Durkan New
3 Homes before. I was trying to establish what that was. I think you were telling us that it
4 was partly Daniel Durkan's time?

5 A No, sorry, I'm looking at the wrong set of accounts here. Forgive me. I honestly can't
6 answer what that one is for. I daren't even guess. I can't even remember if we were doing
7 anything on the gilts or the FURBS into a pension contribution off the top of my head.

8 Q But this is listed as being a management charge paid to a fellow subsidiary undertaking.

9 A Yes.

10 Q You have statements of pension contributions elsewhere. I am just struggling to understand
11 what this could have been.

12 A I can't answer that off the top of my head.

13 Q OK, can I come back to your previous comments about Daniel Durkan's time, would that
14 have been paid through the contribution to Durkan Limited then?

15 A Durkan Limited paid Daniel Durkan's salary and Durkan Limited would have similarly
16 charged Durkan New Homes for that contribution, for that salary.

17 Q Would they have charged you, Durkan Pudelek, for part of his salary as part of the common
18 overheads?

19 A No. Daniel Durkan did nothing for Durkan Pudelek other than attend board meetings.
20 Daniel Durkan was the chief executive of Durkan Limited, Durkan New Homes, and many
21 other companies within the Durkan Group of companies. He had no part in the running or
22 otherwise of Durkan Pudelek.

23 Q All right. Can you turn over to tab 98 and look at the last page of that. That is the next
24 year. Notes to the financial statement for the year ended 31st January 2002. Again, we have
25 related party transactions.

26 "During the year the company paid management charges to fellow subsidiary
27 undertakings in respect of services provided as follows: Durkan Limited
28 £621,000, Durkan New Homes Limited £660,000 [even more than Durkan
29 Limited]."

30 Can you explain to the Tribunal why there would have been a payment to Durkan New
31 Homes of management charges that were more than was being paid to Durkan Limited?

32 A I believe – I never received this number. I suspect this may have something to do with the
33 contribution of Durkan House inter-FURBS, i.e. pension funds of Danny, Mike and Colin.

1 If I remember rightly – yes, Durkan Pudelek paid Durkan New Homes a contribution, a fee,
2 in respect of a proportion of Durkan House, it was actually transferred to the FURBS.

3 THE CHAIRMAN: The what?

4 A It is a thing called the “funded unapproved retirement benefit scheme”. There’s a bit of
5 history here about this.

6 MISS BACON: I am sorry, that was not that year, that was the next year that there was a large
7 payment into pension schemes that you’ve referred to. That was the year ended 2003. It
8 didn’t happen in this year.

9 A There were actually two pension schemes. There was a contribution of gilts of £908,000,
10 but there was also a contribution by our head office, which was owned by Durkan New
11 Homes. In 1999, December 1999, Durkan New Homes bought Durkan House.

12 THE CHAIRMAN: Durkan House is the building where all ----

13 A It’s a building.

14 Q -- the companies are based.

15 A Yes. Durkan Pudelek Interiors refurbished that building. We received tax advice from
16 Javed Siddiqui and Foxborough Consulting independently. That was a tax avoidance
17 scheme called a FURBS, a funded unapproved retirement benefit scheme, whereby you
18 could actually make a contribution of the building into the pension scheme. What we did,
19 we did it in tranches. I think we did one-seventh, two-sevenths, two-sevenths and two-
20 sevenths, until the entire building was in the FURBS. By Durkan New Homes making
21 those contributions into the pension scheme, it had to be reimbursed by Durkan Pudelek
22 from Mike and Colin’s contributions.

23 MISS BACON: So you were not actually making a management charge to Durkan New Homes,
24 you were transferring money around the group for tax avoidance purposes?

25 A It wasn’t so much tax ----

26 Q That is what you have just told the court, Mr. Fraher?

27 A Yes, it is.

28 THE CHAIRMAN: Let him answer the question, Miss Bacon.

29 A It’s quite a legitimate thing to make a contribution of a building into ----

30 Q Yes, no one is suggesting that you have done anything wrong.

31 A -- and this is how you recover it, through a management charge. That is the terminology we
32 use, it’s a management charge that you would levy on the company.

33 Q Is this right, that because Durkan New Homes Limited owned Durkan House, the building,
34 if Durkan House building was being transferred into FURBS then the other companies in

1 the group had to reimburse Durkan New Homes for the loss of the asset from its own
2 accounts and that in proportion to what, their ----

3 A To the benefit of their contribution into it. In fact, if I remember rightly, it went in in the
4 same proportion. Daniel Durkan got 51 per cent of Durkan House, Mike and Colin got 24.5
5 per cent each of Durkan House. Now, one of the reasons for this was Durkan New Homes
6 hadn't got the wherewithal to put the entire building in in one year so it did it over a number
7 of years. Mike and Colin rightly said, "Hold on, we've actually taken a lease on this
8 building, so we're paying the rent, as indeed Durkan Limited are paying the rent on their
9 floor, so we would like to share in the benefit of the scheme". So they got independent
10 advice from Javed Siddiqui, indeed they got independent advice from their own
11 accountants, and they decided to proceed with that. I apologise for being vague earlier on.
12 I was caught on the hop, but now I understand. The first year was the one-seventh, then
13 two-sevenths followed by two-sevenths followed by two-sevenths. That's actually what
14 happened.

15 MISS BACON: So when you referred to a management charges to Durkan New Homes Limited,
16 that was part of this scheme?

17 A Yes.

18 Q And what about the management charges that were paid to Durkan Limited, did those
19 include an element of transferring money for similar purposes?

20 A No

21 Q You say in your second witness statement at para.13 that when DP was set up, Mike and
22 Colin had not been engaged in a business on their own account before – is that right?

23 A That's as I understand it. I believe they were professional managers in other businesses.

24 Q At para.18 you say that at that time they had little or no experience in company
25 administration?

26 A I mean in general administration, yes. Colin is a surveyor, Mike was chief executive of a
27 number of companies, Wiltshires, VT Watkins, and so on, so they weren't that familiar with
28 the admin, the general admin, of companies.

29 Q You and the Durkans, as in Mr. Daniel Durkan and William Durkan, at that point had had
30 considerable experience of running the Durkan companies – is that right?

31 A That would be correct. I would be very familiar with the general administration. Being a
32 chartered accountant I head up the administration of the Durkan group of companies.

1 Q Is it fair to say that in the early days when the business was bedding down much of the
2 board meeting time was spent using that experience that the three of you had to decide on
3 the process and principles under which DP would operate?

4 A No, not at all, William Durkan, as we know, hardly attended any board meetings, one in the
5 three in the relevant period. Daniel Durkan, he's not a man for detail, he is the chief
6 executive. He's more into buying land, and so on. I look after the administration, and I
7 would have discussed it with Colin Simmons, the general admin. Mike and Colin, they
8 came in as two individuals into Durkan House, and they had eight months to establish that
9 business. We gave them a platform so that they had a running start to go and establish their
10 business. So anything we could do to let them focus entirely on building their business, that
11 was the purpose. That was the agreement on day one, we ran the admin, they got out and
12 built the business.

13 Q Can you look at tab 21 in the same bundle, 2B, the one with the financial statements. Can
14 you look at para.5.02?

15 A Yes.

16 Q This was in response to a question that you had raised, and it says;

17 "In response to Mr. Fraher, Mr. Pudelek confirmed no contracts would be entered
18 into without the entire Board being satisfied with the client's ability to pay and the
19 necessary guarantees being in place."

20 Does this mean that you had expressed some kind of concern that this procedure should be
21 put in place and that contracts should not be entered into unless there were appropriate
22 guarantees of the client solvency, and Mr. Pudelek was agreeing that, and also that the
23 board would decide on this?

24 A This board meeting is dated 2nd November 1993. The company had hardly started, it was a
25 year in existence. Its turnover at that stage was probably about £800,000 or £900,000. Any
26 contract that was sought or won at that stage was won by Mike Pudelek through his
27 contracts. I was just concerned that what experience had he got in credit vetting, and so on,
28 and I was just asking a general question that we weren't going to be stuck with a bad debt.
29 It's a normal question that a finance director or anybody with any financial acumen would
30 say. In fact, I didn't have to say it to Mike Pudelek, I'm sure he probably knew it. They
31 were his contacts. I was merely trying to protect the interests of Durkan Holdings by asking
32 what I thought was a relevant question.

33 Q Can you turn to tab 23, para.4.01. This is a discussion about remuneration of the Durkan
34 Pudelek staff, and you considered that the remuneration packages for their staff should not

1 be significantly different than the packages for the DL staff. The board appears to have
2 agreed that the matter would be treated sensitively. Is that your recollection?

3 A I would say that the package should be on – it was a recommendation that it be on a similar
4 basis. When Mike and Colin joined, as per the shareholders’ agreement, their business plan
5 actually said they would pay their staff car allowances. Now, cars are quite a sensitive
6 issue, not so much in Ireland but certainly in the UK, everybody likes a nice car. They
7 moved away from giving car allowances. They were in the private sector. Durkan Limited
8 was in the public sector. It’s very much a bread and butter sector. The private sector goes
9 up and down. To attract the right calibre of staff they were giving their staff fairly flash
10 cars. I was just asking them to deal sensitively with it, bearing in mind that some of the
11 people who they were dealing with for the shared services, they would know some of their
12 colleagues, they would be speaking to them. I just asked that they deal with it sensitively,
13 that’s all.

14 Q If you look at the next paragraph in that minute, 4.02:

15 “AF advised that the overheads of the company required review and incorporation
16 into the trading budget. The Chairman asked that this be done and formalised at
17 the next Board Meeting.”

18 Would the chairman then have been William Durkan, who was at that meeting and recorded
19 as being the chairman?

20 A I suspect that that would be a comment by Mike Pudelek. I don’t think that Bill Durkan
21 would be making comments such as that. Bill Durkan may well have made the comment,
22 but I suspect it was probably Mike Pudelek. Don’t forget, we are talking about March
23 1994. Now, I suspect that the budget hadn’t prepared for the year ended 31 January 1995 at
24 this stage, so the idea was to incorporate – have a look at the numbers you’ve given me
25 originally, Mike and Colin, and come back to me, what you think of the definite numbers,
26 so I can actually put into, reformat it into a budget for you.

27 THE CHAIRMAN: Good, just focusing on the question Miss Bacon asked you, at the front page
28 it says “W. Durkan in the Chair”, and then it says, at 4.02,

29 “The Chairman asked that this be done” -----

30 PROFESSOR PICKERING: Can I just follow in on that -----

31 THE CHAIRMAN: -- whereas later on it does refer to MTP, is that not Mr Pudelek, as in 5.01?

32 So, why do you think it was Mr Pudelek?

33 A It could have been William Durkan, but more than likely Mike Pudelek is the one that said,
34 “Look just get on and, Colin, go and get on, sort out the numbers, put them into a budget”.

1 It might well be the case that Bill Durkan may have said it but I'll be surprised. It's more a
2 question of Mike Pudelek instructing Colin Simmons to meet with me and to sort it out.

3 PROFESSOR PICKERING: But in what sense in the context of that meeting, when Mr Durkan
4 was, Mr William Durkan was there, and shown as having been in the Chair, in what sense
5 was Mr Pudelek going to be viewed as a chairman? Chairman of what? He was Chief
6 Executive of DP. William Durkan was Chairman of Durkan Holdings and was chairing this
7 meeting.

8 A Bill Durkan was in attendance at that meeting, and -----

9 Q No, it says he was in the chair, with respect.

10 A It does. And, again, sir, every meeting he was, Bill Durkan was there. It probably has the
11 word "Chairman" against him, but William Durkan never chaired any meeting of Durkan
12 Pudelek. He was there. William Durkan is a figurehead in the Durkan organisation.

13 Q So, are not these minutes, then, incorrect? Inaccurate?

14 A As regards, yes. If you say that Mr Durkan was the Chairman he wasn't actually, but he
15 was, he was a titular chairman. He was not in fact the Chairman.

16 THE CHAIRMAN: So, when it says, at 7.01:

17 "It was noted that the Chairman and Chief Executive would be visiting sites on the
18 10th March",

19 who is that referring to?

20 A Now, that is referring to William Durkan. Now -----

21 Q As which? As the Chairman?

22 A As Chairman.

23 Q And who is the Chief Executive, then?

24 A Mike Pudelek. Now, just for the sake of it, these are not my minutes. I'm not saying
25 they're incorrect, but Mike Pudelek would always describe William Durkan as "The
26 Chairman". It was, it was a title. It may well have been the case that William Durkan said
27 it, but I'd just, I'd be just surprised. We're going back as far as 1994, we're going back
28 16 years ago. He may well – Bill Durkan may well have said it, but I suspect it's probably
29 Mike Pudelek, because it's more Mike's style to say, just, "Colin, get on there with Alan
30 and sort this out".

31 MISS BACON: Can you turn to tab.24, please, and look at para.4.02 on the second page. You
32 are reporting on a satisfactory cash position, and then there is the comment that:

33 "The meeting agreed that CS and AF should research and report on the more effective usage
34 of this resource".

1 Did that mean that you were being asked to go away with Mr Simmons and put your heads
2 together and come up with a better way of using the cash surplus?

3 A Well, again, we're talking about April 1994. There was obviously a cash surplus and it was
4 lying in a Barclays current account from what I can recollect. And, clearly, my report
5 would have shown the cash surplus. Well, what do you do with a cash surplus? My view is
6 you would, at a minimum, put it into a deposit account. But I believe this money was
7 sitting in a current account.

8 Q Then, at para.7.03 you were expressing concern here that one of the DP sites was reporting
9 an excessive telephone account, and the minutes here are recording that a solution to this
10 would be investigated. So, is it right to say that, as Finance Director, one of your tasks was
11 to do things like monitor DP's telephone bills, as part of monitoring its overall overheads?

12 A No. We would monitor their overheads. We processed the payments, in fact this particular
13 issue, I seem to recollect, was a site telephone and we had, we had Security on site, and they
14 were abusing the system by ringing home. In fact, this bill was up to the, £800 or £900.

15 THE CHAIRMAN: So, they were ringing their aunts in Australia, or whatever on the -----

16 A Well, and further afield. It depends. We had the situation here where we had no call
17 barring and there were no premium rate numbers.

18 THE CHAIRMAN: No, no, I understand.

19 A There were no blocks on those.

20 Q We are not really concerned with what the problem was.

21 MISS BACON: I am just asking about your involvement in it, and this would have been one of
22 the things that you were monitoring.

23 A No, I made the suggestion, but in fact my colleague picked it up in the accounts, we were
24 processing the payment, and said, "Look at this", so we reported it and said, "Look, what do
25 you want to do?" "It's as clear as day what you should do. You should put on call barring",
26 and so on, because literally that site, all the security men needed was the ability to dial
27 "999" outside office hours, basically.

28 Q Could you turn to tab.26. You will see on the front page that that was another meeting
29 where William Durkan is listed as being in the chair for the meeting.

30 A Yes.

31 Q If you go over to p.3 at para.4.03, this is another comment that you are making about site
32 telephone charges. It has obviously not been resolved since the previous board meeting, or
33 previous but one board meeting. Do you agree that what is being said here is that Mike and
34 Colin needed to sort out the problem?

1 A What I'm saying here is that, clearly, the situation that I had highlighted before hadn't been
2 addressed, and they undertook, once I brought it to their attention, just for good financial
3 housekeeping, because you'd had outrageous bills here. So, they undertook to sort that out.

4 Q If you go back to para.3.04, you advised that you remained concerned that the year end
5 result would provide a profit. And then I want you to look at 6.02, the last sentence:
6 "AF again confirmed the need to address the bottom line".

7 So, was your concern here that the tenders that were being put forward for projects did not
8 specify sufficient profit margin?

9 A Not at all. I wouldn't know what tenders were being put forward, and I wouldn't know
10 what prices. What I had here was reports prepared and presented by Mike and Colin to the
11 Board; and they clearly highlighted that the gross profit margin was £131,000. That's
12 before overheads. So, if they were trying to build a business – and here we were into, it's
13 still early days, September 1994 – ideally you would like the accounts to start showing a
14 profit. And I was merely highlighting the fact that probably they might not show a profit.
15 I would have no idea what jobs they were tendering, or price they were tendering at,
16 etcetera, but merely highlighting a situation that appeared to me, as a chartered accountant,
17 if you, if they were going to use their accounts out in the open market, it would be nice to
18 see the word "Profit" rather than "Loss".

19 THE CHAIRMAN: So, your comment was just based on those, that previous little table there,
20 under 3.02? Is that what you are saying?

21 A Precisely. Well, there would have been a pack of information behind this. But, again, the
22 company would only be turning over, maybe a million and a half at this stage. So, we're
23 talking about small money.

24 MISS BACON: So, just above the section that I've just asked you to read there is, in para.6.02:

25 "The Chairman suggested to the Board that work opportunities were increasing and
26 that the trend of material and sub-contract increases was also likely to continue. It
27 was therefore important to take these into account when tendering".

28 There seems to be the same point being made. And when the reference is made to the
29 Chairman, would that have been to William Durkan, who is listed as being the Chair for this
30 meeting?

31 A Again, I can't say that it was William Durkan, but, unless he was making a comment on
32 what he saw before him in the reports, that the work opportunities were increasing, I'm sure
33 he would have read that in the report which said the long list of opportunities was
34 increasing. But he was probably also being mindful that, if the turnover is increasing, well

1 the market is probably getting more competitive, just – so, just be mindful of what’s going
2 on out in the market. He really didn’t have to tell Mike and Colin this. They knew that
3 already, but it’s, it’s rather stating the obvious.

4 Q Is it not fair to say that these examples, looking at telephone charges, looking at profit
5 margins and so on, show that the Board did not simply sit back and look at the reports that
6 were given to it, but rolled up its sleeves and engaged with these issues that were really part
7 of the day to day running of the businesses? You looked at salary packages, you talked
8 about company cars, you have talked about telephone bills and strategic issues like profit
9 margins. Is this not the Board really getting to grips with the running of this business?

10 A This is really sorting out a business in its, it’s been less than two years in existence. There
11 wasn’t much to report at some of these meetings. You can imagine if you turn over £2
12 million a year it’s not a whole lot of money, you had to talk about something, so you would
13 look at the smaller issues at this point in time. A lot of this was just financial housekeeping
14 and getting to know each other really; that’s what quite a bit of it was.

15 Q Can you turn to tab 57, this is Minutes of the Board of directors on 24th January 2001 and
16 again you can see that William Durkan was present at that meeting. If you go over to
17 “Matters Arising”, you have said, I think, that one of your tasks as finance director and the
18 Company Secretary was to deal with some of the personnel and employment issues. So is
19 this an example of one of the issues that you would have dealt with, dealing with specimen
20 letters of employment for the Durkan Pudelek staff?

21 A I think in 2001, in accordance with current legislation at 2001 we had changed the standard
22 letter in our HR department for employees. I thought it appropriate that I should give the
23 same letter to Durkan Pudelek, because they may well want to roll out that same standard
24 letter to their staff members.

25 THE CHAIRMAN: Was HR one of the services which was included in the management charges?

26 A It was.

27 MISS BACON: I think it is common ground that employment and personnel issues were
28 something that Mr. Fraher dealt with – is that right?

29 A That was under my jurisdiction, yes.

30 THE CHAIRMAN: What I was asking was, was it being dealt with because of Mr. Fraher’s
31 involvement in DL and DL were providing this service as part of the service they provided
32 to DP under the management charge, or was he doing this in a different capacity?

33 MISS BACON: I think his evidence is that it is part of his role as finance director. Is that right?

1 A No, madam, I was not the finance director of Durkan Pudelek, I had that title from day one.
2 I was asked would I be down as finance director. I had a role within Durkan Limited as
3 administrator. Durkan Limited provided services to Durkan Pudelek, and one of those
4 services was this basic admin service.

5 THE CHAIRMAN: Sorry, I may have set a hare running unnecessarily. I was just looking back
6 at the list of the services which Daniel Durkan yesterday said were provided to DP, that
7 does not include an HR element.

8 MISS BACON: I was trying to establish in bald terms what the administrative services that were
9 provided as part of the common overheads, and they were obviously provided by someone,
10 and some of those were provided by, as I understand, Mr. Fraher. I think that is what Mr.
11 Fraher was just saying, that he was providing services to Durkan Pudelek?

12 A Madam, when Mike Pudelek and Colin Simmons walked into our building they had no HR,
13 they had nobody with them. Two individuals walked in our door, we provided every other
14 service.

15 THE CHAIRMAN: Yes, but who was providing HR services? We have seen that there was a
16 management charge paid by DP to DL, and for certain services. I am just asking: was one
17 of those services anything to do with HR, or not? Was that why DL was helping out DP? It
18 may not have been that, it may have been you as a DP person doing that, that is just what I
19 am asking; but it may be that HR does not have that connection with DL?

20 A It has, madam, because the services to be provided were any other services of whatever
21 nature that may be required by the company, HR was one of them. The services don't go
22 into every little detail .It was implicit in that agreement that Mike and Colin were going to
23 run the business and we would provide full administrative services on day one and they
24 were paid for within that service charge.

25 MISS BACON: Can I just ask you to turn to the next tab, tab 58, this is a follow on from the
26 extract I have just asked you to look at, 2.01 "New Letters of Employment". I am sorry, if
27 you could just turn back, that was another meeting at which William Durkan was present
28 apparently. Then para. 2.01:

29 "New Letters of Employment

30 The said letters are to be issued to all members of staff as soon as practicably
31 possible. Suzanne Dodson to prepare on a similar basis to the Durkan Limited
32 letters."

33 So, did this mean that you had spoken to Mr. Simmons and he had agreed that the letters
34 should be on the same kind of format to the Durkan Limited letters?

1 A That was in accordance with legislation. In fact the lady, Suzanne Dodson, was Mike
2 Pudelek's PA and when they recruited somebody Suzanne prepared the letters of
3 employment and sent them out.

4 Q Could you turn to tab 67, this is in February 2003, this is again a meeting at which Mr.
5 William Durkan is present. If you turn to the third page, para. 4.3. This is not highlighted,
6 if you would just look at the third paragraph under 4.3:

7 "AF referred to the fact that the nature of the work presently being undertaken by
8 DPL had changed in the course of the last year and MTP/CS/MW clearly
9 recognised the requirement for the appropriate grade of Contracts Manager etc."

10 Was your point there being made that projects were becoming larger and that DP needed
11 more experienced managers?

12 A No, I was really commenting on the situation – we are talking about February 2003, I think
13 we probably weren't too far after the September 11, and I think from what I could gather
14 from the list that Durkan Pudelek's contracts were probably smaller at that stage, it certainly
15 changed in nature – there were certainly no big developments going on – and I was just
16 saying "had they catered for that situation?" I expect they probably had, but it was a
17 comment that I made.

18 Q Could you turn over to tab 70 ----?

19 Madam, if I could make a further point there?

20 THE CHAIRMAN: You are saying that the contracts had got smaller rather than ----

21 A For many years Durkan Pudelek had been very successful working with a particular client,
22 Holmes Place, the leisure centres, and they built actually 27 of them, in fact, they probably
23 counted at one stage for maybe 50 or 60 per cent of their work, they are actually quite
24 sizeable contracts. Holmes Place were no longer building leisure centres, and the nature of
25 the market had changed. It was clear from their list that the work was coming from
26 different sources, and I was merely asking the question, that it was quite a specialised thing
27 building leisure centres, swimming pools, etc, and it was just a comment that I saw from the
28 reports that I saw objectively every two months: "It's clear that you haven't got so many
29 Holmes Place jobs any more, are you adequately resourced? I was just asking the
30 question.

31 MISS BACON: If you go to tab 70 – unless the Chairman has any questions on that? Paragraph
32 5.6 under tab 70:

33 "The [Confidential] case was discussed and it was agreed that the matter should
34 go to Tribunal.

1 **Post Meeting Note:** Having taken advice from Vanderpump & Sykes and the
2 likely legal costs involved, it was agreed that an offer would be made to settle this
3 case. The matter was settled for £2,500 and minimal legal fees.”

4 Was this a problem with the dismissal of one of the DP employees and you were being
5 sued, and you agreed at board level that you would make an offer to settle it?

6 A I think this was a gentleman who, from what I recollect the construction manager dismissed
7 him, and in truth as it turns out probably wrongfully dismissed him, from the advice from
8 Vanderpump & Sykes. So Mike Pudelek took a view, “Look, I’m not throwing good
9 money after bad, just pay him whatever” – settle it basically, and I think they probably
10 negotiated through Vanderpump & Sykes and settled for whatever the sum was, £2,500 and
11 legal costs, legal fees. But it was a Mike Pudelek and Colin Simmons decision: “I’m not
12 throwing good money after bad; we’ve made a mistake, pay up, move on.”

13 Q So is it fair to say from all these extracts that I have taken you to that the board was
14 frequently discussing personnel issues?

15 A Not frequently, this is only one issue.

16 Q Well we have looked at this dismissal, we have looked at issues about letters of
17 employment, we have looked at the nature of the work being undertaken, at least did the
18 board on occasions discuss these kind of personnel issues?

19 A They would, major issues would have been highlighted. It was incumbent on Mike and
20 Colin to report to the board meeting every two months what was going on and this is quite
21 normal, because the last thing you would want is the name “Durkan” dragged into a
22 Tribunal with all the adverse publicity, so with something like this it made perfect sense for
23 them to highlight it at a board meeting and make us aware of what was going on.

24 MISS BACON: I am about to go into a fairly long section of questions, so I wondered if now
25 would be an appropriate time to break, or would you like me to go on for another 15
26 minutes or half an hour?

27 THE CHAIRMAN: No, I think that is an appropriate moment, thank you very much, so we will
28 come back at a quarter to 12, please.

29 (Short break)

30 MISS BACON: Mr. Fraher, I want to ask you a few questions about the budgets of DP and DP’s
31 performance linked to that. Could you turn to tab 49 of the bundle which I hope you have
32 still got open in front of you. Look at para.4. Can you just read the highlighted section at
33 para.4. (Pause)

34 A Yes.

1 Q I just want to ask you about the final paragraph;

2 "AF expressed concern at the budgeted gross profit margin of 6.4% and
3 suggested that this should be reviewed prior to finalisation of the budget."

4 Can you explain what your concern was with that figure? Was it too high or was it too low?

5 A Madam, these are the board minutes of 24th March 1999. The figures we would have been
6 considering at this meeting were the results for 31st January 1999 which indicated that the
7 margin actually achieved in the year to January 1999 was 7.4. Now, Mike Pudelek and
8 Colin Simmons and the operation team had presented a budget previously indicating a
9 margin of 6.4. I thought perhaps on observation, if they'd actually achieved 7.4 to January
10 1999 I questioned whether or not it was appropriate to use a lower figure for the year to
11 January 2000. So I simply said, I suggested that they might like to review it. Now, the
12 history of this budget for January --

13 THE CHAIRMAN: If they had actually achieved in the year to January 1999, if they had
14 actually achieved 7.4 why were they budgeting for the following year only 6.4.

15 A Absolutely. Clearly, they hadn't finalised the budget at that stage. Again, Mike and Colin
16 would have presented a draft budget in about November 1999. Now, that served two
17 purposes. Our insurance year end is also 31st January. So I would have gone out for quotes
18 based on the preliminary turnover figures they would have given me, not so much the
19 margin. So I would have had an idea of what they were talking about as against turnover
20 and margin. Now, if they were saying the budget was 19.652, well there's a whole one per
21 cent difference here of 196,000 possibly, only if they achieved the same margin. Now,
22 bearing in mind the nature of their industry, if they are long term contracts and a long term
23 contract work in progress, I just suggested that it might be a good idea to have a look at it
24 again, lads, and before you finalise it have a further look before it's crystallised.

25 MISS BACON: That is very helpful. Thank you, Mr. Fraher. Can you turn to tab 54.

26 THE CHAIRMAN: Just before you turn, I see that the action point there is AF/CS, so did you get
27 involved there with Mr. Simmons after the meeting to sort this out?

28 A What happened, DPL would have had to finalise their budget anyway, so the idea was that
29 Colin would come up with the final numbers and then I would stick it into the format.

30 Q Sorry, Miss Bacon.

31 MISS BACON: Tab 54.

32 A Madam, would it be appropriate for me to point out that these are now definitely my style of
33 minutes, because I would have the same secretary preparing the minutes. They would have
34 all been in this kind of format.

1 Q That is helpful, Mr. Fraher. Can you look at para.8.02 which is on the third page of this tab,
2 budget for the year to 31st January 2001.

3 “The board noted the said document was not included within the documents.
4 AF advised that the said document had been circulated in early December 1999
5 to both MTP and CS for their consideration. AF advised that a meeting would
6 be convened to discuss the said budget in the near future.”

7 So are you saying that the board says; where is the budget? You say: I sent it to Mike and
8 Colin and we are going to get together to discuss it. Is that what happened?

9 A No, as I explained in my previous comment. I had certain information which I would have
10 used for insurance renewal purposes and they would come up with a figure, say, of £40
11 million for the year. Now, they clearly hadn’t finalised it as regards the margin that they
12 hoped to achieve in the year. I would have given them the information of what I saw were
13 for the common costs for the year. So I was asking them to go back and have a look and
14 finalise it.

15 THE CHAIRMAN: This is the following year though.

16 A Yes, but we’re talking about the same routine here. If you remember, in January 2000 this
17 is the very start of the – almost before the start of the new financial year on 1st February. So
18 there’s no budget for the year to January 2001, despite the fact that I had given them – I had
19 extracted certain information from their reporting that they expected to do from turnover
20 was going to be £40 million, but they never actually came back to me and said: we’re going
21 to make a margin of, we’ll say, 6 per cent or 7 per cent. I would have given them what I
22 would see as the common costs, and it was up to them to come back to me so that I could
23 finalise the budget. Ideally, in a company you try to have the budget in circulation before
24 the commencement of the financial year and here we were, within I suppose five days. The
25 company was quite sizeable in January 2000, so I think it was good housekeeping that they
26 should get their budget and that they should lock into their budget and present it to the
27 board. Again, I was concerned that perhaps some of the work that they had, I needed to
28 know what the margin was. I was there to protect the interests of everybody including the
29 interests of Durkan Holdings, so it would be nice to see what that budget actually was, not
30 just the turnover figure.

31 Q What you seem to be saying is that you did not prepare the budget, but this is actually
32 saying that you had prepared the budget and you had sent it to them.

33 A No, the document?

34 Q We are referring to the budget:

1 “AF advised that said document [which must be the budget for the year to 31st
2 January 2001] . [Then, and you are saying these are your minutes.] had been
3 circulated”.

4 So what you had done is you had sent the budget to --

5 A I had sent the draft budget, based on the information that they had already given me. The
6 information was incomplete in the “said budget” they had given me.

7 Q So you did the first draft of a budget based on the information you had, you sent it to them
8 and asked them to complete the information that you did not have?

9 A The budget was actually quite a simple document. What I had was I had the turnover
10 figures that they would have given me probably in November/early December for the
11 insurance declaration. I had put it in a format and sent the budget, if you like, down to them
12 for them to complete it. I suppose yes, I could use the word “draft budget”, but clearly it
13 wasn’t the budget because the budget hadn’t been finalised.

14 Q So was this normal procedure then? You would do the first draft of the budget each year
15 and then they would complete it or amend it as appropriate, because that seems to be what
16 happened on this occasion?

17 A No, what actually happened was Mike and Colin as operational team would meet in
18 probably November/December and firm up the budget and give me the numbers, but the
19 first number they would give me was what they thought the turnover was going to be. They
20 might wait until they had the results for the year to certainly October/November, or possibly
21 December/January, just to see how things were progressing in their business up to that point
22 in time, and then they would try and lock in on what they thought the percentage was going
23 to be. Generally, at the financial year end, during the year you’ll take a bit of a guess, a
24 rough estimate of what the numbers are. When it gets to the financial year end you’re more
25 particular about the numbers that you actually disclose. So they would have brought a
26 greater degree of, I suppose, clarification of the numbers and the margins at the year end,
27 because they were to be the published numbers.

28 PROFESSOR PICKERING: May I just ask you: the implication of what you have just said seems
29 to suggest to me that budgeting was about what we think we can get in the market for next
30 year, rather than what our strategy is going to be. It is a sort of a reactive approach, rather
31 than something that is driven by decision taking from within the company. Would that be
32 fair?

33 A The decision would be taken by Mike and Colin at November/December. They would
34 know what the secured work was for the year moving forward; they would have an idea

1 because some of that work was jobs they were already working on, because some of these
2 contracts could be two or three years in duration. Then they would have work, secured,
3 unsecured, possibles, probables and so on. They would attribute margin to those, but it
4 would be their budget, it would be their plan. There was nothing cast in stone, obviously,
5 but that was their plan, what they thought they could achieve from the long lists of
6 enquiries, from the contacts and so on. So they would sit down and present me with certain
7 numbers at different times. I would be more concerned to see the complete picture at that
8 particular point in time. I'm sure they had meetings. They met on a regular basis. But I
9 only met them sort of every two months, barring the finalisation, we say, of the numbers in
10 the budget which would be outside of the board meeting, obviously. But to answer your
11 question, they would bring a greater degree of clarification to the numbers. But, with
12 respect, I would have no input in that, only know what jobs they were working on in truth.
13 So I relied on the information that they presented to me, I would reformat it and that would
14 be the budget.

15 Q Could you turn to tab 62, that is about minutes of a meeting which is almost two years later.
16 So we were just at January 2000 a minute ago, and we are now at November 2001, a
17 meeting at which William Durkan was also present. Over the page at para.3.01, in the
18 middle of that paragraph:

19 "AF advised that the budgeted figures against which the actual performance was
20 being compared was not in line with the budget which he had originally
21 prepared which indicated a gross profit margin of 10% compared with the 7.7%
22 against which the actual performance was being compared. In order to avoid
23 future confusion it was agreed that the budget for the year ending 31st January
24 2003 which had been distributed to the directors, would be discussed at the
25 budget meeting on Monday 3rd December 2001 at 2.30 pm."

26 So does this mean that you had prepared a budget originally and that Mike and Colin had
27 disagreed with the figures in that and had adopted a different set of figures – in particular,
28 they had adopted a 7.7 per cent profit margin and the 7.7 per cent was being used to
29 compare actual against budget turnover and so there was a bit of discussion about that. So
30 you then agreed that in future you ought to get together and sort out your budget for next
31 year to avoid this kind of confusion arising?

32 A No, in the absence of a fully detailed and fleshed out budget from Durkan Pudelek – Durkan
33 Pudelek always aspired to make 10 per cent gross, 5 per cent overheads, 1.5 per cent
34 corporation tax and 3 per cent bottom line. That was Mike Pudelek's aim. In the absence

1 of any better information, I would put in, in the draft figure, a figure of 10 per cent until
2 they came back and said; it's not actually 10 per cent, I'm sorry, it's only going to be 7.7,
3 just adjust the number. Quite a simple procedure. At this stage, Madam --

4 THE CHAIRMAN: Why, then, were you complaining that the actual performance, why were you
5 commenting that the actual performance was being compared with 7.7 rather than the 10?

6 A Because I assumed that I had put in the number that they had sort of generally aspired to,
7 the 10 per cent, and I was only advising that they were comparing the 7.7 against the 10.

8 Q No, they were not comparing the 7.7 against the 10; they were comparing actual
9 performance against the 7.7 rather than comparing actual performance against the 10. Is
10 that not right?

11 A Yes, to be honest, I obviously clearly hadn't finished the budget at that stage. They had
12 gone off on their own without actually giving me the revised budget which was showing at
13 7.7. I had actually -- in the absence of me getting their final information I used the 10 per
14 cent margin rather than the 7.7 because they said they were going to actually get.

15 PROFESSOR PICKERING: So what you were saying was that you had set a hurdle for DP of a
16 10 per cent return, and the DP Executive Directors had then lowered that hurdle and were
17 comparing their actual performance against a lower hurdle, rather than the one that you had
18 wanted?

19 A It's the figure that I had used. I had used the figure of 10 per cent in the absence of the 7.7.

20 Q You thought that they should have been comparing their performance against the 10, did
21 you not?

22 A For some reason I may have believed that they were going to work on 10 per cent, but they
23 were actually working on 7.7. There was obviously confusion in the numbers that were
24 being presented to me. I was working on one figure; they worked on another one.

25 MISS BACON: Can I take you to what is next in my series of documents, chronologically next
26 but it is right at the end of the bundle, tab 104. This is about 16 months after the document
27 we have just seen. It is in early 2003, a memo from Colin Simmons to Mike Pudelek,
28 Competition Commission Danny Durkan, and there is something that is highlighted there.
29 It may have been you.

30 A That's Alan Fraher, yes.

31 Q Yes. Sent to Danny Durkan and you.

32 "Following recent discussions, I enclose a copy of the Durkan Pudelek Ltd
33 budget which was prepared at the start of February. This budget excludes
34 turnover and income from Strategic Projects division. [Then the paragraph] This

1 budget does not align with Alan Fraher's budget of 31st January which is based
2 on £25 million for DPL and £10 million for Strategic Projects. Despite this I
3 believe it is the bottom line that counts. Alan's budget is based on 9% gross
4 margin ... therefore we have improved on this as a result of the increased
5 turnover."

6 Then if you go over the page you see comparison with the budget you prepared and an
7 alternative budget that Colin Simmons has prepared. This is the budget for the year to
8 January 2004 that we are talking about, and we are already in the middle of that year
9 because we are at March. So you are still discussing, at that point, the budget for the year
10 that you were in as I understand it, because at the top it says "2003 Full Budget Analysis",
11 so it must have been for that current financial year. What this suggests is that you had
12 drawn up a budget on 31st January, Mr. Simmons did not agree with that, and then he sent
13 Mr. Pudelek, copied to you, an alternative budget – is that right?

14 A Well, madam, a slight correction there, we weren't half way through the year. We were sort
15 of a month and 11 days into the next year. Again, it is pretty clear where I got my numbers
16 from. I was given numbers for the insurance declaration, £25 million for DL and £10
17 million for the Strategic Projects Division. I was also given an indicative percentage of 9
18 per cent gross. Again, in the absence of anything else, I would have just given that figure as
19 a draft budget. As it turns out in this particular case, Colin Simmons thereafter decided to
20 give a more detailed budget. In fact, he actually seasonalised the turnover, as it says on the
21 following page. In my handwriting there it says, "Seasonalised". Up to this point, Durkan
22 Pudelek was saying, "I'm going to do £25 million, say £30 million, and it's going to be £2.5
23 million a month". In this case, Colin came back and said, "I don't think it's going to be
24 that, I think it should reflect the actual turnover on a bi-monthly basis as we think it's
25 actually going to arise". I was merely – Colin was actually clarifying a draft position.

26 Q So you had done the draft budget which you say Colin clarified.

27 A With respect, it's not a draft budget, it's a very simple document that would show that your
28 turnover is £25 million and, say, a margin of 10 per cent, subject to Durkan Pudelek coming
29 back and telling me exactly what the number was from their detailed analysis of the figures,
30 bearing in mind I would have no hand or part in the actual preparation of the detailed
31 budget. I would be working on information that was passed to me and I was formalising it
32 into a document. In the absence of the final document ----

33 THE CHAIRMAN: Do we know what the final document said? Have we got the final budget for
34 this year?

1 MISS BACON: I do not think so.

2 A The final document we worked on was actually Colin Simmons' revised – his more up to
3 date numbers in March 2003.

4 Q Did you then meet with Colin Simmons, discuss this and agree his numbers?

5 A I think it probably ----

6 Q Would you have done that as the finance director of DP?

7 A I would have done that as my task within Durkan Limited, providing the service within
8 Durkan Limited. That was one of my jobs, to formulate the budget based on the
9 information I was given by Mike and Colin. In fact, this report from Colin Simmons to
10 Mike Pudelek says, "If everyone is happy with this I will report on this detailed budget at
11 future board meetings, if not, could I please have your comments". I had no comment, that
12 was their budget and that's what we worked on.

13 PROFESSOR PICKERING: Strictly speaking, this is a forecast of certain numbers under certain
14 categories, is it not? It is not in any meaningful sense a budget?

15 A The original figures that I would get from Mike and Colin, that £35 million, that's a
16 guesstimate.

17 THE CHAIRMAN: £25 million.

18 A It was £25 plus £10 for the Strategic Projects. We couldn't possibly have gleaned this
19 information from a previous board meeting when you would look at what they'd secured
20 and what their long list was. Based on that they said, "We should get 9 per cent". I have all
21 the overheads, so it's just a matter of them saying, "If we think we're going to do £35
22 million, there's 9 per cent", until you come back to me with something more definitive. In
23 the absence of something more definitive that is the document they would produce. That
24 would not be me preparing the budget, that was the draft, as you said before, with the
25 information that they gave me.

26 PROFESSOR PICKERING: The point I was trying to make, and perhaps it is a small point, is
27 that this is not really a budget. You, as an accountant, would not class this as a budget,
28 would you, it is a forecast of certain figures?

29 A Absolutely, at this stage. Colin's information here that he produced a budget, that is a
30 detailed budget because he almost has it by current contracts, completed contracts, and so
31 on, and exactly where he's getting his money from. If I can just point you up here on the
32 right hand side, Colin says here, that's his budget 2003, that is produced by Colin Simmons,
33 this detailed document.

1 Q Again, this is a prediction of where you are going to get your income from. There is no
2 budgeting for different heads of expenditure, is there?

3 A No, this is purely the turnover forecast.

4 MISS BACON: Was there any other budget that was provided or was this it?

5 A No, the budget would be more detailed than this. The real numbers that I would want from
6 Mike and Colin to formulate their budget was, “What’s your turnover going to be, what’s
7 your margin?” Everything else was important, but this was critical to that business plan for
8 the year. That budget is the plan for the year. If they said they’re going to do £35 million at
9 a certain margin, 1 per cent of £35 million is a lot of money. Anything else would pale into
10 insignificance. Their overheads were actually relatively small in the scale of things, but 1
11 per cent out on your margin of the turnover is quite a significant number, or 2 per cent, as
12 the case might be. 2 per cent of £35 million is £700,000. Their overheads were actually
13 quite small relevant to that, so a margin of 1 per cent or a half per cent, they’re serious
14 numbers.

15 PROFESSOR PICKERING: The achievement of your margin, whether gross or net, depends
16 very much on the allocation and control of your costs. What we do not see, but correct me
17 if I am wrong, are detailed costs breakdowns in terms of authorisation to spend on different
18 categories of employee, different projects, and so on.

19 A The only information I would get from Mike and Colin is the turnover figure plus a margin.
20 I didn’t need any more to produce their budget. They had the detailed information. They
21 gave me it in summary format.

22 THE CHAIRMAN: You say that their overheads were very small. Is that because they mostly
23 used sub-contractors?

24 A Yes, they used sub-contractors. They had no direct employees. They would have the odd
25 labourer perhaps, but by and large all their work was sub-contracted.

26 PROFESSOR PICKERING: You can still control your costs that you pay out to your sub-
27 contractors, surely?

28 A Of course they can, that was the job of the operation team. That was nothing to do with me
29 as in Durkan Limited presenting information. They had obviously said at the beginning of
30 the year. It was up to them to decide what margin they were going to get on the job, what
31 margins they had tendered on and whether the job was complicated or otherwise, but that
32 was not for me to decide upon. That was their decision. All I really wanted from them – I
33 know that they aspired to a gross margin of 10 per cent, and hence the previous reference to
34 10 per cent. That’s what they aspired to. In the absence of clarification, I would work on

1 10 per cent in the draft and ask them, "Please clarify it". In this particular case, we're
2 talking about March, we are indeed into the year, and you would expect – I would expect a
3 budget to be prepared in advance of the financial year, i.e. in advance of 1st February. The
4 only information I needed, or the critical information I needed at that point was for the
5 insurance declaration and I was given indicative numbers obviously, £25 million for DP and
6 £10 million for the Strategic Projects Division. That was enough to make my insurance
7 declaration, to calculate the premium.

8 Q You have rather given the impression that you actually needed a figure for gross margin for
9 your insurance declaration, or was that a slip of the tongue, or was that my hearing?

10 A No, you're probably quite right, I didn't need the margin. I certainly needed the margin for
11 the budget. The first thing I needed for my insurance declaration was, "What's your
12 turnover?" because obviously, as you're probably well aware ----

13 THE CHAIRMAN: What is the purpose of this budget then? Is it just so that at the end of the
14 year you can say whether they have done as well as they predicted?

15 A It's a monitoring tool, madam. Every two months we would meet and we'd compare actual
16 figures.

17 Q It is setting their objectives basically?

18 A Absolutely, they were setting their plan. Again, protection of Durkan Holdings investment,
19 if Durkan Pudelek said at the beginning of the year, "We are going to do £35 million" –
20 Durkan Pudelek were going to do £35 million with a margin of 10 per cent gross, you'd like
21 to monitor that performance. Certainly in the role as protecting the interests of Durkan
22 Holdings, and indeed probably looking after the interests of – because our interests mirrored
23 each other, because what was good for Durkan Holdings was good for Durkan Pudelek, you
24 would obviously want to see explanations as to why you weren't achieving those margins.

25 PROFESSOR PICKERING: Can I just ask you, with regard to DL, did you exercise a more
26 detailed role there in terms of financial control, cost budgeting control against cost budgets?

27 A I would be certainly more closely involved in Durkan Limited. Again, that would not be
28 my expertise. I am not a quantity surveyor. Again, I would have a greater involvement in
29 Durkan Limited, more or less deciding and discussing what margin they might work on and
30 whether it was appropriate to the business. I would only make comments on it, because
31 there are people better qualified than me in the QS world, estimators, and so on, they would
32 know about these matters. I wouldn't be involved there.

33 Q All cost control was being achieved by Qs rather than by other qualified or experienced
34 accountants?

1 A Absolutely. The QS in accounting parlance, is basically the cost accountant in old-
2 fashioned terms. The analogy was you've got a financial accountant and you've got a costs
3 and works accountant, someone working effectively on costs and sales, and so on. The
4 surveyor is the job accountant, if you like. He controls the costs, he places the orders, and
5 so on, but it's not something that I would have dealt with.

6 THE CHAIRMAN: Yes, Miss Bacon, I do not know if we have taken you rather off course in
7 that series of exchanges.

8 MISS BACON: I have no problem with that, I was just going to ask the witness to turn back to
9 tab 72. I have more or less finished my questions about budgets. Could you look at
10 para.5.2(b), with the heading "Bank Position". If you read this highlighted section there
11 seems to have been a considerable discussion about undervalued and overdue retentions and
12 the deteriorating profitability of DP. Your concern seems to be that the failure to recover
13 undervalues and overdue retentions was going to have a substantial further impact on the
14 profitability of DP. What you seem to be doing is questioning the assumptions that were
15 being made by Mr. Pudelek and Mr. Simmons about the recoverability of those sums. Is
16 that a fair summary of what was going on at that meeting?

17 A That is a fair summation. As I sit here, the bank balance was £369,000. With the reports
18 that were in front of me it was clear that there were overdue retentions and serious
19 undervaluations. With respect, you would expect in a construction company to have
20 overvaluations. It would be the job of a good surveyor to overvalue and get cash upfront.
21 In this case there were serious undervaluations. In fact, they were £800,000. If you have an
22 undervaluation on a job that could manifest itself in a loss. It means that there's probably a
23 problem because why hasn't the QS, your opposite number, given you the valuation for the
24 full sum of £800,000. In the scale of things we had overdue retentions. It's not just
25 retentions, they're overdue retentions, so retentions well beyond the date on which the
26 certificate of making good defects should have been received. So there may well have been
27 an issue there of recovering that £500,000, with the undervaluations of £800,000. This was
28 a common feature in Durkan Pudelek to a certain point. It's quite interesting that I wasn't
29 far off with what I was actually saying. I was raising a concern, because as we will see
30 possibly later on, there was a job called the Royal Geographical Society where the
31 company, even at that point, was still indicating they were going to make a significant
32 margin. It was a contract of about £4.4 million, it was going to make a margin of 6.7 per
33 cent. It turned out making a loss of 13 point something per cent – i.e. it lost £1 million – but
34 they had actually reported a profit on that job up to that particular point in time. Hence, that

1 undervaluation of about £800,000, I was quite right, as a chartered accountant, saying,
2 “Look, there is obviously an issue there”. It was a feature that had been increasing, and I
3 was saying, again I’m protecting everybody’s interests here, particularly the interests of
4 Durkan Holdings, that we obviously have a problem here. I maybe jumped the gun a little
5 bit here, but this then manifests itself in a massive variance. The company lost a lot of
6 money and it ended up with a net worth at the year end of probably £560,000 odd. The
7 company at that stage was then in a perilous state. That only came to light much later on,
8 because, even as we were discussing these numbers, that job, RGS, was still showing a
9 margin.

10 Q You were conscientiously doing your job as the finance director of DP and a member of the
11 board of DP, were you not?

12 A No, I wasn’t. I was carrying out my function as an employee of Durkan Limited providing
13 a service for which Durkan Limited was paid, and I was sitting there as a chartered
14 accountant protecting everybody’s interests, particularly the interests of Durkan Holdings,
15 by saying that I see a problem here. I was highlighting what was patently obvious to me.

16 Q If you read the third paragraph, I think it should say:

17 “It was agreed that a meeting would be convened on Tuesday 2nd December 2003
18 ... to discuss both the overdue retentions and the gross undervalues ...”

19 Would you have been at that meeting?

20 A No. I’d be surprised if I was, I probably wouldn’t have been. This was something Mike
21 Pudelek said, “We’d better have a look at this”, so he would have got his operations team,
22 i.e. Bob Scott, Colin Simmons and probably the contracts managers and probably the
23 surveyors on the jobs to have a look and see “What’s the story here?”

24 Q So you would have said, “We need to sort this out”, and then they would have gone away
25 and sorted it out?

26 A Well, in truth, they should have seen it themselves, to be honest. They didn’t actually need
27 me to tell them, it was patently obvious on the report that they presented to me. I actually
28 highlighted what was patently obvious to them in the report they had. Can I just make one
29 further point. When I say here there was a gross undervalue, I had seen in many reports
30 coming up from Durkan Pudelek the statement “net undervaluations”, “net
31 undervaluations”, and I had said, “Overvaluation is a good thing, undervaluation is a very
32 bad thing”. As an accountant, I wouldn’t be interested in seeing overvaluations, I would be
33 more interested in seeing undervaluations, because undervaluation could be tantamount to a
34 loss. Similarly, overdue retentions could be tantamount to a loss, and we’re looking at £1.3

1 million here that could well be a loss unless you could actually get the money in. I was
2 merely highlighting what was presented to me.

3 Q So what you wanted to see was not the net setting off against the net overvaluations, but
4 simply the gross undervaluations?

5 A No, what I was saying was – I said in the reports, in my reports, independently, I used to
6 strip out and just show the gross undervaluation. As a chartered accountant ----

7 THE CHAIRMAN: You could do that yourself?

8 A I could do that myself. It was in the numbers. I just extracted them. Again, it was in the
9 interests of every shareholder that they should be aware of this situation. As I say, I wasn't
10 a thousand miles off the mark, despite the fact that they were showing a beautiful position
11 up to here, but I had repeatedly highlighted it. I didn't intervene, I highlighted the matter
12 and it was up to the operations board of Durkan Pudelek to sort it out.

13 MISS BACON: Thank you, Mr. Fraher, can you turn to tab 75 now. This is the meeting of 26th
14 May 2004 at which Mr. William Durkan was present. I have already taken Mr. Daniel
15 Durkan to this yesterday. Can you just cast your eye over the bottom of para.5.1 just to
16 remind yourself of the context of this meeting?

17 A The bottom, i.e. points 1, 2 and 3, is it?

18 Q Yes. I just want you to remind that this was the meeting we were looking at yesterday
19 where the board considered the way forward, and then 1, 2 and 3.

20 A yes.

21 Q Then could you look at your bit, the "Cash Management" section on the next page, para.5.2,
22 in the particular the third paragraph. Again, you are talking about undervalues and overdue
23 retentions, the same point that you have just made to us?

24 A Yes.

25 Q So you are repeating your concern here about the company chasing up the sums due to it.
26 So this is a continuing theme. Can you then turn to tab 80, a meeting of 26th July 2005, a
27 little bit more than a year later, 6.4, "Cash Management", you are making the same point:

28 "The cash position is satisfactory but could be considerably improved by the
29 recovery of the undervaluations and the recovery of the overdue retentions."

30 Then tab 81, para.5.4, almost identical wording:

31 "The cash position is satisfactory but obviously could be considerably improved by
32 the recovery of the undervaluations and the recovery of the overdue retentions."

33 We are now at 28th September 2005. We then turn on a year to tab 86, the meeting of
34 28th September 2006, which is exactly a year later. I do not think I took Mr. Durkan to this

1 yesterday, but in any event there is a long section where you are reported as having asked a
2 number of questions, seven. Can you just read those questions to yourself. (After a pause)
3 Is it fair to say that these questions reflect the fact that, despite your concerns that had been
4 expressed at a number of meetings, which I have just taken you to, you still felt at this point
5 that DP's commercial performance showed a number of problems.

6 A That was my view of the information presented to me, yes.

7 Q And you were saying, effectively, that you disagreed with Mike and Colin's forecasts about
8 the turnover and margins of DP, and their assumptions on things like the realisation of
9 retentions.

10 A Sorry, do you mind if we just go through those piecemeal? Just, take me to each particular
11 point, please?

12 Q So, firstly, looking at their forecasts, if you look at point 2:

13 "Was it realistic to assume that anticipated contracts and possible and unsecured contracts
14 ... would yield margins of 60K, 60K and 33K respectively".

15 So, at that point you are disagreeing with their, or questioning, their forecasts about
16 margins.

17 A No, I, I had been presented with the information; and based on the information that I'd
18 already seen with their deteriorating gross profit margins, that they had actually reported
19 upon, I think it was pretty obvious from others that, I just questioned, well, if you're only
20 making, say, 5-4, say, on that last, on that job, what makes you think you're going to make
21 7.7 here? What has suddenly changed in the market place. I'm just asking – just an
22 observation on what those, the information that was presented to me.

23 Q You were questioning the forecast profit margin.

24 A I think it was based on the order book status, what they had, and the way they thought they
25 were going. If I remember rightly -----

26 Q But you thought they were being very over-optimistic, and you -----

27 A Exactly. Well, I think at this stage, sorry, 2006, right, they'd already taken a hit, if you like,
28 in 2004. We're into 2006. I personally believed that they might have been a little bit
29 optimistic on their projections. And I just asked the question.

30 Q Number 3:

31 "Were overdue retentions in the sum of 328K actually realisable?"

32 So, you were questioning that, assumptions about whether these retentions were realisable.

33 A Again, I was asking the question. I wouldn't know the background to these retentions.

1 THE CHAIRMAN: No, but the point that is being made here is that this figure then appears as
2 something which the company expects to get, whereas in fact if they have then decided,
3 well, it may be that £200,000 of this we are not going to actually recover, because it is
4 actually not owed. Then presumably that £200,000 would need to be written off in some
5 way.

6 A Absolutely. And that impacts on the bottom line.

7 Q Yes.

8 A So, I'm asking what I think is normal questions, questions of anybody trying to protect the
9 interests of a parent company, or indeed the company itself. Don't forget, the net worth of
10 the company was seriously diminished at this point in time. It was down to £560,000.
11 Now, firstly, although I didn't voice it, I was extremely concerned about Durkan Pudelek at
12 that point in time.

13 MISS BACON: Absolutely. I mean, that is exactly what I am putting to you, Mr Fraher. You
14 were very concerned about what it was doing. You have asked a series of questions, a
15 series of very serious questions, to which you wanted answers. You were not just making a
16 few polite suggestions about financial housekeeping, were you?

17 A I wasn't. I was making observations. I wasn't looking for answers. I was making
18 observations on the information that was presented to me. I was asking a simple question –
19 were overdue retentions in the sum of £328,000 actually realisable? Now, I couldn't answer
20 those questions. I had no intimate knowledge of those contracts. In fact I knew nothing of
21 the contracts. Now, a very simple question is, if somebody owes you three hundred and
22 twenty eight -----

23 THE CHAIRMAN: Did you expect somebody to answer these questions?

24 A No. I was merely highlighting them. It was up to the Operations Board, ie Mike Pudelek
25 and his team to go and sort, and basically sort it out. It was not something that Durkan
26 Holdings would be getting involved in. I was merely highlighting the, what I saw as
27 problems, potential problems. As a Chartered Accountant it would be my responsibility to
28 do that on behalf of not only the company, but Durkan Holdings, to protect its interest.

29 MISS BACON: It is quite clear that some answers were given at the meeting, and you were
30 clearly asking for them. For example, if you look at number four, this is a question:

31 "In relation to the contract at Charles Street in the sum of 3.7 million, was it realistic to
32 presume that the margin would be improved on?"

33 And:

1 “AF was advised that the modus operandi was to improve upon the original budget it
2 presented”.

3 And then you replied, clearly.

4 “AF queried this logic as this has not been demonstrated in the financial results in the last
5 12 months at least”.

6 You were not just, sort of, putting out a few suggestions. You were asking for answers, and
7 you were not very happy with the answers that you were being given. Is that not what
8 happened?

9 A I asked questions on behalf of Durkan Holdings, again, to protect its interests. It was quite
10 clear, it -----

11 THE CHAIRMAN: Well, never mind on whose behalf you were asking the question. What the
12 question that is being put to you is, were you asking questions to which you expected to get
13 answers?

14 A I was raising queries. If you, if Durkan Pudelek had a budget margin of 2.5 per cent gross,
15 that’s what, that, I believe, is what I saw on the papers – that they went in at 2.5 per cent
16 gross. Well, if their overheads were 5 per cent, it was pretty clear the job was going to lose
17 money. Now, I was told by Colin Simmons there that the way they operated was, go in low,
18 and then screw the subby, basically, and try and get – improve upon the margin. (Excuse
19 the language). But that was their modus operandi. But, to me that -----

20 THE CHAIRMAN: It had not worked in the past.

21 A It didn’t. It didn’t work in the past. All I’d seen in the past was a deteriorating margin. In
22 fact, the market was reasonably buoyant in September 2006, and why are you going in at
23 2½ per cent on a job? I just, it was a logical question to ask, I thought.

24 Q I am wondering how many more of these instances we are going to go through.

25 MISS BACON: That was the last one. I just wanted to take Mr Fraher to point 7, just in
26 connection with his last answer, that he was not expecting precise answers, and this records
27 that he:

28 “Sought assurance that we were confident in the tender as it had been priced by a relatively
29 new Estimator”.

30 (To the witness) So, you were actually asking a question and you wanted – Mike and Colin,
31 presumably – to assure you about this matter.

32 A I asked the question. We had, Durkan Pudelek had won a contract for £9.1m -----

33 THE CHAIRMAN: Mr Fraher, I am afraid we are going to have to, cannot answer in such long
34 terms. You are being asked a very simple question. We do not need to know about the

1 estimator or the contract. What we are looking at here is what actually went on in the board
2 meeting. So, if you could just focus on that. It says here: “AF sought assurance that we
3 were confident about the new estimator”, and you were assured that that confidence was
4 well placed, or whatever. Now, is that recollection, do you recollect that that happened at
5 the meeting?

6 A Yes. I asked the question.

7 Q Right.

8 PROFESSOR PICKERING: And presumably you also recorded the minutes.

9 A Yes.

10 Q Yes.

11 A I asked that question.

12 MISS BACON: That was the last of the documents on that series of questions. Now, I just want
13 to ask you to turn up your second witness statement.

14 A Sorry, what number?

15 Q At bundle 2A, tab.6, I am sorry, no, it is at tab.7. I am sorry for taking the Tribunal at
16 length through this, but one of the problems is that during the course of the disclosure
17 exercise, it was suggested that we should put all of the relevant extracts that we were
18 relying on to the witness. Now, I actually have not done that. I have tried to focus on the
19 key extracts, but I am conscious that there is an argument being made by my learned friend
20 about his rights of defence; and so I am very aware that I want to put at least the key
21 documents to the witnesses in order that they have an opportunity to comment on them, so
22 that I am not later met with the allegation that we have made claims on the basis of
23 documents, none of which have been put to the relevant witnesses. (To the witness) Your
24 second witness statement at para.12, and a few lines down:

25 “In the latter respect I sometimes expressed a view on ways to improve the cash
26 position of the company. I also expressed a view on how they might want to deal
27 with overdue debts and retentions, and contract undervaluations. These were all
28 views intended to assist Durkan Pudelek in its financial housekeeping. [And, at
29 the end] How the operational Directors of Durkan Pudelek” -----

30 I suppose you mean -----

31 A Sorry, tab -----

32 Q I am sorry, tab.7.

33 A Tab.7 point 12.

34 Q Paragraph 12.

1 A And, sorry, how far down?

2 Q In the middle, basically the second half of that paragraph. I was just reading it where you
3 say that, you expressed views, they were just:
4 “intended to assist Durkan Pudelek in its financial housekeeping ... How the operational
5 Directors of Durkan Pudelek”,
6 which I presume you mean -----

7 A Sorry. Have I got the wrong file?

8 Q Tab -----

9 A File 2A.

10 Q File 2A.

11 A Tab.7

12 Q Tab.7

13 A Yes. Point 12.

14 Q Paragraph 12.

15 A What line?

16 PROFESSOR PICKERING: The fifth line down.

17 MISS BACON: Yes.

18 A Yes, sorry, I beg your pardon. I see, yes, in the latter, yes.

19 Q Yes. Now, what you are saying here is you made a few occasional polite suggestions to
20 Durkan Pudelek about financial housekeeping matters. And then Mike and Colin decided,
21 off their own bat and without intervention by you, what to do about these matters. Now,
22 what I want to put to you is that that is rather an under-statement in the light of the extracts
23 that I have just taken you to, which show that you expressed repeated and very strong views
24 about how DP was managing its business. It was not just that you made a few suggestions
25 about its housekeeping. Is that fair?

26 Q No. I reported on what I saw. I only met Mike and Colin every two months at a Board
27 Meeting, and I would express a view on what I saw before me. I couldn't, I wouldn't have
28 an idea about how their undervaluations arose, how their overdue retentions arose or about
29 the bank position. I would not be privy to that information. I could have got it, but I didn't
30 get it, because that was not my role. I was a service provider to Durkan Pudelek.

31 Q As the Finance Director of Durkan Pudelek, and as a member of the Board of Directors of
32 Durkan Pudelek, and as the Finance Director of Durkan Holdings and the Company
33 Secretary of both companies, was it not your job to make sure that this company was being

1 run properly? And you were doing that. You were trying to say “Here is what you need to
2 do to sort yourself out”. You were not just making -----

3 THE CHAIRMAN: That is two questions.

4 MISS BACON: I am sorry.

5 A There are many -----

6 THE CHAIRMAN: Put the first question first, Miss Bacon.

7 A Well, the first question -----

8 THE CHAIRMAN: The first question is, was it not your job, as occupant of all those positions
9 that Miss Bacon has listed, to see how well the company was doing?

10 A No, it wasn’t. I had the title, “Finance Director of Durkan Pudelek”. I was not the Finance
11 Director of Durkan Pudelek. Had I been the Finance Director of Durkan Pudelek, I would
12 have done something about this. I would have been beating the table.

13 Q Was there somebody else who was the Finance Director of Durkan Pudelek?

14 A No. This was a job that Mike Pudelek and his team ----- I had no knowledge of the actual
15 jobs they were working on. I merely reported on what I actually saw. It was not my job.
16 But I was seriously concerned from the point of view of Durkan Holdings and its
17 investment in Durkan Pudelek, and all the things that you would report upon and the
18 concerns that you would raise.

19 PROFESSOR PICKERING: You told us at least twice this morning, that you only saw Messrs.
20 Pudelek and Simmons every two months at Board Meetings. Yet you were in the same
21 office block, and I would have expected that you would bump into them; that you would
22 have casual comments about how things were going, and that in your role as provider of
23 company secretarial services which they bought in, then you would have other dealings with
24 them, much more frequently than every two months.

25 A No. Indeed, I met them formally every two months. Of course -----

26 Q You are saying formally.

27 A Formally. That’s the only, that’s the only forum at which I discussed the business of
28 Durkan Pudelek was at the Board Meeting. Of course I’d meet them, say, “How’re you
29 doing?” “Any new jobs?” “How’s the business going?” Which you would do.

30 Q Well what about discussing the business of Durkan Pudelek?

31 A Yes, but not on a formal basis.

32 Q No, I understand that. But, you have given us the impression that you never saw them.

33 A Of course, I certainly did see them.

34 Q Yes.

1 A We entered the same front door. We went up in the same lift.

2 Q Sure, that is what I -----

3 A They had a lease on a floor within the same building we were in. Yes. I certainly did see
4 them. But I saw them formally every two months.

5 MISS BACON: I am sorry, Madam. And the second part of my question was going to be,
6 leaving aside your title, what the Board was actually doing was not making a few
7 suggestions about financial housekeeping – it was saying, “Here are a number of very
8 serious problems with your business”, comments that were made over a number of years,
9 and you wanted them to sort it out, did you not?

10 A No. Mike Pudelek and Colin Simmons knew exactly what the story was. Much of what
11 I said at those Board Meetings was for the benefit of Danny Durkan and Bill Durkan when
12 he was there. And I wanted to highlight the situation. I was protecting the interests of
13 Durkan Holdings and by implication I was also protecting the interests of Durkan Pudelek.
14 But Mike and Colin knew exactly what the story was on these jobs. They had the
15 knowledge. I didn’t have the knowledge. I reported on what I saw.

16 Q If you could turn over to para.15, you say that on a few occasions you “raised an eye at”,
17 and then you list a number of points that you queried with Mike and Colin, and you said
18 that you:
19 “... did nothing more than raise my concern. It was then up to Mike and Colin to
20 decide if and how they wanted to address these issues”.

21 But, in your role as the Finance Director and Company Secretary of both Durkan Pudelek
22 and Durkan Holdings, would it not have been a fundamental dereliction of your duty to
23 allow budgets to be prepared that you did not agree with, to allow financial matters to go on
24 which you did not agree with?

25 A As I said, I was not the financial director of Durkan Pudelek. My role on the board was to
26 protect the interest of Durkan Holdings. Mike Pudelek has a full operational board of
27 people. I was there to protect the interest of Durkan Holdings, nothing more.

28 Q Can I take you back to your first witness statement, para.12, and your first witness statement
29 is at tab 3 of the bundle. You say at para.12: “My role as Finance Director was nominal”,
30 and at para. 18 you say that you were “a nominal Director of Durkan Pudelek”. It is the
31 OFT’s case that in the light of the documents you have been shown there was nothing
32 nominal about your role at Durkan Pudelek whether your role as a director or a finance
33 director?

1 A My role was totally nominal. The services I provided to Durkan Pudelek was through
2 Durkan Limited, a service for which they paid. The comments I made I had dual roles to a
3 certain extent at the board meetings. I was privy to the information that I would have seen
4 through Durkan Limited, but my role at the board meeting was to be the eyes and the ears
5 on behalf of Durkan Holdings Ltd and the protection of its interests. I had no operational
6 duty within Durkan Pudelek.

7 Q If you turn back in your first witness statement to para. 6 I just want to ask you a few
8 questions about loans now. You say in the middle of that paragraph that provision was made
9 in the Shareholders Agreement for Durkan Holdings to approach Durkan Pudelek for a loan,
10 and that if it did so it would be charged interest at 2 per cent above LIBOR. Then you make
11 a comment about an occasion when you approached Mr. Simmons for an urgent loan, and
12 he declined your request, citing that Durkan Pudelek wanted to maintain its financial
13 independence of Durkan Holdings by ring fencing its cash. Did Durkan Pudelek ever loan
14 sums to Durkan Holdings?

15 A Never. In fact, this £250,000 I must say I was quite amazed that it had been refused. I only
16 wanted it for about three days because of something that Durkan Estates was doing, and I
17 needed a quarter of a million pounds to exchange on a contract. It was a Friday afternoon
18 and Colin in the nicest way said “No, we stand alone, we ring fence our money”.

19 Q Did Durkan Pudelek ever loan sums to others of the Durkan Group companies?

20 A No.

21 Q Can you turn to tab 93 of bundle 2B, and can you look at the last page of that, and para. 20?
22 “Related Party Transactions”, I have already taken you to this. I have asked you to look at
23 the first paragraph before now, can you now look at the second paragraph:

24 “During the year the company made an interest free loan of £200,000 to Durkan
25 New Homes Limited.”

26 Can you explain that in the light of your answer to my question a minute ago, about whether
27 Durkan Pudelek ever loaned sums of money to Durkan Group?

28 A My view is it never lent money to Durkan New Homes. I appreciate what this says here,
29 but I suspect – I am just wondering, is this one of the contributions that it paid towards their
30 participation in a couple of joint ventures, and it is described here. The auditors would
31 describe it as a loan. Mind you, I prepared the accounts so it is down as a transaction as a
32 loan, but I don’t believe it was a loan, I believe, on the hop now, that it might have been
33 something towards the few spec developments that we did on a joint venture basis, and they
34 paid a contribution, £200,000.

1 THE CHAIRMAN: Was this the work that DP did in doing building work for new homes?
2 A No, no, that was very early on, madam, that was in the year 2000. I suspect that Durkan
3 Pudelek may have got involved with Durkan New Homes when they had the surplus cash,
4 they wanted to participate in joint ventures on three sites: The Cedars, Hadley Garage, and
5 Ivor Lodge I believe, and they may have paid £200,000 on account of costs to be recharged
6 by Durkan Limited to them in that respect, but they certainly never made a loan, I believe. I
7 agree that the wording does not seem very appropriate, but it certainly wasn't a loan, it was
8 an advance against costs.
9 MISS BACON: So you are saying that the audited accounts and the audited financial statement is
10 incorrect in this respect?
11 A Probably in the description but the £200,000 is actually shown there in "debtors", an
12 outgoing by group undertaking £200,000.
13 Q It says it is an interest free loan, that is what it says.
14 A That is actually quite right because had it been a loan under the Shareholders Agreement it
15 wouldn't have been interest free, it would have attracted LIBOR plus 2 per cent, so that is
16 what I am saying, I can only surmise that was an advance against the costs on those three
17 jobs.
18 Q The next tab is tab 94, and can you look at the last page of that as well?
19 "At the balance sheet date, the following amounts were due to the company by
20 Group undertakings as follows:
21 Durkan New Homes Ltd £710,000"
22 was that on the same basis that you have just explained in relation to the £200,000 the year
23 before, or was that a different kind of sum due or loaned?
24 A Again, I don't have the detailed knowledge, but I suspect, 1998, it could be the same kind of
25 job, because ----
26 THE CHAIRMAN: Do not speculate, Mr. Fraher ----
27 MISS BACON: No, if you cannot answer it then ----
28 THE CHAIRMAN: -- if you do not know, then just say you do not know, that is fine.
29 A. I believe that £700,000 is further contributions to Durkan New Homes in respect of the work
30 in progress on those three sites, in fact, I am pretty certain. That does not surprise me, it
31 will be an escalating number, because they were spec development sites, so you keep
32 ploughing your money in and ultimately when the block of flats is finished the money
33 cascades and you get your money back, so there were advance payments in respect of, I
34 believe, those three developments.

1 MISS BACON: Finally, Mr. Fraher, I want to ask you a few questions about infringement 135,
2 could you turn back to your first witness statement at tab 3, bundle 2A? You say you also
3 chased this payment up at some point in December 2003?

4 A Yes.

5 Q You were advised by Colin Simmons that money was outstanding relative to a job that
6 Durkan Pudelek had tendered for?

7 A Madam, is this point 15?

8 Q Point 15, yes. When did Mr. Simmons say that the job had been carried out?

9 A It wasn't, I believe it was a tender they were involved in, he didn't say it was a job, he said
10 it was a tender they had been involved in.

11 Q So why was money owing?

12 A I had no idea.

13 Q Did you not ask?

14 A No, I didn't ask.

15 Q What, a £60,000 plus VAT sum giving a total of £70,500. You say it was not a job but a
16 tender?

17 A I was told by Colin Simmons, he rang me and said they had been involved in a tender with
18 Mansells and that he wanted me to attend a meeting between himself and the representatives
19 from Mansell who were having difficulty paying it. They were obviously involved in a
20 tender, I don't know what the arrangement was, he said it was money due, he didn't say
21 how much was due.

22 Q So you asked about a debt that was owed by Mansell in relation to a tender, not any work
23 that you had done for Mansell?

24 A I don't believe so, I believe it was a tender that they had been involved in jointly.

25 Q Why would money have been owing from Mansell for a tender that you had just been
26 involved in? You know how the process works, you put in a tender and you get the job or
27 you do not, why would you owe another contractor?

28 A It depends what sort of a tender they were involved in; I have no idea what kind a tender it
29 was, this was something that was at short notice, I was asked to attend a meeting. I didn't
30 know how much was involved, but obviously there was some sort of arrangement in
31 connection with the tender, the details of which I did not know. This was a transaction that
32 we now know happened some 11 months beforehand, but it was not something that I was
33 aware of. I would not be aware on a day to day basis ----

1 THE CHAIRMAN: No, but the question you are being asked is, if it was not a job what sort of
2 circumstance could you imagine had given rise to a liability on the part of Mansell to DP in
3 relation to a tender?

4 A I could only speculate – it is speculation, this is not within my knowledge at the time – that
5 they could have been sharing costs on a job, they could have been working on a tender,
6 perhaps Durkan Pudelek were going to do a job for them and brought to a certain stage and
7 was aborted, I have no idea, but there are circumstances where you can be involved in jobs
8 and somebody pulls the plug, they can't get the money, there's a change in the arrangement,
9 they can't get the escrow, they can't get the parent company guarantee, or they can't get the
10 guarantee that they may have required, so the job was aborted and obviously there was an
11 arrangement there whereby Mansells were going to compensate Pudelek for their costs, that
12 was my ----

13 MISS BACON: So you are saying there was some kind of compensation payment, or that is what
14 you thought there would be?

15 A No, I didn't think anything. Madam, you asked me the question: how could I visualise
16 something like that would happen? It had happened on a few occasions, a smaller sum, but
17 at that point in time I had no idea what the issue was, but it's not unusual for somebody to
18 lead you down the track and then suddenly pull the plug and do it themselves, or give it to
19 somebody else. They may reimburse your costs or compensate you in some way for the
20 loss of the opportunity.

21 Q So you are saying that there had been several occasions where there had been compensation
22 payment, and you assumed that this would have been one of them?

23 A No, I didn't say they were compensation payments as such. Some of the cases were
24 recovery of costs. You can incur costs, the tendering process is quite an expensive process,
25 so I'm not saying ----

26 THE CHAIRMAN: No, I do not think he was saying that?

27 A There weren't compensation payments at all, that's the last thing I'm saying. In fact,
28 madam, I remember there was a situation not too long afterwards that we actually took
29 somebody to court and we actually won against costs because the gentleman failed to put
30 the sum in escrow and he just couldn't get a bank guarantee, and the Durkan Pudelek policy
31 was they took commercial risk, they did not take financial risk and, in many cases, some
32 contracts were aborted and they would rightly say: "Look, you brought me down the road
33 here, I want recovery of my costs" and so on.

1 PROFESSOR PICKERING: You said that this had occurred eleven months before you were
2 asked to attend the meeting to try to get the costs, yes?

3 A I now know that it happened some time beforehand, but Colin did say that they had been
4 working on a job, on a tender.

5 Q Had you in your cash management and debtor reporting role included this outstanding sum?

6 A No.

7 Q Why not?

8 A Because I didn't even know it existed. I knew nothing of it.

9 Q So you say you were dependent upon what Durkan Pudelek provided to you by way of
10 information ----?

11 A Absolutely, I wouldn't ----

12 Q -- so they had not provided that information to you?

13 A No, that was the first inkling that they had. But that wasn't with respect, unusual. They'd
14 say "We spent an awful lot of money on that job, he's pulled the plug on the job, he can't
15 get his guarantee", and a two stage tender, whatever it was, is a costly exercise, tendering.
16 So you rightly say: "I want my pound of flesh".

17 Q You say in your witness statement, in the same paragraph that you were looking at, that you
18 attended a meeting between Mr. Simmons and Mr. Percival from Mansell?

19 A Yes.

20 Q Would that have been at your offices?

21 A No, it wasn't at my offices, in fact ----

22 THE CHAIRMAN: Where was it?

23 A It was on, I believe the Mansells' offices are somewhere in Enfield, and Colin Simmons
24 rang me whatever day and said: "Look, will you meet him and try and sort it out?" So we
25 met for a cup of coffee in Waltham Abbey, I believe it is the Swallow Hotel. He said
26 "Would you meet him on the way to work?" I come from one junction, he comes from
27 another one, we met there, had a cup of coffee, that's how we met.

28 MISS BACON: So the meeting would have lasted what, 20 minutes, half an hour?

29 A I don't know how long the meeting lasted because I actually left at a particular point in
30 time. This was, I believe, in December, I was up to my eyes in the office. Now, I met the
31 man ----

32 THE CHAIRMAN: How long were you present at the meeting?

33 A I was probably, probably five/ten minutes. I would say probably five minutes. It was
34 between five and ten minutes.

1 MISS BACON: You are saying that in that five minutes you did not discuss at all the nature of
2 what the money was for?

3 A I had no interest in knowing what the detail was. Colin Simmons was using me as a bit of a
4 weapon: that we have a finance director and he's the bad guy who is going to get the money
5 out of you, he is Mr. Bad Guy, basically. There wasn't an issue. I believe Clive Percival,
6 there was no argument that a commitment had been made to whatever, reimburse costs or
7 whatever. So it wasn't an issue. He had an issue because I believe that they were going
8 under restructuring and if I were to second guess it, he had acted outside his remit. That's
9 guesswork, but I suspect it was a bit of an embarrassing situation for him, I believe.

10 Q You say in your witness statement that you simply advised Mr. Percival that if he could let
11 you have the appropriate details of the job you would raise the necessary invoice. Why
12 would you have asked Mr. Percival for details of a job that you had carried out?

13 A We didn't actually carry out the job. That's the whole point I'm making.

14 THE CHAIRMAN: Just focusing on what your witness statement says there is that sentence:

15 "I simply advised that if he could let me have the appropriate details of the job I
16 would raise the necessary invoice."

17 So what actually were you asking him to do?

18 A You tell me what the job - you give me the details of the job and I will raise the invoice. In
19 fact, the one thing that I did say to him was - I asked him a simple question: do you use self
20 billing? That's the one point, because if you use self billing in the construction industry
21 yes, you will bill yourself. But he then said we don't use self billing. I said: fine, I said, if
22 you just let me know I will raise an invoice. I needed details to raise an invoice.

23 PROFESSOR PICKERING: The details for an invoice are with Durkan Pudelek. I mean, one
24 might say: you tell me how you want this couched and I will do it to accommodate that. Is
25 that the inference?

26 A That's effectively what I was saying. You just let me know what the job is and how you
27 want me to couch and I will raise the invoice on that job.

28 MISS BACON: Did you not know, then, at that stage that this was not a genuine job? That was
29 why you were asking him how he wanted the invoice framed?

30 A I believe it was a tender that they were involved in. I don't think there was a job. I wasn't
31 told what the job was. To be honest, I didn't even ask. I suppose in truth hindsight is a
32 great thing. If I had have looked back I would have said if that was a job. But certainly it
33 was a commitment, to be honest, that Clive Percival had obviously made. Now, in truth, at
34 the back of my mind I said if there was no contract signed and so on, there was dodgy

1 ground. There were many cases where we would chase payments, but if your contract isn't
2 in place, or you haven't got all the legal documentation it's a hard fight to try to get money
3 through a court. So I just said, the man admitted that he owed money in respect of a tender
4 that they were involved in, and I said, you give me the details. He was the one who was
5 having difficulty within his organisation presumably. So I said: give me the details and I'll
6 send you an invoice. It wasn't up to me to raise an invoice. I didn't have the details. So I
7 just asked him a simple question.

8 PROFESSOR PICKERING: It was not enforceable, was it, in the circumstances?

9 A With hindsight it certainly wasn't enforceable.

10 MISS BACON: Did you know that at the time? Did you know at the time that this was a very
11 dodgy job?

12 A No, I didn't think it was a dodgy job. They had made a commitment. I didn't see any
13 paperwork; I saw nothing. I merely attended a meeting for ten minutes and was told there
14 was money due on the tender and the man had obviously made the commitment to pay a
15 sum of money.

16 Q Is it usual for you to meet a competitor at a hotel for coffee to discuss a job like this?

17 A Well, as it turns out, I didn't mind where I met him.

18 THE CHAIRMAN: That is not really the question that you are being asked, Mr. Fraher.

19 A No, you're right. It is unusual. I have met the odd person, so it is a bit unusual, yes.

20 Q But I think the point that was being put to you before was why did you ask Mansell what
21 the appropriate details of the job when you were sitting there with Colin Simmons who, you
22 would have thought, would be a better source of information about what the job was on
23 which this money was owed?

24 A From what I can deduce, it was Mansell – Clive Percival was the one who had the problem
25 with processing the payment. So I said you let me know what you want and I will raise the
26 invoice. Other than that – if that was the case, I could have just raised an invoice, but I said
27 you let me know what the invoice is, or what the job is.

28 MISS BACON: Why did his problems have anything to do with the invoice that you were
29 sending him?

30 A Because he obviously had a problem because they had restructuring. I believe they were
31 being taken over by, as it turns out now, Balfour Beatty I believe. So he obviously had the
32 problem. I can only surmise that he had a problem that he may have exceeded his authority.
33 That is just with hindsight, that is my guesstimate.

1 Q Can I ask you to look at the email chain at tab 14 of this bundle. I have a few more minutes
2 of questions then I will finish in the next three minutes, I think. Tab 14, if you go to the
3 bottom, what has happened here is you have sent three emails, the first two of which have
4 been extracted at the bottom of the third, and then we have got his response at the top. If
5 you look at the first email in your chain at the bottom of the page:

6 "I refer to our previous conversations [plural] and would respectfully request
7 that you let me have the appropriate documentation by return."

8 So does this imply that you had spoken to Mr. Percival from Mansell on several occasions?

9 A No, it means that I met him, and I believe I probably rang him. I can't see the date on this
10 but I suspect it might have been fairly soon after the meeting.

11 Q What do you mean by "the appropriate documentation"?

12 A The invoice, let me know what details you want on the invoice.

13 Q Then, if you look at the top of the page, his ultimate response to your email on 30th March,
14 he says that his colleague Colin will forward details to you and what is required to enable
15 payment to be made. So then on 1st April you get an email from Mr. Gilbert that is not in
16 the bundle but which I will hand up to you. (Handed)

17 "Please raise invoice on the above Order Number for 'Fit Out Works' on a
18 project at '83-87 Southwark Street, London' ... You will receive quality
19 questionnaires via our QA system but I don't need to receive them back."

20 So at this point we know that DP has not ever raised an invoice for the payment, he is
21 asking you to raise an invoice for something that (as Professor Pickering put to you) would
22 normally have been within the knowledge of Mr. Simmons, he is telling you what the job
23 was (again, something that would normally have been within the knowledge of Durkan
24 Pudelek). Taken together with the circumstances of your meeting, the OFT's case is that
25 you must have known at this point, at the very latest at this point, full well this was not a
26 genuine payment for a genuine job and you must have known that your invoice was going
27 to be a false one. Is that correct?

28 A That is not correct. Clearly, Clive Percival had obviously spoken to his colleague and I
29 presume Colin Gilbert may well be someone in the accounts department who gave me the
30 details of the job on which we were to raise the invoice. Now, I thought, to be honest, it
31 was a very straightforward thing as it turns out, just that's the job, raise the job, and that's
32 exactly what I did.

33 PROFESSOR PICKERING: What about the reference to the quality questionnaires? Did that not
34 alert you to the fact that there was something a bit odd?

1 A Well, you would only have a quality questionnaire if you were actually going to physically
2 do jobs. I'm sure there's a whole pre-contract pack before you physically move on to site as
3 in health and safety packages and so on. But this is a job that never actually happened. I
4 believe it was in connection with a tender only. It never progressed to being a job.

5 Q It does not say for an aborted tender; it says for "fit out works".

6 A Well, perhaps that's the wording that they wanted to use.

7 THE CHAIRMAN: They are saying it is called 83-87 Southwark Street, London, but in DP's
8 contract database it might have been called something else, might it not? Should not the
9 invoice have gone out referring to the job as it was known on the DP database?

10 A It wasn't known as a job on the DP database. It never got to the stage of actually being a
11 job. It was only a tender.

12 Q So you realised at the time that there was not anything on the DP database that reflected this
13 job?

14 A To be honest, I didn't look. I was just asked a simple question and here we are, X number
15 of months down the road. So there wouldn't be a job. The only time that a job gets a
16 number is when it's actually live on site. Other than that, it doesn't get a number.

17 Q It must appear somehow in the database in DP when you put a tender in for a job. There
18 must be some record somewhere on the system that you have been involved in a tender for a
19 particular contract.

20 A I wasn't privy to that information. I don't believe the tender actually went in. I believe they
21 were actually working on a tender together. That was how it was put to me: they were
22 working on a tender together.

23 Q How was it going to be processed? How was this amount of money then going to be
24 processed through the DP's books?

25 A As a sales invoice.

26 PROFESSOR PICKERING: What is your view, now it is clear that you were given false
27 information by your directorial colleague?

28 A I'm a bit miffed, to say the least. There's no doubt, I have been compromised. I'm not
29 proud of the fact. But I'm not a bloodhound. I was given information. I took what I was
30 given at face value. Why wouldn't I? I'd known that this was not somebody I'd just met.
31 Colin Simmons has been a director up to ten years before this. I had never come across a
32 situation such as this before, or indeed since. It was a total one off.

33 MISS BACON: The subsequent invoice that was sent for what was an amount of £60,000 plus
34 VAT which was a total of £70,500, you were aware of the invoice going out to Mansell?

1 A Yes, I was because when I got this information I passed it down to the sales ledger
2 department and they raised the invoice and sent the invoice out.

3 Q So you were aware that it was the sum of £70,500?

4 A I was aware, on the day that this invoice came in, because, to be honest, again probably
5 whatever I was doing, I didn't even know how much it was because when I got the details I
6 had to ask Colin Simmons how much the sum of money was, and he said £60,000. So I
7 raised an invoice – I sent it down – in fact, when I sent it down to my colleague, I said
8 would you raise the invoice and it was only afterwards that he said: how much is it for? I
9 rang Colin Simmons and I think he told me that it was £60,000.

10 PROFESSOR PICKERING: So you went to a meeting to get some money without knowing how
11 much was outstanding?

12 A Correct. It could have been £10,000, it could have been £20,000. I didn't know.

13 Q Or a lot more?

14 A It could have been a lot more. It is not unusual for pre-tender costs to be quite sizeable, for
15 tender costs to be quite sizeable.

16 MISS BACON: In the order of £70,000?

17 A To be honest, if I'd known the deal that we were doing, that we did in Drocha (?) it was a
18 million and a half, and the job never went ahead. There were three parties involved. The
19 job never even started.

20 THE CHAIRMAN: Sorry, just one little question on this email. A copy of your "CIS", what
21 does CIS mean?

22 A That's your Construction Industry Scheme tax exemption certificate.

23 MISS BACON: My last question, Mr. Fraher, is that the OFT's case is going to be that this story
24 is just not credible and that you did know what this payment was for. Do you accept that?

25 A I do not accept that at all.

26 Q I do not have any further questions.

27 THE CHAIRMAN: Any re-examination, Mr. Hoskins?

28 Re-examined by Mr. Hoskins

29 Q Only a brief point of clarification. It will not take very long. Take up bundle 2b tab 93,
30 please. These are the DP financial statements for the year ended 31st January 1997. Go
31 through to p.13, please. You were shown item 20 related party transactions with particular
32 reference to an interest free loan of £200,000. You said in response that it was shown in
33 debtors. Can you clarify what you mean by that, please?

34 A That it would be money due by Durkan New Homes to Durkan Pudelek.

1 Q When you say show in debtors, if you turn to p.11, is that a reference to item 9?
2 A Yes, I believe it's the amount owed by a group undertaking, i.e. Durkan New Homes was a
3 fellow subsidiary of Durkan Holdings Limited.
4 Q Thank you very much. I have no other questions.
5 THE CHAIRMAN: Thank you very much, Mr. Fraher. It has been quite a long morning for you.
6 It is now ten past one. We will reconvene at ten past 2.
7 (The Witness withdrew)
8 (Adjourned for a short time)
9 MR. HOSKINS: I would like to call Mr. William Durkan now, please.
10 Mr. WILLIAM DURKAN, Sworn
11 Examined by Mr. HOSKINS
12 Q Could you state your full name, please?
13 A William Durkan.
14 Q Can you take up the bundle numbered 2A, please, and go to the first tab, tab 1. It should be
15 the witness statement of William Durkan.
16 A Yes.
17 Q If you go to p.3, is that your signature?
18 A That is my signature.
19 Q Are the contents of this witness statement true?
20 A It is.
21 Q Thank you very much. I should just say, Mr. Durkan has asked me to point out that he has a
22 slight hearing problem in his left ear, so perhaps you could just bear that in mind. I have
23 told Miss Bacon as well.
24 Cross-examined by Miss BACON
25 Q Mr. Durkan, in your witness statement you have explained your position in Durkan
26 Holdings and Durkan Pudelek. Can I just ask you about Durkan Limited, which is the
27 company that used to be Durkan Brothers. I understand that you are currently a director of
28 Durkan Limited – is that right?
29 A That would be right.
30 Q How long have you been a director of that company?
31 A Since it was formed.
32 Q Which was when?
33 A A long time ago, probably – honestly, I don't know.
34 Q Thirty years ago?

1 A It's more than 30 years ago.

2 Q More than 30 years ago?

3 A Yes.

4 Q You say that over the past ten years or so you have only travelled to London infrequently?

5 A That is correct.

6 Q So you stopped coming to London so frequently around the time you turned 60 – is that

7 right?

8 A Yes, probably, yes.

9 Q So until the year 2000 or 2001 you were travelling to London fairly regularly – is that right?

10 A Yes, but not as regularly as I – I would say I was starting to not come as often, even then,

11 after the mid-90s.

12 Q Could you take up bundle up 2B, which is just behind you. This is the bundle with the sets

13 of minutes of the board or directors of DP. Can you turn to the first tab. which is tab 20,

14 and you will see minutes of board of directors' meeting telephoned at Durkan House on 5th

15 October 1993, which is the first board meeting minutes of DP, and you will see “W Durkan

16 – In the Chair”, and that is you?

17 A That's right.

18 Q So you were chairing that meeting?

19 A That's right.

20 Q If you turn over to tab 22, if you look at the top again you will see, “In Attendance: W

21 Durkan – In the Chair”. So you were chairing that meeting too?

22 A That is right.

23 Q Tab 23, “W Durkan – In the Chair”, you were chairing that meeting.

24 A Yes.

25 Q The next one is tab 26, “W Durkan – In the Chair”, again you were chairing that meeting?

26 A Yes.

27 Q Tab 27 – I am not going to go right through the bundle because they stop saying this around

28 tab 32, but I want to show this to Mr. Durkan – 27 “W Durkan – In the Chair”, you were

29 chairing that meeting?

30 A That's right, yes.

31 Q Then tab 28 – I will come back to this meeting, but I just want you to confirm that you were

32 the chairman of that meeting. When it says “Chairman” it is suggested that is a reference to

33 you?

34 A Yes.

1 Q Tab 30, again that records you as having been the Chairman, so you would have been the
2 chairman of that meeting?

3 A That's right.

4 Q Tab 31, "William Durkan (Chairman)", so you would have been the chairman of that
5 meeting?

6 A Yes.

7 Q And tab 32, "William Durkan – Chairman", so you would have been the chairman of that
8 meeting?

9 A That's right.

10 Q After that it stops recording who the chairman was, but would it be right to say that you
11 would have been the chairman of the subsequent meetings too, just as you have been for
12 these meetings?

13 A No, if I wasn't down as chairman I wouldn't be there.

14 Q If you look at, for example, tab 33, you were present at the meeting. Those present at the
15 meeting were you, your son, Mr. Pudelek, Mr. Simmons and Mr. Fraher. You were the
16 chairman of the board of directors. It does not record here who was the chairman in any of
17 the subsequent minutes, but I was just asking you whether you would have chaired the
18 meeting because you were the chairman of the board of directors?

19 A It says I was present, yes.

20 Q Would you have been the chairman of the meetings?

21 A The way the meetings – I was described as "Chairman" – the way the meetings were run, I
22 probably didn't perform the role as you'd call a normal chairman. I sat, I listened, I didn't
23 have much input into the meetings. Mike Pudelek acted more like the chairman, he and
24 Colin Simmons, and they reported to us at the meetings, that's what they did. I did more
25 listening, I didn't do much talking.

26 Q Can I ask you to put that bundle to one side. I will come back to it in a minute. Can you go
27 to your witness statement, which is in bundle 2A, which you should have in front of you.
28 Would you look at para.5, where you say, "I rarely participated in the Board Meetings for
29 Durkan Pudelek". Then you talk about the number of meetings between 2002 and 2007,
30 where you say you attended only ten of them. When you are saying that you rarely
31 participated in meetings, are you saying you rarely said anything or you rarely attended
32 them?

1 A I would be saying both. When I did attend, I rarely said much at the meetings. I had very
2 little input into the meetings. I did more listening than talking. I hardly ever talked at them,
3 to be quite honest with you.

4 Q Are you also saying you rarely attended board meetings?

5 A Oh, that would be true, yes.

6 Q Are you saying that you rarely attended board meetings for the entire period in which you
7 were the majority shareholder of Durkan Pudelek, or are you saying that you rarely attended
8 the meetings between 2002 and 2007?

9 A The times I attended would be on the minutes.

10 Q On the record.

11 A Yes.

12 Q So when you say you rarely attended, are you just talking about the period between 2002
13 and 2007?

14 A Well, if you go on, you'll probably find – you stopped there at 32 – in the latter part of the
15 90s I didn't attend as many meetings.

16 Q In fact, our case is that you actually attended the majority of the meetings, at least up until
17 2001 – is that correct?

18 A I wouldn't say I attended – not the majority. I think overall I didn't even attend a third of
19 the meetings over the period.

20 THE CHAIRMAN: Where it says on the front page of the minutes, "Present, William Durkan"
21 and the others, do you accept that, where it says that, you must have been present at the
22 meeting, or are you saying, "No, even if it said that, I might not have been there"?

23 A No, I accept that if it said I was present, I was present. I think that they put me down as the
24 chair, I think someone put that in there at the early stages.

25 PROFESSOR PICKERING: My calculation, Mr. Durkan, is that in the period 1992 to 1999, that
26 is the first seven or eight years of Durkan Pudelek's existence, you attended 20 out of 31
27 board meetings, so that is almost 70 per cent?

28 A I'd accept that, yes.

29 MISS BACON: If it would assist the Tribunal, I have gone through the minutes, and did the same
30 exercise for the period to the end of 2001, and it was 28 meetings that Mr. Durkan and 16
31 that he did not attend. I also, for the sake of completeness, checked the minutes that have
32 been disclosed to us but were not in the bundle, because, for whatever reason, we did not
33 rely on them, and those do not show a different picture, so it is not the case that all of those
34 show, when you actually add them all together, Mr. Durkan was not there for the majority

1 of the time. It does appear to be the case that Mr. Durkan was there for the majority of the
2 meetings up until the end of 2001. Obviously what he says about May 2002 to the end of
3 2007 is factually correct. That is why I wanted to ask about his statement there. (To the
4 witness) Is it right to say that during the board meetings you did not always sit there in
5 polite silence, but you did, in fact, make a number of proposals and recommendations about
6 the way that DP should operate?

7 A Yes, I might have contributed. I might have contributed something, yes. If I thought it was
8 in the interests of my shareholding, I would have made comments, I'm sure, at the
9 meetings.

10 Q Can I just take you to a few of the examples. I want to take Mr. Durkan to about six
11 documents. The first is at tab 22 of bundle 2B. If you look at p.3:

12 "Mr. Durkan recommended that Durkan Pudelek consider setting up materials
13 accounts with suppliers in February/March ..."

14 Is that a reference to you rather than your son?

15 A It probably was to me.

16 Q You were recommending that DP should set up materials accounts with its suppliers on its
17 own account?

18 A Yes, because we had to help them out for the start, and I was trying to make them more
19 independent so they could stand on their own two feet.

20 Q That is very helpful, thank you. Can you look at the next tab, tab 23, p.2, para.402:

21 "AF advised that the overheads of the company required review and incorporation
22 into the trading budget. The Chairman asked that this be done and formalised at
23 the next Board Meeting. CS undertook to meet with AF for the purpose."

24 So this was your request following Mr. Fraher's proposal that the overheads should be
25 reviewed and incorporated into the trading budget?

26 A I don't see my name, but it might have been.

27 Q Are we looking at the same document, it is tab 23, para.4.02, and it is a reference to "the
28 Chairman", and you have confirmed that you were chairing that meeting, "The Chairman
29 asked that this be done". All I was asking you was whether you had made this proposal
30 regarding the budgets?

31 A Well, probably I did, yes. In the interests of our shareholding in the company I would have
32 asked for that, yes, indeed.

33 Q Tab 26, p.3, para. 6.02 is another reference to the chairman here, that would have been a
34 reference to you, would it?

1 A It would be.

2 Q “The Chairman suggested to the Board that work opportunities were increasing
3 and that the trend of material and subcontract increases was also likely to
4 continue. It was, therefore, important to take these into account when tendering.”
5 So this was you saying to Durkan Pudelek that they should ensure their profit margins
6 reflected the increase in material and sub-contractor costs?

7 A Yes, because the recession was all but over, and things – how should I put it – sub-
8 contractors would be upping their prices, the material suppliers were, I’d have read that
9 probably in the paper, maybe the “Sunday Times” or something like that, and that was
10 probably a suggestion that I made.

11 Q Thank you, Mr. Durkan. Can you turn to tab 30. This was a meeting that you had
12 instigated, was it not?

13 A Yes, I haven’t read all this now, but I would feel that that’s where I was maybe suggesting
14 that they shouldn’t be looking for work without margins and that they should be making
15 sure that they were getting a margin, I would think so, yes.

16 Q So this was your proposals regarding DP’s strategy going forward, that they should be
17 looking at their profit margins?

18 A Well in the interest of the Durkan shareholding in the company, yes, I’d be making that
19 suggestion.

20 Q Can you turn to tab 42, please, and if you look at the second page, para. 4.1:
21 “William Durkan commented on the potential opportunity for work with Dunloe
22 in the United Kingdom either by way of joint venture or otherwise. William
23 Durkan is to obtain further details on this matter and advise accordingly.”
24 So that looks like you were involved to some extent in exploring new work opportunities
25 for DP?

26 A A little bit part again I think in the Shareholders Agreement that we would help in any way
27 possible to get work for Durkan Pudelek. It’s probably that I knew someone from that
28 company, Dunlop – I might have met them on the plane or something – and they were also
29 based here in London, and I suggested it to Mike Pudelek, I suppose, at the meeting that
30 perhaps he should meet them and get some work through that company.

31 THE CHAIRMAN: You will have to speak up and right into the microphone so that the people
32 who are transcribing this can catch what you say.

33 MISS BACON: The last document I wanted to take you to was at tab 64. This was a meeting on
34 31st July 2002, and you weren’t at the meeting, but if you turn to the fourth page of the

1 meeting, a long highlighted section at para. 4.8, and if you look three paragraphs up from
2 the bottom:

3 “AF mentioned that it was the stated objective of the shareholders and in
4 particular the view of William Durkan that the main concern of the shareholders
5 was to build a business with long term value. This might well be achieved by
6 integrating the activities of DPIL within DPL.”

7 So presumably this means that you had had discussion with Mr. Fraher before the meeting
8 and he was then conveying your views that the best solution for DPIL might be to integrate
9 the business DPIL, is that right? Do you recall?

10 A I think what was happening there was that DPIL were not going very well and they had two
11 sets of overheads and I was probably saying that maybe they should be integrated and that it
12 would save a lot of costs, perhaps – it was only a suggestion.

13 Q And that was conveyed by Mr. Fraher to the board meeting?

14 A It would look like that, yes.

15 Q You accept that because Durkan Holdings have a shareholding in Durkan Pudelek you were
16 concerned to protect the value of your investment?

17 A Yes.

18 Q So you were keen, were you not, to ensure that the DP business was being run effectively?

19 A I guess I was, yes.

20 Q And, as we have seen from the minutes, you did make various suggestions from time to
21 time about DP’s sources of work, but also how it was organised as a company and its
22 commercial strategy, for example, profit margins?

23 A Where does it state that?

24 Q I have just taken you to a point where you were talking about getting work with Mike
25 Pudelek. I have taken you to a point where you had made a suggestion to Mr. Fraher
26 regarding DPIL and DPL, and I have taken you to your comments in the meeting that you
27 instigated regarding profit margins, so I am putting to you that you made various proposals
28 from time to time about things like how DPL was organised and its commercial strategy. Is
29 that correct?

30 A I’m sure it is, but I was only working on the interests of our shareholding in the company, I
31 was trying to make sure that DPL would be a success.

32 Q Do you accept therefore that you were involved in the development of DP’s commercial
33 strategy?

1 A I had no involvement in the running of DPL, and I know nothing about the running, even if
2 some employees walked into the office I wouldn't even know them, and even some of the
3 other employees I have in the office I didn't even know them.

4 THE CHAIRMAN: You were asked about the strategy, Mr. Durkan, of DP rather than the day to
5 day running. Would you say that you did have a ----

6 A Not a massive – I wouldn't have; only now and again I'd make comments, and I might be
7 reading the papers, and I'd be seeing what's happened and I might be making suggestions in
8 the interests of the Durkan Holdings' shareholding.

9 MISS BACON: Mr. Durkan, the OFT's case is that Durkan Holdings was, in fact, very closely
10 involved with the way that Durkan Pudelek was run, do you accept that?

11 A No, I do not.

12 MISS BACON: I do not have any more questions for Mr. Durkan.

13 THE CHAIRMAN: On this question of the input of the initial shareholding of Durkan Holdings
14 in Durkan Pudelek, I should know this probably but can you remember how much it was,
15 the initial stake that you took, or that you put in to DP?

16 A I don't think we put anything in. I think at the time we had just come through a really bad
17 recession here in England, and I know we had another encounter with another guy that had
18 gone bust, there were a lot of good people out there at that time. It was a guy in the office, I
19 think a Lindsay Neilson that Mike Pudelek knew, and heard about us that we might do
20 something like this, a kind of joint venture, and I think that's how it came about. Mike
21 Pudelek and Colin Simmons came to us with a business plan and it was their business plan
22 that we worked from.

23 Q But did you pay anything for the shares that you got?

24 A No, I can't recall we paid anything for the shares.

25 Q How did you envisage that you were going to ultimately liquidate your investment?

26 A We felt we could build up an independent company from our own company that had been
27 Durkan Limited, and that either Mike Pudelek and Colin Simmons would buy our interests
28 out or between us we might sell it off independently if we came to that agreement.

29 Q And then you would get to share in whatever the price was that somebody was prepared to
30 pay for the business, you would get 51 per cent?

31 A That would be correct, yes. But I'd only have got 51 per cent based on the Shareholders'
32 Agreement – and I've never had a Shareholders' Agreement, so you'll have to excuse me
33 about this one. This was the first time that I had – and if you had said to me how often did I
34 read the Shareholders Agreement, I didn't read it to be quite honest with you, and I never

1 referred to the Shareholders' Agreement and I would have been seen to have the casting
2 vote as the Chairman and a 51 per cent shareholding in the company. That was not the way
3 I worked anyway, and I wouldn't work that way.

4 Q No, what I am asking you, Mr. Durkan, is that you have said a number of times and Mr.
5 Fraher said before you, that what you thought you were doing was protecting Durkan
6 Holdings' investments, so what I am trying to explore a little bit is what you saw that
7 investment as being and how you foresaw at the time that you would realise that investment
8 in the fullness of time?

9 A The investment, at the early stages – how shall we put it – our facilities that we provided for
10 them, and I guess that was our investment at the early stages. You couldn't get bonds, we
11 got credit, credit was outside, and all that sort of thing until they got strong enough to be
12 able to get their own bonds.

13 Q At what point did Durkan Holdings then liquidate its investment? Was that at the time of
14 the management buyout or only when it was sold to ----

15 A No, that was a term of the management buyout.

16 THE CHAIRMAN: Yes, thank you. Mr. Hoskins, any re-examination.

17 MR. HOSKINS: I don't have any further questions. Mr. Durkan is keen to catch a plane, so I
18 would ask if he can be released so he can go and catch his plane?

19 THE CHAIRMAN: Yes, thank you very much for coming along, Mr. Durkan, and I will release
20 you.

21 A Thank you.

22 (The witness withdrew)

23 MR. HOSKINS: I will call Colin Simmons, now, please.

24 Mr. COLIN SIMMONS, Sworn

25 Examined by Mr. HOSKINS

26 Q Could you state your full name, please?

27 A Colin Simmons.

28 Q There should be a bundle marked "2A Control Issue" in front of you?

29 A Yes.

30 Q Could you turn to tab 5, please, and the witness statement of Colin Simmons?

31 A Yes.

32 Q If you turn to the final page, p.4, is that your signature?

33 A It is.

34 Q Is this your witness statement?

1 A It is.

2 Q Are the contents true?

3 A Yes.

4 MR. HOSKINS: Thank you very much.

5 Cross-examined Mr. BEARD

6 Q I am sorry you will not have the pleasure of Miss Bacon putting the questions, but I hope I
7 will be relatively brief. I understand you have been in court and you have heard a number
8 of matters that related to your statement be raised with Mr. Daniel Durkan, Mr. Fraher and,
9 indeed, Mr. William Durkan, and I will have some further questions for Mr. Pudelek. You
10 were the commercial director of Durkan Pudelek throughout its existence, is that correct?

11 A I was the commercial director from its inception in 1992 until around 2003 when I became
12 managing director.

13 Q You have open your witness statement, para. 5 of that witness statement, bundle 2A.
14 Paragraph 5 (a) to (d) you talk about how you were involved in the running of the business,
15 and then at (e) you say: "I gave an overview of our financial performance", at the end of the
16 first sentence, and if one reads back to the beginning of para. 5 you are saying at the time of
17 infringements 135 and 240, so between 2000 and 2006 and then the little lettered
18 paragraphs follow, so I understand from that you are saying that between 2002 and 2006
19 you provided the board meetings with the overview of the Durkan Pudelek financial
20 performance, is that a fair reading of the comment in the statement?

21 A From the very beginning of Durkan Pudelek, since its formation in 1992 we went out of our
22 way to provide very detailed documents for board meetings to ensure total transparency of
23 us as minority shareholders and operators of the business to reinvestors and the Durkan
24 Holdings directors so there would not be any suggestion of anything other than openness,
25 we felt that very important.

26 Having said that, when we came to the board meeting they were very informal, initially,
27 they used to be referred to as a "cup of tea", all the people present, with the exception of
28 Alan Fraher, who we saw as representing Durkan Holdings, the Durkan family's financial
29 interests, were shareholders, and summary statements were all we presented verbally at the
30 meeting. Therefore there was voluminous back up documentation from all of our
31 management controls and management meetings, but the meeting itself was all about giving
32 confidence to the Durkan family, Danny Durkan and William Durkan, and Alan Fraher, of
33 our total openness, transparency, and that we were running the business well with the intent
34 to establish a business, grow a business, and have a successful financial business.

1 Q Thank you. Could I ask the question again. Is it the correct reading of your statement that
2 between 2002 and 2006 you gave the board meetings the overview of Durkan Pudelek's
3 financial performance?

4 A Between 2002 and 2006 we gave fully detailed backup documentation, as I think has been
5 already shown by Miss Bacon in her cross-examination of Alan Fraher and Danny Durkan.

6 THE CHAIRMAN: Yes, is this the case then, that you gave a lot of detailed background
7 documentation so that orally at the meetings you gave an overview?

8 A Indeed, indeed. The summary data – in fact, on one or two occasions we were criticised in
9 a joking way for giving too much information. We felt that we should always give more
10 information than less, but to summarise it at the meeting, verbally at the meeting, which is
11 why I think in certain instances the comments of Alan Fraher and William Durkan and
12 Danny Durkan, are shown on the board meeting minutes as representing a large contribution
13 to the meeting whereas in fact, a lot of the documentation we presented was just presented
14 in summary fashion. So all the work and all the running of the company by Mike Pudelek
15 and myself had already been produced and were taken as read.

16 MR. BEARD: The question – I am slightly loath to ask it again, but I am really asking whether
17 you personally gave the overview of the financial performance to the board meetings
18 between 2002 and 2006, because your witness statement says that at the time of the
19 infringements, so between 2002 and 2006, Mike always served as chairman (we have heard
20 evidence on that) and you gave an overview of our financial performance. So did you give
21 an overview of Durkan Pudelek's financial performance at the board meetings between
22 2002 and 2006?

23 A During that period we had Bob Scott had been appointed --

24 THE CHAIRMAN: Can you just focus for a moment. At the meetings did somebody give an
25 oral summary of what the financial performance was, and was that person you, I think is
26 what you are being asked?

27 A Yes, and it wasn't always me because, Madam, during that period, 2003 I think it was, I was
28 promoted to managing director and Robert Scott, who had previously been managing
29 director of Durkan Pudelek Interiors and subsequently the Durkan Pudelek Strategic
30 Projects division, was made commercial director. So he may well have presented some of
31 the financial information in later dates, in addition to which we also had divisional heads at
32 that stage, divisional construction directors: Maurice Williams, David Watson and Robert
33 Cummings latterly, who would also have given some financial information because the
34 company became divisionalised. I'm sorry for not answering the question directly earlier.

1 MR. BEARD: So the answer is that your witness statement is not quite accurate; you did not
2 provide the financial overview to board meetings between 2002 and 2006 and other people
3 did from time to time?

4 A Other people would contribute to it, but I would be very surprised if I didn't give any
5 commercial overview at those meetings, being the commercial driver of the business and
6 the shareholder.

7 Q It may be of assistance just briefly to turn to one or two of the board minutes, if we may.
8 Take bundle 2B (it may already be open). This is the bundle with the board minutes in.
9 Could I ask you to turn to 2b tab 63, please. This is a meeting on 29th May 2002, so you
10 were the commercial director at this time. If you turn over the page you will see at 4.1 you
11 were there providing a financial report that was duly considered and approved. So that is
12 reference to the detailed underlying material and your oral summary: "Regard should be had
13 to the report for specific details". Then at 4.02 Mr. Fraher provided cash management
14 report, and then at 4.3 there are some marketing and estimating costs from Mr. Pudelek, and
15 then at 4.4 "MW provided a construction report". That is Maurice Williams, that is correct
16 is it not?

17 A Yes.

18 Q At 4.05 you presented a surveying report to that meeting. At 4.6 there is a highlighted
19 section to do with health and safety. Did you provide the report in relation to health and
20 safety?

21 A Yes, I did.

22 Q Thank you. Turn on to tab 69, this is a year later, around the time you became managing
23 director, May 2003. The Tribunal is probably relatively familiar with the general layout of
24 these board meeting minutes. At para.4 in this report the health and safety report is now
25 being dealt with by Ian Cresswell, the financial reports were being provided by not just you
26 but you with Alan Fraher, then the cash management reports provided by Alan Fraher,
27 marketing and estimating by Mike Pudelek, construction by Maurice Williams, and then
28 you presented the surveying report at 5.5. Is that correct?

29 A No, the presentation of the papers would have been exactly the same. If I reported on the
30 financial reports prepared by me and not by Bob Scott, then it would have pre-dated my
31 appointment as managing director.

32 Q Understood.

33 A So the basis of the reports were the same as before. I can't explain the reference to AF in
34 5.1. The health and safety report would be by me. Ian Cresswell was not a board member

1 of Durkan Pudelek, so I was the director responsible for the health and safety side and
2 would continue to report on health and safety at the Durkan Pudelek board meeting.

3 Q If we turn on to tab 75, so this is a year on, here we have got the situation where health and
4 safety, that was a report presented by you; 5.1 financial reports and here the reports are not
5 presented by you. This is RJS, this is Bob Scott?

6 A Yes, that's correct.

7 Q So the reports prepared by Bob Scott and Mr. Fraher were presented not by you. I will
8 come back to the remainder of 5.1. It says that Mr. Scott and Mr. Fraher were dealing with
9 the financials, cash management was dealt with Mr. Fraher, again marketing and estimating
10 by Mr. Pudelek, construction Maurice Williams with the additional assistance of Ciaran
11 McGill who had joined the board by that time, is that correct?

12 A Yes, he was at the board meeting, yes.

13 Q Then by that time surveying, that was presented by Bob Scott here. In fact, from this date
14 onwards, so from May 2004, you did not prepare the financial reports for the board, and
15 indeed you did not present the financial reports to the board thereafter. That is correct.
16 That was a matter dealt with by Bob Scott principally, with Mr. Fraher.

17 A No, not quite correct. It's true to say that Bob Scott presented the commercial reports at the
18 board meeting, but I would have had a great deal of involvement with Mr. Scott in
19 preparing those reports before the board meeting. The reference to Mr. Fraher is the
20 formatting of the financial information, very detailed financial information, into a format for
21 budget comparison purposes. That is simply a budget comparison, an A3 folded document
22 within the board papers that limits Mr. Fraher's involvement in that particular part of the
23 report.

24 Q I see. The Tribunal has obviously heard from Mr. Fraher in relation to those matters. I am
25 not going to ask you further about them, but I hope the Tribunal gets the picture of the way
26 in which the financial materials were being prepared and presented across time, and
27 therefore from 2004, not being prepared and presented by you. Just moving on, bundle 2B
28 tab 65. That is minutes of a meeting of the Durkan Group directors. You were not able to
29 attend that meeting. In what capacity were you attending that meeting if you could have
30 been there?

31 A I did attend meetings of Durkan Directors. There was a big misnomer here with the word
32 "Group". May I explain the background to my understanding of what it was. Up until the
33 formation of Durkan Pudelek there was only Durkan, Durkan Brothers, Durkan Holdings,
34 Durkan Estates, 100 per cent owned by the Durkan family, and there was no need for

1 something called Shared Services. Once Durkan Pudelek were formed and there was a
2 requirement in the shareholders' agreement for shared services, there was a need to consider
3 how those would be provided. There was no such thing as the Durkan Group. The Durkan
4 Directors were employees of Durkan Limited. There was an obligation on Durkan Holdings
5 to provide those services, and it was then for them to make sure that their Durkan Limited
6 directors provided those services. In many instances Mike Pudelek and I were either not
7 happy with those services or saw a need to improve them, or to make them more relevant to
8 the Durkan Pudelek business. So when those criticisms or proposals were made to Danny
9 Durkan and Alan Fraher, they arranged meetings with the directors of Durkan Limited in an
10 effort to manage that process. As I say, there was no managerial, financial, organisational
11 thing called the Durkan Group. It also suited our purposes to call something the Durkan
12 Group. It suited our purposes with clients to make us look better, bigger than we were; it
13 suited our purposes with our staff as well, to show that we were bigger, better than we are,
14 and that there's another authority above Mike Pudelek and Colin Simmons that they need to
15 satisfy in terms of their performance. So we used the words Durkan Group when in reality
16 they were a group of individuals, employees, directors of Durkan Pudelek, Durkan Limited,
17 Durkan Estates and New Homes under Durkan Holdings.

18 THE CHAIRMAN: So really this meeting was a meeting of the directors of the individual
19 companies within the Durkan form?

20 A Yes, indeed.

21 MR. BEARD: The question I asked was in what capacity you attended the meetings when you
22 attended them. Could you perhaps just clarify that to the Tribunal?

23 A I would attend the meeting as a director and shareholder of Durkan Pudelek.

24 Q All right. This meeting was in July 2002. In your witness statement you do not mention the
25 fact that actually you were a director of Durkan Estates at this time. Is that correct?

26 A Correct.

27 Q So, in fact, you would be wearing two hats at this meeting.

28 A No, because I don't think I was a Director of Durkan Estates. I believe I may have been a
29 Director of Durkan New Homes.

30 Q Was that a matter of a change in name in relation to the company?

31 A I don't know.

32 Q It is something we can confirm. Perhaps you could just turn on to the next page.

33 A If I may explain?

34 Q Of course.

1 A My involvement, or being a Director of Durkan New Homes, was entirely to do with the
2 purchase of the offices and the FURB arrangement that Alan Fraher referred to and nothing
3 else. I had no involvement in Durkan New Homes.

4 THE CHAIRMAN: Just remind me what “FURB” stands for?

5 A Funded Unregulated Retirement Benefit Scheme. I think.

6 Q Funded Unregulated Retirement Benefit Scheme. Does anybody – does everyone agree that
7 is what ----

8 MR. BEARD: I am sorry, Madam Chairman, if it assists Mr Simmons’ recollection, according to
9 company reports he was a Director of Durkan Estates, which may have traded under a
10 different name, from January 2001 until October 2005.

11 A I accept that, if that’s what company reports say.

12 Q If we just turn on and look at this document, it is a document to which other witnesses have
13 been taken. What we see on the first substantive page is a discussion of matters of health
14 and safety, and the promulgation, or the consideration of promulgation, of a group health
15 and safety strategy, that is correct.

16 A Which document are you referring to?

17 Q I am sorry, I am at tab.65, still, just over the page, highlighted section. I am sorry,
18 Mr Simmons.

19 A I was not at the meeting.

20 Q Thank you. I will put these questions to somebody else.

21 A But, if you wish, I can elaborate on health and safety, and for the view of group health and
22 safety for clarification. Up until 2001, Durkan and then Durkan Pudelek, by virtue of a
23 shared service, employed an organisation called the Eastern Builders’ Safety Group, which
24 was a consortium of small and medium-sized builders in Hertfordshire and Cambridgeshire,
25 to provide externally sourced health and safety services – inspections, management,
26 training, etcetera. As the Director responsible for health and safety within Durkan Pudelek,
27 I occasionally had meetings with them and my opposite number, Mr Barton, at Durkan
28 Limited, in an attempt to coordinate those services to make it, to manage an external
29 consultant, effectively, rather than the internal service. I volunteered, or was delegated, to
30 go, attend, various meetings with Eastern Builders’ Safety Group in Cambridgeshire, and
31 I came very quickly to the view that they represented the smaller end of rural Hertfordshire
32 and Cambridgeshire builders, and that we ought to “up our game”, if you like. So, I was
33 instrumental in arranging a head hunt and convincing the other people within Durkan
34 Holdings and Durkan Limited that we needed an in-house safety manager; and I arranged a

1 head hunt and interviewed and recruited Ian Cresswell, who I think is an excellent, was an
2 excellent candidate and, as I understand it, is now the Health and Safety and Environmental
3 Director of Durkan Limited. I drove that because I felt that we were getting behind the,
4 behind the game on health and safety. The whole business had changed from a very
5 prescriptive approach in the 70s and 80s and early 90s, to a much more managerial risk
6 assessed approach in the late 90s and early part of this century. So that was the purpose.
7 And we called him the Group Safety Manager. Again, we called him that for external
8 reasons and for staff and internal employment reasons. But, each company had its own
9 safety policy.

10 Q If I can take you back to your witness statement, Mr Simmons, para.5(f) where you talk
11 about your account of the dealings between Durkan Pudelek and Durkan Holdings in
12 relation to their services, and towards the end of that paragraph you set out that:

13 “Initially, as per the Shareholders’ Agreement, the cost of the services to be provided by
14 Durkan Holdings was set at 5% of Durkan Pudelek’s gross annual turnover.

15 Thereafter, and certainly within 18 months, as Durkan Pudelek became established
16 and recruited its own contracts administrative personnel, we aggressively
17 negotiated an appropriate arm’s length service charge commensurate with the
18 reduced level of services being provided”.

19 Now, we have heard evidence from Mr Fraher on this, that in the early years Durkan
20 Pudelek contributed nothing in relation to the services to which you referred as a matter of
21 overheads, and that there was a negotiation, a discussion, between you and Mr Fraher about
22 those matters. But, we have also heard from Mr Fraher that, by around 1997 a general
23 formula was in place whereby your contribution (and by “your” I mean Durkan Pudelek’s
24 contribution) was assessed as a proportion of the Group turnover. You would accept that
25 that is the correct account of how these matters were dealt with.

26 A Yes, as a generalisation. But, I think it fair to point out that the – something that wasn’t
27 clear from Mr Fraher’s evidence – that the original agreement if one referred to the
28 shareholders’ agreements here, that the overhead should be 5 per cent less any people we
29 employed, which progressively became more and more; and that that 5 per cent and shared
30 services included for the avoidance of doubt, the salaries and remuneration of Mike Pudelek
31 and Colin Simmons. So, inevitably, the contribution to Durkan Holdings for that which
32 they provided would diminish over time. The meeting and the arm’s length negotiation we
33 talk about was actually in the interpretation of what were meant by overheads, which Alan
34 Fraher referred to, in other words which costs were, overhead costing and which costs were

1 project costed. But there was never any doubt that, as we took on more and more staff
2 ourselves and provided more of those services, including our salaries, because originally we
3 weren't paid for a year and then 15 months, they would reduce as a percentage, although
4 they would increase because of increased turnover.

5 THE CHAIRMAN: Yes, but the point was that the formula changed from being 5 per cent, or
6 some per cent, of your, of DP's gross turnover to being a proportionate share of the
7 overheads, whatever was included in that pot, but you paid for it in proportion to the same
8 proportion that DP's turnover was to the other members of the -----

9 A Yes. That was what was agreed.

10 Q Thank you.

11 MR. BEARD: Just one or two questions in relation to infringement 135. You will recall that this
12 is an infringement whereby a sham invoice was raised in relation to a tender arrangement
13 between Durkan Pudelek and Mansell and the finding of infringement was made by the
14 OFT and it is set out in the decision. Now, Mr Fraher has been asked various questions
15 about it. You now accept that you were involved in setting up this fraudulent arrangement
16 seeking compensation in relation to the tender. That is correct, is it not?

17 A I accept that I organised the arrangement with Mansell to pay us the compensation payment,
18 and we have always accepted that.

19 Q And Mr Fraher said in his evidence that he thought that you were probably embarrassed
20 about that situation. Is that correct??

21 A I thought that Alan, Mr Fraher, said he was embarrassed. But, yes, I am embarrassed by it
22 also.

23 Q And you knew that you had done wrong by setting up this sham arrangement.

24 A Yes, I did.

25 Q Now, Mr Fraher said that he was not often involved in meetings with contractors about
26 debts. That is correct, is it not?

27 A Mr Fraher – I invited Mr Fraher to come along to no more than, I guess, half a dozen
28 meetings over the course of the 15 years of Durkan Pudelek being part of the Durkan
29 Group, to meet with various clients on creditworthiness issues and possibly half a dozen
30 instances on outstanding debts. So, it was fairly limited, his attending meetings.

31 THE CHAIRMAN: I am sorry. What is the difference between creditworthiness issues and
32 outstanding debts?

33 A Sorry, Madam. One was at the beginning of a prospective contract, and one was after there
34 had been a default, if you like, or a potential default. But they were always -----

1 Q So, about half a dozen instances where you invited Mr Fraher to come along to meet various
2 clients. So, was that half a dozen on creditworthiness issues, and another half a dozen on
3 bad debts, or -----

4 A Yes.

5 Q -- half a dozen or -----

6 A Yes. And they were always at my instigation.

7 MR. BEARD: So in this instance, when you had approached Mr Fraher to come along to this
8 meeting, it was quite an unusual circumstance.

9 A It was relatively unusual.

10 Q So, you explained to him you were in a difficult situation and you had done wrong.

11 A No. I explained to him that we had an agreement with, to be paid some money – and the
12 amount of money wasn't actually established at that point – and that I wished him to come
13 along to show that we had a Finance Director, or someone who was serious about collecting
14 debts.

15 Q Would it not have been natural to explain the problem discreetly to him in this unusual
16 circumstance?

17 A No, not necessarily. It was an organisational matter. It wasn't something that I needed to
18 discuss with Alan Fraher.

19 Q So, you did not have to give Alan any reason why he should head out to the Swallow Hotel
20 at Waltham Abbey to discuss a debt?

21 A No, because it was an out – it was a small amount as well, in the scheme of things. In the
22 scheme of the Durkan Pudelek turnover it was a relatively small matter. So, and it was
23 relatively local. And I said, "Look, can you come along here for ten minutes, just to give
24 this guy, show him that he needs to cough up the money?"

25 Q If the matter was small, is it not likely you needed to give more reason why Mr Fraher
26 needed to go out of his way to attend a meeting?

27 A No. Because we ran the business. Mike Pudelek and I ran the business, and Alan provided,
28 he and his team provided services to that business; and part of those services were credit
29 control services. So, if I said I needed someone to come along with me, and "I need you to
30 come along", then it was reasonable that he would come along.

31 Q Well, Mr Simmons, it seems somewhat implausible that Mr Fraher would not have wanted
32 to know why it was that he was being asked to come along in these unusual circumstances,
33 and it does appear that the natural interpretation of the situation would be that you did
34 explain to him. But you deny that.

1 A Yes, I do, because there was no need to explain this to him. In actual fact I would be
2 absolutely staggered if, well with the suggestion that, having explained it to him, he would
3 then put things in emails and writing and suggest litigation against the individual is beyond
4 comprehension, in my view.

5 THE CHAIRMAN: Was it rather this – that you knew and he knew. You know, “Ask no
6 questions, you’ll be told no lies”, that you did not explain what it was, and he did not ask
7 you what it was, because you both thought perhaps it is better he did not know what it is.
8 Was it that sort of view?

9 A It wasn’t even as sophisticated as that, I’m afraid. It was just a business dealings that, there
10 was no need for me to tell him. There wasn’t particularly any need to do so, although
11 obviously I was conscious of the fact that it wasn’t perhaps a normal or proper recovery of a
12 debt. So whether I was economical with what I told him, yes, probably I was. He wasn’t
13 inquisitive about it. We spent ten minutes in the car driving to Waltham Cross. We
14 probably didn’t meet each on a regular basis so we talked about a lot of other things as well.

15 Q Mr. Fraher referred to himself as “Mr. Bad Guy” in this context. I do not know if you have
16 ever seen the film “Pulp Fiction”, but there is a character in that film played by Harvey
17 Keitel, who is called “Mr. Wolf”, and people call on him when they need problems sorting
18 out. The reason you called on Mr. Fraher to attend was, as you say, because you had a
19 serious issue that you need to sort out, and Mansell were kicking up a fuss about making an
20 apparently fraudulent payment, and you brought in Mr. Fraher to do the sorting out. You
21 did it because he was the finance director. So far from him being a distant uninvolved
22 shareholder, you were actually bringing him in to deal with a specific practical problem.
23 This was a member of the board being required to get his hands very dirty indeed, was it
24 not?

25 A Well, I have to say, this is the first time I have thought of Alan Fraher as – yes, I have seen
26 “Pulp Fiction”, and John Travolta would be more my version. No, this is not a case of the
27 Con-dem government making sure Liberals have got blood on their hands, not at all, that’s a
28 completely wrong interpretation. I brought him along because he was the guy that collected
29 the money. That’s the beginning and end of it.

30 Q His involvement in these details in coming along and being the enforcer in these
31 circumstances is hardly consistent with the pitch that you try and paint of his being a silent
32 partner on the board, is it?

33 A He didn’t come along – Alan Fraher didn’t come with me to the meeting as a board
34 member, he came along as the head of the accounts function that was headed “Credit

1 control". Yes, he had an individual that actually dealt with the day to day, but when I
2 needed someone ----

3 THE CHAIRMAN: When you got to the meeting with Mr. Percival how did you introduce him?
4 Does he know Mr. Fraher, or how did you introduce Mr. Fraher to him – do you remember?

5 A I would have introduced him as the finance director with the purpose of recovering the
6 money, the payment.

7 MR. BEARD: Could you just go to para.7 of your witness statement, five lines from the bottom.
8 I think the answer to Madam Chairman's question may lie there. You say here:

9 "I brought Alan in to show that we had a finance director and I was intent on
10 getting payment."

11 That is correct, is it not?

12 A Yes, it is.

13 Q Thank you, I have no further questions.

14 A If I can elaborate on that statement, it was to show an external party we had a finance
15 director, not that we actually had a finance director.

16 MR. BEARD: Thank you, Mr. Simmons, the Tribunal may have some questions for you.

17 PROFESSOR PICKERING: Mr. Simmons, when you took Mr. Fraher to other meetings, the
18 other five meetings presumably on debts, was Mr. Fraher left in the dark as to what the
19 nature of the debt was in those cases?

20 A In most cases he would already be aware of the nature of the debt. There were two kinds of
21 payment. One is certified payment, which is where a third party certifies payment. In the
22 majority of large build construction contracts, there is an internal process where the Durkan
23 Pudelek surveyor will inform the accounts department who would raise the invoice and
24 create the credit line. Then there are certain other contracts, smaller contracts, and this may
25 well be considered as one of them, where there wasn't a third party, we just billed for some
26 work carried out. I can't recall whether those other half dozen instances involved the latter
27 of those two types of arrangement.

28 Q It seems a little odd that Mr. Fraher was kept in the dark and allowed himself to be kept in
29 the dark about the purpose, the real purpose, and the origins of this debt given that he
30 produced the debtor reports or the debtor analysis for Durkan Pudelek. Is this really what
31 happened and how it happened?

32 A It is. As I say, the debtor analysis would be generated from the invoices which in turn were
33 generated from certificates on the one hand. If it were direct invoices for work carried out
34 on an exchange of letters, for example – I can remember numerous situations where we

1 might have done £30,000 of work for an architect's office to replace some doors, or after a
2 break-in, and we wouldn't raise the invoice until some time afterwards. It wouldn't be a
3 certificate, therefore it wouldn't be collectable or chaseable that way. Later on it may be
4 that the architect said, "I don't want to pay, I thought it was a favour", and maybe we'd
5 come to some arrangement where they'd pay £15,000, that sort of arrangement. Plus the
6 fact, this was a tender, and we had, on a couple of occasions, organised and participated in
7 what's called a "bill share". A bill share, historically, is the origins of quantity surveyors as
8 a separate profession in construction, but these days involves parties talking to one another
9 who are also tendering and, as I understand it, the clients consent to. So when a client
10 produces a particularly large or difficult contract and do not want to pay a quantity surveyor
11 to take off the quantities and prepare the schedules and there's a lot to do, it is not
12 uncommon that the builders would say, "We'll split the cost of this between us" until such
13 time as there's a successful contractor whereby they would pick up the costs of the entire
14 bill share. I don't want to go into the legalities or otherwise – I'm not well enough
15 informed to know how that sits in the OFT, and I don't want to dig a bigger grave for
16 myself any – but it is purely a mechanism, as long as it is transparent, for producing a
17 schedule, which is a very expensive schedule to produce.

18 Q Mr. Fraher was at some pains this morning to tell the Tribunal that he was not really Durkan
19 Pudelek's finance director. Would he have been embarrassed then at being introduced as
20 your finance director?

21 A No, not at all, sir. We used Durkan's – we used terminology like "Group", we used
22 terminology like Alan Fraher as a finance director in order to impress people and to give
23 them greater weight externally. We might have used the term "Alan Fraher, finance
24 director" to a member of staff to impress him internally as well, but we all knew as
25 directors, and we all knew that the Durkan directors and Durkan Pudelek directors and the
26 Durkan Holdings directors knew exactly who ran that business, and that was Mike Pudelek
27 and Colin Simmons. We ran it day to day, we ran it week to week and year by year.

28 Q My final question, you will be glad to know, the year of this infringement, what was DP's
29 net profit?

30 A This is 2003/04, I believe, which is our *annus horribilis* ----

31 Q You can probably turn it up. I am afraid, not being a lawyer, I do not have the mastery of
32 all these tabs, but I am sure somebody can help us.

33 MR. BEARD: The year ending 2003. The financial year ended 2003 is at tab 99 of 2B.

34 PROFESSOR PICKERING: Thank you very much, Mr. Beard.

1 MR. BEARD: I am just slightly concerned about the date in relation to the infringement. I think
2 it would be 2004, the next one, it will be tab 100 that the Tribunal will want, depending on
3 the purpose of the question.

4 PROFESSOR PICKERING: That will become clear, I hope. All right, 2004 then, retained profit
5 carried forward, £558,000, you agree that figure?

6 A Yes, and that was our disastrous year.

7 Q So actually £60,000, which would presumably go straight through to the bottom line, was
8 quite well worth having, was it not? It was about 10 per cent, just over 10 per cent, of the
9 actual shown and retained profit?

10 A Certainly, if there was an obligation to pay £60,000, we would have not walked away from
11 it, yes. Otherwise, we would have done.

12 Q Would you?

13 A If it had been £6,000 – if it had been a small amount of money. It was a significant amount
14 of money, and it arose because we ended up tendering twice for the same project where we
15 were told we would be tendering once, and spent considerable sums of money on tendering.
16 So it wasn't on the bottom line, no, sir, it was to go some way to offsetting the considerable
17 costs that had been spent already.

18 Q In your evidence earlier you have related the £60,000 to your turnover, and the point that
19 seems to me to be relevant is to relate it in your retained profit, your net profit?

20 A I don't see any bearing on our net profit or our turnover of £60,000.

21 Q There is a very big difference in terms of the proportionate influence?

22 A It's £60,000 at the end of the day, £60,000 which we thought was collectable. We felt,
23 obviously clearly wrongly, we did wrong, but it had been expended by us in tendering the
24 whim of a client who decided to tender this whole thing again and put everyone to a great
25 deal of expense.

26 Q If I may just go back on my assurance that that was the last question, in view of what you
27 have just said, why did you feel unable to walk away when the client had changed the rules
28 of this particular tendering game?

29 A We were tempted to. I can recall a conversation about it, but we quite liked the work, it was
30 quite an attractive project, and we didn't like to. Without going into the realms of cover
31 bidding now, we didn't like to tell clients that we didn't want to tender for work because,
32 although they said it didn't prejudice you, it certainly did prejudice us in terms of the
33 consultants that were putting tender lists together.

1 MR. BLAIR: I have one question, Mr. Simmons, and it arises on para.5(b) of your witness
2 statement, if you still have got it open. That is tab 5 of bundle 2A, “We did not defer to
3 Durkan Holdings for our commercial strategy”. In the course of yesterday and today we
4 have heard a great many responses saying that there were queries raised by the Durkan
5 representatives, observations, comments, questions, highlighting, never a command. I am
6 interested in your reaction to those suggestions, comments and highlighting. Did you feel
7 you had an obligation to comply with them?

8 A Not at all. Mike Pudelek and I ran the business. The comments made by Danny Durkan,
9 William Durkan and Alan Fraher, great, thank you very much, some of them were actually
10 quite helpful, but 99.9 per cent of time we had already made those suggestions anyway. We
11 were putting that in our submissions and our documents. Latterly we used the board
12 meetings with our non-shareholder directors. We would go along there for a shareholders’
13 meeting before the board meeting and say to Alan or Danny, “Look, guys, we’d like to put a
14 few rockets up Maurice Williams”, so we actually used, in the same way as we used the
15 word “Group” with our staff, it gave us an extra weight, an extra impetus, saying we’ve got
16 a group behind us – we subtly, tactically, Mike Pudelek and I, used the Durkans to say,
17 “Look, you’re going to have to report these numbers to the Durkans, make sure you’ve got
18 your act together”. We would use subtly the Durkan non-executive directors to sometimes
19 berate our non-shareholder directors. Anything sensitive that was shareholder matters we
20 would discuss entirely separately.

21 MR. BLAIR: Thank you very much.

22 THE CHAIRMAN: I have a couple of questions. Your witness statement, just looking at that
23 para.5, refers to Durkan Holdings, “We did not defer to Durkan Holdings”. You have
24 explained in (f) that Durkan Holdings itself is a non-trading investment holding company. I
25 am just trying to understand whether you thought of Mr. Durkan senior and junior as being
26 Durkan Limited people, rather than Durkan Holdings people, because Durkan Limited was
27 really the construction business of the Durkan enterprise ----

28 A No, madam.

29 Q -- rather than Durkan Holdings, which did not actually carry on any business – is that right?

30 A As I understand it. When I refer to Durkan Holdings I refer to the Durkan Holdings
31 directors, William Durkan and Danny Durkan and Alan Fraher as representing the
32 shareholders, the 51 per cent shareholders, in Durkan Pudelek. We did not defer to those
33 guys at any time. We didn’t get overruled, we didn’t have a vote, we didn’t a vote. In the
34 early days we were new and we were respectful because they were growing their business,

1 they had established the business Durkan, and were very, very good in their market place.
2 We had come along, with quite an innovative Shareholders' Agreement, they were quite
3 forward thinking in saying: "Look, I've got a couple of good guys here, maybe we can
4 invest in something in the private sector". After a while that became extremely successful
5 and, despite all the evidence to the contrary, you are talking about board meetings when
6 things went wrong and, yes, they did go wrong in 2003 in particular, and perhaps in 2005
7 also. In the early days we were building a business slowly, but quicker than we could have
8 done, Mike Pudelek and Colin Simmons on their own, and by '97/'98 with an extremely
9 successful business, and well respected in the market place and an extremely profitable
10 business for many years up until this disaster in 2003.

11 Q Just thinking back to the board minutes – I do not want to go back to them now – there is a
12 number of times where it says this report was considered, or duly considered and approved,
13 and that phrase can either be the minute that is taken after 10 minutes discussion or 20
14 minutes discussion or actually no discussion at all. This may not be a fair question, but can
15 you say in the generality of cases where it says that in the minutes: "This was duly
16 considered and approved" did that mark any particular length of discussion on the topic, or
17 report?

18 A Not particularly. I can see why people might read those minutes in hindsight, the way that
19 are suggesting, that there may be some influence by Durkan Holdings' directors on the
20 minority shareholding. Alan Fraher wrote those minutes, in particular the latter minutes
21 since he took over writing those minutes, in a particular style, in the third person, He
22 talked about board approval, and a certain formality to them as well, indeed, there is
23 confusion about William Durkan and the shareholders, Mike Pudelek ran the meeting, that's
24 the truth of it.

25 Q That phrase, the "duly considered" what does that signify as to how much debate, if at all
26 any, there had been?

27 A Virtually none. We would present and if they had nothing to say about it, it would be "the
28 report was duly considered and taken, and noted", and that was the end of it, move on. If
29 there was something to say about something Alan would write a minute about it. We were
30 not particularly worried about those minutes because we never expected to be sitting here
31 15 years later talking about what the minutes were. We were out there making money and
32 building a business and quite frankly they were nice meetings and we did not object to the
33 way it was worded particularly, I don't think you'll find an instance where we say: "Hang
34 on a minute, I didn't say it quite that way". It wasn't of any concern to us. Yes, you need

1 formal meetings because we are a board of directors, but it was much more informal than
2 that.

3 THE CHAIRMAN: Thank you very much. Any re-examination, Mr. Hoskins.

4 MR. HOSKINS: No questions, thank you.

5 THE CHAIRMAN: Thank you very much, Mr. Simmons.

6 A Thank you.

7 (The witness withdrew)

8 MR. HOSKINS: I call Mr. Pudelek.

9 Mr. MIKE PUDELEK, Sworn

10 Examined by Mr. HOSKINS

11 Q Could you state your full name, please?

12 A Mike Pudelek.

13 Q If you could find bundle 2A and go to tab 4, please??

14 A Yes.

15 Q And then turn to the last page, p.6, please. Is that your signature?

16 A It is.

17 Q Is this your witness statement?

18 A Yes, indeed.

19 Q And are the contents true?

20 A Yes.

21 MR. HOSKINS: Thank you very much.

22 Cross-examined by Mr. BEARD

23 Q Mr. Pudelek, you were the chief executive of Durkan Pudelek Limited from 1992 until
24 2007, when you and Colin Simmons bought out the majority shareholding, is that correct?

25 A Indeed, yes.

26 Q Until you bought out the Durkan Holdings shareholding, they held 51 per cent of Durkan
27 Pudelek?

28 A Yes, they did.

29 Q But you say that Durkan Holdings was merely a silent partner and it never influenced the
30 operation of Durkan Pudelek?

31 A The Shareholders Agreement was expressly crafted to ensure that the aspirations and
32 ambitions of Mike Pudelek and Colin Simmons could not be in any way mitigated by the 51
33 per cent shareholders. The whole ethos of setting up Durkan Pudelek was that we would be
34 indispensable in terms of getting work, winning work, running work, getting paid for work.

1 We set up Durkan Pudelek after we had obtained venture capital from 3i and Trillion.
2 When I went to meet Bill Durkan I had an alternative to the Durkan Group. My first
3 meeting with the Durkan Group was with Tim Hennessy, who was a friend of Lindsay
4 Nielson. At that meeting it became clear to me that Durkan were interested in expanding
5 their activities into the private sector and to give themselves alternatives to the vagaries of
6 the public sector, if that helps.

7 Q Miss Bacon has put questions to Mr. Daniel Durkan, Mr. William Durkan, and to Mr. Alan
8 Fraher, who were the three “Durkan Holdings’ Directors” as they have been referred to, and
9 in the light of that questioning I have fewer questions for you. But the first matter I wanted
10 to ask one or two questions about was an example of the accounts, indeed, they are the
11 accounts which Professor Pickering has been raising with Mr. Simmons just a moment ago.
12 They are at tab 100 of bundle 2B, which is I think on your right? Whilst you are looking for
13 that, just for the Tribunal’s note, the infringement 135 in fact occurred on 27th January 2003,
14 so strictly speaking if one were looking at the infringement falling within a financial year it
15 would fall within the earlier report which was that found at 99. If one were considering the
16 recovery of the payments which occurred subsequently it would be the material to which
17 Professor Pickering referred. I am sorry, it was a digression, it related to earlier points. (To
18 the witness): If you could just open that document, it is the financial statements for the
19 year ending 31st January 2004 for Durkan Pudelek, and if one opens it at p.1 here we have a
20 list of the directors. So the list of directors is expanded from the original five and Bob Scott
21 and Maurice Williams have joined. In the course of some of his evidence Mr. Fraher
22 referred to the phrase “the operational board”, but just to be clear there was only one board
23 of directors for Durkan Pudelek and at this time it was these people, that is correct is it not?

24 A At this time, yes. Previously there had been Durkan Pudelek Interiors and it had a
25 managing director, Bob Scott. That is just a matter of clarity.

26 Q Thank you, that is very helpful. Miss Bacon has already been through the bankers,
27 solicitors, auditors and so on. If one turns on to p.3, one sees the end of the report of the
28 directors, a standard form of report, signed by you ----

29 A Indeed.

30 Q -- as the chief executive. If I could take you on to the final page of this document, first of
31 all, point 24 we have the question of “Controlling Related Parties”. Here it says:

32 “The financial statements of the company depart from FRSA ...”

33 - which is an accounting standard –

1 "... in not containing a statement regarding ultimate control of the company. This
2 departure is considered necessary to preserve the legal rights of confidentiality . .
3 . The company's immediate parent company and controller is Durkan Holdings
4 Limited . . ."

5 Then it goes on to explain that the ordinary shares in Durkan Holdings Ltd are held by
6 discretionary trusts, the identities of which are not known which is the reason why the
7 accountancy standard has to be departed from.

8 What is said there is that the controller of Durkan Pudelek is Durkan Holdings Ltd, and you
9 agree with that, do you not?

10 A No, I don't.

11 Q You do not?

12 A It may be that in the accounts – sorry, let me rethink what I am going to say for clarity –
13 yes, for accounting purposes Durkan Holdings are given here in auditing parlance by Grant
14 Thornton as being the controlling company, the reality is 100 per cent certain the controllers
15 of Durkan Pudelek were Mike Pudelek and Colin Simmons and we would have had it no
16 other way. The Shareholders Agreement is express, there is nothing in that Shareholders
17 Agreement that I've ever found that can suggest otherwise; we had it crafted that way.

18 Q So just to be clear, the accounts of the company are usually seen as the picture of the
19 company that is presented to the world and these were signed off by you in the report of the
20 directors, and they were prepared by your auditors, and your auditors said the controller of
21 Durkan Pudelek was Durkan Holdings ----

22 A Grant Thornton never said that to me.

23 Q They did not say that?

24 A No accountant in 40 years in construction has ever said that to me.

25 Q So are you saying that this is wrong?

26 A No, what I am saying is that nobody in 40 years has said that to me with a Chartered
27 Accountant's hat on.

28 Q So you are saying there is a difference between the control that is described by an
29 accountant, in other words, an assessment as to who controls a company for the purposes of
30 declaring that to the world under the relevant accounting standards and what is actually
31 going on?

32 A As a business man it is not high on my list of priorities. My priority as a business man is to
33 make profit, it is the only tangible sign of success in business, and it is what I was trained to
34 do; I can do nothing else.

1 Q If you could just turn back the page to point 22, it says “Related Party Transactions”, p.13.
2 So here under point 22 we have:

3 “During the year the company paid management charges to fellow subsidiary
4 undertakings in respect of service provided, as follows . . .”

5 And then there are indications in relation to Durkan Limited and Durkan New Homes
6 Limited. So what that is saying is that the companies Durkan Limited and Durkan New
7 Homes Limited are subsidiaries of Durkan Holdings just as Durkan Pudelek is, would I be
8 right in reading that?

9 A If 51 per cent is the argument I really can’t disagree with that, but if what you are saying is
10 the test is 51 per cent then I would have to take advice to argue the point differently.

11 Q As one has seen, and Miss Bacon has already raised these matters with Mr. Fraher,
12 substantial payments were made to Durkan Limited and Durkan New Homes Limited. If
13 we work our way up to 21, we have “Leasing Commitments”.

14 “At 31st January 2004 operating lease payments amounting to £Nil . . . are due
15 within one year. The leases to which these amounts relate expire as follows:”

16 And then this is explained in a little note at the bottom of 21:

17 “Motor car lease agreements in place at 31st January 2003 were taken over by
18 fellow subsidiary undertaking, Durkan Limited, during the year ended 31st January
19 2004.”

20 Now am I right in understanding that what has happened here is that Durkan Pudelek had a
21 number of car leases, cars for use by the company, perhaps by the directors of the company,
22 and these leases have now been taken over by Durkan Limited and that is why it appears in
23 the account in this way?

24 A I really couldn’t say, other than the whole ethos of the business was to look for synergy and
25 efficiency and cost, and indeed management. So as part of the services under the share
26 agreement it may be that Mr. Fraher used his initiative to provide a cost effective solution to
27 a problem.

28 Q I would like to take you to a different set of accounts, this time from bundle 2a, further on
29 from your witness statement, tab 17. These are the Durkan Holdings Limited Consolidated
30 Financial Statement for the same financial year, the financial years had been aligned. So
31 you see at page 1 a similar layout where the Durkan Holdings directors are set out and the
32 bankers and solicitors and so on that Miss Bacon has dealt with. I then turn to the back, to
33 the page before the final page, p.21. There we see at point 28 at the top: “related party

1 transactions". We see some figures set out. Then if one moves down one can see in bold
2 "Durkan Limited during the year".

3 A I am sorry?

4 Q If you keep going down there are some figures, and then about halfway down the page on
5 the left hand page is effectively a subheading in bold: Durkan Limited during the year, and
6 it sets out the various matters relating to Durkan Limited. Then if one carries on down on
7 the left hand side in bold one sees Durkan Pudelek Limited. If one looks at that, you have
8 the same phrase, during the year paid management charges to fellow subsidiary
9 undertakings in respect of services provided and there are the figures in relation to Durkan
10 Limited and Durkan New Homes Limited. So what we have here are different sets of
11 related party transactions being described in the Holding company accounts for Durkan
12 Limited and Durkan Pudelek Limited. Then if we just work back to para.27 on p.20 you see
13 the articulation there of all of Durkan Holdings' subsidiary undertakings that are dealt with
14 in these accounts and there you can see the Group interest in ordinary shares. First is
15 Durkan Limited with 100 per cent shareholding; then you have Durkan Pudelek, and then
16 Durkan Pudelek Interiors, both of which are 51 per cent shareholdings. Then if you work
17 your way back through the document to p.2 --

18 THE CHAIRMAN: So Durkan Pudelek Interiors was not 100 per cent owned by Durkan
19 Pudelek, then; it was part owned by Durkan Pudelek and half owned by --

20 MR. BEARD: Crucially 51 per cent, yes. It does appear that is the case. It may be that as a
21 subsidiary of Durkan Pudelek Limited that an accounting requirement would have required
22 you to declare it in that way, because if you had a 100 per cent shareholding of Durkan
23 Pudelek in a subsidiary you may well attribute the shares to the shareholdings. I place no
24 point on that. I think it is a subsidiary of Durkan Pudelek.

25 MR. BLAIR: That would be the same of Durkan Pudelek Holdings Limited further down in that
26 list, which I have not actually heard of before.

27 MR. BEARD: I am sorry?

28 MR. BLAIR: Durkan Pudelek Holdings, the fourth last in the list.

29 MR. BEARD: No. Durkan Pudelek Holdings Limited, it is referred to in some of the board
30 minutes. We would have to track back and identify that. I do not think any issue arises. I
31 think, as I recall from the board minutes, it was raised as a mechanism for certain tax
32 arrangements relating to Durkan Pudelek if I recall correctly. But I do not think anything
33 turns on that for present purposes. In any event, could the Tribunal and Mr. Pudelek go
34 back to p.2. I would ask you, Mr. Pudelek, to read p.2 down to "Results and Dividends".

1 (Pause) Mr. Pudelek, what this shows is that at the time Durkan Holdings had three
2 operating divisions through which it carried out construction activities. The fact that in one
3 of them, Durkan Pudelek, two of the executive team had a minority shareholding did not
4 make any difference to the way in which it was seen as part of the Durkan Group. That is
5 an accurate presentation of the position, is it not Mr. Pudelek?

6 A It may have been seen that way by Mr. Fraher, Mr. William Durkan and Mr. Daniel Durkan,
7 but it certainly wasn't the way that Colin Simmons and Mike Pudelek would see it. With
8 that 51 per cent shareholders' agreement in place I think I can be forgiven for thinking
9 otherwise.

10 Q But it is not just a matter of subjective appreciation. This is what Durkan Holdings was
11 saying in its report of the directors to Companies' House and to the world: Durkan Pudelek
12 is part of us; it is an integral part of our business; we have three divisions; they cover
13 different sectors of the construction industry but they are all part of the Durkan Group
14 family. That is right, is it not?

15 A I think in the purest legal sense you could be forgiven for suggesting that to me, but in the
16 reality of the commercial world I couldn't possibly agree.

17 Q Thank you, Mr. Pudelek. The next tab I would like to take you to is tab 12 in the same
18 bundle. This is a printout of the Durkan website in 2007. If one looks at the first page,
19 what one sees on the top left hand corner of the main printout is the logo of Durkan Group
20 at the time. That is correct, is it not Mr. Pudelek?

21 A That, I believe, is the logo at the time and may well still be.

22 Q Then if one reads across this menu bar it says: Durkan Group, Durkan Limited, Durkan
23 Estates, Durkan Pudelek, Durkan Ireland and then there is some text relating to Durkan
24 Group and its concerns about clients and quality of work and so forth. If one then turns
25 over the page, what one then sees is a list of contacts in relation to Durkan Group. It gives
26 the address of the head office and then Ireland, and what one sees is: for new business
27 opportunities contact Julian Harajda, for career opportunities contact Julie Fletcher, and
28 then further down: health and safety queries contact Ian Cresswell. This is all Durkan
29 Group. We then turn on to the next page and we see in the top left hand corner a slightly
30 different logo and that is the logo for Durkan Limited at the time. You would agree with
31 that, Mr. Pudelek?

32 A Sure.

33 Q Yes. Then there is some text about Durkan Limited and its commitment to the public sector
34 construction. If one turns over the page again, then we start seeing a list of projects that

1 Durkan has been involved in and that have been described as effectively an advert for
2 Durkan. I am sorry, unfortunately this document is not paginated. The next page that I
3 wanted to take the Tribunal to is 12 pages on and it says “Durkan Pudelek”.

4 A Yes.

5 Q So this is the Durkan Pudelek website at the time. Is that right, Mr. Pudelek?

6 A Yes.

7 Q What we see in the right hand corner is the Durkan Pudelek logo, which is the same
8 typeface as the other two logos and it has the flash in the bottom right hand corner. What
9 colour was it, Mr. Pudelek? Unfortunately we only have a black and white printout?

10 A Burgundy.

11 Q Burgundy, thank you. It was a different colour. The other logos were blue and yellow, is
12 that right?

13 A Blue and yellow are the racing colours of William Durkan and indeed I believe the rest of
14 the family. Burgundy and the double triangle logo of Durkan Pudelek was actually put
15 together at the second attempt, probably in 1995/1996, and the website designers couldn't
16 find a way to incorporate the double diamond into this in a sensible way. I was persuaded
17 to go with the format of continuity in terms of following the format of the Durkan logo.
18 But, as a sop to Durkan Pudelek, and indeed I suppose my powers of persuasion, we got to
19 keep the burgundy.

20 Q Thank you, Mr. Pudelek. So it is a subsite within the Durkan.co.uk site and it is Durkan
21 Pudelek. Then there is an account there of the sort of work that Durkan Pudelek specialised
22 in: challenging and complex projects in Central London. Then one turns over the page and
23 sees some examples of the projects you have been involved in. If one continues on,
24 unfortunately several pages, one gets to a page where, on the left hand side you have
25 Durkan Pudelek and then against a white background is the word “Careers”.

26 A Yes.

27 Q Thank you. And on that one sees that this is Durkan Pudelek Careers Section, and in the
28 text it says:

29 “To find out more about a career with Durkan Pudelek [it is just under the section
30 with the bullet points in the main text] download the Durkan Group Fact File.

31 Alternatively, contact Julie Fletcher, Human Resources Administrator Manager”.

32 So, if you want to come and work for Durkan Pudelek in any capacity, you download
33 Durkan Group information and you contact the Group Human Resources Manager, is that
34 right?

1 A In this instance, yes, quite simply Human Resources and Personnel were part of the services
2 provided to Durkan Pudelek under the Shareholders' Agreement, the cost of which was
3 audited by Colin Simmons annually and agreed with Alan Fraher in common with all other
4 Group services and there was a formal review between Colin and Alan to ensure that the
5 interests of, basically, Mike Pudelek and Colin Simmons, were never lost in the eyes of
6 Alan Fraher or indeed – well I hesitate to say it to him – we were together with these people
7 for, for more than 12-15 years, and I don't remember ever having a disagreement about
8 anything with Bill Durkan or Alan Fraher or Danny Durkan, except perhaps on the golf
9 course. So -----

10 Q So you were an enthusiastic attender of the Golf Day, then.

11 A Sorry -----

12 Q You were an enthusiastic attender of the Golf Day.

13 A It hasn't got any better. So, I think we should leave that subject if we may.

14 Q Sorry, it was quite wrong of me! If one turns on, again, beyond that page, one sees a list of
15 contacts for Durkan Pudelek, rather similar to that which one saw on the first page in
16 relation to Durkan Group and in particular, I know, Julie Fletcher, for career opportunities,
17 Ian Cresswell for health and safety. And then one turns on the page again and the logo has
18 changed in the top left hand corner. It has got the grouping hat on. It has lost the Pudelek.
19 It has still got the right hand flash, but now we are in the Durkan Estates section of the
20 website.

21 A Sorry, would it be in order if I, I apologise for interrupting you, but I've just seen
22 something, and perhaps I could give this a go?

23 Q Of course.

24 A Under the Departments and the Contacts, there's Claire Riviere, who was part of our
25 Marketing Department, and there's myself and Colin. Claire Riviere was not paid for by,
26 under the Shareholders' Agreement, it was a cost that we chose to incur as Durkan Pudelek.
27 That was a resource that I felt at the time that we needed, because essentially to bring in
28 £45 million-worth of work, a conversion of one in five, even I in the end with tight-pockets
29 and short arms, decided I needed a bit of help in bringing in the work, and Claire was part
30 of the get-work thrust of the company.

31 Q Thank you. Just before we move on from the website, Mr Daniel Durkan was not sure
32 whether the same web designer was responsible for the Durkan Pudelek website as for
33 Durkan Group and Durkan Limited and Durkan Estates. It seems relatively clear that it was
34 the same person. Can you confirm that, Mr Pudelek?

1 A There was a number of people involved, I seem to remember. Essentially Claire looked
2 after our end of it and I thought she did a great job. But there was, because of the number
3 of people involved and I suppose because of the departmental astigmatism that you find in
4 any company, there was lots of opinions as to what a website should look like. It's not very
5 cost-effective, and I think at the end of the day the decision was made to get the thing live
6 as soon as possible, and we tried to cut down on the number of people that actually had an
7 influence. But, as for the company and the executives within that company that we hired in
8 to do it, I haven't a clue. Sorry.

9 Q But what was developed was a coherent presentation of the Durkan brand through the
10 website.

11 A Pardon? I don't think, having listened to everybody's evidence over the last two days, that,
12 I don't think we've got it across the whole idea was the old Robbie Burns thing:
13 "Oh, to see yourself as others see you".

14 We were about creating an image that would allow us to actually build a company a lot
15 more quickly than if I'd taken the offer from 3i's and Trillion. We had a 40 years
16 experience within Durkans that we could draw on in terms of resources that were tried and
17 trusted. In the early days it was a great comfort to us that we were able to actually use
18 people. I mean, there was the odd occasion, I mean, poor Bill Nash, lovely man, but when
19 it came to buying materials and sub-contractors, he wouldn't be the best, and Danny and
20 I had to have words about Bill, and Bill sadly left the employment of the Durkan Group not
21 that long afterwards.

22 Q So, Danny Durkan.

23 A Yes.

24 Q Yes.

25 A They were responsible for satisfying our needs, ie the agreement. Durkan Limited are not
26 signatories to the Shareholders' Agreement. That Shareholders' Agreement is basically an
27 agreement between Durkan Holdings and Durkan Pudelek and it sets out very clearly in that
28 agreement what they must do. That was a negotiation that I had with Tim Hennessey. Alan
29 Fraher inherited that agreement. He was not party to formatting that agreement. It probably
30 goes to underline the need for a learning curve. In the early days with Alan when he
31 actually came on board as the key guy in terms of ensuring that we were getting what we
32 needed, that the whole ethos was "Build a company, get your 7-10 years' worth of profit,
33 consecutive years of profit, and then get your multiplier to sell that business for as much as
34 we could sell it for", and that's why, when you look at the Shareholders' Agreement, there is

1 no exit clause in that agreement. The agreement – Bill Durkan is an ace businessman. He
2 and I knew and Colin and Danny knew that the whole purpose of Durkan Pudelek was to
3 wind it up, get it profitable, get it with as good a reputation as we could get. That’s where
4 the valuers and the construction company with the ten years of consecutive profits, that’s
5 why we went to Grant Thornton. Their expertise was to groom us for sale. I had a heart
6 attack in 2001. That kind of accelerated that initiative. Yes. I wanted to live to enjoy some
7 of it. So, you know, the whole thing was not about four shareholders with nothing in
8 common. We had, we were four guys that were hell bent on doing the best we could to
9 build a company up and sell it. And if you read the Robert Horvath report, you will see that
10 Robert Horvath had to put an exit strategy in place that Danny, Bill, Colin and I could live
11 with.

12 Q So, those were the four guys that were there to build a business: Danny, Bill, you, Colin.

13 A They were investors. We didn’t, they couldn’t contribute. I mean, Bill is a fantastic
14 businessman and he can build and sell houses like nobody else I know. And Danny equally.
15 But, they can’t dig a hole in the ground and put a double or triple basement in; they can’t
16 build 25 storey blocks of flats. That’s what I cut my teeth on. That’s what we were there to
17 do. I was the guy that went out and got the business. Colin is an ace commercial guy. His
18 job was to give Alan the numbers so that Alan could put the numbers into the machine. We
19 used a system called “Easybuild” and you can buy that off the shelf and it’s excellent.

20 Q Could I just go back to the website. The construction of the website used similar logos for
21 all of the Durkan entities and for the Durkan Group. So, going back to my earlier question,
22 it was all part of developing a Durkan brand, putting together the website in that way. Is
23 that correct?

24 A It was quite simply the fact that it seemed to be beyond the wit of the technocrat that came
25 to the meeting to put my double diamond in burgundy into the thing on the argument that it
26 wasn’t aesthetically pleasing. That was the reason why we’ve got the thing we’ve got.
27 I mean, if they’d done it three years earlier, it might have been different.

28 Q But what it actually did was promoted and presented a coherent brand and, as someone that
29 has been involved in marketing, you recognised that that is an important function for a
30 business.

31 A Indeed. I can’t argue against that. We’re looking to take every advantage in a very hostile
32 environment.

33 Q So, you would also agree that, from the perspective of the website, what you saw was
34 Durkan Pudelek presenting itself to the world as a Division of Durkan Group.

1 A In terms of what the outside world perceived, you cannot manage people's perception.
2 What you can do is try and influence it. We were looking to build a company using
3 everything to our advantage. If people chose to believe that we were part of the Durkan, the
4 huge group of Durkan companies in play here, I'll take that advantage, I'm in business,
5 I want to make a profit.

6 Q Right. Moving on now to your witness statement, there are just one or two propositions
7 I wanted to ask you some questions about in that. Your witness statement you have already
8 been taken to, but it is at tab.4 of bundle 2A. Now, the particular proposition that I just
9 wanted to test briefly, albeit it is one that has been tested rather more fully by Miss Bacon,
10 is in relation to para.5(v) the last sentence of that paragraph. You may just want to remind
11 yourself of it. This is just in relation to the Board Meetings.

12 A Sure.

13 Q And you say:
14 "Durkan Holdings used these meetings to satisfy themselves about their ... investment in
15 Durkan Pudelek, I think for them the meetings really served no other purpose".
16 Now, if I could ask you to take up bundle 2B, which is the bundle with all the Board
17 minutes and accounts and so on in, and, given the number of these Board minutes the
18 tribunal has now seen and the fact that the tribunal can obviously read them for itself and
19 has heard evidence in relation to them, I will only take you to one or two. But if we could
20 just open at tab.20, the first of them, and Mr Bill Durkan is in the Chair, and this was not a
21 set of minutes, I think, prepared by Mr Fraher, it says at 1.03 that you would take the
22 minutes of this meeting. And if one turns over the page to 5.01:
23 "It was agreed that Mr Fraher would provide a short report in future [finance report]
24 Mr Fraher confirmed that the Company's cash balance remained positive and that the
25 position would be conveyed to Mr Simmons or Mr Pudelek on Monday of each
26 week".

27 So, here was a statement in the Board minutes that the relevant finance report was going to
28 be generated by Mr Fraher and passed to you or Mr Simmons, or perhaps both of you, on a
29 weekly basis. That is correct, is it not?

30 A It would appear to be. These minutes are dated 1993.

31 Q Yes.

32 A The 5th October. Is that correct, 5th October 1993?

33 Q I think that is the date of the meeting.

34 A Sorry, the date of the meeting.

1 Q I think they may have been generated a little later.
2 A Sure.
3 Q Just looking at the final page where it says -----
4 A November. Sorry, I do apologise. I see that.
5 Q No, no.
6 A We were months into a new venture. In terms of the time line of the building, the time line
7 of the business, in my witness statement, yes, it is, clearly I'm not going to write 15 witness
8 statements, I have to try and corroborate and to look to the consistent approach to the fact
9 that these things evolved over time, ie the way in which the company operated at 5.01, in
10 terms of what Alan was to provide, I mean, that was an agreement that probably arose from
11 the fact that we'd got our first job and we had something to report. By the same logic, Alan
12 couldn't prepare a finance report unless Colin provided him with the numbers, because
13 that's the way in which a construction business operates. The quantity surveying fraternity
14 have to do whatever it is they do (I've never been able to fathom it out in 40 years) but they
15 actually do the numbers and hand them to the Finance Department, and after a due period of
16 time you get a set of management accounts that tells you not an awful lot, but it's what
17 makes the world go round.
18 Q Thank you, and then at 7.01, this under "Get new work", the Chairman, and this is Bill
19 Durkan, suggested that:
20 "… the tender control schedule was evidence that considerable effort was made
21 since the company's inception, and believed that, with an improvement in the
22 market this would lead to a more buoyant situation. The Chairman asked Mr.
23 Daniel Durkan to convene a meeting with the Directors of Durkan Brothers to
24 ensure a proper co-ordination of all pre-contract issues."
25 This was Mr. Bill Durkan saying, "Look, we have got to make sure there is a proper
26 separation between the private work you are doing and the public work that Durkan
27 Limited", as it later became, "is doing" – is that right?
28 A No. Basically, what's happened here is that Bill has flown in. He's gone to a board
29 meeting with Durkan Limited, the directors of Durkan Limited have got what they see as
30 competitors in the company, i.e. a newly established Durkan Pudelek. It is not owned by
31 the Durkan family in its entirety, they're uncomfortable, and for, I suppose, the first two or
32 three years they were looking to make sure that their vision of their future was unaffected in
33 its entirety by the activities of Colin Simmons and Mike Pudelek. The jungle drums in the

1 construction industry can beat pretty loudly, and even back 1992 I'd run three businesses by
2 then so these guys knew me.

3 THE CHAIRMAN: Just focus on the answer to the question. What you are being asked, and I
4 am not quite sure whether your answer is actually agreeing with Mr. Beard or disagreeing
5 with Mr. Beard, that there was, shortly after Durkan Pudelek got going, some upset within
6 Durkan Brothers that you were going to be trespassing on their turf basically, and somebody
7 said, "Look, we have got to sort this out because you have got to be separate so that you do
8 not trespass on each other's turf".

9 A That's exactly right, absolutely.

10 Q In fact, you are agreeing with what Mr. Beard suggested.

11 MR. BEARD: That is very helpful, thank you. Indeed, that has confirmed that that was the
12 approach in the next meeting, which has already been referred to by Miss Bacon, and I will
13 not detain the Tribunal further with that. Just turning on to another quick example, tab 23, it
14 is a section that has been put to other witnesses so I will deal with it briefly, 4.01, 4.02 and
15 4.03, discussion of finance matters, and here we have Mr. Fraher and Mr. Simmons working
16 together to resolve issues to do with the overheads. It is not just you or Mr. Simmons
17 dealing with these things, it is members of the Durkan Holdings board, the Durkan Holdings
18 directors of Durkan Pudelek, in particular Mr. Fraher, assisting with dealing with these
19 matters. That is right, is it not?

20 A It need not have been Mr. Fraher. Mr. Fraher was delegated by Durkan Holdings. If they'd
21 taken on another appropriately qualified accountant to look after their interests then they
22 could have allocated that guy, and as long as Colin and I were happy with the guy's ability
23 to do the job then. yes, we'd probably have gone along with it. As it happens, Alan did a
24 good job and we were happy.

25 Q Just at 7.01, it is a matter that has been clarified earlier, but this was a discussion about
26 arranging site visits, you and Mr. Bill Durkan – that is right, is it not?

27 A Absolutely. Every opportunity to learn from the master should not be turned away.

28 THE CHAIRMAN: With those site visits, would you both meet the client on the site?

29 A It usually entailed finding a betting office so that Bill could get some money on a horse, and
30 we'd go and see a couple of jobs, have a bit of lunch, get to know each other in the early
31 days, and then spend the afternoon in a betting shop really getting to know each other.

32 Q Thank you for your frankness, Mr. Pudelek.

33 A And don't ever take a tip from him, because I never made a penny.

1 MR. BEARD: If we could turn on to tab 29, just a very brief question on this one. Could you
2 look at 1.00(b):

3 “Mike Pudelek explained that the sole source of work was not from his old
4 contracts ...”

5 There was an issue as to whether or not this was a typographical error, should that be “old
6 contacts”?

7 A Yes, indeed, it should.

8 Q This was a meeting instigated by Mr. Bill Durkan, and here the Master is concerned about
9 what is going on, if I am using the right terminology, and at 1.00 there is a report of what
10 Bill Durkan considers are concerns to him at that time and the strategic direction that needs
11 to be followed by Durkan Pudelek. Is that a fair appraisal of that?

12 A I think if you take the company at the time of the management buy-out, the turnover was
13 around £40 million. At the time this meeting took place in 1995, I’ve got a feeling the
14 turnover would have been somewhere between £5 and £6 million – that’s just off the top of
15 my head. I was just trying to get this into a bit of context, because it’s obviously been
16 referred to a number of times in the evidence thus far. Bill Durkan is a shareholder of
17 Durkan Pudelek. We held board meetings which were essentially shareholders meeting,
18 and Bill from time to time, and it was very rare, would actually remind Colin and I why we
19 were in business. We were in business to make money, to wind the company and dispose of
20 it after ten years. When Bill reminds you of things, you’d do well to remember that he’s
21 been there and done it, so I was happy for him to say what he said.

22 Q This was Bill particularly concerned because it was him that instigated the meeting. The
23 comments that he makes at 1 through to 3 were matters that, in those circumstances, you
24 would take seriously?

25 A I’ve never disregarded what I consider to be good commonsense advice around a board
26 room table. Everybody’s opinion is worthy of hearing.

27 Q Could we just move on to tab 75. This is May 2004 and obviously you have been through a
28 difficult period. Bill Durkan was there, although he came less frequently after 2001. The
29 financial reports presented by Bob Scott and Alan Fraher were considered. One can see at
30 5.1:

31 “The Board considered that the way forward for this company is as follows ...”

32 You have got 1, 2 and 3. Again, this is the strategic direction. Was this the direction that
33 was being suggested by Bill as being a reminder as to how this company should operate, as
34 you put it?

1 A I believe that a good board should be inclusive and the opinions of everybody round the
2 board room table should be taken into account because nobody is going to enact the policy
3 that's agreed if they disagree with it, or at least they will not enact it as well as they could.
4 The way that we operated was that everybody was asked their opinion. We had Maurice
5 Williams, who wasn't restricted to just talking about construction, he was asked to talk
6 about strategy. Ciaran McGill was new to us, but he'd been with a sizeable construction
7 company and came with his proposals. Bob Scott has been around for a long, long time and
8 has worked with me for 30 years, I suppose, off and on. So we had a company that had a
9 major loss. It was incumbent upon us to discuss what we were going to do about it and to
10 try and come up with a way forward. As chief executive, you're chief executive in the good
11 times and you're also chief executive in the bad times. It's my job to do something about it,
12 but I have to take the people with me. Part of that was actually to get some motivation and
13 Bill's input into motivating everybody was good. Danny and Alan took on board that their
14 investment, Durkan Holdings' investment, had been compromised, but the whole thing was
15 about trying to go forward together.

16 Q You had a discussion at the board, all that wanted to speak could speak, but obviously some
17 people's voices had more weight than others. You come out with a set of principles that
18 you are going to operate on the basis of, and because everyone has bought into them
19 through the discussion that helps ensure that that is the way the company is going to run. Is
20 that fair?

21 A You've lost an important point, if I may suggest. Sitting around a board room table
22 everybody is equal. The shares are not on the table, okay, so nobody's voice carries more
23 weight than the others. Some of them were a lot more eloquent than me, but we can live
24 with that. All I was interested in was a commonsense way forward that people could buy
25 into. A good management principle is that if everybody is pulling in the same direction you
26 get there that bit quicker.

27 Q That is very helpful, thank you. Just to go back to your witness statement, at para.6 you
28 refer to the Durkans as "silent partners". The picture you paint is not one of silence but
29 informed comment and assistance – is that a fair summary?

30 A I think it might be helpful if I was just to suggest that 3i, had we gone to 3i and Trillion for
31 the venture capital, they would probably have had a lot more to say than the Durkans said.

32 Q Just one more board minute, tab 65, if I may. This is the minutes of the meeting of the
33 Durkan Group directors. Here we have got Danny Durkan, Robert Clark, Bob Barton, Jim
34 Briggs, Alan Fraher, yourself, Bob Scott, Maurice Williams, John Loughlin and Noel

1 O'Dowd, and then apologies from Bill Durkan and Colin Simmons. If we work down
2 through that list, they were from various bits of the Durkan Group. So Danny Durkan was
3 from Holdings, Robert Clark from Limited, Alan Fraher Holdings, yourself from Durkan
4 Pudelek, the same for Bob Scott and Maurice Williams, and then Durkan Estates, John
5 Loughlin and Noel O'Dowd. What we see over the page is the discussion of Group Health
6 & Safety and then the Best Practice Committee (Group), and you were tasked to convene a
7 meeting with the aim of establishing objective strategy for attainment, and so on. Then we
8 see what happened in relation to IT, the main premises, Durkan House, which all parts of
9 the Durkan Group shared. Then the canteen, was that shared? That was in Durkan House,
10 was it?

11 A Sorry, I'm just trying to remember the date – 2002 we were by then in Waltham Cross. Do
12 you know, I can't remember.

13 Q I am not sure much will turn on it. Then 7: "Christmas Dinner and Dance", "8 Salaries and
14 Staff Turnover" so a group discussion about that. Then "Control of Overheads" which you
15 have already indicated was a matter of concern to all. Then at 10 "Gordon Brown's public
16 expenditure proposals", and included in this area of discussion it says was the profile of the
17 group generally and consideration should possibly be given at this juncture to raising the
18 financial and operational profile of the group. So this was all group entities benefiting from
19 a strategy to raise profile. Is that what was being discussed there?

20 A It's an away day. It's when, if you like, the executives of the company are actually talking
21 about things which are of common interest. It is people who, if you like, Maurice Williams
22 is involved in safety, Bob Barton is involved in safety, and John Loughlin is involved with
23 safety ----

24 THE CHAIRMAN: Well we are not talking about safety here, Mr. Pudelek, we are talking about
25 raising the financial/operational profile of the group. Mr. Beard, perhaps if you could put
26 slightly more focused questions to Mr. Pudelek.

27 MR. BEARD: Well, I can put it in relation to point 12. (To the witness): Was there a group
28 marketing strategy discussed at the meeting?

29 A Julian Harajda and Barbara John, and Claire Riviere were not at the meeting so I doubt that
30 it was, but I've no recollection to be frank, but with the absence of those people I doubt that
31 they would have.

32 Q It is minuted here that there was such a discussion, I think mainly in the context of point 10?

33 A Site presentation would probably have come up because everybody driving around London
34 is a critic of a builder's presentation in terms of poor hoarding and signage. An opportunity

1 was never lost to have a pop at the construction guys about making sure that their sites
2 looked good to the outside.

3 Q So at least there were some components of presentation of the group that were discussed in
4 terms of ----?

5 A It was commonality – commonality of interest, commonality, we were looking for synergy
6 all the time. We were looking to be cost-effective, we were looking for any way to
7 improve.

8 Q And do you recall how long this meeting was? It started at 10 am, and you say it was an
9 “away day”?

10 A It wouldn’t have gone beyond 12.30, that is for sure. We had a rule that meetings had to be
11 two hours, just allowing for it to run over it might have been two and a half as it was
12 coming up to lunch, but we weren’t keen on long meetings – they’re expensive.

13 Q Could you just turn back to tab 64. On these minutes the date has been corrected to 31st
14 July, and it is at 12.15 p.m.. Am I right in thinking that here what you had was the group
15 directors’ meeting at 10 for a couple of hours, and then various members of the group
16 directors who were not involved in Durkan Pudelek then left and you then had your Durkan
17 Pudelek, Durkan Pudelek Interiors meeting. Is that right?

18 A That’s the way we tried to do it. If Bill was coming across, they’d have the Durkan Limited
19 board meeting early at 8, we’d have a cup of tea and sit down with Bill maybe at 10, and
20 then we’d try and have the Durkan Estates meeting after that and then Danny and Bill and
21 Alan would have their discussions, and Bill would be back at the airport as quick as he
22 possibly could.

23 Q And were there many meetings of the group directors?

24 A No, I mean when you say “many”, I’m good on numbers – how many?

25 Q Two or three a year?

26 A No, no. No, no, no. Departmental astigmatism reigned for the first few years. They
27 wouldn’t talk to us unless there was something to talk about.

28 Q It is just interesting, if one turns to the end of tab 65 again, this is July, and it says there:
29 “The next meeting of the Durkan Group of Directors will be held at the same time
30 as the next Board Meeting in September 2002.”
31 So that would be three months hence?

32 A Sorry, I thought you meant over the life of the business.

33 Q No, no, I am sorry, around this time?

1 A It is this timeline thing. The company was evolving, Durkan Limited were getting huge in
2 terms of its activities in the public sector. We had grown a little as well. There was need
3 for, if you like, added sophistication. In business you have these initiatives from time to
4 time when you think something should get better. You will get somebody new joining you
5 who says: “We did it better at Lovells”, or “We did it better at Bovis”, and you say: “How
6 did you make it better?” and if you think it’s a good idea then you will have a wee prompt
7 and say: “Maybe we should think about joining the 21st century.”

8 Q Still on tab 65, if you could have the list of attendees. If we start at the top, Daniel Durkan,
9 he was Durkan Holdings, but he also held directorships at this time in Durkan Pudelek?

10 A Yes.

11 Q Durkan Limited?

12 A I believe so.

13 Q And Durkan Estates?

14 A I would go along with that, yes.

15 Q Then Robert Clark, he held a directorship in Durkan Limited at that time. He subsequently
16 had a brief directorship in Durkan Holdings. Then you have Bob Barton, who was Durkan
17 Limited. Jim Briggs, Durkan Limited, Alan Fraher, Durkan Estates, Durkan Limited,
18 Durkan Pudelek and Durkan Holdings. Then there is you. In your witness statement you
19 talk about your role as a chief executive, the director of Durkan Pudelek. At that time you
20 were also a director of Durkan Limited and Durkan Estates, were you not?

21 A I was asked for a brief period of time, I forget how long, it might have been two or three
22 years at the very most, if I would join the board of Durkan Limited as a non-executive
23 director, purely and simply to address areas of Danny’s business ambitions for the company
24 in terms of the way in which the board of directors operated within Durkan Limited. You
25 are talking about people who joined the company on leaving school and had worked their
26 way up through the company to board positions and never been anywhere else, had not been
27 on external training schemes, and I was pleased to help – I never got paid for it, I will add.

28 Q If I said that the period was 2001 to 2005 that would be right?

29 A My diaries would confirm that.

30 Q And the same is true of Durkan Estates, 2001 to 2005?

31 A The Durkan Estates thing was in name only, and it was all about my pension insofar as
32 Durkan New Homes (as it as) bought Durkan House, Durkan House was put into pension
33 plans. We have talked about the FURBS. It was a legal nicety, Alan is a guy who makes

1 sure that these things are done properly, and had us appointed to the board. I don't
2 remember attending a meeting.

3 Q So as a matter of formality, at this group directors' meeting you have three hats, albeit you
4 say one of the hats was one that you barely wore, but you had at least two hats, and in a way
5 by that time you embodied the structure of Durkan Group, that there was one big family
6 with different divisions. You had come in through Durkan Pudelek but actually you were
7 working with Durkan Limited, you had pension arrangements that meant you were a
8 director of Durkan Estates, and actually you embodied the sense that there was a single
9 group here?

10 A No, not at all. We had only one objective. I hope I am not making myself out to be
11 obsessively compulsive, or compulsively obsessive, but Colin and I were the poor people at
12 the table. We wanted to make money. That was the one and only reason that we signed up
13 with Durkans and not with Trillion or 3i. We had only one objective, to make money. It
14 was only right and proper that Bill Durkan gave us the benefit of his experience. He wasn't
15 able for lots and lots of reasons, probably the fact that he was as busy as could be across in
16 Ireland, he couldn't give, if you like, his directors the benefit of his experience as he would
17 like to give it, and I was the next oldest guy sitting at the table and I got asked, very nicely,
18 if I could just go along and give Danny and Alan support, remembering that there are
19 always factions around every boardroom table, and the Durkan Limited boardroom table
20 was quite large.

21 MR. BEARD: Thank you very much, Mr. Pudelek, I have no further questions. The Tribunal
22 may have some questions for you. I am sorry, I am conscious of the time, I have tried to cut
23 down the number of questions.

24 THE CHAIRMAN: Mr. Pudelek, we do have some questions for you, I am aware you have been
25 in the witness box for a little while now, and I wondered if you would prefer to go on now
26 and get finished this evening, or if you would prefer to stop now and start again tomorrow?

27 A Madam, I am completely at your disposal, it is whatever you would prefer.

28 THE CHAIRMAN: Well let us continue and see where we get to.

29 MR. BLAIR: Mr. Pudelek, we heard yesterday, I think, that there was a policy in Durkan Pudelek
30 that the company would neither give nor receive a cover price. Do you remember who took
31 that decision and whether it was you that formed that view?

32 A I can be quite specific on that. I received a copy of an article that was written in the building
33 magazine, and it was sent to me by Robert Clark, as managing director of Durkan Limited
34 to say that he had issued instructions to his staff to cease the practice of giving and

1 receiving covers. I discussed that with Colin and with Andy Stevens, our chief estimator.
2 We took the view that for us it was unworkable because if we didn't submit a price at our
3 time in the market, it would act badly against us because quantity surveyors, if they don't
4 get a price back – I'm not great fan of quantity surveyors, but a quantity surveyor can spot a
5 cover price a mile off, they expect to get them, or at least they did until this initiative.
6 Cover pricing has been endemic in construction since I was 16, and before. So it was all
7 part of the game that the consultants played, and it was part of the game that the builders
8 played. We all knew it had to happen, it was an expedient. A good example is you are
9 expecting a tender in on 1st February, it arrives on 1st March, and the estimator who was
10 going to price the job his wife has just had a baby, so you don't have an estimator to price
11 the job, what are you to do? Are you going to upset the architect/quantity surveyor or are
12 you going to take a cover?

13 THE CHAIRMAN: Just focusing on Mr. Blair's question, which is that you were aware that
14 Durkan Limited were adopting this policy and you made a decision within Durkan Pudelek
15 that ----

16 A It was very much by exception.

17 Q -- it was not really on for you to ----

18 A Andy Stevens was required to talk to either Colin or myself in the event that he was forced
19 into giving a cover, but we did not cease the practice in its entirety. Durkan Limited did.

20 MR. BLAIR: So there is a difference between the two parts of Durkan Group?

21 A I mean, Robert Clark is a first class guy that, as far as I'm concerned he could have been on
22 the moon in Durkan Pudelek with Colin Simmons, and he ran Durkan Limited, and what he
23 did was his business and what I did was my business.

24 Q Thank you.

25 PROFESSOR PICKERING: Mr. Pudelek, I am afraid I have a few questions. Forgive me for
26 having them at this late stage in the afternoon. Can I just ask you to start: at its peak how
27 many employees did DP have?

28 A I believe it was around about 80, sir.

29 Q Thank you. Forgive me asking this, Job 7000, what was it?

30 A It was the quantity surveyors' sin bin; it's where they put all the costs they couldn't
31 reconcile elsewhere within the business I think is probably the answer, and Alan had to
32 unravel it at the end of every year. It was areas of cost where we had to – I don't know – if
33 somebody had a pool car, for instance, and there was a cost associated with that, we'd have
34 to put that into Job 7000, just to have somewhere to put it, because it wasn't part of the car

1 policy; it wasn't part of the overhead; it was a cost that had been incurred by reason of
2 probably somebody who was on a car allowance having a car go into a garage, had not been
3 able to afford to get it out the garage, we needed him at work so we'd hire a car for him. It
4 was an expediency, Job 7000.

5 Q Could it have been used for things like compensation payments?

6 A Absolutely not.

7 Q No?

8 A No.

9 Q Thank you.

10 A You used the plural there. In 40 years in construction there has been one compensation
11 payment in my career. We've talked about that.

12 Q Right-ho, fine. In terms of the accounts, the financial statements that you have been taken
13 through and we have heard quite a bit about, I noticed that besides the management charges
14 that are recorded that Durkan Pudelek paid to other parts of the group each year, there were
15 some sums outstanding at the balance sheet date that were owed by Durkan Pudelek to other
16 group companies, but also in some years there were quite considerable sums owed by other
17 group companies to Durkan Pudelek. For example, the biggest was in the year ended 31
18 January 2001 where nearly £1.2 million was owed to DP. The following year it was
19 £655,000 and so on. Could you, in general terms, quickly tell us what these related to,
20 please?

21 A Durkan House was purchased and over a million pounds worth of work had to be done to it
22 to make it habitable as we wished it. The work was carried out by Durkan Pudelek Interiors
23 (as was at the time). The way in which that was operated was operated by Alan in a very
24 cost effective way. We didn't want to have, if you like, quantity surveyors involved from
25 the outside, so it was basically done I think as near as cost plus as you can get it, open book
26 policy, whereby Bob Scott had to put the expenditure in front of Colin, Colin would either
27 agree it or not agree it, taking it that there were two quantity surveyors in the same room so
28 the agreement would take a while, and then it would go in front of Alan and I think that's
29 basically what happened.

30 Q What year was Durkan House purchased?

31 A I think it was 2000, sir, thereabouts. It might have been earlier.

32 Q There was over £400,000 owed. I mean, you know, this is owing at the end of a financial
33 year but does not necessarily reflect monies paid during the course of that year. Are we to
34 assume that in the course of the following year each of these monies was paid?

1 A There would never be a debt left unaccounted for between any Durkan company and
2 Durkan Pudelek, because Colin's job was to ensure probity and to ensure that our interests
3 as shareholders were at all times, if you like, a half a per cent ahead of the Durkans.

4 Q In 1997 there was £200,000 owing, which we have established was the interest free loan
5 which you made to Durkan New Homes, so we do not need to go into that.

6 A Well, that was us as shareholders having made a decision to participate and to reap the
7 benefits of their expertise as developers.

8 Q OK. The following year, 1998, which was two years before the purchase of Durkan House
9 (and this is to 31 January 1998), £788,000 outstanding on turnover, related to your total
10 turnover of £16 million,. That is a large sum. Does it strike you as to what that was about?

11 A Alan Fraher would tell you. I mean, if you get Alan back in the witness box he'll tell you
12 exactly what that is.

13 Q I am sure he can brief Mr. Hoskins.

14 A Yes. I couldn't tell you exactly what that is.

15 Q No, OK. Thank you. This is my final cluster of questions. I would just like to take you to
16 tab 9 in bundle 2a, which is the subscription and shareholder agreement. You have told us
17 quite forcefully and forcibly this afternoon how you saw the intentions in terms of setting
18 this agreement up. First of all, could I ask you who Tim Hennessey was?

19 A Tim Hennessey was William Durkan's chief executive at the time of the Durkan Group of
20 companies.

21 Q OK, did he move on shortly, because he does not seem to --

22 A No, I think either a year and a half or two years later Tim also wanted to return to Ireland,
23 and that was enacted. I've lost all contact with Tim, which is a regret.

24 Q But he features in this.

25 A He was the lynchpin to this.

26 Q Right, and had a potentially significant role in terms of determining remuneration and so on.

27 A Indeed, yes.

28 Q Could we look at para.6.1 which is matters requiring consent of the shareholders. This,
29 presumably, was meant to be seen as of considerable significance: "The company [DP] shall
30 not without the prior written consent of all the shareholders" and then do various things
31 which are essentially financial and are about the overall strategic control of what a company
32 can do.

33 A Tim was an expert. I mean, he was a doubly qualified chartered accountant.

1 Q Did any of these in fact impinge upon any decisions that you needed to take? Did you ever
2 receive written agreement of the shareholders?

3 A As far as I was concerned and Colin was concerned, they were freebies, they were things to
4 give away. We had no intention of issuing any other shares. We had no reason to even
5 think that we would do anything under clause 6.2. Certainly, the whole idea of getting into
6 bed with the Durkans was to have the financial comfort of the Durkan Group – sorry,
7 Durkan Holdings (I mustn't say Durkan Group)! We could have another two hour debate
8 on what constitutes a group! We weren't going to give any guarantees on indemnities. It
9 was for the Durkans to give them to us and to procure them for us. This document was a
10 negotiation. We wanted control, and Tim wanted to make sure that he did the best he could
11 for Bill. We got to the stage where we were walking away from each other over the 51 per
12 cent because Colin and I were adamant that we had to have 50 per cent and Bill had to have
13 50 per cent, and it got to the stage where we had a little bit of a mentoring session with
14 Stanley Watson who was the lawyer. Stanley said: look, Bill won't sign anything where he
15 doesn't have 51 per cent of it, so Colin and I just looked at this document again and said:
16 hey, what does 51 per cent mean in these circumstances? We were indispensable. If you're
17 indispensable you can afford to be magnanimous on giving Bill 51 per cent. He wasn't
18 going to go out and get the business; he wasn't going to win the business; he wasn't going
19 to run the business. This document gave us everything we wanted.

20 Q I understand what you are saying. OK. Now, you initially had separate bankers.

21 A That was my fault.

22 Q What was your fault: to have separate bankers?

23 A To have Barclays. In one of my previous lives I'd done a lot of work for Barclays Bank and
24 I knew the building and surveying department of Barclays Bank, and I was insistent that we
25 could – you know, we were start up, I didn't have any business. So I thought: hey, wouldn't
26 it be nice if we had Barclays as our bankers and go into Barclays and say: hey, you've got
27 my account, now you give me business. That was entirely why Barclays Bank were our
28 bankers. As it turned out, you'll see in the documents, we actually got a job from Allied
29 Irish Bank not long after we gave them our account, so Bill was right again and I was
30 wrong.

31 Q Was there any formal, or indeed informal, agreement that restricted your expenditure ability
32 without the agreement of either of the Mr. Durkans?

33 A No.

34 Q You had unlimited authorisation, did you?

1 A We took pains to be transparent, because you've got to remember, we didn't know each
2 other. So in the early days Colin and I would laboriously fill out our petty cash slips as you
3 should do anyway, we accounted for every penny that we spent. If I took somebody out to
4 lunch, then we actually submitted it; we agreed in the first budget how much our marketing
5 budget would be, and I think we brought in the work for less than the marketing budget in
6 most of the years that we actually were in business.

7 Q Thank you. I notice 7.1 is obviously very important to you, but I would guess also to
8 Durkan, because that was the thing that enshrined the key roles in operational terms that you
9 and Mr. Simmons had.

10 A Tim had our CV's, he had testimonials on us, he took references up on us. He knew who he
11 was getting into bed with in every which way.

12 Q 7.4 has two elements which I would have thought were cutting the other way. First of all,
13 that you did not get paid until 1st July 1993, and secondly that you were both on three year
14 fixed term service contracts.

15 A I gave way on that. I promised myself after the fiasco I got myself into at Spearhawk (?) I'd
16 never sign a fixed contract again, I'd always be free. Tim, quite rightly, pointed out that the
17 value in the business was in Colin's abilities and my abilities to build the business. We
18 gave way on that. In terms of the remuneration, Tim felt that we had to be hungry to make
19 the business work. I agreed with that; I thought it was a good incentive that if we were
20 going to grow a business then Colin and I should actually share the pain and not rely
21 entirely upon Durkans for everything in terms of all the services that we were going to
22 demand. I mean, the truth is that if the market had been different we would have had a lot
23 more out of Durkans in terms of service, they would have had to have given us a lot more.
24 As it was, we were able to recruit some very good people at very good reasonable rates
25 progressively as the recession bit. So we were getting good resources for good prices.

26 Q So in that respect they were nailing you down somewhat, at least on paper?

27 A Yes, and willingly. I mean, I understand the business concept that if you're going to be
28 successful you have to be incentivised. You've got to remember we very shortly would
29 thereafter own 25 per cent of a very sizeable asset in Waltham Cross through our efforts.

30 Q In para.12, which is headed "Non Competition Restrictions", the non compete
31 arrangements, it is very interesting that 12.1 starts off "Pudelek and Simmons", not the
32 company. Then it goes on to limit not only what you, through the company, would do but
33 what you both would be able to do, or not do, for up to a year after you had left that
34 business.

1 A It was a cheap one to give away to Tim in the negotiation. I didn't know anybody in the
2 housing association world; I wasn't going to get any business out of the housing association
3 world, but it was, I suppose, about 85 per cent of everything that Tim did. So I was quite
4 happy to sign up to not doing housing association work.

5 Q I see. My final observation on this – and thank you for your helpful and, as usual, candid
6 observations --

7 A I'm probably digging a deep hole, but I'm telling the truth!

8 Q Thank you. Paragraph 13 Dividend, no dividends until 31st July 1997.

9 A Colin and I would have signed up for longer quite frankly, because our focus was to get the
10 business up to a trade sale. That was where the money was.

11 THE CHAIRMAN: You wanted to build a capital asset?

12 A Well, if you get £50,000 and you've got three children in private education what are you
13 going to do with your £50,000 dividend? You're going to spend it. Whereas, if you're in
14 for the long game and you're going to do something for ten years then it was about making
15 one big hit, especially after I had had the heart attack. I was looking for one big hit.

16 PROFESSOR PICKERING: The points I have just put to you on paper might be interpreted as
17 giving Durkan Holdings, the 51 per cent shareholder, quite a lot of control.

18 A No, we negotiated with Tim and gave Tim what we wanted to give him, common sense
19 prevailing. But at no place in this document does it say that Mike Pudelek and Colin
20 Simmons are indispensable. This whole document is built around us. Sorry, this whole
21 document is built around us being indispensable. I mean, if you read the Horvath Report,
22 he is some sort of business guru, and it's the first thing that he spotted: that the business
23 relied entirely upon Mike Pudelek and Colin Simmons.

24 Q But also, and we have not really addressed this but you might just like to comment, reading
25 that report it seems to me that he is saying, certainly by the time that he was producing it,
26 that there are some problems, there are some issues to be addressed. Am I right that he
27 subsequently joined the board?

28 A I wouldn't know, sir, that's nothing to do with me.

29 Q I think I noted that. Thank you very much.

30 THE CHAIRMAN: Any re-examination, Mr. Hoskins?

31 Re-examined by Mr. HOSKINS

32 Q You were taken to a number of examples of where Bill Durkan had made contributions in
33 DP board meetings and you stated that you never disregarded good common sense advice

1 and everyone's opinion is worth hearing. Just clarify two points for me. Who was
2 responsible for setting DP's commercial strategy?

3 A Colin and I. I mean, responsibility and accountability, as far as I'm concerned, come to
4 work in the same pair of trousers. Colin and I were both responsible and accountable, and if
5 Bill had a comment, or Alan had a comment, or Danny had a comment, or, God forbid, my
6 father still has a comment, I'll listen. If it's common sense who am I to disregard it?

7 Q Who was responsible (to use that word again) for DP's success or failure?

8 A Me, Colin, 50-50.

9 Q Thank you very much.

10 THE CHAIRMAN: Thank you very much, Mr. Pudelek.

11 (The Witness withdrew)

12 THE CHAIRMAN: I think that is certainly enough for today. What is the programme for
13 tomorrow morning?

14 MR. HOSKINS: In relation to the witnesses on this issue again, I think some of them may well
15 attend, but can they formally be released, because obviously I do not want to have to drag,
16 particularly Mr. Simmons and Mr. Pudelek here every day if they have completed their
17 evidence.

18 THE CHAIRMAN: Yes, yes, I have released them so far as I know. Thank you.

19 MR. HOSKINS: Tomorrow it is the control issue, sorry the infringement 220 witnesses. They
20 will not be called in order because we have got the Canadian issue. Hopefully, the order
21 will be first Mr. Sharpe, then Mr. Briggs then Mr. Clark and Mr. Copeland as soon as
22 possible in the afternoon at the Jones Day offices.

23 THE CHAIRMAN: Thank you very much. We will start then at 10.30 tomorrow. I think that is
24 satisfactory with everyone? Thank you very much.

25 (Adjourned until 10.30 a.m. on Wednesday 21st July 2010)

26