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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1121/1/1/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

22 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 FOUR)**

## 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.

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1 THE CHAIRMAN: Yes, Mr. Beard?

2 MR. BEARD: Madam Chairman, I am going to deal with the Office's case in relation to  
3 Infringement 220 and I am going to deal with this part of the appeal in four parts: dealing  
4 with the relevant evidential test, the nature of the evidence relied on by the OFT and  
5 Durkan's criticisms of it, the nature of Durkan's evidence, and then some observations in  
6 conclusion.

7 In doing that, I am going to refer the Tribunal to two short clips of documents that were on  
8 the file, one of which relates to the point about Alan Armstrong and the other relates to how  
9 the Peter Goodbun transcript was generated. Those are documents that Mr. Hoskins has not  
10 had a chance to digest and see. He may wish to oppose them being admitted, he said. I do  
11 not want to deprive him of the opportunity to do that. There are two options: one is that  
12 one could take five or ten minutes to allow Mr. Hoskins to look at these, but I would  
13 suggest that perhaps the better way of proceeding is I begin the submissions and before I  
14 reach the point where I refer to those documents I will raise the matter with the Tribunal,  
15 because I envisage that might be after three-quarters of an hour to an hour, and I know that  
16 other constitutions of the Tribunal like the opportunity to put a break in during the morning,  
17 and that might be a sensible point at which to do this.

18 THE CHAIRMAN: Yes. Do you have any views on which of those we should pursue,  
19 Mr. Hoskins?

20 MR. HOSKINS: I am quite happy, I just need five minutes to read the documents.

21 THE CHAIRMAN: Let us make a start and then take a break.

22 MR. BEARD: I am grateful. First, I will deal with the relevant evidential test. This is a matter  
23 that has been considered by the Tribunal in various cases, in particular in the *Napp* case, and  
24 for your notes that is at Bundle 5A, Tab 12, and in particular at para.109. The statements  
25 made there were subject to some clarification and consideration in the *AllSports and JJB*  
26 case. That is at Bundle 5A, Tab 18, para.204. Since those cases there has been at least one  
27 important House of Lords authority dealing with the matter. It is, therefore, perhaps  
28 appropriate just to spell out the position from the Office's point of view. The burden of  
29 proving an infringement of the Chapter I Prohibition is on the Office, and the standard of  
30 proof is the normal civil standard of balance of probabilities. The quality of evidence  
31 required to satisfy this standard, the seminal statement of the law is in the speech of Lord  
32 Nicholls in *Re H (Minors)*, which, for your notes, is at Bundle 5A, Tab 7, p.586, and the  
33 relevant paragraph is para.22. As it happens, that paragraph is actually set out in the

1 liability defence. It may be helpful if the Tribunal has the liability defence, and can turn up  
2 p.11. There you will see the paragraph:

3 “The balance of probability means that a court is satisfied an even occurred if the  
4 court considers that, on the evidence, the occurrence of the event was more likely  
5 than not. When assessing the probabilities the court will have in mind as a fact, to  
6 **whatever extent is appropriate in the particular case**, that the more serious the  
7 allegation the less likely it is that the event occurred and, hence, the stronger  
8 should be the evidence before the court concludes that the allegations is established  
9 on the balance on the probability ... **this does not mean that where a serious**  
10 **allegation is in issue the standard of proof required is higher. It means only**  
11 **that the inherent probability or improbability of an event is itself a matter to**  
12 **be taken into account when weighing the probabilities and deciding whether,**  
13 **on balance, the event occurred.** The more improbable the event, the stronger  
14 must be the evidence that it did occur before, on the balance of probability, its  
15 occurrence will be established.”

16 So whilst the relevant standard is always the balance of probability, the evidence required to  
17 meet that standard may differ according to the context, with stronger evidence required for  
18 an allegation that is improbable.

19 There is no presumption that conduct attracting a penalty, even a severe penalty, is  
20 inherently improbable. Rather, as Lord Nicholls emphasised, context is essential. This  
21 matter was considered rather vividly by Lord Hoffmann in *Secretary of State for the Home*  
22 *Department v. Rehman*. The relevant passage is set out in footnote 28 in the defence.

23 THE CHAIRMAN: It is a very well known passage.

24 MR. BEARD: Yes.

25 “The civil standard of proof always means more likely than not. The only  
26 higher degree of probability required by the law is the criminal standard. But,  
27 as Lord Nicholls explained in *Re H*, some things are inherently more likely than  
28 others. It would need more cogent evidence to satisfy one that the creature seen  
29 walking in Regent’s Park was more likely than not to have been a lioness than  
30 to be satisfied to the same standard of probability that it was an Alsatian. On  
31 this basis, cogent evidence is generally required to satisfy a civil tribunal that a  
32 person has been fraudulent or behaved in some other reprehensible manner. But  
33 the question is always whether the tribunal thinks it more probable than not.”

1 These issues were considered by the House of Lords in *Re D (Northern Ireland)*, which is at  
2 Bundle 5A Tab 29. There Lord Carswell considered the evidence required to meet the civil  
3 standard, and in particular I would refer the Tribunal to para.28.

4 But the authority to which I would like to direct the Tribunal's attention in particular is at  
5 5B Tab 32 *In Re B*. This concerned very different circumstances, consideration of a  
6 standard of proof under a statutory scheme relating to family law matters under the Children  
7 Act. The comments made by Lord Hoffmann were of more general application. They start  
8 at p.5/20. He makes clear in para.1 that whilst he agrees entirely with Baroness Hale who  
9 gives the principal opinion:

10 "I add some observations on the standard of proof only to underline, without in  
11 any way qualifying, what she has said."

12 Then at para.13 p.7/20 he there approves explicitly the passage from *Re H (Minors)* to  
13 which I have already referred the Tribunal and he says:

14 "I think that the time has come to say, once and for all, there is only one civil  
15 standard of proof and that is proof that the fact in issue more probably occurred  
16 than not."

17 In doing so, he comments on some of the earlier case law. Then at 14 he says:

18 "Finally, I should say something about the notion of inherent probabilities."

19 There he is talking about Lord Nicholls comments in *Re. H*. Then he goes on in para.15,

20 "Common-sense, not law, requires that in deciding this question [the balance of  
21 probabilities question] regard should be had to whatever extent appropriate to the  
22 inherent probabilities".

23 He then deals with it in the context of the sexual abuse considerations. If the Tribunal  
24 would read the rest of para.15. If one turns on to the leading opinion of Lady Hale at para.  
25 69, she is there talking about civil proceedings. Then, if one goes down to para.72 she says,

26 "As to the seriousness of the allegation, there is no logical or necessary connection  
27 between seriousness and probability. Some seriously harmful behaviour, such as  
28 murder, is sufficiently rare to be inherently probable in most circumstances. Even  
29 then there are circumstances, such as a body with its throat cut and no weapon to  
30 hand, where it is not at all improbable. Other seriously harmful behaviour, such as  
31 alcohol or drug abuse is regrettably all too common and not at all improbable.

32 Nor are serious allegations made in a vacuum. Consider the famous example of  
33 the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of  
34 greensward regularly used for walking dogs, then of course it is more likely to be

1 a dog than a lion. If it seen in a zoo next to the lion's enclosure when a door is  
2 opened, it may well be more likely to be a lion than a dog".

3 So, the position is clear. Balance of probability is no gloss. The question for the Tribunal is  
4 whether it is more likely than not that the infringement occurred.

5 Pausing just there for a moment, in opening Professor Pickering raised an issue about this.  
6 Mr. Hoskins started brandishing a fictitious yellow card. He said this (transcript Day One,  
7 p.33, line 33 onwards),

8 "The actual question for the Tribunal to ask itself is: Is there a version of the story,  
9 given the limited facts we have, which is plausible and does not result in an  
10 infringement?"

11 With respect to Mr. Hoskins that is fundamentally wrong. It does not matter which  
12 metaphors he waves about. It is far too high as a threshold of proof. One can effectively  
13 test that. If you just substitute the word 'reasonable' for the word that he used - 'plausible' -  
14 in his formulation, you get, "Is there an alternative version of the story given the limited  
15 facts which is reasonable and does not result in an infringement?" Now, saying that a  
16 reasonable alternative version of the story exists is effectively the same as saying you have  
17 a reasonable doubt about the infringement story. It is only when you have a reasonable  
18 alternative account of events that you can have a reasonable doubt about an infringement  
19 story. So, what Mr. Hoskins' formulation does is that it tends towards a formulation that  
20 amounts to a criminal standard of proof - effectively, beyond reasonable doubt. In other  
21 words, you do not have any doubt that there are alternatives, reasonably stories out there.  
22 Mr. Hoskins also sprinkled his opening with some references to Article 6 of the European  
23 Convention on Human Rights, and suggested that somehow the presumption of innocence  
24 supports this formulation of the relevant test.

25 Now, first, it is just worth noting in passing that the presumption of innocence is not a  
26 creation of the European Convention. It is a fundamental tenant of the common law. The  
27 presumption of innocence, secondly, is why, in civil cases, you have to prove on the balance  
28 of probabilities that something occurred - in other words, that it is more probable than not.  
29 You have to prove 51 percent - not just 50 percent.

30 So, Mr. Hoskins set the threshold for the Tribunal to consider in the wrong place. The  
31 House of Lords has confirmed where the threshold lies. It would be a significant error of  
32 law to apply the approach that Mr. Hoskins is advocating in this context.

33 Next, moving beyond the standard of proof to some general observations about the nature  
34 and quality of evidence required to discharge that standard, it is well-established that

1 improving an infringement of the Chapter I Prohibition, the OFT, or indeed any relevant  
2 regulator, does not have to rely on a specific type of evidence. Nor is there any general rule  
3 as to the volume of evidence required to prove an infringement. A single item of evidence,  
4 or indeed wholly circumstantial evidence, may be sufficient proof of a prohibited agreement  
5 or concerted practice. It may be necessary to draw inferences from fragmentary and sparse  
6 evidence in order to establish unlawful conduct.

7 Where you have unsupported evidence from which you are trying to draw inferences it is of  
8 course necessary to take into account whether or not there are any other plausible  
9 explanations for the evidence that has been offered, and one sees that in the account given  
10 in *Aarlborg* which is quoted and approved by this Tribunal in the *AllSports* case, Tab 18,  
11 Authorities Bundle, which is the first tab in 5B. If one turns to p.48, para.204 is a  
12 concluding paragraph following an extensive consideration of case law on the standard of  
13 proof, but I have already directed the Tribunal to subsequent House of Lords' authority  
14 which was not considered there. What is important is paras.205 and 206 just to read those  
15 paragraphs.

16 (After a pause) It is perhaps from para.57 of *Aarlborg Portland* which is quoted in para.  
17 206, which Mr. Hoskins gets his reference to another plausible explanation test, but it is  
18 very clear there that what one is talking about is a circumstance as set out in para.56 of that  
19 judgment:

20 "Even if the Commission discovers evidence explicitly showing unlawful conduct  
21 between traders, such as the minutes of a meeting, it will normally only be  
22 fragmentary and sparse, so that it is often necessary to reconstitute certain details  
23 by deduction."

24 So where you have limited fragmentary documentary material and there are two  
25 interpretations of it, yes, it is quite right, you must consider whether there is another  
26 plausible explanation for the text, markings, layout, content of the documentary material if  
27 you are doing it by deduction, of course that is right, but that does not mean that the whole  
28 shape of the relevant test is changed, and what is important from looking at *Aarlborg*  
29 *Portland* as approved in *JJB* is that there is a recognition that limited evidence may well be  
30 sufficient.

31 Applying these principles to the present case three particular comments need to be made.  
32 First, the Tribunal in assessing the quality of evidence will undoubtedly need to take into  
33 account the fact that the infringements found by the OFT are serious ones for which, in  
34 many cases, substantial penalties had been imposed. Nevertheless, the Tribunal will also

1 need to take into account the fact that the findings of infringement are made in relation to  
2 conduct which was widespread in the construction industry and which has been admitted by  
3 a vast number of undertakings. This is therefore not a case where the infringements in issue  
4 can be regarded as inherently improbable. Ingrained practice does not become unusual and  
5 improbable simply because it is unlawful and has attracted severe penalties for a number of  
6 undertakings.

7 Secondly, the nature of the infringement involved very little documentary evidence of the  
8 unlawful conduct. That does not prevent the OFT reaching conclusions as to what probably  
9 occurred on the basis of the totality of the evidence before it, nor should that prevent this  
10 Tribunal doing so.

11 Thirdly, the OFT is required to prove that the instances of cover pricing between  
12 undertakings found in the decision occurred. It is not required to prove the precise date on  
13 which they occurred, or indeed, the specific individuals involved for each infringement.  
14 The absence of those details does not prevent, and has not prevented, the OFT from  
15 demonstrating the existence of conduct constituting an infringement of the Chapter I  
16 Prohibition.

17 Against that background, what evidence did the OFT have for this infringement? First of  
18 all, there is the Builders' Conference report, which we looked at in the course of hearing  
19 evidence. I would ask the Tribunal to find it at Bundle 4, Tab 7. There are three points to  
20 draw to your attention at this stage in relation to this document. First of all, the cross by the  
21 name of Durkan under the list of main contractors, the reference to Mr. Sharpe in  
22 manuscript at the bottom, and the figure next to the name of Mr. Sharpe, which is just under  
23 the eventual Mansell bid, about 8 per cent higher than Durkan's own eventual bid.

24 If you are to look at that document on its own, it looks odd on its face. Why is someone at  
25 Mansell, which is where this document comes from, marking up against Durkan, one of its  
26 rivals, and why is the name of a Durkan employee down there, particularly when that  
27 employee is the estimator for the Durkan job? That is especially strange, because a contact  
28 is referred to for Durkan in the main contractor list, and it is Guy Copeland, not Brian  
29 Sharpe. Mansell could have no legitimate reason for having contact with him so far as you  
30 could see in relation to this matter, contacting the rival estimator. Then there is a figure  
31 next to his name.

32 The name and cross refer to Durkan. It looks like this figure might also be related to  
33 Durkan in some way. If you later found out it was what Mansell bid, the natural and  
34 reasonable inference would be that that figure had come from Durkan, probably from Brian

1 Sharpe, the name mentioned next to it. That is what you might naturally have taken from  
2 the document just on its own.

3 Mr. Hoskins tried valiantly to conjure alternative scenarios. Mansell rang Durkan, found  
4 out it was Mr. Sharpe, but then went elsewhere because they could not get Mr. Sharpe or a  
5 number. Of course, reading the document alone, you cannot rule out that possibility, but  
6 looking at the document and the manuscript markings just on their own, that account given  
7 by Mr. Hoskins is not the most likely interpretation.

8 Of course, the key thing here is that you are not looking at the document alone without any  
9 explanation or other evidence. Mr. Goodbun of Mansell has provided evidence. The  
10 Tribunal has been taken to this transcript, both in Mr. Hoskins' opening and in the course of  
11 evidence, but there are various points that I would like to draw to the Tribunal's attention.

12 It is at Tab 12 in the bundle. If we just start at p.1:

13 "This interview is being tape-recorded ... I'm Sarah Mills, an investigating officer  
14 with the Cartels branch of the Office of Fair Trading. This interview is taking  
15 place at the offices of Freeth Cartwright ... I am interviewing ..."

16 Then the name is given, Mr. Goodbun. Then the next major piece of text:

17 "This interview is part of an investigation by the Office of Fair Trading ... into  
18 suspected bid rigging activity in the construction industry. This interview's taking  
19 place as part of the leniency application by Mansell plc to the Office of Fair  
20 Trading. The content of this interview may be used in the investigation and  
21 decision-making process by the Office of Fair Trading. You have the right to have  
22 legal representations present and you've chosen to do so. Is that correct?  
23 Correct."

24 Then it is stated that it is a voluntary interview. Then at the bottom:

25 "I must warn you that if during the course of this interview you knowingly or  
26 recklessly provide information to the Office of Fair Trading that is false or  
27 misleading in a material particular, you may be guilty of a criminal offence  
28 punishable by a fine of up to £5,000 or a maximum of two years imprisonment or  
29 both. Do you understand that?"

30 Mr. Goodbun says, "I understand".

31 So what is particularly important to note here, and I will come back to it, is that

32 Mr. Goodbun is being instructed as to the sanctions that exist under s.44 of the Competition  
33 Act that if, in the course of this interview, "you say something knowingly or recklessly

1 misleading or false, you will face a criminal penalty”, a serious sanction. It is personal, it is  
2 the individual that faces this penalty.

3 THE CHAIRMAN: This interview took place on 17<sup>th</sup> April 2007.

4 MR. BEARD: Yes.

5 THE CHAIRMAN: Roughly where were the OFT in the course of their investigation? Was that  
6 at an early stage of the investigation? It was about a year before the SO went out, is it not?  
7 The SO went out on 18<sup>th</sup> April 2008, I think.

8 MR. BEARD: I think that is right, yes. It was relatively well advanced, but it is right to say that  
9 this is well before the SO was published because, of course, part of the process of producing  
10 the statement of objections is, of course, that the OFT is required to set out its reasons for its  
11 decision and then make available the relevant documents it is relying upon, including this.  
12 Just for the Tribunal’s reference, if the Tribunal sees documents with a number in the right  
13 hand corner, almost invariably in this case that number will be the access to the file index  
14 number. So these are documents that were made available to the parties.

15 Looking at this transcript, what can we see from Mr. Goodbun, which is particularly  
16 relevant to the interpretation of the document that we have already seen and the finding of  
17 infringement that the Office made in its decision? The first and most important thing that  
18 one can take from this, and there is no ambiguity about it, no doubt about it, Mansell took a  
19 cover on the Claremont Close job. Mr. Goodbun, the chief estimator, said they took a  
20 cover. He knew, there is no doubt. To be fair to Mr. Hoskins, he does not suggest that  
21 Mansell is confused and that actually it was competitively tendering for the job. That  
22 means that the question that then remains is: who did Mansell obtain the cover price from?  
23 Then we ask ourselves: what evidence do we have from Mr. Goodbun on this?

24 Crucially, at p.13 he says he chose Durkan. That is halfway down the page. It is a  
25 paragraph to which the Tribunal has already been referred, but you may just want to refresh  
26 your memories by reading that paragraph. (Pause) So what he is saying here is: I, as the  
27 chief estimator, chose Durkan as the people from whom I wanted us to get the cover price.  
28 He is not just saying that; he is saying why he chose to cover bid in this case and why he  
29 chose Durkan. He chose to cover bid here because of the specialist nature of the job, and  
30 the people that he identified on the Builders’ Conference list. He did not want to end up  
31 competing with specialist contractors in relation to specialist work. So he chose to cover  
32 bid here because of the specialist nature of the job. He remembered that. Of course, the  
33 Durkan witnesses: Mr. Sharpe, Mr. Copeland and Mr. Briggs, did not. Mr. Sharpe and Mr.

1 Briggs accepted that the job was a specialist one when it was put to them. For your notes  
2 the references are: Day 3 p.10 lines 28 to 30; and Day 3 p.21 lines 28 to 33.

3 Why Durkan? Because it is a similar sized organisation and therefore in theory it has a  
4 similar sort of cost structure and would be putting in similar sorts of price level bids. That  
5 again was an approach that Mr. Copeland recognised. The reference to that is Day 3 p.47  
6 lines 18 to 20.

7 So we know Mr. Goodbun chose Durkan as the source for the cover; we know  
8 fundamentally that Mansell did cover; we know he had good reason to choose Durkan; we  
9 know why he wanted to cover. He remembered the details of this in a way that other  
10 witnesses did not.

11 We furthermore know from p.11 what his role was in this job. If one starts two-thirds of the  
12 way down the page:

13 “SM: Okay, thank you. Now turning to the, the contract that I understand  
14 you’re, you’re aware of which is the external structural refurbishment of 1342  
15 Claremont Close, London, tender date of the 29<sup>th</sup> March 2005, what was your  
16 role in, in the actual sort of preparation of this tender? (A) [I was] managing  
17 my estimator that was dealing with it.”

18 He was intimately involved. He was the one that said go to Durkan, he was not the one  
19 going to Durkan. One of his estimators would do that. Who was that? Phil Hart. So we  
20 know a cover price was received by Mansell and used by Mansell. The managing estimator  
21 says he wanted to get the cover from Durkan. He does not suggest that the cover came from  
22 anywhere else. Instead, he explains the manuscript on the Builders’ Conference document.  
23 He says that they are Phil Hart’s notes, and that he was the estimator on the Claremont  
24 Close job. That can be seen from pp.11 through to 12.

25 At this point I was going to pick up the issue that Mr. Hoskins raised for the first time in  
26 opening, suggesting that perhaps Phil Hart was not the relevant estimator. The transcript  
27 reference is Day 1 p.34 line 11. He said that PG was not asked by the Office whether he  
28 was giving an explanation of the annotations that had been given to him by the author of the  
29 annotations, whether that was Phil Hart or Alan Armstrong.

30 The reason why Mr. Hoskins made this point was because he had highlighted that in the  
31 table appended to Mansell’s leniency application (which is found at Tab 10 Bundle 3) that  
32 there was a reference on p.2 to “AA”.

33 As I say, this was the first time this point had been raised. Someone with eagle eyes  
34 preparing for the case must have spotted it. But if it had been raised sooner, the Office

1 | could have explained what had happened. Actually, after that leniency application was  
2 | raised ----

3 | THE CHAIRMAN: Are you now going to give the evidence?

4 | MR. BEARD: I am going to deal with this and therefore I was going to pause.

5 | THE CHAIRMAN: Yes.

6 | MR. BEARD: I suggest that Mr. Hoskins might like to have a look at those documents and see  
7 | whether or not he has any concerns about them. The reason I was just going on to say that  
8 | what happened was the team went away and worked out who it wanted to interview at  
9 | Mansell. The material that I was going to provide to the Tribunal indicates how that  
10 | process worked in the context of Mr. Goodbun in particular, and in relation to this issue  
11 | relating to Alan Armstrong.

12 | THE CHAIRMAN: But is this evidence just relating to the question of whether it was Phil Hart  
13 | or Alan Armstrong, or is it more general?

14 | MR. BEARD: It is relating to the question why it is that the OFT was not raising issues about  
15 | Alan Armstrong, given the text on the leniency application, which is the point that Mr.  
16 | Hoskins raised. The documents that I refer to, you will see if they are provided, are all from  
17 | the file.

18 | THE CHAIRMAN: Yes, all right.

19 | MR. BEARD: If the Tribunal is going to rise to deal with that, there is a second short clip of  
20 | documents that I will come on to which just explain the process by which Mr. Goodbun's  
21 | transcript of interview was dealt with. The Office is concerned that the Tribunal  
22 | understands the process that is undertaken in relation to the preparation of these transcripts.  
23 | It will be relevant to submissions that have been made by Mr. Hoskins about the nature of  
24 | the evidence being relied on by the Office of Fair Trading. It may be that these are matters  
25 | that the Tribunal does not require documentation on.

26 | THE CHAIRMAN: The fact is that no-one has so far appended this transcript to a witness  
27 | statement explaining how it came about. So there could have been a debate about whether  
28 | this is actually evidence properly so called in the case at all, but my understanding from the  
29 | way Mr. Hoskins opened the case was that he was not taking a point on whether this is  
30 | evidence. It says what it says and we are being invited to interpret it. Anyway, let me not  
31 | anticipate.

32 | MR. BEARD: That is why I am cautious about whether there is any need for any further  
33 | documentation. But if we are rising it might be sensible that I provide both to Mr. Hoskins.

34 | THE CHAIRMAN: How long do you think you need, Mr. Hoskins?

1 MR. HOSKINS: 15 minutes/10 minutes. Certainly not more than 15 but perhaps I will be able to  
2 do it in 10.

3 THE CHAIRMAN: Why do we not we say that we will come back at twenty past, and if you  
4 need some more time then just let us know.

5 MR. HOSKINS: Thank you. I am most grateful to the Tribunal.

6 (Short break)

7 MR. BEARD: Mr. Hoskins, I understand, has no objection to the documents, but he wanted the  
8 opportunity to comment on them more accurately.

9 MR. HOSKINS: I simply wanted to explain what my position was. I am happy for them to go in.  
10 I have asked Mr. Beard to resist the temptation to embroider them by giving any evidence  
11 from the Bar, but, of course, I know he would never attempt to do that anyway. Thank you  
12 very much.

13 MR. BEARD: It is a terrible insult to say that I would never attempt to! (Laughter)

14 Before I return to the matter relating to Mr. Armstrong, during the course of the earlier  
15 submissions, madam, you asked about the stage at which the interview in question with Mr.  
16 Goodbun was carried out. If it assists, in the Decision the description of the Office's  
17 investigation starts at p.246. It started because there had been effectively a whistle blown or  
18 a complaint brought in April 2004. One sees thereafter that there were a series of s.27  
19 inspections in 2004 and searches in 2005. Then one works one's way forward through quite  
20 an extensive exposition of the investigative steps that were then taken by the Office. But,  
21 just for your notes, at p.259 there is a table under para. ii.1479 which describes 'Further  
22 Interviews Conducted --' and there is indicated the 17<sup>th</sup> April interview with Mansell which  
23 was the day on which Mr. Goodbun was interviewed. Then there is further discussion of  
24 how the matter proceeded. So, it was relatively far along the way. But, of course, as is set  
25 out here and elsewhere in the Decision, part of the difficulty in the early stages of the  
26 Decision was just managing the vast amount of material. So, although the investigation had  
27 been going on for some time, it should not be presumed that there was a sort of distilled  
28 knowledge in relation to particular matters at any particular point along the way.

29 Just dealing with the suggestion that was made, it was made for the first time -- It is not a  
30 matter that you will see in the Notice of Application or the skeleton - the suggestion that  
31 somehow Mr. Armstrong was involved. As I say, the reason the Office picks it up is merely  
32 because, it having been raised for the first time in opening, it seemed appropriate that the  
33 Office check why it was that nothing had been said in relation to Mr. Armstrong, given that  
34 indication on the leniency schedule.

1 If I could just hand up this clip of documents? (Same handed) These are all documents  
2 which were on the file. The first document is an email from Sarah Mills, dated 19<sup>th</sup> March.  
3 It says, "Thank you for the information regarding the estimators". It is being sent to Jane  
4 Francis who is at CMS Cameron McKenna - so, Mansell's lawyers by this point. There it  
5 says, "I attach to this e-mail a proposed schedule for the interviews". If one turns over the  
6 page one can see a number of names and dates, but in particular the week commencing 30<sup>th</sup>  
7 April -- The name Barry Russ, and then the name Alan Armstrong. Barry Russ appeared as  
8 a figure in a number of other appeals. So, Mr. Armstrong was there mentioned. The next  
9 document is actually an e-mail of 15<sup>th</sup> March. So, it preceded that e-mail from Sarah Mills.  
10 This is actually the initial sending of a spreadsheet by Jane Francis to the Office setting out,  
11 as she described it, 'the Mansell employees connected with each contract'. If one turns on  
12 through that to no. 51. That is the third page of the table.

13 "External structural refurbishment. 13-42 Claremont Close, London. London.  
14 Newham London Borough Council. 29<sup>th</sup> March, 2005. AA (Alan Armstrong?)  
15 South-East" [Then] "Alan Armstrong".

16 THE CHAIRMAN: Just looking at the first page, what are the headings? They are blacked out.

17 MR. BEARD: They are extremely hard to read, but if one turns to the back of this bundle you  
18 will find a document that has colour in it. This is not the same schedule. It is to do with  
19 other potential infringements. The only reason it is there is for the same reason the Tribunal  
20 asked: I could not read the top. What this does is set out the relevant headings, albeit for the  
21 next schedule. But, I think one can read across ----

22 THE CHAIRMAN: Well I do not think we can.

23 MR. BEARD: "Name of contact", "Location of work", "Awarding Body".

24 THE CHAIRMAN: Yes.

25 MR. BEARD: "Approximate date of tender", and then it is "Mansell estimator and/or associate  
26 and name of office", and then the last one cannot be read on that table, and I think that that  
27 is "Relevant name". I will come on to why it is a slightly different table, if I may, by  
28 reference to ----

29 THE CHAIRMAN: Well it looks like it is a spreadsheet and they have hidden various columns in  
30 printing out ----

31 MR. BEARD: No, it is slightly more complicated. Madam, if I could just take you to the next  
32 email and then it might become slightly clearer.

33 THE CHAIRMAN: All right.

1 MR. BEARD: The next email is a document B3908, and here is an email from Susan Hankey of  
2 CMS Cameron McKenna to Sarah Mills and there is an attachment to it which is the OFT  
3 interview spreadsheet and it says:

4 “As I mentioned this morning, Mansell has now been through the spreadsheet of  
5 contracts on which the OFT will interview. The attached now combines:

6 the OFT’s list,

7 the job title and office location of each named person.

8 In a few instances Mansell’s suggestions that someone other than that person  
9 named on the OFT’s list might know better about the relevant contract. These  
10 suggestions come from recent discussions with estimators, where Mansell has  
11 clarified with those estimators the analysis of who had charge of certain contracts  
12 which Mansell had previously carried out on a paper basis. See items 51, 53 and  
13 54.”

14 So what one then gets on the next page is an extended schedule, and so that is the earlier  
15 schedule but with extended columns, and it is that which that schedule gives the titles to.

16 If one compares what you have on that schedule is the “Name of Contract”, “Location of  
17 Work”, “Awarding body/client”, “Approximate date of tender” and then the next bit is  
18 “Mansell estimator”, and then it is the next four columns that were difficult to read, and  
19 they are the red columns. So it is “Mansell confirmation of relevant name”, “job title”,  
20 “office location”, “tender number.” I should say that is the only relevance of that document  
21 with the red in just to identify the titles on those four additional columns.

22 If you look at this extended schedule down at no.51 again, what you have is:

23 “External structural refurbishment, London Newham Borough Council, 29<sup>th</sup> March. AA  
24 (Alan Armstrong?) South East”, which was as per the previous schedule, but now, under the  
25 column headed “Mansell confirmation of relevant name”, it now says: “Peter Goodbun”,  
26 and his job title and office location.

27 If one turns back to the covering email one sees in the third bullet point it said “See items  
28 51, 53 and 54”. Then in the next bullet point:

29 “Assuming the OFT wanted to interview these persons, additions to your list  
30 would therefore be Peter Goodbun (based at City Road, London) ----”

31 So this is specific change in relation to 51. Then:

32 “-- and Andrew Stanley (based in Croydon but left the business February 06).

33 Conversely, there would be no contract attached to Alan Armstrong (on your  
34 London interview list.)”

1 THE CHAIRMAN: And that is because the people interviewed were all the more senior  
2 persons?

3 MR. BEARD: No, that is not the case.

4 THE CHAIRMAN: Why had not the name in the other one ----

5 MR. BEARD: Because that whole section has not changed. The change is in relation to the red  
6 section. So the left hand side had been left as per the previous document, so you can  
7 compare and contrast, so there is no change there. But the red section is as it is headed,  
8 starting with the column "Mansell confirmation of relevant name".

9 THE CHAIRMAN: So the effect of this is that it is not really a question of whether it was Alan  
10 Armstrong or Phil Hart, but rather a question of whether it was Alan Armstrong or Peter  
11 Goodbun?

12 MR. BEARD: Yes, and all this is doing is showing the communication that the Office obtained  
13 from Mansell, the leniency applicant, who had effectively gone through the table and said as  
14 per bullet point 4:  
15 "Assuming the OFT wanted to interview these persons, additions to your list will  
16 be Peter Goodbun [and that will be in the context of 51]. Conversely there would  
17 be no contract attached to Alan Armstrong."

18 MR. BLAIR: I hope this is not a red herring, but all the ranks of the people who are reckoned to  
19 be the relevant people are all managers rather than estimators as such, so it is chiefs rather  
20 than Indians.

21 MR. BEARD: I am not sure that is quite right. I mean if one looks down the job title there are  
22 chief estimators, estimating managers, section leader estimating, regional chief estimator.

23 MR. BLAIR: Not the rank that Mr. Sharpe mentioned of "estimator", or indeed senior estimator.  
24 There are one or two senior estimators.

25 MR. BEARD: There are some senior estimators, there are estimating managers. To some extent  
26 what is salient is not simply the rank but the information that the people were in a position  
27 to give. So Barry Russ, for example, in relation to a number of other cases was someone  
28 who had prepared the grand schedules – it does not apply in this case, but when Mansell  
29 made its leniency application there were a number of tables that Barry Russ had prepared  
30 which included references to various tenders where he said that a cover price had been  
31 given or received, and therefore clearly Mansell in putting its best foot forward for the  
32 leniency process clearly thought that Mr. Russ was the right person to come forward for  
33 that.

1 PROFESSOR PICKERING: Can I follow on? Can you tell us what the job titles were of Mr.  
2 Hart and Mr. Armstrong? I will leave you to answer that first and then I have a follow-on,  
3 please.

4 MR. BEARD: The only information I believe that we have in relation to Mr. Hart is as per the  
5 transcript, that he was an estimator, but we do not have any more formal job title for him.

6 MR. HOSKINS: Sir, if I can assist? If you go to Bundle 3, Tab 9, this is a document I took you  
7 to in opening.

8 MR. BEARD: I apologise, I am grateful to Mr. Hoskins.

9 PROFESSOR PICKERING: Yes, they were senior estimators, and Mr. Goodbun was the  
10 estimating manager. My follow-on question was why would Mr. Goodbun have said it was  
11 Mr. Hart who did the detailed estimating on this contract, or would have done, and not Mr.  
12 Armstrong, as per the Mansell schedule?

13 MR. BEARD: "As per the Mansell schedule". The Mansell schedule – are you referring, sir, to  
14 the schedule at Tab 10?

15 PROFESSOR PICKERING: Yes, I am.

16 MR. BEARD: That was the Mansell schedule drawn up for the purposes of the leniency  
17 application. That was drawn up subsequently. It was clearly drawn up in the process of  
18 applying for leniency and it was appended to the leniency application that proceeded it or,  
19 more exactly, it was appended as part of the leniency application, whether or not they  
20 arrived simultaneously I would not want to assert.

21 That schedule at Tab 10 is not a document internal to Mansell in the sense of it being drawn  
22 up along the way contemporaneously, it was a document drawn up subsequently for the  
23 leniency application.

24 THE CHAIRMAN: But the Mansell name on that pull-out, the A3 paper, those are all initials of  
25 people, but when it says: "Mansell name", "Mansell name" of what? Who is that  
26 indicating, or what is the significance of those initials? They do not seem to bear any  
27 relation to the initials of the people who are the "Mansell confirmation of relevant names",  
28 which mostly would be a lot of "BRs" or a lot of "KLs", but we do not see those initials  
29 there at all, we see "BPs". That column "Mansell name", those initials do not seem to be  
30 indicating the same thing as the column of "Mansell confirmation of relevant names" so far  
31 as this schedule you have just handed up is concerned, the significance of that being, as I  
32 understand it, that what we are debating is whether Mr. Goodbun misremembered who had  
33 been the estimator on this case as being Phil Hart rather than Alan Armstrong. The fact that  
34 you were told that actually, if you were going to be interviewing estimating managers, the

1 right one to interview for this contract was Peter Goodbun and not Alan Armstrong, I do not  
2 think that helps in deciding whether the actual estimator was Alan Armstrong rather than  
3 Phil Hart.

4 MR. BEARD: I think it is important perhaps just to bear in mind what the Office was being told  
5 in the email, the B3908. What it was being told was that Mansell has clarified with those  
6 estimators, i.e. those that there had been discussions because that is what is referred, the  
7 analysis of who had charge of certain contracts which Mansell had previously carried out on  
8 a paper basis. I am obviously concerned not to give evidence in relation to these matter.  
9 The A3 schedule that you are referring to where the initials appear was one done at an early  
10 stage in the leniency process.

11 THE CHAIRMAN: Nobody is suggesting that Peter Goodbun was the estimator on this contract.  
12 He says it was Mr. Hart.

13 MR. BEARD: Clearly, once the decision is made to take a cover bid then you do not have anyone  
14 carrying out an estimating process. If there had been, what Mr. Goodbun says is that it  
15 would have been for Phil Hart.

16 THE CHAIRMAN: Why did Phil Hart make those marks – that is a rhetorical question. I do not  
17 understand how the documents that you have handed up are said to clarify why it says “AA”  
18 in relation to that.

19 MR. BEARD: It is not intended to clarify. Essentially what the documents have been handed up  
20 for is just to show the process that was followed by the Office in considering who it was  
21 appropriate to interview. Initially they had those A3 schedules that were an early part of the  
22 leniency process.

23 THE CHAIRMAN: What, this?

24 MR. BEARD: The A3s. They look at those, they see the letters that are specified as Mansell  
25 names. They receive a schedule from the lawyers for Mansell, which is the schedule that is  
26 under the email of 15<sup>th</sup> March 2007. That schedule at 51 suggests that Alan Armstrong is  
27 the correct person to interview in relation to 51. This is consistent with the earlier leniency  
28 application.

29 THE CHAIRMAN: Wait a minute, which schedule am I looking at?

30 MR. BEARD: If one looks at the schedule under document B3899.

31 THE CHAIRMAN: If you look at this table which is attached to 3899, the majority of the names  
32 in that column are Barry Russ. Looking back at our big spreadsheet one would expect to  
33 see, if there was some relationship between this column and that column, lots of BRs in that  
34 column on the A3 spreadsheet, but I do not think there are any.

1 MR. BEARD: I do not think that is correct, because this table is focused on the City Road office.  
2 The spreadsheet that you are referring to covers a wider area.

3 THE CHAIRMAN: So this A4 schedule is the City Road office?

4 MR. BEARD: Yes.

5 THE CHAIRMAN: All right, I understand that.

6 MR. BEARD: So it is wrong to try and read across this more detailed schedule into the grand A3  
7 and try and do a compare and contrast of names to lines. All I am doing is identifying that  
8 there was a line on those big A3 schedules that were part of the leniency application that  
9 pertained to this job, albeit that that leniency material contained many, many more jobs than  
10 this later more detailed schedule.

11 PROFESSOR PICKERING: It is not actually accurate to say that once you have got a cover then  
12 you have no estimator involved for two reasons: first of all, we have been told that the  
13 cover was sought only late on; and secondly, we have seen in evidence that there was quite  
14 a degree of subterfuge on the part of companies that were going to take a cover, but they  
15 still sent their estimator out and got him to ask questions, and so on.

16 MR. BEARD: That may be so. The point I was making was merely that you did not have to go  
17 through having your estimator carry out the four week estimating process. It clear from  
18 Mr. Goodbun's evidence that, in relation to the job, he did defer responsibility in relation to  
19 these matters to Mr. Hart. He says that because that is what he is saying in relation to his  
20 account of the manuscript text. He is not saying that Phil Hart is wholly irrelevant to this, it  
21 is a name that is referred to.

22 PROFESSOR PICKERING: Yes, but the earlier document submitted by Mansell says it was  
23 Mr. Armstrong, and Mansell in the email that you have put in this morning does not say  
24 Mr. Armstrong was not involved, it says that Mr. Goodbun would have known better about  
25 this case than Mr. Armstrong. There is a slightly different inference and there is no  
26 reference to Mr. Hart at all here. I suppose the question really is, did the OFT really  
27 overlook the possibility of finding out what Mr. Hoskins's role was, and indeed establishing  
28 whose handwriting it was on that Builders' Conference schedule?

29 MR. BEARD: I think the answer to the latter question is clearly not, because Mr. Goodbun gives  
30 clear evidence as to what that manuscript on the Builders' Conference schedule is, and that  
31 is set out in the transcript. So the OFT clearly had that evidence. They also knew that Phil  
32 Hart had left the employ of Mansell some time previously, because that is also referred to in  
33 the transcript of evidence. In those circumstances, when the leniency applicant is saying,  
34 "This is the person that is best able to talk to this contract", then it is right that the Office

1 carries out its interview with that person, asks them both about the documentary material  
2 that it has, which he is able to comment on and does so at pp.11 to 12, but also that he is the  
3 person that is able to give direct evidence about the process of obtaining a cover in relation  
4 to that job. He is the one that chose Durkan, he is the one that gave the reasons why Durkan  
5 was chosen. One can understand in those circumstances why Cameron McKenna is saying,  
6 “This is the person in charge of that contract, he is the person you should speak to in  
7 relation to it”.

8 PROFESSOR PICKERING: And he delegated the collection of the evidence to Mr. Hart, of  
9 Mr. Goodbun’s evidence?

10 MR. BEARD: I am sorry, he delegated?

11 PROFESSOR PICKERING: The collection of the cover price?

12 MR. BEARD: He delegated the collection of the cover price, yes, that is what Mr. Goodbun’s  
13 evidence is saying. Mr. Goodbun is not saying, “I received the call from Durkan”.

14 PROFESSOR PICKERING: The question is probably, who in Mansell made the call to Durkan?

15 MR. BEARD: He is not asserting that he did it, he is saying that Phil Hart was the person who  
16 was dealing with obtaining the cover from Durkan. That is clear from his evidence.

17 THE CHAIRMAN: Let us try and move on.

18 MR. BEARD: I think it is important in this context to actually go back and look at the terms of  
19 Mr. Goodbun’s transcript in relation to what he said about Phil Hart. That is at Tab 12, p.11  
20 onwards. He has been presented with a document which has been provided by Mansell,  
21 which is a Builders’ Conference pre-tender report, and there is a cross on it next to the name  
22 of Durkan Limited. He is specifically asked:

23 “Are these your notes on this document?

24 No. That’s Phil Hart’s.

25 Okay. But do you have any knowledge of that those notes mean at all?

26 Oh, yes.

27 ... would you mind explaining them?”

28 He explains specifically what those notes are. Then, as one goes down, he says:

29 “The x against the, the name would indicate the name that he approached.”

30 So that is Phil Hart. So that is evidence of the delegation to which Professor Pickering was  
31 referring.

32 “... the name of the individual is Brian Sharpe at Durkan, and the figure is the  
33 figure, the quote, that would have been given to us as the guide in which to go on.”

34 Then Sarah Mills asked:































































































































1 MISS BACON: If anything at all, but we are happy to do that first thing tomorrow morning.  
2 THE CHAIRMAN: How are we getting on – Mr. Beard, yes?  
3 MR. BEARD: Sorry, I was going to raise merely a matter that I forgot at the outset of this  
4 afternoon, which was to ask formally that Mr. Singla could be released for this afternoon  
5 and for tomorrow morning.  
6 THE CHAIRMAN: Well, I retrospectively allow him to be absent this afternoon and  
7 prospectively acknowledge his absence tomorrow morning.  
8 MR. BEARD: I am most grateful.  
9 MR. HOSKINS: In terms of timing, subject to any questions you may have I shall be  
10 significantly less time on Infringement 220. What I would imagine is I finish on that and  
11 move straight into penalty instead of hanging around until after lunch.  
12 THE CHAIRMAN: Quite. So we will start at 10.30 tomorrow morning. Thank you very much.  
13 (Adjourned until 10.30 a.m. on Friday, 23<sup>rd</sup> July 2010)  
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