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

Case No. 1118/1/1/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

12 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING  
(President)

MARCUS SMITH, QC  
DR. ADAM SCOTT OBE TD

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GMI CONSTRUCTION HOLDINGS PLC  
(2) GMI CONSTRUCTION GROUP PLC

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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**HEARING  
DAY ONE**

## APPEARANCES

Mr. Aidan Robertson, QC (instructed by McCormicks) appeared on behalf of GMI Construction Holdings PLC.

Miss Kelyn Bacon 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 PRESIDENT: Good morning ladies and gentlemen.

2 THE PRESIDENT: Good morning, Mr. Robertson. Good morning, Miss Bacon.

3 MR. ROBERTSON: Mr. President, members of the Tribunal, I appear for the appellants in this  
4 appeal, who I will refer to collectively as GMI. My learned friends Kelyn Bacon and Tony  
5 Singla appear for the respondent, OFT.

6 I will outline what Miss Bacon and I have agreed as regard to the order of events for the  
7 day.

8 THE PRESIDENT: I knew you would work something sensible out.

9 MR. ROBERTSON: I hope we have. I am going to deal first of all with some housekeeping  
10 matters. I do not think there is a need for a formal opening of our case. You have full  
11 written submissions. So, we will proceed without delay to call our witnesses who the OFT  
12 want to cross-examine. That will be, first of all, John Naylor, and then Mr. James Shann.  
13 Mr. James Shann is currently not in this room because Miss Bacon has asked that he wait  
14 outside until Mr. Naylor has finished his evidence. We have no problem with that. Once the  
15 witnesses have been dealt with, we think with a fair wind that might be by around midday, I  
16 will then commence with our submissions on liability. It will be over to Miss Bacon for her  
17 submissions and then I will reply. We think, again, with a fair wind we might be finished  
18 on liability today. That would then leave the penalty aspect of the appeal for tomorrow  
19 morning.

20 In terms of housekeeping, can I just check the Tribunal does have the files? There should  
21 be two files of the Notice of Appeal. There should be our skeleton file, which I think is  
22 numbered 4 on the Tribunal's notation - a slightly slimmer file. You should have the OFT's  
23 liability defence and the OFT's penalty defence - obviously we do not need the penalty  
24 defence until tomorrow. There is a short reply skeleton that we served last week.

25 THE PRESIDENT: I have not actually read that. I am sorry. I was not aware of that.

26 MR. ROBERTSON: I am going to take you through the text of it anyway when we come to our  
27 submissions on liability. I imagine that will probably be after lunch. It might give you an  
28 opportunity. It is a two-side skeleton.

29 THE PRESIDENT: Just for your note, as it were, we will probably take a ten minute break at a  
30 convenient moment, mid-morning. So, maybe after your first witness. Let us see how we  
31 get on. Then we will read that then.

32 MR. ROBERTSON: Good. The final bundle you should have is a small additional authorities  
33 bundle on liability.

1 As regards confidentiality there are no matters for today which, as far as we are aware, will  
2 raise issues of confidentiality. Therefore we will not need to go into any private hearing.  
3 Without further ado, I will call our first witness, Mr. John Naylor.

4  
5 Mr. JOHN STEPHEN NAYLOR, Sworn

6 Examined by Mr. ROBERTSON

7 Q Mr. Naylor, can you give the Tribunal your full name, please?

8 A It's John Stephen Naylor.

9 Q. Your address, please?

10 A GMI Construction, Middleton House, Westland Road, Leeds. LS11 5UH.

11 Q Mr. Naylor, of the files in front of you there should be a file marked File 2 of 2.

12 A Correct, yes.

13 Q Could you take that and turn to Tab 14? (After a pause): You will see that document  
14 there is headed 'Affidavit of John Naylor'.

15 A Yes.

16 Q Could you just flick through that and confirm that that is a copy of the affidavit you made  
17 on 26<sup>th</sup> June, 2008?

18 A It is, yes.

19 Q Are there any corrections you want to make to it?

20 A No, no, that's fine.

21 Q Mr. Naylor, I suggest you leave that file open and also take the slimmer of the two files  
22 sitting there, which is the skeleton bundle file, and could I ask you to turn to tab 7 of that  
23 file?

24 A Yes.

25 Q That should be a document headed witness statement of John Naylor?

26 A Correct.

27 Q Could you just flick through that and confirm that that is a copy of the witness statement  
28 that you made in these proceedings on 28<sup>th</sup> April 2010?

29 A It is, yes.

30 Q And are there any corrections you wish to make to that?

31 A No.

32 MR. ROBERTSON: If I can now hand you over to Miss Bacon, who will have some questions  
33 for you.

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Cross-examined by Miss BACON

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Q Mr. Naylor, I understand that you joined GMI in 1986 as its estimating director?

A I joined in 1986, I wasn't a director at that time.

Q What were you then?

A I was just the senior estimator.

MR. ROBERTSON: If I can just interrupt, Mr. Naylor, you are being questioned by Miss Bacon, but if you can address your answers to the Tribunal that would be helpful, thank you.?

A I am sorry.

MISS BACON: And when was it that you became promoted to estimating director?

A It was approximately about 16 years go.

THE PRESIDENT: I am just checking, that microphone is on, is it?

A The light is on, yes.

THE PRESIDENT: Thank you.

MISS BACON: So that would have been approximately 1994?

A It was in that order, 1994, yes.

THE PRESIDENT: You became a director?

A Yes.

MISS BACON: Where did you work before that?

A Before I was at GMI I spent just over a year working at a company called Manstons, which was very much the same people that I work for with GMI, and before that I worked for a few years for a company called "Wiggins Construction."

Q And what position were you at Wiggins and Manstons? Was it also an estimator?

A At Wiggins I was a QS and an estimator. At Manstons I was employed as an estimator.

Q "QS" is quantity surveyor?

A Quantity surveyor, sorry, yes.

Q And you said that there are now two people in your department at GMI, is the other estimator still Mr. Peacock?

A The other estimator, and has been for over 20 years, is Mr. Gary Peacock.

Q So he must have arrived in about 1990, is that right?

A He arrived at GMI before that, he was actually a quantity surveyor at GMI and then we decided to put him into the estimating department because there was only me in it at the time and it would have helped me out, and he has been with me now probably about 23 years, something like that.

Q So during that time there has been essentially a team of two, you and Mr. Peacock?

1 A True, the only estimators GMI have ever had have been myself and Gary Peacock since our  
2 inception, yes.

3 Q Can I ask you some general questions about your awareness of cover pricing now?

4 A Yes.

5 Q Obviously you have a vast amount of experience in the industry, so you are presumably  
6 aware that cover pricing was a practice that was widespread throughout the industry?

7 A I am aware that cover pricing took place, predominantly through the 1970s and the 1980s  
8 into the 1990s. It was a practice I was familiar with as an estimator, yes.

9 Q Can we agree that one of the reasons people took cover prices during that time was that  
10 sometimes they had limited estimating resources so they just would not be able to price up  
11 some jobs?

12 A Yes, it was generally because the number of tenders that were passing through the  
13 department probably exceeded the ability to price them with the number of people in the  
14 department. It was also that most of the tenders at that stage were predominantly what we  
15 would call single stage tenders which were based on bills of quantities which were fairly  
16 straightforward tenders to price.

17 Q Do you agree that cover prices were often taken at the last minute when companies - for  
18 example, companies with limited resources - realised that they simply were not going to be  
19 able to price up a job?

20 A In my experience cover prices were taken early in the tender process. I think any estimator  
21 who was worth his salt would probably appreciate fairly early that the number of tenders he  
22 had in front of him were going to create a problem.

23 Q Do you agree that there were some instances where a company would get a tender in, and  
24 was not quite sure whether it would be able to tender for it or not, and then in the last couple  
25 of days realise that it just was not going to get it together for whatever reason?

26 A Again, in my experience, the only time that that happened to me was part-way through a  
27 tender process in which we informed the client that we were having difficulty with the  
28 information that was provided, which I reported to Jim Shann, who has been my managing  
29 director all those years, and we went back to the client and expressed our doubts that we  
30 could put a competitive tender on that particular job. As it turned out, the client told us to  
31 take a back seat and he would come back to us. He received some highly qualified tenders  
32 from the other contractors, all of which were well over budget at the time. The client then  
33 came back to us and we sat down with a design team because the client was quite keen for  
34 us to do the job. We sat down with the design team and we worked through it together, and

1 we brought the job within the budget. Generally I never got into a situation late on in a  
2 tender period whereby I thought, "Oh, my goodness! I'm not going to complete this".

3 Q Mr. Naylor, can I pass you up a passage from the Decision? I am passing this up because I  
4 understand Mr. Naylor has not got a Decision bundle in front of him. (Same handed) Can  
5 you look at para. IV.33, p.401? I am not asking you about what your policy was. I am not  
6 asking for your experience, but generally whether you agree with the factors that are being  
7 listed by Irwins at this paragraph, and then one point over the page to 8H

8 A This is IV.33?

9 Q Yes.

10 A Do I agree with these items on this list? Is that the question?

11 Q Exactly. The paragraph reads, "Irwins listed the various factors which led to cover prices  
12 being taken as --" and then it goes (a) down to (h) and I wondered if you agree with that as  
13 a general statement of the reasons behind cover pricing from your twenty and more years'  
14 experience?

15 A The limited resources of the estimating function is very much down to the managing  
16 director, which in my case was Jim Shann, who acted as a gatekeeper in terms of tenders.  
17 So, it's not a problem that we ever -- from probably the mid-nineties onwards we ever had  
18 because as tenders were coming in I would sit down with Jim Shann and we would decide  
19 what we were capable of in our fairly limited estimating department and what we weren't  
20 capable of. So, I don't feel that that would've applied to us.

21 Q I am not asking whether any of these applied to you. I am just asking if you can agree with  
22 this as a general statement of the reasons why people gave cover prices -- or took cover  
23 prices.

24 A Okay. In that respect, yes (a) - yes. (b) Unsolicited inquiries ----

25 MR. ROBERTSON: Sir, I hate to interrupt the witness here. But, my learned friend is asking the  
26 witness for opinion, and the evidence that we are interested in from this witness is evidence  
27 of fact.

28 MISS BACON: I am not asking for opinion. He has given evidence that he has been in the  
29 industry for a great number of years, and I am asking him as to his understanding as to the  
30 reasons why people gave cover prices.

31 MR. ROBERTSON: This is a case about GMI. It is not a case about the industry generally. The  
32 OFT has done a lot of work about the industry generally and set out in the Decision. We do  
33 not dispute that.

1 THE PRESIDENT: We will watch it, Mr. Robertson. It strikes me as being admissible at the  
2 moment.

3 MISS BACON: That was the only paragraph of the Decision that I wanted to take you to.

4 A Okay.

5 THE PRESIDENT: You are being asked to comment on each of those.

6 MISS BACON: I was not asking you to comment on each specifically I was asking you to  
7 comment on whether generally this was your understanding.

8 THE PRESIDENT: I think you have got to look at each one.

9 MISS BACON: I am happy to go through each of them.

10 A So, do you want me to go through each one individually?

11 Q I am happy for you to go through each one individually.

12 A Okay. Well, (a) we have discussed. (b) - unsolicited enquiries with inadequate poor  
13 information. Yes, that's fairly common. (c) - additional post-tender work and previous  
14 tenders. I would suggest that ties in with (a) which is really limited resources. I mean, in  
15 our situation we have two estimators. So, it's a fairly easy decision for us to take in terms of  
16 whether we've got the capacity or not. But, it would be a reason. (d) The limited  
17 information available with current enquiries. Do you mean the limited information  
18 available with a particular tender enquiry?

19 MISS BACON: Yes. Yes, I think so.

20 THE PRESIDENT: I do not understand that just as it stands.

21 MISS BACON: Sir, I think this means a situation where the client sends out a tender and does  
22 not give sufficient information for that tender to be priced up properly.

23 THE PRESIDENT: 'Information available with current enquiries'. What on earth does that  
24 mean?

25 MISS BACON: I am not sure what the last three words mean.

26 THE PRESIDENT: I would pass over that one because I do not think it is fair to ask the witness  
27 to comment on something that is hard to understand.

28 A A short tender period with inflexible deadlines. That really should be dealt with before  
29 anybody could get into a cover situation, I would suggest, because as the tender documents  
30 come out we're all aware of the tender period. If we don't feel it's long enough we put in a  
31 official request for an extension of time. If the client refuses an extension of time for  
32 whatever reason we would then return the documents.

33 Inability to obtain material or sub-contract quotations. Not necessarily in our case. If that  
34 happened -- In certain cases that would happen with a statutory authority - gas, water who



1 are notorious for not giving quotations within a limited period of time. So, in that case we  
2 would probably -- I would discuss it with Jim Shann. We would then put what's called the  
3 provisional sum against an item of, say, something -- Let's speculate -- say, £20,000 which,  
4 in our experience, we would feel was a sensible figure and not just a silly figure to get a low  
5 figure -- But, I don't feel that that is a reason for taking a cover - that particular item. I  
6 think any estimator should be able to deal with that in a number of ways.

7 '(g) The realisation that after initial work, inspection of the site and documentation that the  
8 company will not be in a position to offer a competitive price.' Again, that would happen  
9 within the first few days and, again, if that was GMI we would speak to the client, we  
10 would request further information if we felt it was lacking, or we would return the  
11 documents.

12 THE PRESIDENT: You are saying that from your point of view that would not be a reason.

13 A It certainly wouldn't be a reason for GMI. I'm not saying it wouldn't be a reason for other  
14 contractors.

15 '(h) Orders received during the tender period resulting in inability to carry out the project  
16 efficiently if awarded.'

17 MISS BACON: This is more or less the same as (c), is it not -- additional post-tender work --  
18 Something comes in and then you cannot price up the project because you are dealing with  
19 something else.

20 A I used to sit down with Jim Shann and we'd assess our tender -- or, our work on site  
21 situation - whether if we did tender a particularly large job whether we had the capacity -- if  
22 we had really large job pending, we would -- In our particular case we always decided that  
23 a job is only a job when you get an order. We wouldn't turn tenders away on the basis that  
24 we thought we were going to get a job. A tender period is relatively short - a period over,  
25 probably three, maximum four weeks. I think to receive a big order in that period, it must be  
26 something that you were aware of when you took the tender documents. So, again, I don't  
27 feel that that would affect the way that GMI tendered.

28 Q So, just to sum up, Mr. Naylor, your evidence is that these might have been reasons why  
29 other companies turned down work, or took a cover price, but they were not reasons why  
30 you would ever take a cover price.

31 A That's basically correct, yes.

32 Q I understand that you now have a strict procedure in place at GMI to prevent disclosure of  
33 information to competitors at any time during the estimating procedure.

1 A We have a procedure whereby in-house we have some forms we fill in as tender documents  
2 come in which are anti-collusion forms, we don't discuss tenders with other contractors.  
3 We don't have a written policy as such. We've had myself, Gary Peacock and Jim Shann  
4 for well over 20 years who work together, so we didn't feel the need to put anything in  
5 writing because we spoke to each other every day, we had regular meetings, we would be in  
6 each other's office every day and we didn't feel that a written policy was particularly  
7 necessary. The paper work is a little bit more abundant nowadays, so we have one or two  
8 forms that we now fill in as tenders come in just to confirm what we have been doing for  
9 20-odd years.

10 Q So from what I understand you have just said there was no written policy before this  
11 procedure was put in place as a result of the OFT's investigation?

12 A No, we didn't feel it necessary to have a written policy for the reasons I've just explained.

13 Q You had not received any competition compliance training, had you?

14 A I haven't received any competition compliance training, no; we didn't feel it was necessary.

15 Q So is it fair to say then that until this written procedure was put in place there was not a  
16 formal cover pricing policy in place at GMI?

17 A The cover pricing policy at GMI was that we didn't do it, basically from probably the mid-  
18 90s onwards, approximately. Gary Peacock, who was my senior estimator, discussed  
19 everything with me, I knew what he was doing every day in terms of tendering. I in turn  
20 discussed everything with Jim Shann, my managing director, so we were very happy that all  
21 three of us were all in tune, and we knew that cover pricing was not an issue with ourselves.

22 Q I will come on to that in a minute. Can I start, before we get to the mid-90s, with the  
23 position in 1986 when you joined GMI, you say, as a senior estimator?

24 A Yes.

25 Q You say that from around 2000 you were pricing around 100 tenders a year?

26 A Yes.

27 Q In 1986 was it the same sort of number?

28 A In 1986 when we were setting out I was the sole estimator initially until Gary joined me a  
29 few years later within the company. As a new company we were trying to get a foothold in  
30 the market, we would basically invite tenders from the market and, yes, there were odd  
31 occasions when the capacity of me probably wasn't sufficient to deal with the  
32 predominantly single stage tenders, which is usually a bill of quantities, and we dealt with  
33 that as best we could.

1 Q Are you saying at that stage you did take cover prices when you did not have sufficient  
2 capacity?

3 A To a very limited degree, yes, cover pricing I wouldn't say it was right but it was an  
4 accepted part of the business back in the business at that time. There were occasions and I  
5 hesitate to say that it was very often because it wasn't. There were occasions when, as a  
6 single estimator I found myself in a position where we had probably invited too many  
7 tenders through the door and it was a occasionally rather than a rule and, yes, I did take the  
8 odd cover.

9 Q The reasons that you have just said did not apply to GMI, when you say that, talking about  
10 the more recent situation, and you accept that when you joined there were reasons why GMI  
11 would take cover prices?

12 A Yes, early days we weren't the company we are today, obviously, we were trying to get a  
13 foothold in the market as time went on we developed a very strong client base, and we got  
14 more into negotiated work, and in fact I think in around about the year 2000, probably  
15 nearly 70 per cent of our work was negotiated. We had built up a very good reputation over  
16 a number of years as a company and ----

17 THE PRESIDENT: What date did you say that was again, Mr. Naylor?

18 A Around about 2000.

19 Q That was the 70 per cent figure was around then?

20 A I think the figures are in the documents, but I suspect it was in the order of probably late  
21 60s, 70 per cent, and that figure has increased; in the subsequent years that figure increased,  
22 because as a company we had a good reputation, we were non-adversarial, we were good  
23 builders and people wanted us to work for them. So basically cover pricing was no longer  
24 an issue from the early days it wasn't, we just developed our client base as best we could,  
25 and very successfully.

26 MISS BACON: Can you give the Tribunal an idea of how frequently, for example how many  
27 times a year you would take cover prices when you were doing so, say, in the late 1980s or  
28 early 1990s?

29 A It is a bit difficult to be specific, I would think probably in a year maybe between half a  
30 dozen and a dozen times maybe, probably less than that to be honest. That was in the early  
31 days into the 80s into the 90s we developed, Jim Shann acted as a "gatekeeper" – is the  
32 word we have used – to filter tenders through so it was no longer an issue, it was only when  
33 we were setting out as a company and we were trying to establish ourselves in the market.

1 Q Can I ask you now about giving cover prices, because you have just given evidence about  
2 taking cover prices? Of the tenders that you priced up, approximately how often would  
3 somebody ring you up and ask for a cover price? Was it every tender? Was it every other?  
4 Was it maybe every three or four, or less frequently?

5 A It was fairly infrequent to be honest we were never really part of the cover giving and taking  
6 culture as a company. I have never been one for discussing too much with other  
7 contractors, only to a limited degree, I always felt it was better to do my own price and rise  
8 or fall by that. I found it a distraction talking to other contractors and still do. So we were  
9 never part of a sort of circle of contractors who used to ring each other up on a regular basis,  
10 and so it is difficult to put a number on that. I cannot put a specific number on that but it  
11 was very limited.

12 Q So approximately how many times a year. You have given evidence that it may be half a  
13 dozen or a dozen times a year that you might have taken a cover, can you give a vague idea  
14 of how many times in a year you would have given a cover price?

15 THE PRESIDENT: When are we talking about?

16 MISS BACON: I am still talking about the early period when he was still taking covers, so late  
17 1980s, early 1990s, I will move on in a bit.

18 A Well, we are talking 20-odd years ago. The thing about taking covers is that if you take a  
19 cover from somebody, if somebody took a cover they would feel that if somebody rang  
20 them they would be able to give a cover to the same company if necessary on a different  
21 job. As I say, it was never a culture that I was particularly part of but if we priced 100 jobs  
22 a year – I can't think – at that time we would probably give – very few – maybe five or six  
23 covers over the period, very few.

24 Q Your evidence is that at some point in the 1990s you ceased giving cover prices, or you  
25 stopped giving them so much?

26 A Yes.

27 Q Can you put a finger on what the turning point was? Why did things change?

28 A There wasn't a turning point, it was a gradual turning point whereby the nature of tenders  
29 changed. We had a lot of negotiated work as I alluded to earlier, a lot of the tenders became  
30 more complex, they were two stage tenders, which involved part negotiation with the client  
31 after submission. A two stage tender generally means that in round terms you price the  
32 profit, you sent a scheme, and the client may say "We've got a budget based on a three  
33 million pound scheme", for instance, "We would like you to put your preliminary costs,  
34 which are the costs of the site agent, the cabins, security", that sort of, and a percentage

1 profit based on this. They will probably go to half a dozen contractors. They will then put  
2 their profit and prelims on a scheme, and the client will then narrow it down to either one or  
3 two, and in many cases put it down to one contractor who will then work with the design  
4 team to bring the contract term within budget. In terms of general tendering, we probably  
5 price design and build tenders which meant that it was no longer a 'first past the post'  
6 situation with tenders because it wasn't just the price that the client took into account - it  
7 was the design of the building, the strength of the company. In fact, that has gone on  
8 nowadays insofar as some of the tenders we submit now have the price as only a percentage  
9 of the decision. In fact, we had a tender in a couple of weeks ago where the price  
10 represented 40 per cent of the client's decision. The rest was down to the company, the  
11 company's history, health and safety, and all those sort of issues.

12 So, the nature of tendering changed. In-house we decided that it was not really appropriate  
13 to give or take covers any more. It was no longer a conveyor belt of bills of quantities.  
14 We're talking more complex jobs. It was quite possible, if you put a tender in and you were  
15 second or third, that the client may well call you in for a discussion to go through your  
16 price. You may well have included a more expensive building within the planning  
17 requirements than somebody else. You may have included a larger provisional sum for  
18 incoming services than one of the opposition. So, from our point of view, and I am only  
19 talking about GMI here, the nature of our work became very difficult. If we'd wanted to, it  
20 would've been very difficult to give or take covers. It sort of naturally died out.

21 Q So, are you saying that there came a point that nobody ever rang you up and asked for a  
22 cover again?

23 A No, I'm not saying that, no. No. People did ring up and ask for covers.

24 Q So, if we look at the situation, for example, after the year 2000, how often -- You said from  
25 that time you were pricing up about 100 tenders a year.

26 A Yes.

27 Q How often would somebody at least ring you up and ask for a cover price?

28 A Not very often, I have to say. I think the industry has changed. Certainly the market that  
29 we're in - the private -- generally the private sector market that we predominantly are in --  
30 As I say, it became --It virtually died out. I mean, if you don't ring people up and ask for  
31 covers, which we didn't, then people are less inclined to ring you and ask you for a cover.  
32 So, we very much kept ourselves to ourselves as contractors, and we didn't really get  
33 involved in that. So, from the year 2000, very little.

34 Q Does that mean a few a year or less?

1 A Does it mean a few a year?

2 Q It is only the last ten years. So, do you have an idea of how many?

3 A It's difficult to put a number on it. I mean, I can't stop people ringing me up obviously 'cos  
4 we are who we are. But, I would think no more than -- You would probably get in the year  
5 2000 -- What's that? Ten years about -- You would probably get maybe half a dozen calls  
6 over a year? We don't get any in the last few years, but ----

7 Q So, can we say that between 2000 and the start of the OFT's investigation when everyone  
8 suddenly became aware that it was unlawful -- Say 2000 to 2005. Your evidence is that you  
9 were being called up maybe five or six times a year; is that right?

10 A No. I was saying we got called up maybe in the year 2000 five or six times a year. I would  
11 say that by the year 2005 that had virtually died out completely. People knew that we didn't  
12 give or take covers, so they didn't bother ringing us.

13 Q Can I ask you about the alleged infringement 101, which was the Centurion Park, York  
14 tender? You write about that in your first affidavit. Actually you might want to turn up  
15 your affidavit in Bundle 2, Tab 14. At para. 7 you are referring to this particular alleged  
16 infringement which was alleged in the Statement of Objections. You say that you received  
17 an unsolicited telephone call from Mr. Nelson from Irwins.

18 A Correct.

19 Q I gather that Mr. Nelson is someone you knew fairly well, was he not, because you had  
20 worked with him at, was it, Manstons?

21 A The history between me and Mr. Nelson was that I worked at Manstons for approximately  
22 twelve months. At that point I was directly responsible to Mr. Gilman who was the  
23 Chairman of Manstons. Mr. Gilman subsequently moved on and for about a three month  
24 period I went into the estimating department and worked alongside Mr. Nelson for about a  
25 three month period before I went back and worked for Mr. Gilman, yes.

26 Q You say in your witness statement that when he asked you for a cover price for this job you  
27 told him that you would need to discuss it with Jim Shann.

28 A Correct.

29 Q Why did you need to ask Mr. Shann first?

30 A Because that was the way we worked. There were no secrets between Jim and I. This was a  
31 client that we did a lot of work for at the time. We felt it was probably an opportunity to put  
32 down Irwins a little bit because they, at the time, were trying to work for this particular  
33 client and for whatever reason Mr. Nelson felt he was incapable of giving a price. So, I  
34 went to see Jim and Jim decided to speak to the client.

1 Q Was there any other occasion since 2000 when on one of the occasions when someone rang  
2 you up for a cover price you said that you would speak to Mr. Shann and then went to the  
3 client and asked their permission?

4 A If that had happened - and I can't specifically remember it happening - I would've discussed  
5 everything with Jim. We discussed everything together and similarly with Gary Peacock.  
6 If that would've happened to Gary, he would've discussed it with me.

7 Q Can I take that question in stages? Was there ever an occasion when you gave a cover price  
8 to someone in response to a request since 2000?

9 A No.

10 Q So, your evidence is that on all of the other occasions apart from the single occasion  
11 involving Mr. Nelson you flatly refused?

12 A Yes.

13 Q Did you refuse after speaking to Mr. Shann or before speaking to Mr. Shann?

14 A I spoke to Mr. Shann first.

15 Q Can you report any other occasion when you went to a client and asked them for their  
16 permission?

17 A Not specifically at this stage.

18 Q So, your evidence is essentially that each time that somebody rang you for a cover between,  
19 say, 2000 and, say, 2005 you spoke to Mr. Shann and you turned them down flat?

20 A In that period we had very, very few 'phone calls asking for covers, and any 'phone calls I  
21 had I would discuss with Jim, yes. And turned down, yes.

22 Q If Irwins had called you up on another occasion, what would your response have been?

23 A If Irwins had called me up on another occasion? I would've spoke to Jim Shann as well.

24 Q Why was this particular tender special then?

25 A It was a client that we had a very good relationship with, and we still have today. At the  
26 time there were certain people within the design team for this particular job that were  
27 pushing for Irwins to do the job, and we thought it was probably good to let the client know  
28 that Irwins weren't pricing the job and they may have excluded them from future tenders,  
29 which would obviously have been to our benefit.

30 Q Were there other occasions when Irwins did call you and you refused?

31 A I can't specifically remember. You've alluded to that earlier - that I had some sort of  
32 friendship with Peter Nelson. It was just the opposite in many ways because when I left  
33 Manstons Peter went his own way and I think Peter would probably have expected to join  
34 GMI and that never happened for reasons that are probably well documented. So, there was

1 a slight edge between myself and Peter. So, if there's any suggestion that Peter was a friend  
2 of mine and that he used to ring me up on a regular basis, that just didn't happen.

3 Q So, your evidence is that there was some kind of bad feeling actually between you and ----

4 A No, there wasn't any bad feeling. There was just a coolness. It wasn't bad feeling. I saw  
5 Peter occasionally at social functions. We'd have a quick nod and say, "Hallo. How are you  
6 doing? Okay" and move on. But, there was always this underlying sort of, "Maybe I  
7 should have got that job, and not you".

8 Q Your evidence is that in 2002 when he called and asked you for a cover price you wanted to  
9 put him down. I am not saying that in a critical way. You wanted to put him down in some  
10 way and so you went to the client and told them. What I am slightly struggling to  
11 understand is why that was the only occasion when you did that. I mean, surely there were  
12 other occasions when he might equally have called you and asked for a cover price and you  
13 would have wanted to put him down?

14 A This was nothing personal about Peter and myself. This was Irwins and this was GMI. We  
15 were just representing our companies. On this particular occasion I just wanted to speak to  
16 Jim because it was a regular client of ours. It was a company that were trying to do work,  
17 and I was actually surprised when he rung me, to be honest, because I thought they  
18 would've gone out for that particular job, which they didn't. So, I cannot recall -- If Peter  
19 Nelson had rung me at any other time, which I cannot recall him ringing to me, to be honest  
20 -- But, again, I would've spoken to Jim Shann and we would've made a decision on that  
21 basis.

22 Q You see, Mr. Naylor, is it not actually more probable that there was nothing special about  
23 this occasion and that you did give cover prices on other occasions when you were asked by  
24 Mr. Nelson?

25 A No.

26 Q Can I ask you about the Lancaster Park tender in June 2000 which occurred approximately  
27 two years before this occasion? By that time you would have been the estimating director;  
28 is that right?

29 A Correct.

30 Q That was a tender that you would have either priced or you would have helped Mr. Peacock  
31 to price.

32 A Yes. I priced that one myself.

33 Q You have got your first affidavit open there. You did not say anything about this tender in  
34 that affidavit, did you?



1 A No, I did not.

2 Q In particular, you did not say that although you priced it, this could not have been a case  
3 where you gave a cover price. (After a pause): You did not say there, "I have seen the  
4 OFT's Statement of Objections. I priced that job and it's inconceivable that I could have  
5 given a cover price to Mr. Nelson then".

6 A I have no recollection of Mr. Nelson ringing me on that particular job.

7 Q You did not say anything about that tender in this affidavit.

8 A Correct, yes.

9 Q You did not say in that affidavit that you had never given someone a cover price since 2000,  
10 except for the occasion in 2002 which you talk about.

11 A Correct. I think I've alluded to that in my witness statement somewhere.

12 Q So, is it fair to say that at the time of your affidavit - and this was, as you will have seen,  
13 sworn in 2008 - you actually could not remember if you had or had not given a cover price  
14 for that tender?

15 A This is the Lancaster tender we are talking?

16 Q It is the Lancaster Park, York tender.

17 A Yes.

18 Q I am trying to understand, Mr. Naylor, why you did not say something about this in your  
19 affidavit if you priced the tender?

20 A Well, I had no recollection of Mr. Nelson ringing me on that particular tender, and if he had  
21 I would've spoken to Jim Shann and we would've discussed it the same way we did the  
22 Centurion Park tender.

23 Q But why did you not say that in your affidavit? If it was the case that you would have  
24 discussed it with Mr. Shann and you would have then gone to the client, why did you not  
25 say, "I could not have given a cover price because that's not something I did. I would have  
26 asked Mr. Shann first, and we would have gone to the client"?

27 A I don't recall ever receiving a 'phone call from Mr. Nelson on that particular job.

28 Q Can I ask you to turn to your witness statement which is the statement in the other bundle  
29 you have open? Turn to para. 6. This is the first time that you refer to this tender in your  
30 evidence, is it not?

31 A Yes, it is, yes.

32 Q Your evidence at para. 7 is essentially, as I understand it, that you cannot recall anything  
33 specific about the tender?

34 A I think I am referring generally to tenders in general at point 7, yes.

1 Q You have not given evidence that you specifically recall the tender, you have not said that  
2 you remember this tender, and you remember that you did not give a cover price to Mr.  
3 Nelson?

4 A I remember the tender, I can't remember – if I didn't receive a 'phone call there was nothing  
5 to remember as far as I was concerned.

6 Q Let us suppose you had been asked for a cover by Mr. Nelson, and you just cannot recall the  
7 'phone call now, was there a particular reason in 2000 you would have flatly refused him, or  
8 refused him after speaking to Mr. Shan, when we know in 2002 he went to the client?

9 A Well if I had received a 'phone call from Mr. Nelson, again this was for a very good client  
10 of ours, this particular job, which I believe was Evans of Leeds, I would have discussed it  
11 with Jim, and we would have gone down the same route, but if I didn't receive a 'phone call  
12 from Mr. Nelson there was no route to go down.

13 Q Your evidence is that you cannot remember any other occasion when you did go to the  
14 client, so it is to be presumed then that this was not an occasion when you went back to the  
15 client?

16 A It was not necessary for us to go back to the client.

17 Q So what I would like to know is what was different about this tender two years earlier from  
18 the Centurion Park tender in 2002? You have said that in both cases Irwins was the other  
19 party. You have said that in both cases you had a good relationship with the client, why  
20 would it be that in 2002 you give Mr. Nelson a cover, and in 2000 effectively your evidence  
21 is that you did not give him a cover?

22 THE PRESIDENT: He was not asked.

23 A Well we didn't give a cover because – yes, you took the words right out of my mouth.

24 MISS BACON: Well actually your evidence was you could not recall being asked?

25 A Well I couldn't recall being asked, and if I had been asked I would have spoken to Jim  
26 Shann, and seeing as I didn't speak to Jim Shann, particularly in the light of the client on  
27 that particular job who is one of our major clients, I would definitely have spoken to Jim  
28 Shann. I can't remember a 'phone call if I didn't receive a 'phone call.

29 Q Can I move on to ask about infringement 228, which is the Leeds College of Art and  
30 Design, this was in 2005? This was a case where you say that you sent out subcontractor  
31 inquiries?

32 A Correct, yes.

1 Q Do you accept that in this case, after you had obtained some of those subcontract prices you  
2 might have decided, for whatever reason, not to put in a competitive bid for the project, but  
3 to take a cover price instead?

4 A No, if we had decided, which we didn't, but in the early days – in the 80s, whatever – a  
5 decision to take a cover price was taken on day 1 we wouldn't have sent out inquiries. When  
6 we get a tender in we spend a lot of time, probably a couple of days going through the  
7 documents and deciding, because it is an expensive process sending out tender inquiries and  
8 we do not send them out on a job if we have no intention of pricing it.

9 Q Can I just ask about that, because I understand that this was a job where the client had sent  
10 you the bill of quantities, is that right?

11 A Yes, the client's quantity surveyor, which was Burnley Wilson, sent a bill of quantities, yes.

12 Q So it was a build only job, you had the bill of quantities, so what you had to do was to send  
13 the relevant quantities out to your subcontractors?

14 A Correct.

15 Q Essentially it would be a process of taking the quantities off the speck, sending them to the  
16 subcontractors and asking for their quotation for that particular bit of the project?

17 A It's not quite as simple as it sounds. Obviously a bill of quantities is an elemental  
18 breakdown of a job which is measured by a QS. In this particular case certain jobs involve  
19 the subcontractors visiting the site, working out the complexity of the job, working out the  
20 access to the site, it is not just a matter of putting numbers against a measured bill. In some  
21 trades it may be – painting or whatever – but certain trades it requires quite a lot of input from  
22 the subcontractor, such as glazing, cladding, the external building, they need to work out  
23 what they need to gain access to a restricted site, etc., so there is quite a lot of work  
24 involved.

25 Q Is this the case with this particular project, do you recall?

26 A I can't recall details of the particular job, but I suspect – again I can't particularly recall the  
27 specific job, but I would suspect a job like that could possibly have access issues.

28 Q Perhaps you could jog your memory by looking at one of the letters that were sent from you  
29 to one of your subcontractors for cladding, that is in the first of your bundles at tab 5, and it  
30 is at p.138?

31 A Yes.

32 Q You can see there you have a standard letter, you say that you are “currently tendering for  
33 the above project on a build only basis, and invite you to submit your quotation for  
34 cladding.” Then you set out the particulars there?

1 A Yes.

2 Q There is nothing in that, is there, that indicates that this was a particularly complicated job,  
3 and the subcontractor needed to look at the quantities. You sent the preliminary pages, the  
4 spec. pages, the extract from the bills of quantities, and the drawing numbers. You give  
5 them further conditions, and you were asking them to price the job up and send it back to  
6 you, were you not?

7 A Correct, yes. The subcontractors are expected to visit the site as we are as main contractors.  
8 We sent the drawings, they could tell from the drawings if it was a complex job, and as we  
9 cannot claim a lack of knowledge of the site, if we have not done a site visit we cannot  
10 suddenly turn up once we have priced the job and say: "We didn't realise we couldn't go  
11 down that road", or whatever, or "We couldn't close that road off". So it is the  
12 subcontractor's responsibility, even if it is not spelt out in that particular page.

13 Q Looking at what you had to do was send out those letters to the various subcontractors  
14 telling them the relevant bits from the bill of quantities, and the relevant pages and then they  
15 would price up the job, if necessary going off to a site visit first?

16 A Correct.

17 Q So this would have been one of those cases where it was not extraordinarily difficult for you  
18 to send out your subcontract inquiries??

19 A I am just saying we wouldn't have done it because we either send things back, or we decide  
20 to proceed, no matter how complicated it is we decide to either not price a job at day 1 or  
21 day 2, or we proceed with sending out the documents.

22 Q You say in your affidavit at para. 16 that you remember speaking to someone at the  
23 estimating team at Totty?

24 A I have said that, yes.

25 Q And I understand that the reason was to get feedback on the likely outcome of the tender?

26 A Yes, what happens once you have submitted a tender a lot of the time the quantity surveyor  
27 will write to the contractors once the tender has been appointed and give a schedule of the  
28 tenders received, they will give a list of the contractors, and alongside that a list of the  
29 tenders, but not against the actual contractor, they will be mixed up so you don't know  
30 which contractor has priced, which is their price.

31 After certain tenders go in there can be quite some time before that letter comes out and, as  
32 a department, if you have got other tenders going in, it is important to know if you are in the  
33 running for particular jobs, and it is not something we did particularly frequently. As I say,  
34 I was never one for really speaking to other contractors. It is probably an accepted practice

1 once tenders have gone in and once the client has a chance to look at tenders, for a  
2 contractor to ring another contractor and swap prices. Again, it is something that I would  
3 speak to Jim about if somebody rang me to swap prices. This particular job we were  
4 interested and it was a reasonably – looking at the value, quite a big job, so we were keen to  
5 know where we stood, and we are keen to know where we stand on any jobs, because we  
6 wish to know where the market is, so even if you do not come lowest on the job, if you  
7 come last, or whether you come third, it gives you a feel for the market in terms of where  
8 people are pricing jobs these days, yes.

9 Q Why did you not just call the client's quantity surveyor to find out what the different tender  
10 prices had been?

11 A The quantity surveyors are particularly secretive about prices, and it was easier to pick the  
12 phone up in this particular case, and once we knew we were out of it we moved on.

13 Q Can you recall when it was that you spoke to Totty?

14 A I can't recall exactly the time, no; some time after the tender went in clearly.

15 Q And can you recall for this particular tender how you had got the information that Totty was  
16 tendering?

17 A Quite often, when you are tendering a job and you send out to may be four subcontractors  
18 for each trade, as an average, say, and inevitably some of them do not come back on time,  
19 so you pick the phone up: "Where is my price for decorating" or whatever, and they say:  
20 "Yes, I'll have it for you tomorrow. Oh, by the way I've received the inquiry from Totty's,  
21 from Irwins, from whatever, so whatever bit of paper is near to you on your desk, you  
22 scribble that down, it's just a little bit of information, it doesn't particularly affect your own  
23 particular tender, but it's information that is pretty readily available, perfectly legally during  
24 the tender process.

25 Q So you knew, before you submitted the tender, that Totty was going to be submitting a bid?

26 A I can't remember exactly when we were aware of Totty submitting a tender. It may have  
27 been during the tender process, it may have been subsequent to the tender process, because  
28 after a tender is submitted inevitably the subcontractors who could possibly have priced two  
29 or three named contractors will ring you up and say: "Are you in the running for such and  
30 such a job? I've spoken to so-and-so and they've not heard anything" so it's quite  
31 conceivable that that information was made available after the tender submission.

32 Q Did you just ring Totty, or did you ring any of your other competitors?

33 A From memory we only rang Totty. We did not have a relationship with Totty at all. Around  
34 about that time there were a lot of new contractors around and a lot of them were getting

1 very keen, and while certain contractors like ourselves, like Totty, had been around for a  
2 while, were fairly established names, it was better in that situation to speak to an established  
3 name.

4 Q If you just rang Totty how did you know what the result of the tender would be?

5 A Because we knew our figure and we knew we weren't the lowest.

6 Q But you have already given evidence to the court that price wasn't everything?

7 A Yes, correct, within reason. I think in that particular case there was quite a gap. We had  
8 obviously over-egged it completely in our tender, which sometimes happens, so it was  
9 highly unlikely that we were going to be spoken to by the client. If you price a job, say a £3  
10 million job and, say, there's £50,000 between the first and the second then yes, there's a fair  
11 chance, even on a straight forward tender, that the client will call you in and discuss your  
12 tender. If there is half a million between you and the lowest then it is highly unlikely.

13 Q In this case there was actually £200,000 between your bid and Totty's. Your bid was  
14 £4,795,210 and Totty's was £4,604,432, so how would you have known that you were out  
15 of the running at that point if you did not speak to any of the other ----

16 A Because it wasn't a design and build job. I think on a bill of quantities, if you're £200,000  
17 out on a bill of quantities then it's highly unlikely that you're gonna get called to an  
18 interview. On a design and build job the gaps can be much wider because, as I explained  
19 earlier, in terms of the bid the price isn't necessarily everything. But, this was a  
20 straightforward bill of quantities from what I can recall.

21 Q Right. So, you are saying that on straightforward bills of quantities jobs around the relevant  
22 time period between 2000 and 2005 price was essentially the determining factor.

23 A It was very much more the determining factor rather than on a design and build job because  
24 everybody had priced the same quantities and in theory if the QS had done his job correctly  
25 it really should be a first past the post situation, depending on any particular qualifications  
26 that the contractor may have put forward with his tender.

27 Q You say that you discussed calling Totty with Mr. Shann.

28 A Correct.

29 Q Can I ask you to turn back in the same bundle - Bundle 2 - to Mr. Shann's affidavit at Tab  
30 13, p.7? Can I ask you to turn to para. 31. Mr Shann says that,

31 "John Naylor, our estimating director, recalls that at some point after the date of  
32 return for tenders he telephoned Totty's estimating department ... John Naylor  
33 cannot recall who he spoke to at Totty ... John Naylor recollects that after

1 speaking to Totty, his conclusion was that there was little likelihood of GMI  
2 securing this project ----“

3 A Correct.

4 Q Is he reporting in this affidavit a conversation that you had with him for the purpose of  
5 preparing the affidavit?

6 A That's a complex question.

7 Q Let me put it another way.

8 A Can you just explain that, please?

9 Q He is not giving direct evidence of the conversation. He is saying that you recall the  
10 conversation. So, this implies that he spoke to you at some point later and that you told him  
11 about it at some point later. I am asking you when you spoke to him about it. Would it  
12 have been for the purpose of him preparing this affidavit?

13 A No. I spoke to -- I would speak to Jim immediately after the 'phone call to Totty's,  
14 assuming he was in the office. I spoke to Jim -- Any events that affected GMI and the  
15 estimating department we discussed every day, and we were both kept -- Jim was kept fully  
16 informed of any 'phone calls such as that.

17 Q Mr. Naylor, it will be the OFT's case that he does not recall that conversation because it did  
18 not take place. Do you accept that?

19 A I think Jim can't recall every conversation we've had over the last twenty-five years, with  
20 respect.

21 Q It will be the OFT's case that in fact on this tender you did take a cover price from Totty's.  
22 Do you accept that?

23 A No, I don't accept that.

24 Q It will also be the OFT's case that you, or somebody at GMI, gave a cover price to Irwins  
25 in relation to infringement 14 in relation to Lancaster Park, York. Do you accept that?

26 A I don't accept that, no.

27 Q I have no further questions.

28 MR. ROBERTSON: I have only one question for re-examination.

29 Re-examined by Mr. ROBERTSON

30 Q You were taken to a letter that you sent to a subcontractor in relation to 'phone 228.

31 A Correct.

32 Q How many subcontractors would you contact for a job such as that one?

33 A For a job such as that you would probably go out to maybe -- say there were probably  
34 twelve to fifteen different trades. So, say, average fifteen. You'd send an average of

1 possibly four subcontractors per trade, which is obviously sixty as a guide - possibly more,  
2 depending on if one particular element of the building was quite important and quite a large  
3 element of the building. You may even go to six. So, you can send anything between fifty  
4 and a hundred enquiries out.

5 Q How long does that process take of sending out those enquiries.

6 A Well, again, depending on the complexity it could take two to three days, or even up to a  
7 week. If there's a lot of drawings to copy and a lot of drawings to send out, certainly if we  
8 have a four week tender period certainly the first week is spent sending out enquiries -  
9 because we send out not just for subcontractors, but we also send out material enquiries for  
10 the cost of things like concrete, hardcore, any particular bricks, stone -- So, it is a long and  
11 necessary process, I'm afraid.

12 Q I do not have any further questions for the witness. The members of the Tribunal may have  
13 further questions for you.

14 THE PRESIDENT: No. Thank you very much, Mr. Naylor.

15 (The witness withdrew)

16 (Short break)

17 MR.ROBERTSON: Sir, Members of the Tribunal, I now call Mr. James Shann.

18 THE PRESIDENT: Yes.

19 MR. DAVID JAMES SHANN, Sworn

20 Examined by Mr. ROBERTSON

21 Q Mr. Shann, can you give the Tribunal your full name and address, please?

22 A My name is James Shann. My address is Middleton House, Westland Square, Leeds, LS11,  
23 5UH.

24 Q Mr. Shann, can you take the file marked "File 2 of 2", and turn to tab 13, please?

25 A Yes.

26 Q You will see that it is headed "affidavit of James Shann", can you just flick through that and  
27 confirm it is copy of an affidavit that you swore on 26<sup>th</sup> June 2008?

28 A It is.

29 Q I know there are two points of correction that you have alerted my instructing solicitors to.  
30 The first is on p.5, and the heading there: "1987 – 1996" above para.18 I am told that that  
31 should read "1996 – 2008" is that correct?

32 A That's correct.

33 Q The other point of correction – I do not think, strictly speaking, it is actually a point of  
34 correction, it is just a point of information for the Tribunal, there is reference at para. 18 to



1 Mr. Nelson being appointed senior estimator at William Irwins Ltd and then para. 21 a  
2 reference to “Irwins Ltd” and you have said that you are not sure of the exact changes in  
3 name and company format between 1996 and 2008. For the Tribunal’s note Irwins is  
4 described in the decision at paras. II.747 to 768, pp 146 to 149. I do not think there is any  
5 need to put in a formal correction, that is just for information. Subject to those points, Mr.  
6 Shann, are there any other corrections you wish to make to your affidavit?

7 A No.

8 MR. ROBERTSON: My learned friend, Miss Bacon, has some questions for you.

9 Cross-examined by Miss BACON

10 Q Mr. Shann, can you turn to the second page of your witness statement, please?

11 THE PRESIDENT: Is that the witness statement?

12 MISS BACON: I am sorry, it is confusing because there were two affidavits to start off with, and  
13 then there was subsequently a witness statement, it is an affidavit. (To the witness): You  
14 refer on that page to your policy of returning documents if you felt that you were unable to  
15 submit a tender, and you say that your secretary found 24 letters to that effect, and that  
16 those were annexed to your affidavit. Can I ask you to turn to vol.1, it is marked “1 of 2”  
17 and behind tab 5, p.151?

18 A Yes.

19 Q That is a page which says: “Tab 11 Letter from GMI to clients declining to tender”?

20 A Correct.

21 Q If you then look at the letters in that clip there, from p.151 onwards, that is all the letters that  
22 your secretary found, as I understand it?

23 A That’s correct.

24 Q These are not signed, so they look as though they have been pulled off your IT system, is  
25 that right?

26 A I would think that’s right yes.

27 Q So am I right in thinking that this is the lot that was on your IT system, from 2000 onwards?

28 A It’s the only ones that my secretary could find at the time of the investigation.

29 Q And they cover the period from 10<sup>th</sup> November 2000 and the last of the letters is 15<sup>th</sup> May  
30 2008, and that is at p.175?

31 A Correct.

32 Q So there are none that you found and decided not to put in?

33 A No, those are all the letters that my secretary found. I think what you have to remember is  
34 that over a period of whatever it was, 2000, 2010 that the typewriters at work have changed,

1 and systems change, so sometimes the systems get destroyed. Those were the only ones she  
2 could find in existence. I'm not saying that's the only ones that ever took place, but we did  
3 have a record of returning documents, and sometimes it was done orally and sometimes it  
4 wasn't.

5 Q Can you turn to p.165, please?

6 A 165?

7 Q Yes, it is a letter dated 12<sup>th</sup> January 2004?

8 A Yes.

9 Q This seems to be a letter following an email from the client and what you seem to be saying  
10 is that you had agreed to look at the tender documents to see if the timescale was realistic,  
11 but you had not agreed to tender by the deadline. What then happened, according to this  
12 letter, is that you sent out some subcontract inquiries, got back a fairly negative response as  
13 you say and you decided that you could not tender within the deadline, and so you returned  
14 the papers to the client. Is that right?

15 A That is what the letter says, yes.

16 Q And there seems to have been awkwardness with the client which you are referring to in the  
17 last paragraph of your letter, after you did that?

18 DR. SCOTT: Sorry, just for the transcript, "the letter" is from Mr. Naylor, not from Mr. Shann.

19 MISS BACON: The letter is from Mr. Naylor, not Mr. Shann, but they are annexed to the  
20 affidavit of Mr. Shann, which is why I am taking Mr. Shann to it. I was asking Mr. Shann  
21 what he was saying, not what Mr. Naylor was saying, you are right. (To the witness): Do  
22 you remember this incident with the client?

23 A I don't recall it at all, no.

24 Q Are any of the other letters that you have annexed to your affidavit cases where you have a  
25 similar incident with a client that you accepted the tender initially and then sent out  
26 subcontract inquiries and then were returning it after that?

27 A That is these letters in here?

28 Q Those letters, yes.

29 A Can I flick through them?

30 Q Yes, you can do that.

31 A (After a pause) I can't recall any of the letters in the terms of the jobs. Clearly, from some  
32 of the letters, the jobs just wouldn't have been applicable to GMI. Some of them would  
33 have been too small.

1 Q Do you accept that the letter that I have taken you to, January 2004, is the only letter as far  
2 as you are able to interpret it from the file that you have annexed to your affidavit where  
3 you are returning a tender after you have sent out sub-contract inquiries?

4 A That would appear to be correct.

5 Q I understand that you have now a strict compliance policy that prohibits any discussion of  
6 prices with a competitor, either before or after a bid?

7 A I can't honestly answer that question, because I'm not involved in the company any more. I  
8 am a non-executive chief executive. I have stayed on the company to maintain our  
9 relationship with existing clients. I've not been party to what has happened in the last two  
10 years.

11 Q Can I ask you about the time that you were intimately involved with tendering then. Is it  
12 right to say that there was not any compliance policy before the OFT investigation?

13 A There wasn't any compliance policy in place, no, it was an unwritten policy.

14 Q Is it fair to say that estimators might have given cover prices from time to time?

15 A Not with GMI, no.

16 Q Are you saying that throughout the time that you were at GMI estimators were never giving  
17 cover prices?

18 A No, that's not particularly what I'm saying. In the earlier part of GMI, Gilman Construction  
19 and GMI, when we first formed the company, like most new companies, it would be a  
20 single tender situation trying to get more work in, and I would think – I can't think of a  
21 specific incident – but I would think it is likely that, yes, we would have given or taken  
22 covers in the early 80s – early to mid-80s.

23 Q When do you say that that stopped?

24 A I would think around about early to mid-90s.

25 Q Do you accept that in some cases estimators might have given a cover price without telling  
26 you?

27 A I would say it's inconceivable at GMI that that would have happened.

28 Q Was there any specific written prohibition on giving cover prices?

29 A There wasn't any written documents. GMI wasn't run as a company where we had written  
30 policies. We'd all work together for a long, long time. The estimating department was  
31 specifically opposite my office in GMI. John and myself had worked together for – well,  
32 we have done now for 28 years. We only had one other estimator, Gary Peacock, who's  
33 been there for 20 years. We didn't need written documents. We spoke every day. If I was  
34 in the office we would have conversations about the tenders.

1 Q Did you ever specifically prohibit your two estimators from giving a cover price?

2 A It was agreed in principle that we wouldn't give – as the company progressed from the early  
3 80s to the 90s, it became apparent that with the type of jobs we were chasing there was no  
4 need for us to give cover prices or take cover prices.

5 Q On jobs where you have given a cover price, such as, as you say, a single stage tender with  
6 a bill of quantity supplied by the client, is there anything that would have stopped one of the  
7 two estimators from giving a cover price?

8 A We just wouldn't have done it. It just wasn't in our policy at the time. It would have served  
9 no purpose to help our competitors. Why would we want to do that? Why would we assist  
10 them in putting in prices when they're competing against us.

11 Q Can I ask you now about the alleged infringement 101, which was the Centurion Park,  
12 York, tender in March 2002. You refer to this in your affidavit at paras.22 onwards. This  
13 was the occasion when you say that Mr. Nelson rang up Mr. Naylor to ask for a cover price  
14 in March 2002. Is it fair to say that what happened on that occasion clearly stuck in your  
15 mind?

16 A I think the project as a whole sticks in my mind. The incident sticks in my mind, but the  
17 project – there's many a thing you can't remember in the industry. As a company, you  
18 price a lot of jobs. If I went back to 2000, you don't remember them, it's impossible, you  
19 get that many jobs. If you don't get them the file is binned and you move on. When you  
20 get a job where you've billed it and you live with it for whatever, two years, whatever the  
21 length that job might take from tendering it, to running through to get to a contract, to  
22 taking it through to completion, yes, that job sticks in your mind because you've got it warts  
23 and all. There's loads of problems with it and it's there, it's right in front of you. I could  
24 write a book about that job, yes.

25 Q Is one of the reasons that this particular incident sticks in your mind that this was the only  
26 time you had asked the client's permission to give a cover price?

27 A It doesn't stick in my mind for that purpose, no.

28 Q Was this the only time that you asked a client for permission to give a cover bid to a  
29 competitor?

30 A In my recollection, yes.

31 Q So there was no other occasion that either Mr. Naylor or Mr. Peacock came to you and  
32 asked if they could give a cover bid for a project?

33 A Not that I can recall, no.

1 Q Can I then take you back to the Lancaster Park infringement. This is the tender some two  
2 years earlier where, as you will be aware, the OFT says that someone at GMI gave a cover  
3 price to Irwins?

4 A Yes.

5 Q Presumably that was not a case where you went back to your client and asked for  
6 permission to give a cover bid?

7 A I would suggest, and I am speculating now because I'm going back to 2000, had that  
8 incident occurred as it has been alleged, then, yes, I would have taken advantage of that  
9 situation and I would have spoken to Irwins, most definitely.

10 Q Do you recall speaking to Irwins on that occasion?

11 A I didn't, no.

12 Q Your evidence on this in your affidavit amounts to saying that the relevant estimating  
13 director at Irwins was unreliable?

14 A That's correct.

15 Q What you do not say in your affidavit is that it is completely inconceivable that anyone at  
16 GMI could have given a cover price for this?

17 A I don't think I'd be sat here today if that was conceivable. You know, we're defending this  
18 situation.

19 Q Why did you not say that in your affidavit, Mr. Shann? Why did you not say, "GMI could  
20 not have given a cover price because I know, personally, my office is opposite that of the  
21 estimating director and they would have always told me"?

22 A All I can say is, we would not have given Irwins a cover on an Evans project.

23 Q Do you accept, Mr. Shann, that when you swore this affidavit you could not rule out  
24 entirely that a cover price might have been given on that project?

25 A I can categorically say we would not have given Irwins on an Evans project.

26 Q What was special about the project in Centurion Park which meant that you gave a cover  
27 price for that, but you would not have given Irwins a cover price for an Evans project?

28 A Can I have a little bit of time to explain the – it's not as straightforward. In the mid-80s,  
29 late 80s – I need to go back to a company we set up called Business Homes. Business  
30 Homes was set up by Simon Holmes. There was an ex, not colleague, associate that we'd  
31 worked with previously at the previous company. He set Business Homes up to do nothing  
32 but specifically B1 units, business parks on the outskirts of major towns near to motorways,  
33 etc. In setting that company up he asked GMI to join them as their preferred contractor, and  
34 we negotiated all Business Homes works from 1986 through to the present day. We helped

1 him progress that. He had an idea in his head how he wanted these units to work. B1 units  
2 are basically like 5,000 sq. ft. units, two storey units, sometimes were semi-detached,  
3 sometimes were detached. These parks were developed to suit small businesses or people.  
4 Then it progressed to hopefully they'd have new offices as they grew, and so on. It was a  
5 new concept that Simon had introduced. I know now round Britain there are numerous  
6 people that do it, but believe me Business Homes at that time, they were front runners in  
7 that, and they asked us to join them and come together and give our expertise on building,  
8 value engineering, to try and get the most economical unit on the market.

9 We progressed this through from, as I say, probably 1986 onwards. Even today, it's still  
10 being progressed, it is still thriving Simon Holmes is that kind of business person. We  
11 negotiated all these contracts for Business Homes and we went round the country. The first  
12 one was in York. There were various sites in Leeds. I went as Coventry, Peterborough,  
13 Stockport, numerous sites. His intention was he was going to build – to quote Simon, very  
14 optimistic, a million square feet a year. He never did, but there we go. We became known  
15 in and around Leeds as the B1 experts. That's without dispute, you can speak to anybody in  
16 Leeds, even now, and they would say that.

17 We did these projects from the design build. We're almost partners in this, we didn't take  
18 any profit from the development. We tried to work together as a team. If we were building  
19 five office blocks, we might be concentrating on one, and Joe Bloggs down the road might  
20 come and want to buy a unit, and Simon would say, "Can you stop working on that one and  
21 work on this one". We'd always entered – it was a team effort.

22 So we've got all this expertise and then along comes Barry Gregory, of Gregory Properties,  
23 who is an ex-colleague of mine. He's also a business associate. We've worked with him,  
24 we've negotiated jobs. We've done a lot of projects with Barry, and I went to see Barry  
25 because I learnt he was doing this Centurion Park in York, with a view to, "Look, we are  
26 the people to build this unit for you, we'd like to negotiate with you". We'd negotiated  
27 numerous contracts with Barry in the past. Barry explained to me at that time that, yes, he  
28 would like to do that, but his other director at the time wanted on this occasion to go out to  
29 tender. He said he was going to keep it to a fairly limited amount of tenders and ideally we  
30 would be the preferred contractor, but that's what his other directors wanted to do.

31 Barry then employed a quantity surveyor called Mike Summers. I would hazard a guess,  
32 I'm speculating, that Mike Summers was the one that would probably instigate Irwins going  
33 on to that tender list. They were well known within Leeds as working together very closely.

1 So that sets the scenario. We wanted to negotiate with Barry on Centurion Park, but his  
2 directors wanted it to go out to tender. We priced that job, we were in the throes of pricing  
3 it when Irwins approached John Naylor if we could give him a cover, which, in a sense, was  
4 like music to my ears. You stick there, John ----

5 Q I am sorry to interrupt, I actually was asking what was special about that that was not the  
6 case for the Evans job, and you said quite categorically, "I would not have given a cover  
7 price to Irwins for the Evans job". I understand what you have said the alleged  
8 infringement 101, and you are explaining to the court why you went to the client then. Can  
9 you explain to the court why you would not have got permission in relation to the Evans  
10 job?

11 A I didn't get permission from Evans because the incident didn't occur. What I did say, if that  
12 incident had occurred -- had they come to GMI and John Naylor would undoubtedly have  
13 told me that Evans wanted cover, I would most likely have spoken to Irwins about it.

14 Q So, your evidence is not that you would not have asked Evans. Your evidence is that you  
15 would not have asked Evans. Your evidence is that you just cannot recall Mr. Naylor asking  
16 you for permission on that tender.

17 A I can't recall it because it didn't happen.

18 Q Can I ask you about infringement 228? That was the Leeds College of Art & Design job.

19 A Yes.

20 Q You say in your witness statement at para. 30 that once you have sent out enquiries to  
21 subcontractors you are fully committed to the estimating procedure.

22 A Correct.

23 Q You say that this is because sending out enquiries is very expensive. I have taken you to the  
24 letter in January 2004 where you did send out enquiries to subcontractors and then found  
25 out that you could not price the job in time. Presumably there were other occasions when  
26 that occurred?

27 A Not specifically when -- There might have been occasions. I can't recall it. But, we have  
28 sent jobs back - not numerous - in the middle of a tender process and I can only think --  
29 Two spring to mind in the last four or five years.

30 Q So, there were occasions when you started off sending out subcontractor enquiries and you  
31 were in the middle of the tender process and you realised that you could not price up the job  
32 and you decided not to do it.

33 A As I've said, there's two incidents that spring readily to mind in the last four or five years of  
34 my term in office.

1 Q Do you accept that this might have been an occasion when for this job you got half way  
2 through the project? You got some of the subcontractor enquiries back and you decided not  
3 to submit a competitive tender and to take a cover price from Totty.

4 A No, I don't think so because, as I've just explained previously, these occasions are rare and  
5 they do stick in your mind because it does hurt if you spend, between them, let's say,  
6 £5,000 and £10,000 to start sending out enquiries and start an estimating procedure, and  
7 then you have to turn it in for whatever the reason might be -- The reason when we turn the  
8 other two projects in was insufficient and bad information. You know, we just couldn't get  
9 it out of the team, so we sent -- In the end, we passed it down to them, and they came back.  
10 You know, you've got to cut your losses eventually.

11 Q Can you look at para. 31 of your witness statement? You say that,  
12 "John Naylor, our estimating director, recalls that at some point after the date of  
13 return of tenders he telephoned Totty's estimating department --"  
14 Further on you say,  
15 "John Naylor cannot recall to whom he spoke at Totty ... John Naylor recollects that  
16 after speaking to Totty his conclusion was that there was little likelihood of GMI  
17 securing this project".

18 Am I right in thinking that you learnt about this incident while you were in the course of  
19 preparing this affidavit?

20 A Sorry? Can you be more explicit?

21 Q What you say in your affidavit is that Mr. Naylor 'recalls' that. You say that at several  
22 points in this paragraph. Am I right in thinking that you do not have any direct recollection  
23 of this -- that you are reporting what Mr. Naylor had told you at some point?

24 A That's what it suggests, yes.

25 Q Am I right in thinking that he must have told it to you for the purpose of preparing this  
26 affidavit?

27 A Well, when the allegation came in, obviously we did our research as to, you know, we'd  
28 been alleged of actually taking a cover from Totty. I mean, we try and look back in the  
29 documentation to see what -- But, unfortunately, the jobs when we've priced them -- the  
30 files are thrown away. I mean, you don't save things. You'd just disappear under paper if  
31 you saved all -- So, you're trying to go through recollections - hence why I started ringing  
32 round subcontractors to get in my own mind how we priced this job. Did we send out  
33 inquiries? Yes, we have. If we sent out inquiries, we would have priced that job.

34 Q My question is whether you have a direct recollection or whether this is reporting ----



1 A I have not a direct recollection of that particular contract, no.

2 Q And you do not have a recollection of this particular conversation that Mr. Naylor says he  
3 had with you. (After a pause): You do not recall Mr. Naylor coming to you at that point  
4 and saying, "Let us take a price from -- Let us 'phone Totty and see what price they put  
5 in"?

6 A I can't ----

7 THE PRESIDENT: He does not actually say that. He says, "Mr. Naylor recalls that at some point  
8 after the date of return he telephone ----"

9 MISS BACON: I am sorry. I should perhaps take you to what Mr. Naylor says about this which  
10 is at the following tab, right at the end of that bundle. At para. 16,

11 "Following submission of our tender, Jim Shann and I discussed that it would be  
12 useful to obtain feedback in relation to this tender. We discussed which company  
13 would be a good compromise, knew Totty ..."

14 Now, I am asking you, do you have any recollection of this conversation with Mr. Naylor?

15 A No.

16 Q If Mr. Naylor had decided to take a cover price at the last minute on this job, is it  
17 theoretically possible that he could have done so without you knowing?

18 A Absolutely not.

19 Q I have no further questions.

20 Re-examined by Mr. ROBERTSON

21 Q Mr. Shann, you say that you do not recall having the conversation with John Naylor about  
22 the post-tender discussion with Totty. Did you discuss post-tender feedback with other  
23 known tenderers with Mr. Naylor as a matter of practice?

24 A It was an everyday occurrence. You know, if I was in the office there wouldn't be a day  
25 didn't go past that I wouldn't speak to both estimators about situations that were developing  
26 or had developed.

27 Q You were asked about the letters that were sent via Mr. Naylor and Mr. Peacock returning  
28 tenders. When tenders were returned, were they always returned with a letter?

29 A No. Sometimes they'd be done orally. I mean, in the file there, there's information from  
30 Leeds City Council. Leeds City Council had a system where they'd actually ring either  
31 myself or John Naylor up, asking if we want to tender for a job. We'd probably discuss it  
32 and decide whether it was appropriate; whether we had the resources. I think we counted  
33 something like fifty out of sixty-seven where we said, "No" orally. I mean, I think there's

1 probably a couple of occasions where we did get documents and sent the letters back, and  
2 eventually changed us minds, but, no, it wasn't always done by letter.

3 Q You said in your evidence that Evans were an important client. We are talking about an  
4 alleged infringement in 2000. Was Evans an important client in 2000 for GMI?

5 A Well, yes. I mean, Evans have always been an important client. We had a spell around, say,  
6 1998 to 2002 where we did very little work with Evans. Prior to that, we'd done a lot of  
7 work -- a lot of prestige contracts with Evans where they wanted a preferred contractor who  
8 they could rely on. They'd got some big tenants to go into buildings - major projects in  
9 Leeds. They wanted the comfort from someone that they knew. They'd get a quality build  
10 and it'd be built on time. There'd be no claims. Unfortunately things change in companies.  
11 My initial contact at Evans was a man called George Best. He was the managing director  
12 there. He actually died of cancer in '95. He was replaced by John Bell. The policy  
13 continued. They still had a lot of projects, did Evans. Yes, they had some major clients to  
14 go in their buildings. They negotiated contracts with GMI. The last one, as I recall, was  
15 about '97. We built an office block for the Environmental Agency. There was one or two  
16 minor problems that occurred on that building. This wasn't a design and build project. This  
17 was - how can I call it? - a conventional contract where they employed the architects and  
18 the quantity surveyors, engineers and we were the builders. There were one or two  
19 problems occurred after that event, and, as you do, you've got a twelve months defect  
20 period, and we thought we'd cleared all these defects, and it came to my knowledge later on  
21 that some of the defects hadn't been cleared, and there was a bit of -- I won't say a dispute,  
22 but there was a difference of opinion as to where the problem lay in terms of what it choice  
23 of materials that made the problem or was it one of workmanship? So, we had that minor  
24 setback with that job, and at the same time Evans -- Philip Turner was promoted to look  
25 after all the developments in Evans, and Philip's remit at that time was, "We're gonna  
26 tender everything in this given period", which was fine. We'll tender. But, they didn't have  
27 any major projects -- didn't have any major clients going into the buildings. So, they had  
28 time to go out to tender and they could just get a better feel of the market. So, yes, I mean,  
29 there was a period for four years where everything I think Evans did they tendered it.

30 THE PRESIDENT: That is the 1998 to 2002 period.

31 A Well, certainly until 2002. Whether it was '98 -- It was '98/99. It's in that period. I'm  
32 not saying we didn't -- The relationship didn't end there, but there were various reasons  
33 that sent them out to the market rather than negotiate the jobs. The jobs were fairly what I  
34 call medium-size contracts ranging from £500,000 to £2 million maximum - most of them

1 spec units. So, they had time to look in a different light. Philip Turner, at that time,  
2 couldn't see value unless it got the lowest price - which is fine. I mean, that's how some  
3 people work. But, all I can say is as soon as Evans, after 2002, got a major job - which was  
4 around about 2002/2003 -- They had a site down at Fradleigh and they had chance of  
5 pulling a major distribution unit there - pre-let. They needed certainty with a contractor.  
6 They needed certainty with price. They needed certainty with quality and programming.  
7 John Bell invited me down there and said, "We'd like you to come back. We'd like to carry  
8 on as we were in '98, Jim. Will you form part of the team and we'll try and pull this job  
9 together?" So, yes, the relationship started again. You know, they started getting one or  
10 two big jobs and we've negotiated. You know, we've had numerous contracts with Evans  
11 since.

12 MR. ROBERTSON: Thank you very much. The Tribunal will note that there is a witness  
13 statement from Mr. Turner, served with the Notice of Appeal. I do not have any further  
14 questions for this witness.

15 THE PRESIDENT: Dr. Scott has a question.

16 DR. SCOTT: Just to look at what typically happens in circumstances where you were returning  
17 documentation, most of the letters in the bundle that we have looked at do not tell us the  
18 date of the incoming documentation. They merely give us the date of the outgoing one.  
19 But, the ones which do have both the incoming date and the outgoing date are typically  
20 between one day and six days. Does that reflect the fact that you would fairly rapidly take a  
21 decision on whether you were going to do the necessary work or return the documentation?

22 A I think that's true. You know, we're a very much hands-on company. We haven't got other  
23 area offices to consider. GMI Construction is the office in Leeds. The decisions were made  
24 by myself and John Naylor and the resources in the estimating, and, of course, the resources  
25 of the company. So, yes, it would be a fairly quick decision. I didn't have to have a board  
26 meeting, that's for sure.

27 Q Thank you.

28 THE PRESIDENT: Thank you very much, Mr. Shann.

29 (The witness withdrew)

30 MR. ROBERTSON: That concludes the oral evidence. The Tribunal will be aware that there is,  
31 in fact, considerable witness evidence served by GMI. You have heard from Mr. John  
32 Naylor and Mr. James Shann. There are also witness statements from Mr. David Shann of  
33 GMI and, as I have already mentioned, we have served witness statements from third parties

1 - that is to say, Mr. Philip Turner of Evans and Mr. John Burnley, who is an independent  
2 quantity surveyor.

3 THE PRESIDENT: Yes.

4 MR. ROBERTSON: We have set out in our skeleton argument our submissions on the approach  
5 to the evidence and I do not really want to spend very much time on the approach to the  
6 evidence. It is in our skeleton argument in paras. 7 to 28. The OFT's approach is  
7 essentially to say that infringement by GMI is not inherently improbable, and we refer to the  
8 observations of Lord Nicholls in the *Re H* cases and some of the OFT's skeleton.

9 It is certainly true that cover pricing in the past was endemic, that does not mean it was an  
10 epidemic in which everyone was infected. We have heard this morning evidence, consistent  
11 evidence, from both Mr. Naylor and Mr. Shann as to the occurrence of cover pricing on a  
12 sporadic basis when GMI was first set up in the 1980s, that it was a practice that as far as  
13 GMI was concerned had ceased to have any relevance by mid-1990s.

14 As regards to inherent probability, there is one point just to bear in mind for GMI. Most  
15 addressees of the Fast Track Offer from the OFT accepted it. For us the Fast Track Offer  
16 would have made a difference, as the fine ultimately turned out, of £438,146, so the thick  
17 end of half a million pounds.

18 As you will have gathered, GMI is a proud Yorkshire firm, and everyone knows that no  
19 Yorkshire man will take a coverly approach to being parted from their money. The fact that  
20 GMI is appealing and does dispute these findings of infringement, we say indicates that  
21 plainly it feels it did not infringe, and that it must have sound reasons for that belief. That  
22 is what marks us out of the run of the mill.

23 As regards the Tribunal's approach to weighing the evidence, we have set that out in  
24 writing. The basic observation is that there is no witness evidence from the OFT, they base  
25 their case on documents, that is to say transcripts of interviews with leniency applicants,  
26 and the tender book in relation to the first infringement, what we have called the "Totty  
27 Tender Sheet" in relation to infringement 228.

28 On the interviews, the individuals interviewed by the OFT were clearly doing their best to  
29 assist but the transcripts of the interviews are not witness statements. Interviewees were  
30 obviously read the standard warning about the need not to give false and misleading  
31 information. But it is plain that the transcripts of the interviews have not been prepared  
32 with the care and attention to detail that would be expected of a witness statement. We have  
33 seen evidence of that in relation to the OFT's eleventh hour attempt to revise the transcript  
34 of the interview with Mr. Rhodes of Totty, at para.28 of their skeleton. Hopefully the

1 Tribunal will now have seen our reply skeleton to see what we have to say about that. We  
2 say that is indicative of the caution with which one has to approach these transcripts. The  
3 OFT will never complain about us advancing a case in the notice of appeal that was not  
4 advanced in response to the statement of objections. The OFT has not sought to go back to  
5 any of the interviewees to obtain witness statements, and therefore the evidence cannot be  
6 tested in the way that Miss Bacon tested the evidence of Mr. Naylor and Mr. Shann.  
7 In reality the OFT's case relies entirely on documentary evidence. We say properly  
8 understood, that documentary evidence provides no corroboration.

9 I think the best thing to do is to go through the evidence as it is in the decision in relation to  
10 each of the infringements, and I am going to go through this at a relatively steady pace; if I  
11 am going too slowly the Tribunal will let me know, but I think you just need to look at each  
12 of the documents carefully and understand them for what they are.

13 Infringement 14, the alleged cover to Irwins in June 2000.

14 The pleadings – there have been several rounds of pleadings – it is worth just reading out  
15 the references so that they are on the transcript. Infringement 14 is in the decision at paras.  
16 IV.863 to 893. The notice of appeal paras. 19 to 33, the OFT's defence paras. 11 to 16,  
17 GMI's skeleton, paras 29 to 90, and finally the OFT's skeleton paras. 15 to 21.

18 In essence the OFT's case is that someone at GMI gave a cover price to Irwins in June 2000  
19 on a tender to FR Evans Leeds Ltd for an office development at Lancaster Park, York.

20 GMI has no record of this tender. As is common practice in the industry, documents are not  
21 retained where a tender is not successful – there is no statutory reason to retain the  
22 documents and there is no commercial reason to do so ever, and it is absolutely consistent  
23 across the industry that people do not.

24 The evidence relied upon by the OFT consists of three documents. First, an interview with  
25 Mr. Nelson of Irwins, sub-paras. 12 (c) to (d) of the OFT's defence. A reference in Irwins'  
26 tender register to GMI, that is para 12(a) of the OFT's defence, and a reference in a tender  
27 submission to GMI, para. 12(b) of the OFT's defence. I will go through each of those in  
28 turn.

29 Mr. Nelson of Irwins, was interviewed by the OFT as part of Irwins' leniency application.  
30 The transcript is in fact in three parts, and for your reference I use the OFT's document  
31 reference numbers, the middle part of the interview 11254 is at annex 5 to the OFT's  
32 defence, and then the first and third parts of the interview are documents 11253 and 11255  
33 and they are annexed to our skeleton at annexes 1 and 2.

1 There are other documents referred to in that interview, these are a list of tenders given and  
2 taken compiled by Mr. Nelson. That was supplied to the OFT as part of Irwins' leniency  
3 application. The information was taken from the Irwins' tender register and some other  
4 documents, and he explained in his interview that he had compiled those lists purely by  
5 reference to the contemporaneous documents. They were not contemporaneous documents  
6 themselves – it is not as if Mr. Nelson was compiling as he went along from 1999 to 2006 a  
7 list of tenders given and taken, it was merely a document that was put together for the  
8 purposes of the leniency application, it has no independent evidential value – that is  
9 contrary to the OFT's assertion in para. 13 of the defence that they somehow do.

10 He also, as part of Irwins' leniency application, compiled a directory of individuals with  
11 whom he has had contact as other construction firms gave their contact details, and that  
12 makes reference to Mr. Naylor of GMI. Again, that is a document that was put together at  
13 the time of the leniency application, it is not a contemporaneous document and we say it has  
14 no evidential value. It is merely a list of names, contact details, to assist the OFT with its  
15 investigation.

16 The OFT has accepted, as I read sub-para. 17(a) of their skeleton that its case in relation to  
17 Mr. Nelson's evidence relies upon his interpretation of documents when he has no  
18 recollection of the actual event. When questioned about the reference to GMI on the  
19 Irwins' tender register in relation to the Irwins' tender Mr. Nelson was clear in stating that  
20 he could not remember taking a cover from GMI on this occasion, and that is unsurprising  
21 because the interview was in March 2007 and the instance concerned was in June 2000.

22 I think it would be helpful at this point to turn up his interview, it is annex 5 of the OFT's  
23 defence. The passage that deals with the Evans' tender is on pp.22 to 23. You will see, if  
24 you turn to the top of p.22, there is a reference to "EF" who was the interviewer – Emma  
25 Fisher of the OFT – and the reference "IN", that is Mr. Nelson,, his full name is Ivan Peter  
26 Nelson although I think everyone refers to him as Peter Nelson. There you will see that the  
27 case officer refers to the Lancaster Park development. "... can you recall anything about  
28 that contract?" Mr. Nelson says:

29 "Yeah. This will be one that we have absolutely no chance of getting it."

30 "Why's that?"

31 "No chance of getting this job at all. Looking at that list, I don't recall it but I can  
32 just see from there now, if I came in now and I knew the competition, I would say  
33 that GMI would get that without even trying. They get 90 % of Evans work do all  
34 their design and build work."

1 As to that it is plain that Mr. Nelson says he does not recall it. He is attempting to  
2 reconstruct what happened by looking at the tender register, and the first thing he says is  
3 “Well, I see GMI’s name. I can just see from there now, if I came in now ...” so he is  
4 talking about March 2007, “... and I knew the competition” – “I knew that GMI were in  
5 competition” – “... I would say that GMI would get that, without even trying. They get  
6 90% of Evans work to do all their design and build work.”

7 He is wrong in making that inference, because in the period in question, as Mr. Shann has  
8 just explained to you, GMI had fallen out of favour with Irwins. In fact, during the period  
9 in question, 1998 to 2002, so two years either side of that contract GMI only secured one  
10 minor contract for repair work from Evans, and that is Mr. Turner’s evidence, his witness  
11 statement is in tab 11 of file 1 – I do not suggest you turn it up. He sets out there who  
12 contracts were awarded to and in tab 12 you will see there a list as he has provided of who  
13 contracts were awarded to at the time, GMI only picked up the odd contract. Their  
14 favourite contractor at the time was Stainforth – we will come back to Stainforth because  
15 our submission is it is likely that Mr. Nelson took cover from Stainforth, not from GMI,  
16 because that was his habit at the time. Stainforth are an addressee of the decision but have  
17 not appealed it.

18 What the OFT say about Mr. Nelson’s perception about the work going automatically to  
19 GMI is to argue at sub-para 15(a) of the defence that even if Mr. Nelson is mistaken about  
20 the amount of work obtained by GMI, this mistaken perception may still have been a cause  
21 of him taking a cover price of the tender. As we said in our skeleton, with respect, my  
22 learned friends are being obtuse. Mr. Nelson does not give any evidence as to his  
23 perception at the time in relation to this tender as (a), he is perfectly clear he has no  
24 recollection at all at the time; and (b), when you see what he says in interview, he is  
25 actually talking about his belief now in 2007. The OFT has not responded substantively to  
26 their point. They maintain their basis of the mistaken perception.

27 THE PRESIDENT: Are you planning to carry on with the interview?

28 MR. ROBERTSON: Yes.

29 THE PRESIDENT: We have the document.

30 MR. ROBERTSON: I think it would be helpful to understand how the tender book works that we  
31 are talking about. I have asked my learned friends to produce the original. It is not so easy  
32 working from the photocopies. I think my learned friend Mr. Singla has tabbed up the  
33 alleged infringement.

1 DR. SCOTT: May I ask you both, whilst it is coming up, if you accept that in most of these  
2 companies the sort of contact with sub-contractors that has been described from the witness  
3 box was likely to have taken place – in other words, that prospective contractors would  
4 learn from sub-contractors who else was likely to be in the running?

5 MR. ROBERTSON: We accept that, that is one of the ways in which people found out. You will  
6 see references to Mr. Rhodes, for example, of Totty talking about that. The other evidence  
7 that is given is that there were also information organisations – Glennigans is one of them  
8 that is referred to – who sold this information. They went out in the market to find what  
9 tenders were currently out there and they found out who the prospective contractors were,  
10 and that information was available commercially. I think there is also evidence that local  
11 trade associations also disseminated their information. Sub-contractors were a source, but  
12 they were not the source.

13 MISS BACON: It is also the OFT's position that that was one of the sources. In fact, a number  
14 of the leniency witnesses gave evidence that if they wanted to take cover for a particular job  
15 they would ring round the sub-contractors and say, "Who else is passing it up?" That would  
16 give them the information they needed to then phone the main contractor and take a cover  
17 price for that job. That is certainly our case.

18 MR. ROBERTSON: As to understanding the tender register. It was explained by Mr. Nelson in  
19 the opening part of his interview.

20 THE PRESIDENT: I am sorry to interrupt. We have got the original which we are just passing  
21 round. I have got a coloured version.

22 MR. ROBERTSON: Annex 4 of the skeleton argument.

23 THE PRESIDENT: That is the thing for us to look at?

24 MR. ROBERTSON: Yes, that is the document I would ask you to mark up, as it were.

25 MISS BACON: Sir, the only problem I have found with that version is – it is in wonderful in  
26 glorious Technicolor, but it has not got the page numbers at the bottom. In the version that  
27 is attached to the liability defence it does have page numbers. For that reason, in my  
28 submission, I was going to take you to the dim black and white version because of the ease  
29 of reference.

30 THE PRESIDENT: I think, as it happens, that is the one I have marked up. We will keep both of  
31 them open.

32 MR. ROBERTSON: I will take you to the colour pages when it is relevant. I think the first  
33 document to take you through is the opening part of Mr. Nelson's interview with the OFT in  
34 which he explains the tender register. That is in our skeleton bundle at tab 1, and it begins



1 at p.6 and continues to half way down p.8. Perhaps I could invite the Tribunal to read pp.6  
2 to 8 of that document. It is the one that begins on the opening page 11253, and it is the  
3 passage begins, "I have a book which you've seen", "A tender register". Can I invite the  
4 Tribunal to read through to p.8, the passage that ends with EF saying, "Aha", just before the  
5 first hole punch.

6 THE PRESIDENT: (After a pause) Yes.

7 MR. ROBERTSON: To explain what the tender register is, it is Mr. Nelson's contemporaneous  
8 record of tenders as they come in. You will see that, as the columns go across, they have  
9 columns that, as he explains, deal with the date on which the tender comes in, the left hand  
10 column, a description of what the project is, who the client is. Then in his fourth column,  
11 and sometimes the fourth and fifth column, there will be a brief description of the type of  
12 tender, bill of quantities, design and build, or whatever it might be. There is then a column  
13 in which either percentages or the letter "C", sometimes "cover" is marked. There is the  
14 column with the price that he has gone in at. There is the date which is the tender deadline.  
15 There are then columns for initials stating who dealt with the initial enquiry and who  
16 compiled the tender. Then the final column is the notes column. The key to understanding  
17 this register is that it was not all completed at the same time. It was a working document. It  
18 recorded tenders coming in. It recorded who had dealt with the enquiry, the relevant  
19 initials. The middle columns, dealing with the price that it went in at and the percentage,  
20 the percentage profit margin, or C – that is where Mr. Nelson had taken a cover – the price  
21 did not go in until he priced it up. His evidence was that he was putting in tenders right up  
22 to the deadline. He is either putting in a proper tender or he had taken a cover.  
23 If he had put in a proper tender he marked down his percentage margin. Of course, he could  
24 not do that if he had not priced it up, he would only know what the cover price was that he  
25 had taken. In those situations you do not find a percentage, you just find a "C" or "cover".  
26 Over the period there are about 450 tenders, over a seven year period from 1999 until  
27 March 2006, when the knock came. Over that period there were about 450 tenders and he  
28 appears to have taken cover on about 130 occasions.

29 The final column, "Notes", was, as he explained it in his interview at p.8. Officer Fisher  
30 asks him:

31 "And in the final column?"

32 It's just notes, really, which you'll see in there. It's just if I find out various people  
33 that happen to be in for the tender.

34 So, you'd note competition in the final column or ...

1 ... anything else that I might think of ... that might be of use.”

2 So what he is doing in the final column is, as he discovers who else is in for a job, he  
3 sometimes jots it down there.

4 You will discover who is in for a job well before you price one up or before you put in a  
5 cover price, because you will only get a price for the job if you price it properly relatively  
6 close to the tender deadline. Mr. Nelson’s evidence was that he was putting in tenders,  
7 sometimes the morning of the day on which the tender was due to be back.

8 For cover prices, you cannot take those in advance either, because even if you have not  
9 priced it up you are relying upon somebody else to do that and they have gone through the  
10 same pretty exhaustive procedure that Mr. Naylor referred to this morning of writing to sub-  
11 contractors, getting it back, and so on. So no one is in a position to give someone a cover  
12 price until relatively close to the tender deadline too. That means that the notation “C” or  
13 “cover” is going in there relatively late in the day, whereas you discover who else is in for  
14 jobs much earlier than that. So the notes column is independent of and separate to the “C”  
15 or “cover” column.

16 What the tender register does not show is Mr. Nelson saying, “Cover, yes, I am going to  
17 take a cover on this”, and, final column, “it is from, this is the person giving me the cover”.  
18 He does not describe that in his interview. He says the right hand column is for notes “if I  
19 find out who the competition is”.

20 Actually, when you look at the tenders and do the breakdown of the relationship of “C” to  
21 what is in the right hand column, the final column, you will see there is absolutely no  
22 correlation at all. What appears in the final column is not an indication, either as a matter of  
23 fact or inference, of who supplied a cover. The OFT’s case is that it is, but it plainly is not.  
24 The reason why we asked for the original tender register to be supplied is that infringement  
25 14 demonstrates this very neatly. If you look in the decision, and the tender register is  
26 printed out as a little table, it looks all very neat, “C”, cover, right hand final column,  
27 “GMI”. When we finally got hold of the tender register, which was not until quite recently,  
28 Mr. Garside and I inspected it at the OFT, and I will invite you over the short adjournment  
29 to have a look at that page, which I think has been flagged up by Mr. Singla, and you will  
30 see that the “C” is in pencil and the “GMI” is in pen. They have obviously been written  
31 down by Mr. Nelson at different times. We say the clear evidence is that he had jotted  
32 down GMI as being one of the competitors in for that particular tender. He had  
33 subsequently decided to take a cover, and that is why the “C” goes in, but the two events

1 took place separately. The OFT now make it clear that they accept that that is the cover.

2 They do not ask you to say that the two notations were made at the same time.

3 Sir, that might be convenient place to take a break.

4 THE PRESIDENT: We will see you at two o'clock.

5 (Adjourned for a short time)

6 THE PRESIDENT: Mr. Robertson?

7 MR. ROBERTSON: President, members of the Tribunal, I was taking you through the tender  
8 register to demonstrate lack of correlation between the word 'cover' and names appearing in  
9 the final column. I will take you to the statistics. As I have already said, the tender register  
10 contains details of about 450 tenders over a period from 21<sup>st</sup> June, 1999 to 14<sup>th</sup> March,  
11 2006. Having had the opportunity to inspect the original we can see - and this is all marked  
12 up and colour-coded on the copier annexed to our skeleton - that the headline figures are  
13 these: there are 130 entries which refer to 'C' or 'cover' in the fourth, or sometimes the  
14 fifth, column. Of those 130 covers - or where Mr. Nelson has recorded taking a cover - 41  
15 entries refer to two or more other construction firms in the final column, but in only six of  
16 those entries is the name of a competitor marked with an asterisk or by underlining. The  
17 other thirty-five entries have no other form of highlighting. So, there is nothing on the face  
18 of the document, as it were, to link cover and then someone going 'Tick - that is who I got  
19 the cover from'. Forty-five of the entries refer to one competitor in the final column. Forty-  
20 four of the entries - so, forty-four of the covers - do not refer to any competitors in the final  
21 column. So, on forty-four of the 130 occasions Mr. Nelson has recorded taking a cover but  
22 has not noted down a name in the final column. The reason we say that is the final column  
23 was actually something that he used to mark down who the other companies were in for a  
24 particular tender. That is the use he made of it. He did not use it as a means of recording  
25 from whom he took cover, except on six occasions, apparently - that is, six out of the one  
26 hundred and thirty entries.

27 THE PRESIDENT: That is because of the asterisk or the underlining.

28 MR. ROBERTSON: Yes. We are going to go to an example of this in relation to the alleged  
29 infringement 101. We are going to show how that one worked because my learned friend  
30 relies on that against us. So, those are the 130 entries where cover was taken.  
31 Out of 320 entries in which there is no record of a 'C' or a 'cover', 105 of those entries refer  
32 to two or more competitors in the final column. Forty entries refer to one competitor in the  
33 final column. Again, those entries show that competitors were being marked down not

1 because they were people that Mr. Nelson was taking cover from, but others who were  
2 known to be in as competing for that particular tender.

3 THE PRESIDENT: I am sorry. 105 refer to two or more.

4 MR. ROBERTSON: Yes. Forty refer to one. The remainder do not refer to any.

5 The OFT at sub-paragraph 15(b) of the defence say, "Ah! Look at alleged infringement 101  
6 - the Centurion Park contract". This is the one where GMI gave Mr. Nelson a cover price  
7 with the permission of the client. We discussed this this morning -- or, it was discussed by  
8 Miss Bacon with my clients this morning. In fact, when you look at this entry on the  
9 original tender register it supports our case and rebuts theirs.

10 THE PRESIDENT: Just tell us, is that the one you have marked?

11 MR. ROBERTSON: My learned friend, Mr. Singla, has flagged it up, I hope.

12 THE PRESIDENT: Yes, he has. Thank you.

13 MR. ROBERTSON: You will see when you look at that the date on the left is 13<sup>th</sup> February,  
14 2002 - Phase 1 Centurion Park. Design and build. Then, in the right-hand column you have  
15 three names marked there. Then, in different pen, in brackets, marked GMI. What we say  
16 that demonstrates -- The pen that GMI has been marked in also appears, when you look at  
17 the original to be the same pen in which the letter C has been written along with the cover  
18 price - £2,152,249. So, what that shows is that GMI was noted twice in the final column,  
19 first as one of the three competitors identified by Mr. Nelson and then again, later, but  
20 specifically identified through the use of brackets, as the supplier of the cover price.  
21 In our submission the Centurion Park entry thus demonstrates that a simple reference to a  
22 name in a final column, in a case where cover was taken, does not raise any presumption  
23 that the name was the supplier of the cover price because here it is clear, from the first time  
24 GMI's name was put in the final column, that it was not at that point supplying a cover  
25 price. That was only done on the second occasion when GMI's name was put in the final  
26 column again, identified by brackets on that occasion.

27 THE PRESIDENT: It may not matter in the slightest, but do we know what the other entries are  
28 in that final column, just out of interest? I cannot decipher those words?

29 MR. ROBERTSON: I will ask Mr. Garside, who is the expert on the tender register. I cannot  
30 quite make it out myself.

31 THE PRESIDENT: No. What I am not sure of is whether they are all contractors or whether  
32 there is some other comment made there. It does not matter at the moment.

33 MR. ROBERTSON: We have explored the Centurion Park contract this morning and the reasons  
34 why, essentially, as Mr. Shann says in his witness evidence, GMI did not want that tender to

1 be delayed, and therefore with the client's permission was willing to assist Irwins on that  
2 occasion.

3 We say that the conclusion that there is no necessary link between names in the final  
4 column and the taking of cover is unsurprising.

5 Mr. Garside has just passed up a note to confirm that the other three names there -- the other  
6 names there beside GMI are W. Birch and Finnegan. Those are both construction firms.

7 THE PRESIDENT: Thank you very much.

8 MR. ROBERTSON: So, as we said, the conclusion is that there is no necessary link between  
9 names in the final column and the taking of cover is unsurprising. If Mr. Nelson were  
10 making a call at the last minute and it was somebody he knew, there is no reason why Mr.  
11 Nelson would need to write down the name. It was enough for his system to write down a  
12 'C' or 'cover' rather than inserting a percentage profit margin as he did on properly priced  
13 tenders.

14 We accept that he did appear on six of the 130 recorded instances of taking cover to  
15 indicate that the cover had been taken from one of the parties in the final column by adding  
16 an asterisk or underlining a name. But, nothing of that sort appears in relation to the  
17 evidence tender.

18 The OFT also refer in their skeleton to two other infringements with the letter 'C' in the  
19 fourth column and the name of the competitor supplying cover in the final column. These  
20 are infringements 62 and 94. We say that neither example takes the OFT any further in its  
21 case on infringement 14 against GMI because the overwhelming evidence of the tender  
22 register, as a whole - and the Centurion Park contract is a specific example - demonstrates  
23 that there is no necessary link that in such a case the firm in the final column supplied a  
24 cover. Therefore, whatever might have happened in relation to infringements 62 and 94  
25 raises no presumption in relation to infringement 14.

26 Looking at those two infringements in fact we say that they do not demonstrate that there is  
27 a link or a correlation in the tender register as a whole with the entry of the 'C' and the  
28 name of the party providing a cover.

29 If I can deal first with infringement 62, it took place on 6<sup>th</sup> June, 2001. It is dealt with, for  
30 your note, in the Decision at paras. IV.1908 to 1929. Mr. Nelson identified the party from  
31 whom a cover was taken as being Lotus. He did so by reference to the name appearing in  
32 the final column. If I can ask you to look at what Mr. Nelson actually said, it is quite  
33 revealing. This part of the interview is annex 5 to the OFT's liability defence. Can I ask

1 you to turn up annex 5 and go to pp.13 to 14? The passage begins by the second hole punch  
2 with Officer Fisher saying,

3 "I think we can skip that one. Okay. The next one is .. We've got general  
4 building John Street Market, Bradford ...

5 Yeah. This actually was .. although it says City of Bradford, this was actually for  
6 Bovis ...

7 And do you, do you recall anything about the, the exchange of covers in relation  
8 to this contract or ...?

9 No. It would be back again, towards the end of the .. It'll be on a time basis,  
10 really".

11 So, he does not remember taking cover.

12 THE PRESIDENT: He says, "Yeah", does he not?

13 MR. ROBERTSON: He Says,

14 "No. it would be back again, towards the end of the .. It'll be on a time basis,  
15 really".

16 Yeah. Okay. Again, um, did you create that entry? Is that your handwriting?  
17 ...Yeah.

18 Yeah. Um, and again there's a C in the fifth column.  
19 A C there.

20 So ... That indicates to you that you took a cover.

21 I think Lotus on them, yeah.

22 And in the final column there's, ah, Lotus".

23 What he does not say is, "I know that's Lotus because I've noted it down in the final  
24 column and that was my system -- or, that was my practice. It's jogged my memory". He  
25 thinks it is Lotus, but he is not identifying the entry of the 'C' in the column and the entry of  
26 the name in the final column as there being any correlation between the two. If there were,  
27 he would have explained it, but he did not. He did not refer to any correlation or practice  
28 between noting down when a cover was taken and a name appearing in the final column. If  
29 he did, his answer would have been very different. Infringement 62 does not therefore  
30 establish what the OFT has to prove.

31 Turning to infringement 94 - 23<sup>rd</sup> February, 2002 - again, for your note, this is dealt with in  
32 the Decision at paras. IV.2706 to 2733.

33 Sir, I should also just add in relation to Lotus that Lotus accepted the OFT's fast track offer  
34 in relation to that infringement. So, they did not dispute infringement. They accepted the

1 fast track offer and they have not appealed. They have got a fine of, I think, £156,000. So,  
2 they have not appealed.

3 Infringement 94 on 23<sup>rd</sup> February. As I say, the reference is paras. IV.2706 to 2733. Again,  
4 I think it is instructive to have a look at that interview. This one is at annex 2 to our  
5 skeleton. The relevant passage is at pp.4 to 5. I think one might have expected this to stick  
6 in Mr. Nelson's memory because Officer Fisher says half-way down p. 4,

7 "Right. The next one is a proposed club, Fandango Morley, Leeds, dated 23<sup>rd</sup> of  
8 the 1<sup>st</sup> 02. do you recall anything about that contract?"

9 Yeah. I suggested it never, never happened. Absolute rubbish job for, for a  
10 nondescript client, some lady who lived in ..."

11 THE PRESIDENT: And then there was amusement on all sides.

12 MR. ROBERTSON: Yes. Exactly. Then Mr. Nelson said, "I took a cover on that".

13 It sticks in his memory. He can remember this because of the absurd name of the club.

14 "I took a cover on that partly because I didn't really have any money and, ah, it, I  
15 knew they were, anyway they were in for it. So ...

16 You knew Ellmore ...

17 Ellmore's was in for it and I, I think I went and had a look at it and I just said ...  
18 and in actual fact the job never went ahead" ----

19 Then he gives some more details about it. Then, as the amusement continues, Officer  
20 Fisher says,

21 "[laughs] Can you just confirm for me that this is your, um, your handwriting and  
22 your entry in the tender register?

23 It is, yeah.

24 And again in the fourth column there is a C. So, it indicates to you, you took a  
25 cover.

26 Yeah.

27 In the final column it says Ellmore. So that indicates to you that you took a cover  
28 from Ellmore".

29 What he does not say is, "Yes that's my system". What he says is, "Yeah, I knew they  
30 were". He has already given us he knew Ellmore was in for it, and that is why he recalls  
31 this, he remembers the specific details of this particular contract and that is how he  
32 identifies Ellmore. Again, that does not establish the correlation that the OFT seek to rely  
33 upon.

34 THE PRESIDENT: He is actually saying he did not take a cover though, is he not?

1 MR. ROBERTSON: Yes, I hesitate to place absolute 100 per cent certain reliance on these  
2 particular transcripts because, as we have heard from the OFT they are unreliable, but this  
3 did form the basis for infringement 94 and it was Irwins taking a cover from Ellmore's.

4 THE PRESIDENT: It does not seem to be saying so there, anyway.

5 MR. ROBERTSON: That is what the OFT found.

6 MISS BACON: Sorry to interrupt, but the witness is being asked first: "Did you take any  
7 covers?" and then the questioner corrects herself, and said: "No, did you give any covers in  
8 relation to that contract?" Then the witness says "No", so in answer to the second question,  
9 after the question has been corrected.

10 THE PRESIDENT: Where does it say he did, just as a matter of interest? Where does it say that  
11 he took one.

12 MISS BACON: That is at the bottom of p.4, five boxes up: "No, I took a cover on that part  
13 because I just really didn't ..."

14 THE PRESIDENT: Yes.

15 MISS BACON: So in that case he was being asked if he gave a cover.

16 THE PRESIDENT: I follow now, yes.

17 MR. ROBERTSON: The position is Ellmore has denied giving a cover, that is recorded in the  
18 decision at IV.2718 to 2720 but that is as far as the matter went with Ellmore's because they  
19 promptly went into administration before the decision was adopted, and there is no appeal  
20 from Ellmore's, from their administrator or otherwise, and you will see that that is recorded  
21 in the decision at VI.440.

22 We do not submit that Irwins did not take a cover in the case of the Evans' tender, but as I  
23 have already indicated there are alternative candidates from whom Irwins could have taken  
24 a cover. They could have taken a cover from either Guildford Construction, a successful  
25 tenderer, or Stainforth, whose tender was only slightly higher than GMI's tender.  
26 Guildford Construction is not otherwise mentioned in the decision. Stainforth is an  
27 addressee, it was found to have given and taken cover prices. It admitted giving a cover to  
28 Irwins in infringement 165. Mr. Nelson had previously worked with Stainforth's managing  
29 director, and one of Stainforth's estimators, and that is set out in his interview which is  
30 annexed to the liability defence at annex 5, p.6. Mr. Nelson, in that part of the interview,  
31 gave evidence that he had taken covers from Stainforth on several occasions, and you will  
32 see that at pp.5 to 11 of that interview.



1 Stainforth was also involved in infringement 21, giving a cover to Strata, infringement 195,  
2 taking cover from Strata, it received a penalty, as I have already said, of £156,737, that is at  
3 VI.22 of the decision and it has not appealed.

4 As we read sub-paragraph 15(d) of the defence, the OFT do not disagree that Irwins could  
5 have taken a cover price from either Guildford or Stainforth, but they say there is no  
6 plausible reason why, if Mr. Nelson had obtained a cover price from one of these  
7 companies, the name of the company was not indicated on the tender register alongside that  
8 of GMI with some annotation showing who had ultimately supplied the cover price. As I  
9 have already demonstrated that assertion is entirely at odds with how the tender register  
10 worked, as is plain from the face of it. Just to reiterate there are 130 entries with “C” or  
11 “cover” indicated in the fourth or fifth column, some 44 have no entry in the final column,  
12 in another 45 cases there is more than one name in the final column, but no annotation  
13 showing from which, if any, a cover had been taken. There was only such an annotation in  
14 six of the 130 cases. That shows it was normal practice. 79 of the 130 entries in which  
15 covers were taken, nearly two-thirds, for Mr. Nelson to note taking a cover in the tender  
16 register without indicating where it had come from.

17 In the other cases in which only one company is mentioned in the final column, and there is  
18 a “C” we just do not know, we cannot make any inference one way or the other.

19 We say it is flying in the face of the evidence from what we say the tender register shows, to  
20 be dismissed as being highly improbable. It is in fact the regular normal basis that there is  
21 no annotation, there are no covers being marked as being taken without a name being  
22 indicated as the provider of the cover.

23 We say the reference to GMI in the tender register does not support at all the inference  
24 which the OFT seeks to draw. The other plausible explanation, actually rather more likely  
25 explanation, is that GMI was noted down in the final column by Mr. Nelson as one of the  
26 likely competition for that tender. Mr. Nelson subsequently took a cover, most likely from  
27 Stainforth, which he noted in pencil in the fourth column but, as was his normal practice,  
28 did not note from whom the cover had been taken. We say it cannot be inferred from the  
29 tender register entry to the requisite standard of proof that cover was taken from GMI.

30 That leaves the other document that the OFT relies upon, which is a tender submission.  
31 That document, and I think we should look at that first, is to be found at the OFT’s defence,  
32 and it is annex 2, and the sole annotation upon which the OFT relies is the letters “GMI” in  
33 the top left corner. The problem with this document is that the OFT failed to put the  
34 meaning of this to Mr. Nelson in interview. The OFT neither asked a meaningful question

1 nor received a meaningful reply about this tender submission. The only mention is in the  
2 interview at annex 5 to the OFT's liability, p.23. We will see on p.23 Officer Fisher saying  
3 "Next we've got the form of tender for that contract . . . just confirm to me?" Mr. Nelson:  
4 "It's my writing, yeah." "...that'll be the actual amount tendered?" "Yes." "Is that right?"  
5 "Yes, that's it, that will be the overall figure, and that'll be for a full section of it, full  
6 scheme ...." Officer Fisher: Oh, okay. And, um, there's a reference to GMI in the top left-  
7 hand corner." Mr. Nelson: "There you go, yeah". Officer Fisher: "Yeah. So, you've jotted  
8 that down to remind yourself that you're getting cover from GMI or ..." "Mr. Nelson: Just  
9 about filled it in, probably to put that in afterwards, I'm thinking, yeah."

10 THE PRESIDENT: Bit of a leading question there from the ----

11 MR. ROBERTSON: As we said it is a masterclass in how not to question a witness. The OFT  
12 put it in their defence, they recognise that Mr. Nelson does not express himself with  
13 complete precision. We submit his explanation is in fact incomprehensible. We do not  
14 think that even Paul, the psychic octopus, could explain what that was supposed to mean.

15 (Laughter)

16 Let us go back to basics on this. Mr. Nelson gave clear evidence to the OFT in that  
17 interview that he did not remember the tender. So he does not remember writing on the  
18 document, so he cannot give evidence as to why he put the letters "GMI" on the tender  
19 submission. We have no other explanation for it. What we do know, as far as we can tell  
20 from the decision, is that it was not part of a system by which Mr. Nelson recorded taking  
21 cover. We get that from looking at the other infringements which are referred to in the  
22 decision.

23 There are eight infringements involving Irwins in the decision, they were a leniency  
24 applicant and by the time of the decision they had been taken over by a company called  
25 Jack Lunn, who was found to have committed three infringements in the decision, that is  
26 why there are 11 infringements against Jack Lunn and Irwins, eight of those are for Irwins.  
27 Of those eight infringements the OFT refer in the decision to retained forms of tender in  
28 five of those cases and those are – apart from infringement 14 – 62, 94, 125 and 165.

29 Infringement 14 is the only instance where there is any mention of such a notation on the  
30 form of tender, so there is no similar fact evidence pointing to this as being a record of a  
31 cover taken, as far as we can see it is not a system. Mr. Nelson, at no point in his interview  
32 refers to such a system.

33 The OFT's only response in their skeleton at para. 19 is to say: "Well, we do not seek to  
34 rely upon similar fact evidence", that is not the point; we are relying on the absence of it as

1 demonstrating that no inference can be made from this document. There quite simply is an  
2 absence of any explanation or any comprehensible explanation for the initials “GMI”  
3 appearing on the corner of the document, and therefore no inference as to its meaning can  
4 be drawn. We do not even know whether those initials were added – we do not know what  
5 point in time they were added. For all we know about it they could have been added when  
6 Mr. Nelson was gathering together documents to supply to the OFT as part of the leniency  
7 application. We do not have to go and establish when those initials were added, we simply  
8 say that there is no explanation in the interview or otherwise, and there is no evidence that  
9 they are part of some system.

10 We submit that the OFT, in relation to the evidence, to which it refers, in the decision, does  
11 not meet the requisite standard of proof, and therefore this finding of infringement must be  
12 set aside. The burden of proof is on the OFT to establish infringement, and they have not  
13 discharged that.

14 To the extent that it is necessary we have served evidence explaining that GMI was not in  
15 the habit of giving covers, and it certainly was not in its interest to do that to Mr. Nelson of  
16 Irwins. You have heard evidence this morning from Mr. Naylor and Mr. Shann as to this  
17 and I do not think that there is really anything that I need to add to our written submissions  
18 and the oral evidence this morning on this point. It is submitted the OFT has not made out  
19 its case against GMI in relation to infringement 14 to the requisite standard of proof, and  
20 that that the finding of the infringement of the Chapter I prohibition in this regard should  
21 accordingly be set aside.

22 I turn now to the second of the infringements, 228. This is an alleged cover from Totty in  
23 June 2005. Again, for the Tribunal’s record, to run through the pleadings on this, the  
24 finding is at the decision, paras.IV.6364 to 6391; GMI’s notice of appeal 34 to 43.

25 THE PRESIDENT: These are paragraph numbers?

26 MR. ROBERTSON: These are paragraph numbers – the OFT’s defence, 17 to 22, GMI’s  
27 skeleton 91 to 131; OFT’s skeleton, 22 to 32, and finally, our reply skeleton served, having  
28 listened to the tape of the interview with Mr. Rhodes.

29 In essence, the OFT’s case is that GMI took a cover price from Totty in June 2005 on a  
30 tender from the Leeds College of Art and Design for extensions to the College’s workshops  
31 in Leeds. As with infringement 14, we have got little record of this tender. As is common  
32 practice in the industry documents are not retained where a tender is unsuccessful, but you  
33 have seen the enquiries that were sent out to some of the sub-contractors that we have been

1 able to retrieve or have been supplied by their sub-contractors. We saw one of those this  
2 morning.

3 The evidence relied upon by the OFT consists of essentially three items: firstly, a reference  
4 in a Totty tender sheet to GMI, and that is para.18(a) of the OFT's defence; secondly, a  
5 general explanation by Totty's parent company, Propensity, of its participation and cover  
6 pricing, and in particular an interview with Mr. Martin Miller, at that time a bid manager,  
7 for Totty, as part of Propensity's leniency application. Those are sub-paras.18(b) and (c) of  
8 the OFT's defence. Then thirdly, an interview with Mr. Steve Rhodes, at that time an  
9 estimator for Totty, also as part of the parent company, Propensity's leniency application.  
10 It is not specifically referred to the OFT's defence, but it is referred to in the decision.

11 The first document I need to take you to, therefore, is the Totty tender sheet. You can see  
12 that annexed as annex 7 to the OFT's liability defence. This is a document which is  
13 explained by Mr. Miller in his interview, and it is an internal document generated by Totty  
14 Construction Group. What it does is summarise how the tender that is going to be put in is  
15 calculated. It has got various manuscript additions to it. The crucial one from our  
16 perspective is in the top right hand column marked "Competition". This is where, as the  
17 document was generated, Totty would list who was in on the tender, and you will see at  
18 number 5 the apparently damning words "GMI (Cover), £4,795".

19 The other points on this document that I would just invite you to take notice of, because  
20 they will be relevant, are under the heading "Tender final summary", it has got "Tender  
21 number C7002". The "C" means that it has come into the commercial department of Totty.  
22 That is explained by Mr. Rhodes.

23 You will also see in manuscript down towards the bottom left, "TCG" then three figures.  
24 Mr. Miller's evidence is that he has written that and it is after the award of the contract, they  
25 have had feedback of the nature that we have discussed this morning from the client, in fact,  
26 from the client's QS, and they have said these are the three lowest bids. As you will see,  
27 those were the three lowest bids and Totty was in at £4.6, so they did not get the contract.

28 THE PRESIDENT: I am sorry, Mr. Robertson, you did say, but I did not get a note of what  
29 "TCG" meant.

30 MR. ROBERTSON: Totty Construction Group. This was a copy of the Totty tender sheet.  
31 Going back up to the apparently damning words "GMI cover", and then the figure, we  
32 asked to see the original of this document following several of the statement of objections.  
33 It is not in the OFT's possession, it was retained by the leniency applicant. The OFT  
34 declined to give us access to the original on the basis that it was basing its case on a

1 photocopy rather than the original. We then wrote to Propensity's solicitors requesting  
2 production of the original. That request was declined by a letter dated 24<sup>th</sup> June 2008 on the  
3 same basis. They said there is no requirement to produce the document as the OFT was  
4 relying on a photocopy rather the original.

5 We raised the matter again with the OFT after the decision came out and as part of this  
6 appeal. At our invitation the OFT contacted Propensity's solicitors on 9<sup>th</sup> March of this  
7 year to request production of the original. Quite remarkably, the OFT has now been told by  
8 Propensity's solicitors that the original tender sheet cannot be located. That is the only  
9 explanation we have had. We presume that means that Propensity has destroyed the  
10 original and that is the reason why they cannot locate it. That is despite the fact that  
11 Propensity has been put on notice by our mid-2008 request that it wished to see the original.  
12 Despite the fact that Propensity's solicitors, who are acting in a number of appeals against  
13 the decision currently before this Tribunal, were aware that GMI was also appealing.  
14 That appears to us to be a serious breach of Propensity's leniency agreement with the OFT,  
15 and no doubt the OFT will inform the Tribunal what action it intends to take against  
16 Propensity arising out of their breach of the leniency agreement; but of more direct  
17 relevance to this appeal, it means that we have denied the opportunity to inspect the best  
18 evidence, namely the original tender sheet.

19 THE PRESIDENT: Just remind me when your original request was – was it originally to the  
20 OFT?

21 MR. ROBERTSON: It was originally to the OFT. The request and the OFT's response are set  
22 out in our response to the statement of objections. Can I give you the reference to that in  
23 the bundle.

24 THE PRESIDENT: Yes, I know I have seen it somewhere.

25 MR. ROBERTSON: It is referred to in paras.46 to 49 of our written response to the statement of  
26 objections. That is in file 1 of the notice of appeal files, tab 5, p.18.

27 Then the exchange of correspondence, after the OFT said, "No, we are just relying on a  
28 photocopy", with their solicitors is at the same volume, tab 5, pp.60-62. The request was  
29 declined on 24<sup>th</sup> June 2008.

30 The OFT say at para.25, "We have not identified any substantive matter in relation to the  
31 missing Totty tender sheet". That is not correct. We have advanced a positive case in  
32 relation to infringement 228 which may or may not have been assisted by the original Totty  
33 tender sheet. In particular, in our submission, it is likely that the annotation that Mr. Miller  
34 said that he made in the top right hand corner of the sheet, we think that those were made at

1 different times. We think that “GMI cover” was written on one occasion and then, looking  
2 at the figures, they appear to be written differently. It looks like it could even be a different  
3 pen. We think they were written subsequent to that. They were certainly written on a  
4 different occasion, we say.

5 We know from the tender register with Irwins in infringement 14 that if you look at an  
6 original document things may become apparent which are not apparent from a photocopy.  
7 In that case differences between pen and pencil on the register, or different colours of pen,  
8 as we saw when we looked at infringement 101. Those sorts of differences are not apparent  
9 from a black and white photocopy.

10 Sir, it is our submission that we are entitled to the benefit of the doubt and that “GMI cover”  
11 and the figure were written at separate times and for separate reasons.

12 I should also say that, without access to the original best evidence, it is impossible for this  
13 Tribunal to determine whether the original tender sheet might have been altered in any way.  
14 It is not a completely far fetched suggestion – see the *Italian Flat Glass* case as noted by  
15 Mr. Ian Forrester QC in his article that we have supplied as part of our liability authorities.  
16 One just does not know without the original. We say that the copy Totty tender sheet on its  
17 own is insufficient evidence of an infringement.

18 We then go to what Mr. Martin Miller said in his interview with the OFT on 8<sup>th</sup> May 2007.

19 We go to that because the OFT refers in the defence at sub-para.18(b) to its reliance on what  
20 it described as a “general explanation by Totty’s parent company, Propensity, of its  
21 participation in cover pricing”.

22 THE PRESIDENT: This is the Miller interview?

23 MR. ROBERTSON: The Miller interview. The only reference that you get in the decision or in  
24 the defence to evidence from individuals employed by Totty at the relevant time are three  
25 individuals, Mr. Martin Miller, Mr. John Kirby and Mr. Steve Rhodes. When it comes  
26 down to it, as is clear from para.29 of the OFT’s skeleton argument, its case on  
27 infringement 228 hangs on Mr. Miller’s recollection.

28 I should say just for the sake of completeness, we do not need to go to John Kirby’s  
29 interview. We did annex the transcript of that interview to our skeleton at tab 5, and at p.14  
30 John Kirby explains that Mr. Miller reports to him, or reported at the relevant time to him;  
31 he, John Kirby, had no recollection of the tender that forms the basis for infringement 228.  
32 So John Kirby does not assist.

1 When we look at Mr. Miller's evidence – perhaps we could take that up – at annex 8 to the  
2 liability defence, and the relevant passage is at p.11. It actually starts at p.10. Can I ask you  
3 to read ----

4 THE PRESIDENT: Just above the hole punch?

5 MR. ROBERTSON: That is right, "KB", which does not stand for Kelyn Bacon, it stands for  
6 Kevin Barton, and it says, "Okay, moving onto specific contracts", and if I could ask you to  
7 read to p.12 where that passage ends with Mr. Miller saying, "We didn't know, we were  
8 quite a long way out", and then I will make some submissions on what is said there. (After  
9 a pause) The points we would ask the Tribunal to note are, firstly, the point about the  
10 tender number C7002, which he says, at the bottom of p.10, 'although was a public job, that  
11 came into the Commercial Division'. That is relevant because you will see Mr. Rhodes is  
12 questioned about it, and he goes, "Ah! This isn't one of my tenders. This actually went to  
13 the Commercial Division. I'm in the Public Division". That is the point that we make in the  
14 reply skeleton. So, this is Mr. Miller's department. He says at the bottom of p.10,

15 "-- I can't remember for the life of me ever speaking to GMI. It's not a company  
16 that I've spoken to in the past, and I don't know any of the estimators there.

17 That's not to say that one of our other estimators or, or directors hadn't received a  
18 'phone call. But, yes, I do remember that, that they got a cover price from  
19 ourselves".

20 So, he is saying that Totty provided a cover to GMI on the basis of that annotation, but in  
21 fact he is not in a position to give direct evidence about it because he did not do it; he has  
22 never spoken to GMI; he does not know anyone there. He concludes that it must be one of  
23 the other estimators. The only other estimators that he refers to are Steve Rhodes and  
24 Justice Goodyear. He says he wrote the figure on there. "I can't recall making the 'phone  
25 call to GMI". That is two-thirds of the way down p.11.

26 So, of the other two estimators that he says are the candidates to have done this -- Well, as  
27 you will have seen from our skeleton argument, Mr. Goodyear had left before this tender.  
28 He left at the time there was an reorganisation in April 2005. So, it is not Mr. Goodyear.  
29 As we will see, it is not Mr. Rhodes either.

30 So, all we have got is Mr. Miller saying, "I wrote down those words and letters", but he is  
31 not giving evidence that a cover was given. He did not do it. The likely candidates he  
32 identifies, as we see, did not do it either.

33 The other point just to make clear from that is the reference further up, just by the first hole  
34 punch to getting feedback once we put tenders in. That is the explanation for the

1 handwriting at the bottom left of the tender sheet. He confirms the figure that they went in  
2 at at p.12 of £4604. You have seen that from the tender sheet.

3 Turning to Mr. Rhodes, he had actually been interviewed about a month before Mr. Miller.  
4 Mr. Miller was interviewed on 8<sup>th</sup> May, 2007. Mr. Rhodes had previously been interviewed  
5 on 17<sup>th</sup> April, 2007 - so, about three weeks before. He does not say that he gave a cover to  
6 GMI. He clearly had no specific recollection. He gave possible explanations, but he did not  
7 give an explanation himself. His interview is at annex 6 to the GMI skeleton argument.  
8 The first passage I would like you to note is at p.2. That is the evidence that Mr. Rhodes  
9 gives to the reorganisation, and then the allocation of contracts between divisions. He says  
10 there that he is the bid manager in the public division and during the relevant period there  
11 were other divisions - accommodation and commercial - and the tender went, as we can see  
12 from the figure, starting with a 'C', to the commercial division. So, this tender did not go  
13 into Mr. Rhodes' division. So, this is not a tender that he was involved in.

14 Turning then to p.21 you will see there that he is shown this tender sheet by the case officer,  
15 Eugene O'Sullivan where he says,

16 "Move onto another one, Leeds College of Art & Design, which is .. I suggest that  
17 Totty provided cover to GMI, according to this ...

18 Um, that was a commercial tender, given it's got the 'C' reference before the  
19 number.

20 Right.

21 If it had an A it would be Accommodation. If it was P it would be Public. This is  
22 obviously since we split into three divisions ----"

23 They subsequently went into two divisions, which is why he talks about two or three. At  
24 this time there were three. Then he says,

25 "-- so that is the Commercial Division which primarily was Martin Miller as being  
26 manager and one or two estimators that were working with Martin at the time".

27 So, it is not Mr. Rhodes working with Mr. Miller. He is in a separate division. Then he  
28 says,

29 "And yes, that does suggest that either we gave GMI a cover. Uh, it's likely that  
30 that is the case because the value is written down".

31 So, this is a document he has not seen. He is not the author of it. He is just trying to offer  
32 an explanation as a helpful part of a leniency application. He says, "The reason why it  
33 suggests we gave GMI cover is because the value is written down".



1 “Going back to the other option that we knew they’d taken a cover from one other  
2 contract, it would be less likely we knew the value and definitely we wouldn’t  
3 know the value before the tenders went in”.

4 Now, what the other option is that he is talking about is that he gives evidence that  
5 sometimes you know you have given someone else a cover - one of the competition;  
6 alternative you hear that one of the competition has taken a cover provided by a third party,  
7 and not provided by Totty.

8 So, those are the two options that he is talking about there. He is looking at the figure and  
9 saying, “Well, because there is a figure down there, that suggests that the first of my two  
10 options is the more likely explanation.”. That is why he rules out -- or, does not rule it out,  
11 but he says it is less likely that it is the second option because of that figure being there.

12 THE PRESIDENT: We get what is now the corrected version at the next tab.

13 MR. ROBERTSON: Yes. Then he says, “Yeah, it wouldn’t be the figure we gave them”. The  
14 OFT have said, “Well, if you listen to the tape it says it would be the figure we gave them”.  
15 The tape is slightly indistinct. We are not going to ask the Tribunal to listen to it because, in  
16 our submission, it does not matter which version is correct. What is revealing is that he says  
17 ‘would’ - not ‘is’ or ‘was’. He is not giving evidence about a tender that he was involved  
18 in. He is just trying to offer explanations about something that went on in the Commercial  
19 Division - not in his division.

20 The alternative explanation which he has ruled out as being less likely is, in fact, an option  
21 that he refers to on a number of occasions in his interview. There is nothing special about  
22 this particular tender. He refers to it on pp.15, 16, and 17 of the interview. If you just turn  
23 back to those pages, the first reference is on p.15, about three-quarters of the way down.

24 “And it think it’s also got a, um, under 3 it says Boots 1.39 mill co. What does  
25 that mean to you?

26 That suggests to me that we’ve given them a c over price and that was the figure  
27 that we gave them. Or that we’ve found out subsequent to the tender going in that  
28 they took a cover from another contractor and that’s what price they went in at”.

29 So, he is referring to finding out that another contractor took a cover from a third party, and  
30 that was jotted down on that particular instance. Then, if you look on p.16, over the page,  
31 about one-third of the way down,

32 “It .. you gave Simons cover on that job?

33 I’d hazard a guess, uh, that we gave those three cover prices out or that we may  
34 have given , given at least one of them out and we found out, by conversation,

1           you know, it might have been that we rang one of those people who said can you  
2           help us out and they may have said, well, actually we're already taking a cover  
3           ourselves from whoever. So that is nothing more than a note that we know they're  
4           not pricing the job because they've taken a cover from somebody".

5           There is another reference to it at the top of p.17.

6           "Yeah. What I'm saying is, if as an example, a day or a week after the tender's  
7           gone in, we've subsequently found out by speaking to other contractors that Sisk  
8           had not, in fact, priced the job but had taken a cover, it might be that you'd put the  
9           C on afterwards, but that would be unlikely, probably 5 per cent, percentage  
10          change that happened. So in the main I'd hazard a guess those three people took  
11          covers before the tenders went in and we gave at least one or two all three of those  
12          covers".

13          So, those are the two possibilities he is talking about. It is either noting that, "We gave a  
14          cover to this contractor", or, "We discovered that this contractor took a cover from a third  
15          party".

16          That is what Mr. Rhodes is suggesting in his interview. He does not know what happened  
17          on this specific instance because it was not a tender that was prepared in his department and  
18          he cannot give direct evidence about it.

19          So, we are left with a document where Mr. Miller says that he wrote these matters down on  
20          it, but the OFT have not identified who in Totty is supposed to have given the cover price to  
21          GMI. It appears that within Totty there was also a practice of noting down situations where  
22          it is thought that a competitor on a contract has taken a cover from a third party. Of course,  
23          that latter option has never been part of the OFT's case against us, and certainly could not  
24          support a finding of infringement against us.

25          Let us just have a look at these annotations in a bit more detail.

26          THE PRESIDENT: The infringement in this case is that you took one from Totty.

27          MR. ROBERTSON: No, they gave one to us.

28          THE PRESIDENT: Sorry, that is what I mean, yes, you took the cover.

29          MR. ROBERTSON: Yes, exactly we took a cover.

30          THE PRESIDENT: You took one from someone else?

31          MR. ROBERTSON: That is the allegation against us, yes. That is the basis of the finding of  
32          infringement.

1 THE PRESIDENT: Just apropos of very little, I notice that this tender document is recorded as  
2 being p.1, you not having seen the original cannot help on whether there is a p.2 or whether  
3 there is anything on p.2?

4 MR. ROBERTSON: The OFT have said: “We rely on this photocopied sheet”, that is it.

5 MR. SMITH: Mr. Robertson, you may also not be able to help on this, again it being a copy, but  
6 in the transcripts the point is made that different estimators adopt a different practice, some  
7 write in the figures, and others clearly type up the information they receive on to some sort  
8 of electronic document. But the fact that one has handwritten annotations implies that there  
9 is a printout on which you then write the additional details, and I wondered whether we  
10 could establish with any degree of probability the date of the printout? I see in the top right  
11 hand corner, next to the tender number reference of C7002 is a “Rev A 26.05”.

12 MR. ROBERTSON: I think this is prepared quite close to the tender going in. Mr. Miller gives  
13 quite a lot of evidence about the preparation of this sheet, and I think that is prepared at 20<sup>th</sup>  
14 June. You will see that the return date on the top left is 22<sup>nd</sup> June, so it is prepared for an  
15 internal meeting in Totty. We know it is then annotated up – we know it is annotated  
16 subsequent to the tender going in because that is the tender feedback at the bottom left  
17 “TCG”, that is the feedback they get post tender. What we do not know is when these  
18 annotations in the top right, “GMI cover” and that figure were put. Mr. Miller says in his  
19 interview: “I wrote those down pre-tender submission”, but that is as far as it goes.

20 MR. SMITH: That may be as far as it goes, certainly, but can I test it in this way? The fact that it  
21 says the date of the revision here must imply that this form was not printed out before 20<sup>th</sup>  
22 June?

23 MR. ROBERTSON: Yes.

24 MR. SMITH: But either on 20<sup>th</sup> or afterwards. So the handwritten annotations are going to be  
25 some time after the print out and after 20<sup>th</sup> June, whereas for instance the details about the  
26 competition, Quarmby, NewCon and Interserve, the interest will be pre-20<sup>th</sup> June. I do not  
27 know if that gets us anywhere, but there is a gap.

28 MR. ROBERTSON: At some point on or after 20<sup>th</sup> June Mr. Miller has written “GMI Cover” and  
29 that figure. We submit he has written those on two different occasions. He said he wrote  
30 them before the tender went in but, as you will see, we say he must be mistaken certainly as  
31 to the figure, because that could not be a cover price given to GMI, it is too low.  
32 As for the GMI cover that could be an explanation that we gave GMI a cover, though it was  
33 not Mr. Miller who gave GMI cover someone has told him, but we cannot track down who  
34 has told him on the basis of that belief. Or, it could equally have been somebody telling Mr.

1 Miller GMI are in for this but they have taken a cover and that is the alternative scenario  
2 Mr. Rhodes outlines in his interview, but then leaps to the conclusion that that could not be  
3 the case because the figure is there. But of course, if the figure was written on a different  
4 occasion it quite easily could be the case.

5 MR. SMITH: Yes, thank you.

6 MR. ROBERTSON: If I could just take you through the first of their submissions which is that  
7 figure is too low to be the cover price, as we said in our skeleton argument, the figure that  
8 appears there, which is the figure that GMI went in on, that is 4 per cent higher than Totty's  
9 bid, that is not high enough to be a cover price supplied by Totty.

10 Mr. Miller states that he would have provided a cover price of 5 to 7.5 per cent higher than  
11 the price that Totty was going in at, it is in his interview liability defence, annex 8, p.9. We  
12 know that Mr. Miller did not supply the cover price because he said so.

13 DR. SCOTT: It is strange because it does look as though the figure top right, and the figures  
14 bottom left, are different in character in that one is taken to four significant digits and the  
15 other is not, and yet if one was in possession of 4795, bearing in mind what you have said,  
16 you might suspect, if you were having that mind, that somebody else had suggested that  
17 figure and you might still think that it was a cover price but at somebody else's suggestion?

18 MR. ROBERTSON: That figure, there, we say the likely explanation is that that is the post-  
19 tender discussion that we had with Totty and it has been jotted down there against us, that is  
20 what GMI went in at.

21 The figures on the bottom left, Mr. Miller says that is his handwriting. He says he has had a  
22 discussion with the client's QS, who said "You did not get it", the three last bids were 3.8,  
23 4.2 and 4.6, and Totty know they were the 4.6.

24 DR. SCOTT: You talked earlier on about Miller's evidence of the 5 to 7 per cent uplift. The  
25 4,795 is quite a precise figure – it may be like pricing things at £4.99, but is there anything  
26 about patterns in how accurately people provide these numbers, or do they normally provide  
27 them fairly roughly?

28 MR. ROBERTSON: They provide them on percentage uplift from their own figures, I will come  
29 on to that.

30 DR. SCOTT: Yes.

31 MR. ROBERTSON: As to the precise uplift they give, I do not think I can help you with that on  
32 these cases because we do not have any evidence of us doing it, as it were.

33 DR. SCOTT: Yes, Miller appears to be suggesting that he has a rough idea in his mind about how  
34 he would approach this.

1 MR. ROBERTSON: I do not think, but we can check overnight, that I have evidence I can take  
2 you to of Miller giving a cover price and saying it goes down to so many significant digits.  
3 But if we could have the liberty of dealing with that tomorrow, if we are able?

4 THE PRESIDENT: Yes.

5 MR. ROBERTSON: Then I can do the necessary research tonight on that point.

6 DR. SCOTT: Because the 4,795 as I recall is accurate -----

7 MR. ROBERTSON: It is Totty's price.

8 DR. SCOTT: Yes.

9 MR. ROBERTSON: And we say yes, we told them, because we had a post-tender discussion and  
10 you heard evidence about that this morning. To our mind there is no mystery where that  
11 figure comes from, it comes from us, that is not the figure supplied by Totty to us, that is  
12 our own independently priced bid. We say it rather looks to us that that has been added at  
13 a different time. It is consistent with our case that we properly priced this tender, put it in  
14 and then subsequently Mr. Naylor had a conversation with one of the estimators at Totty  
15 and told them what our price was, we learned what their price was and that was typical  
16 practice in the industry.

17 Just going back to the point why that is not high enough to be a cover price taking 4.604 as  
18 your starting point, Mr. Miller says a cover price has to be 5 to 7.5 per cent higher although  
19 that is not his cover price. The two other pieces of evidence that you have before you are  
20 Mr. Rhodes' interview, where he says 7 to 10 per cent higher, and that is referred to in his  
21 interview, annex 6 to our skeleton, p.12 Mr. Miller's line manager, Mr. Kirby, states that he  
22 would have provided a cover of 10 per cent higher, and that is annex 5 to our skeleton, p.12.  
23 Even if you take the lowest of those figures, 5 per cent, which is Mr. Miller, although he  
24 says he did not provide a cover price here, that would have given you a figure of 4,845, not  
25 4,795. In fact, if you take the other figures, 7 to 10 per cent, which was Mr. Rhodes'  
26 evidence, it is in our skeleton the price would be considerably higher. So we say that just  
27 does not look like a cover price from Totty, it is not the way they approach cover pricing, so  
28 it is pretty likely, we say, that it is the figure we supplied in post-tender discussions.

29 I should just say for the sake of completeness, Mr. Rhodes explains in his interview, which  
30 is annex 6 to our skeleton at p.12, why you would leave a considerable margin for error,  
31 why you would not supply a cover price too close to your own, basically – if you will  
32 pardon the pun – it leaves you in danger of blowing the cover.

33 THE PRESIDENT: Not the best joke of the year! The best we can hope for?

1 MR. ROBERTSON: I think it is unfortunately. I am sorry, that is obviously not the figure given  
2 by Totty to GMI, where did it come from? Legitimate post-tender discussions. You have  
3 had evidence this morning from Mr. Shann, Mr. Naylor, you have written evidence before  
4 you from Mr. Philip Burnley, which I have already mentioned and, indeed, you have post-  
5 tender discussions and, indeed, Mr. Rhodes of Totty describes it in his interview with the  
6 OFT – again for your note: annex 6 to our skeleton, p.12.

7 That figure is obviously not the figure obtained as a cover price by GMI by Totty, it is too  
8 low, and it is obviously legitimate and routine post-tender feedback. That leaves GMI  
9 cover, and you already have my submissions on that, that there are two alternatives, and  
10 there is simply no evidence from anyone in Totty that Totty gave the cover price to GMI, no  
11 one can give direct evidence.

12 Mr. Miller says he was told, but it was never put to him in interview, could it also be, as Mr.  
13 Rhodes has explained to us three weeks' earlier, that GMI could be noted there as having  
14 taken the cover price from a third party and understanding that somebody in Totty had,  
15 where would that information come from? Perhaps a likely source would be a  
16 subcontractor as mentioned earlier today, because they supplied information about who else  
17 was tendering, and again that is mentioned by Mr. Rhodes in his interview at p.8.

18 This alternative possibility had clearly been flagged up in the earlier Rhodes' interview, it  
19 was never put to Mr. Miller in that leniency interview, and the OFT have chosen not to take  
20 this any further as, indeed, they have done with all the individuals who have been  
21 interviewed as part of leniency applications. The OFT has not gone back and sought to put  
22 in further witness evidence so that these individuals could be called and questioned, so we  
23 cannot take the matter any further.

24 We submit that it is quite possible, it is plausible, that some third party told Totty that GMI  
25 were submitting a cover price, which is what is recorded by the words "GMI Cover". Of  
26 course, that third party might have been completely mistaken and the evidence would be  
27 unattributed hearsay and that is not to be relied upon. That is the OFT's evidence.

28 You come to our evidence and again I remind the Tribunal – as if you needed reminding –  
29 that the burden of proof is upon the OFT to establish infringement. We refer to our  
30 evidence. First, as we have heard this morning there is consistent evidence that GMI did  
31 not regard it as necessary to participate in cover pricing by taking covers. GMI had a  
32 practice of declining to tender. We have been able to retrieve correspondence from IT  
33 systems, we have provided a schedule which Miss Bacon did not take my witness to this  
34 morning, from Leeds City Council, showing that out of 67 invitations to tender sent by the

1 Council to GMI between 2<sup>nd</sup> January 2002 and 22<sup>nd</sup> January 2008 GMI declined to tender  
2 on 50 occasions, and returned the papers on two further tenders.

3 If you go back in the decision to infringement 211 (para.IV.5876) you will see there  
4 recorded an example of GMI declining to tender only some months before this  
5 infringement. We say there is no good reason why GMI should have abruptly departed  
6 from what was a standard practice in relation to this tender.

7 You will see in the decision, when the OFT deals with this submission – they admit this  
8 error in para.21(a) of their defence – they rejected GMI’s submission on the basis that the  
9 present infringement relates to the provision of a cover price, not the acceptance of one. Of  
10 course, that was wrong, and they accept that is an error.

11 You have heard Mr. Shann and Mr. Naylor giving evidence that GMI did not take a cover  
12 price on this tender, and submitted a *bona fide* tender.

13 Thirdly, their evidence is supported by the communications that we had with prospective  
14 sub-contractors, not a small exercise, as was explained. There is no good reason why GMI  
15 would have had such communications with its sub-contractors on this tender if it could  
16 simply have avoided the cost and the time of doing that by simply taking a cover.

17 Mr. Naylor was clear in his recollection that this was a tender GMI very much wanted to  
18 win, and he is perfectly straight talking about this. He cannot recall the specific tender  
19 itself, but he is confident that GMI would have put in a properly priced tender as the  
20 correspondence with sub-contractors would indicate.

21 So we submit that on infringement 228 the OFT has not made its case out to the requisite  
22 standard of proof and the finding of an infringement in this regard should accordingly be set  
23 aside.

24 We have given you a plausible alternative explanation of what might have happened. We  
25 have been denied access to best evidence when it comes to the tender sheet. To the extent  
26 that there is any benefit of doubt as to the interpretation of that, we submit that should fall in  
27 our favour.

28 Sir, unless I can assist you further at this stage those are our submissions.

29 THE PRESIDENT: Thank you, Mr. Robertson. Miss Bacon, shall we have a short break, or are  
30 you made keen?

31 MISS BACON: Perhaps five minutes, I do not need any longer than that.

32 THE PRESIDENT: We will have a short break.

33 (Short break)

34 THE PRESIDENT: Miss Bacon?

1 MISS BACON: Mr. President, members of the Tribunal, can I start by handing up a navigation  
2 table for which I take no credit at all. It is all Mr. Singla's work. That will set out the  
3 relevant paragraphs in our pleadings, essentially updating the position as set out at the back  
4 of the penalty defence where you will recall there was a navigation table for the relevant  
5 bits relating to each appellant. (Same handed)

6 Liability: GMI's appeal on liability is a pure challenge to the sufficiency of the evidence  
7 put forward by the OFT. Mr. Robertson said that the OFT's evidence does not meet the  
8 burden of proof in respect of either of the two infringements, and we say it does meet that  
9 standard. It is, of course, true that in an infringement of this nature the evidence will be  
10 fragmentary. That was the evidence of all of the leniency applicants. The contacts took  
11 place predominantly, if not always, by telephone. There was little by way of records.  
12 What we have in the present case is a number of contemporaneous documents all of which  
13 indicate the same thing. They are corroborated by the leniency evidence. We saying that,  
14 taking all of that, it is just too much to submit that this was all a very, very unfortunate  
15 coincidence, which is essentially Mr. Robertson's case. His case is that on three separate  
16 contemporaneous documents the annotation 'GMI' sometimes with the word 'cover' just  
17 appeared by accident because the person who wrote it down meant something else, or they  
18 did not know what they meant, or that it was a post-tender discussion. We say that the  
19 coincidences far too frequent. In this case we have got three documents all incriminating  
20 GMI. Taken together with the leniency explanations of how those documents were created  
21 gives the OFT sufficient to prove, on a balance of probabilities, that these infringements  
22 occur.

23 I want to start with a few comment on GMI's evidence before turning to the points on the  
24 specific infringements. Now, GMI's case has always been that it was innocent of cover  
25 pricing. Mr. Robertson has made that today. He has said that GMI is marked out from  
26 other companies - it was not party to the practice of cover pricing during the relevant  
27 period. The evidence of Mr. Naylor and Mr. Shann to the Tribunal this morning also is  
28 consistent with that submission. But, what is interesting and, we submit, very odd is that  
29 that was not the evidence given in the written evidence - so, the two affidavits and the  
30 witness statement.

31 Starting with whether or not GMI ever took a cover, it is striking that in the affidavits and  
32 the witness statement neither Mr. Shann, nor Mr. Naylor ever assert categorically that no  
33 cover prices were taken since the 1990s, which was the evidence of Mr. Naylor today. The  
34 statement simply is not there. The OFT asks rhetorically, "Well, why not?" If this was a



1 company that was simply innocent of any wrongdoing - and its directors and employees  
2 were absolutely convinced that they had never breached competition law - why should they  
3 not have said in their affidavits sworn in response to the Statement of Objections, "I have  
4 never taken a cover price during the relevant period. I have never been aware of any other  
5 employee at GMI taking a cover price either"? It would have been the natural thing to have  
6 said, but they did not say it. What they said was that they were sure that on this occasion,  
7 for various reasons, that a cover price was not taken. They do not say, "It could not have  
8 been taken. It is inconceivable that it could have been taken because we never did it".

9 The same occurs in relation to giving cover prices. The two affidavits of Mr. Shann and  
10 Mr. Naylor conspicuously do not claim anywhere that they never, ever gave out cover  
11 prices or even that they did not do so since, say, 2000 or since the mid-1990s, which was  
12 what their evidence to the Tribunal this morning was. Again, why not? These were  
13 affidavits that were sworn in response to very serious allegations in the statement of  
14 objections in circumstances where GMI knew that they could face very heavy fines if the  
15 OFT found them to have infringed the Competition Act. So, if it really was the case that  
16 ever since the mid-1990s, except for the Centurion Park tender, which was the subject of  
17 considerable discussion this morning, they had neither themselves given a cover price, nor  
18 were aware of any other employee (such as Mr. Peacock) giving a cover price. Why did  
19 they not say so? It is a short point. It is striking that they did not say that when they came  
20 to the Tribunal this morning, and said something quite different, which is, "We know that  
21 this could not have occurred because since the 1990s we have had a policy, or practice of  
22 neither giving, nor taking cover prices".

23 We say that the reasonable inference from their written evidence is that they had not made  
24 those statements in their affidavits and in the second witness statement of Mr. Naylor  
25 because at the time they could not state decisively that cover prices had been neither given  
26 nor received. If they had been able to state that decisively, they would have said so then  
27 and not to wait to come to the Tribunal and say so in cross-examination.

28 The evidence of Mr. Naylor was actually that cover pricing had taken place in GMI during  
29 the first ten or so years when he was there. But, it had died out at some point in the mid-  
30 1990s. On being pressed as to the reason why it had died out, his explanation was that over  
31 time the nature of work changed and so there simply was not the opportunity to because, he  
32 said, the kind of tenders that GMI was participating in were not the kind of tenders where  
33 cover pricing would have been effective, or would have taken place.

1 We have seen that both infringements alleged in this particular case in 2000 and 2005 were  
2 the kind of infringements-- or were the kind of tenders where cover pricing could have  
3 taken place. GMI accepts that in relation to the first of those - the 2000 infringement where  
4 it is said that GMI gave a cover price to Irwins -- It is accepted that Irwins did take a cover  
5 for that infringement. So, it is certainly not the case that in 2000 GMI simply was not  
6 participating in the kind of tender where cover pricing could have taken place. Equally, in  
7 relation to the 2005 infringement - infringement 228 - it is also not said, "Well, this is  
8 simply not the kind of tender for which it would have been possible to take a cover price".  
9 In that respect I took Mr. Naylor to the relevant letter sent to subcontractors, and it is quite  
10 clear that this was a build-only job where the bill of quantities had been provided by the  
11 client. It was not a design and build job where a great deal of work would have had to be  
12 done by the main contractor. It plainly was a case where a cover price could have been  
13 taken if the subcontractor inquiries had not come back with positive results or, for whatever  
14 reason at the end of the day, they decided they could not have put in a competitive bid.  
15 So, what is lacking is any clear explanation of why there would have been no cover prices  
16 given and no cover prices taken from the mid-1990s onwards. The evidence goes to show  
17 that perhaps during this time GMI's business evolved so that there were less instances of  
18 cover prices being taken or received. But, it does not explain why giving or receiving of  
19 cover prices should have come to an abrupt halt in the mid-1990s at a time when there was  
20 no evidence of any competition compliance training or any formal prohibition, or any  
21 formal policy, or any other external reason why GMI would suddenly have stopped taking  
22 and giving cover prices.

23 So, we say that is completely consistent with the findings of infringement in the Decision.  
24 Not only do we have an absence of denial, if you like, in the written witness evidence, but  
25 we also have a complete absence of a plausible explanation for why GMI should suddenly,  
26 contrary to its previous practice in the mid-1990s, have stopped taking or giving cover  
27 prices.

28 GMI also said that its supposed policy from the mid-1990s onwards is evidenced by letters  
29 sent to clients returning tender documents. But, as I established this morning, only one of  
30 the letters that was appended to Mr. Shann's affidavit was in fact a case where a tender was  
31 returned mid-tender, so to speak. All of the other letters were cases where, at the outset, a  
32 tender was returned So, that does not show that there was a consistent policy even if half-  
33 way down the line GMI had decided not to tender. It would still return the tender  
34 documents.

1 THE PRESIDENT: It does show though that contrary to what, as it were, is the general feel in a  
2 lot of the case, that this company was not afraid to say, "We are not interested in this one",  
3 or, "We cannot cope with it".

4 MISS BACON: Sir, I accept that. I accept that in some cases a leniency applicant has come  
5 along and said, "We would never turn away tenders at the start". That was essentially Mr.  
6 Nelson's practice. He would just take everything through the door and he knew he had  
7 taken many things for which he did not have a capacity to price. I am not saying for one  
8 moment that that was what GMI did. You were right to say that those letters show that  
9 they did return tenders. My point is that in relation to the taking of the cover that is alleged  
10 in this case, it is not a case where they took a cover at the start, and if they did so they have  
11 obviously sent out enquiries to subcontractors. If they did take a cover price - which it is  
12 the OFT's case that they did - then it would have been mid-tender. My submission is that  
13 the letters do not show that if they started out down the line, they would always simply  
14 return.

15 THE PRESIDENT: You point to the fact that there is only one of the letters found ----

16 MISS BACON: Yes. Exactly. There is only one. That one does not establish a policy. As we  
17 have seen from the one -- Actually the one is quite revealing ----

18 THE PRESIDENT: I think his evidence was that far from there being a policy, they would regard  
19 that as a very unfortunate circumstance - that they normally only took things on if they  
20 thought they could ----

21 MISS BACON: That was his evidence. My point is that there certainly was no policy that could  
22 be demonstrated from the letters - that even if they had got into that very unfortunate  
23 circumstance they would have always returned the tenders. Actually what happened on  
24 that occasion was quite revealing because the client was obviously quite upset that they had  
25 returned the documentation mid-tender. In our submission, that is often a reason why - and  
26 certainly it is a reason given by many of the leniency applicants - you would mid-tender  
27 take a cover price, because they say you would have accepted the tender -- you have gone  
28 down the road of making enquiries and what-not, and then you realise you would not be  
29 able to price it, and rather than offend the client, you would then take a cover price because  
30 clients often got agitated if you did return the documents. That is exactly what the January  
31 2004 letter shows - that on this occasion the client was obviously agitated that they had  
32 returned the documents. So, we say, in the light of that experience, it would have been  
33 entirely plausible if, a year later, they had thought, "Well, that happened to us last time - the

1 client got upset. So, on this occasion we started to price it up. We cannot do it at the end,  
2 for whatever reason. We'll take a cover price".

3 So, I am not trying to make a sort of similar fact case, but merely saying at this point that  
4 there certainly was no policy in that regard evidenced by the letters. That is consistent with  
5 my submissions that there was no reason why there would have been a sudden change of  
6 approach as between the early 1990s, when it is accepted that GMI both gave and received  
7 covers, and 2000/2005, when at that point nobody, according to the evidence of all of the  
8 leniency applicants, thought that this was something that was terribly unlawful. They were  
9 all doing it. So, if they were all doing it, why was GMI not doing it? That is not something  
10 that the witnesses this morning were really able to explain.

11 THE PRESIDENT: I thought he did explain it. I thought that he did give an explanation.

12 Whether it is the correct one is another matter.

13 MISS BACON: His only explanation was that the majority of their work was not the kind of  
14 work where you could have given or received cover. So, they did not do it.

15 THE PRESIDENT: But I think he also said that they did a lot of work for prestige clients and  
16 obviously the letters to some extent confirm this: that they would rather be straight with the  
17 people at the outset and turn them down for a good reason than get into a mess. I thought  
18 his evidence was that they basically did not get into this sort of a mess.

19 MISS BACON: Yes, and his evidence was that they handed tenders carefully and so they did not  
20 get into that kind of mess. What it does not show is that if, in an unfortunate circumstance  
21 they had got into a mess, they would have never taken a cover. Neither does it explain why,  
22 if they knew somebody like they knew Mr. Nelson at Irwins, and that somebody rang them  
23 up and said, "Can you help us out? We are in a bit of a mess on this job. Will you help us  
24 by giving a cover?" and there is no explanation as to why they would have flatly turned him  
25 down. Indeed, as I will come on to this point in a minute, in relation to the Centurion Park  
26 tender, we know that they did not turn Mr. Nelson down. They said, "Actually we will go  
27 away --" Mr. Naylor said to Mr. Nelson, "I will go and speak to Mr. Shann" and then they  
28 went and asked the client. The evidence was that they asked the client because that was a  
29 particular very long-standing client with whom they had a very close relationship. That was  
30 Mr. Shann's explanation at some length - that this was a very old client, who they had done  
31 a lot of work for over the time. They obviously had a very close relationship with the client  
32 and a very trusting relationship with the client. That was obviously a case where he felt  
33 able to go back to the client. But his evidence was not that this happened regularly. Actually  
34 they never said that they ever went back to any other client. So, this was, we would

1 submit, an outlier in the sense that because of the very close relationship between these two  
2 companies over a period of a number of years which he described, he did feel able to go and  
3 ask the client whether a cover could be given. However, that is not, we submit, evidence  
4 that on no other occasion would a cover have been given. We submit that that is evidence  
5 that on this occasion they asked the client, and there would not have been other occasions  
6 when they would have done so because of the absence of the special relationship.

7 Those were the comments I wanted to make by way of introduction.

8 Can I come on to the first of the two infringements? Infringement 14. This was the  
9 Lancaster Park, York tender. I am grateful to Mr. Robertson for going through all the  
10 documents. I hope I do not need to take you back to them all again. However, the two  
11 contemporaneous documents you have seen - the first is the Irwins' tender form with the  
12 annotation 'GMI' in the top left-hand corner. Mr. Robertson's case on that is attached to  
13 our liability defence at tab 2. This is the first in a series of what Mr. Robertson said is  
14 essentially "unfortunate coincidences", that we have got an annotation "GMI" in the corner.  
15 That appears to implicate GMI. He said that we do not know what that means because  
16 Mr. Nelson does not express himself very well in the interview. The OFT has never denied  
17 that. We have said quite plainly in our defence that we accept that Mr. Nelson does not  
18 express himself with precision in the interview, in the transcript that we have seen. What  
19 we are saying is that if you put this together with the other contemporaneous evidence it is  
20 all consistent. There is "GMI" in the corner, and then if you go to the tender register there  
21 is GMI. I will take you to that in a minute. It is two consistent annotations.

22 We are certainly not saying that this was a case where Mr. Nelson gives evidence of having  
23 a particular system. There were some leniency applicants who did have a particular system,  
24 the way that they have recorded it. We are not saying, as Mr. Robertson accepted, that we  
25 are not relying on some kind of similar fact evidence, "He did this for lots of other tenders  
26 and so this is the reason why he did it for this one". What we are saying is that there must  
27 be some reason why the initials were on the document. If you look at the evidence as a  
28 whole the most plausible reason is that that they were there because a cover was taken for  
29 GMI.

30 The second contemporaneous document is the famous tender register. I am going to refer to  
31 it in its form in annex 1 to the liability defence, simply because, as I have said, that has got  
32 page numbers on it. The starting point for this is that Mr. Robertson accepts that a cover  
33 was taken for this particular tender. He is not saying that the evidence is insufficient to  
34 establish a cover being taken. That is actually beyond any reasonable doubt. If you want to

1 look at the entry on p.16 for this particular tender, although it does not contain a marking  
2 saying “C”, it does not have a percentage mark up. You will see if you run down that all the  
3 cases where Mr. Nelson does not have a percentage mark up but has a “C” or the word  
4 “cover” somewhere are cases where he has taken a cover. You will not see it so well on  
5 that, but if you turn back a page you can see it more clearly because there are quite a few  
6 instances of “C” on the previous page. So where he prices a job up he puts the percentage  
7 mark up in and where he does not price a job up he puts a “C” or the word “cover”. This  
8 was a case where he does not put the percentage mark up and that may be one of the reasons  
9 why Mr. Robertson accepts that in all likelihood a cover was taken by Mr. Nelson for this  
10 particular tender.

11 What Mr. Robertson says is, assuming that a cover was taken what the evidence does not do  
12 is prove that it was taken from GMI. He makes several comments in that respect. He starts  
13 off by pointing out that the annotation in the last column need not have been written at the  
14 same time as the word “cover” and that consistently, he says, there was no specific link  
15 between the last column and the word “cover” or “C”. He says that all we have got is this  
16 single name, there is nothing saying that this single name, GMI, was the person that we  
17 cover from because of the absence of a link.

18 We say that, in fact, if you look at the other instances of cover taken where we rely on this  
19 document in the decision where it is accepted that a cover was taken you do see cases where  
20 a single name has been written in the last column and where there is the letter “C” or the  
21 word “cover”, and where it is accepted that a cover was taken. The first is – I think I should  
22 show you these, Mr. Robertson did, in fairness, refer to some of them, but he did not take  
23 you to where they are – at p.31 of this tender document, and that is the Lotus example. That  
24 was actually infringement 62. You will see there the single name, Lotus. It is slightly  
25 obscured by the words “OFT Copy”, but you can see in the middle column there is the letter  
26 “C”. That was an infringement that was accepted.

27 Another example is one I do not believe Mr. Robertson took you to, which was  
28 infringement 165, and that is at p.55, and the bottom line there you see “Stainforth” and the  
29 letter “C”. Again, not challenged. That is infringement 165. Just to give you the references  
30 – Mr. Robertson gave you the reference for 62 – the reference for 165 is decision,  
31 para.IV.4617 to 4638 at pp.1229 to 1233.

32 I am not saying that these are exhaustive, but it does show that there are other cases where  
33 infringements have been accepted where the evidence for that is a single name in the last  
34 column and the letter “C”. In fact, I believe Mr. Robertson took you to some of the cases

1 where Mr. Nelson commented on this. I do not think he took you to the comments in  
2 relation to 165, so I should just take you to that now. It is in the same volume at tab 5, p.9,  
3 in the bottom right hand corner.

4 THE PRESIDENT: The interview.

5 MISS BACON: That is Mr. Nelson's interview. I am just taking you to this bit because  
6 Mr. Robertson took you to the interview in relation to the Lotus infringement and some of  
7 the others.

8 THE PRESIDENT: This is infringement 165.

9 MISS BACON: Yes, 165. Half way down you will see in between the two hole punches:

10 "Okay. The next one is a residential development, Stanningley Road, Leeds, dated  
11 the 17<sup>th</sup> of the 9<sup>th</sup> 03. Do you recall anything about that contract?"

12 He says he does not really recall anything. He says:

13 "Okay. And, again, um, it's your handwriting?"

14 Yeah.

15 Yeah? And you created the entry in the register. In the fourth column there's a C,  
16 so again that, that indicates to you that there's a ...

17 Yeah.

18 ... you took a cover on that contract. And, again, in the final column, um, you've  
19 written Stainforth. So, that indicates to you that you took a cover from ...

20 Yeah.

21 ... from Stainforth."

22 MR. SCOTT: It is obvious, but he has said he does not recollect, he is then clearly led by the  
23 person interviewing him.

24 MISS BACON: I am not going to deny that. It is apparent from the face of the document that he  
25 was being led. I do not want to put this point too highly. The point that I am making is  
26 simply that it is not correct to say that there is never any link between the final column and  
27 the middle column. There are several infringements in which there is one name given in the  
28 final column, the letter "C" in the middle column, where it is accepted that a cover price  
29 was received by Mr. Nelson. On those occasions they are infringements that have not been  
30 challenged.

31 THE PRESIDENT: And Stainforth is this case.

32 MISS BACON: One was Lotus, one was Stainforth.

33 THE PRESIDENT: And Stainforth and Lotus accepted that they had been given the covers?

1 MISS BACON: Stainforth and Lotus, accepted that they had indeed given the covers. Those are  
2 not infringement decisions that are challenged by the parties. It is simply the case that there  
3 was an obvious correlation in some cases and we are saying that the same correlation exists  
4 in this case. There was only name in the final column, that of GMI. If, on this occasion,  
5 Mr. Nelson had approached Stainforth there is no reason why he would not have written  
6 “Stainforth” in the final column alongside “GMI” and indicated it with an asterisk.  
7 Actually the Centurion Park tender is a good example of what we say he would have done.  
8 That is at p.40, the second entry. You have seen this already. There are the slightly  
9 illegible other names in the right hand side, “W Birch”, “GMI” and then “Finnigan”, as Mr.  
10 Garside, I believe, has translated for the Tribunal. He has noted the three names down and  
11 then he has extrapolated GMI – he has indicated it separately with a bracket. So you see  
12 that when he did have a couple of names and he was minded to indicate that one or other of  
13 them had given him a cover price, he would indicate it separately.

14 MR. SCOTT: If you look further down at items 19, 20 and 21, there are two names in each case  
15 and it is ----

16 MISS BACON: It is nought indication.

17 MR. SCOTT: There is a certain inconsistency.

18 MISS BACON: We are not saying that on those cases it is conclusive that one of them was the  
19 party giving cover. The point is that in this case what is extraordinary is that there was not  
20 anything else. There is Stainforth anywhere on the document. He could have put Stainforth  
21 on, he could have put Stainforth and underlined GMI or asterisked GMI or whatever. In  
22 this case all we have is the single name GMI.

23 THE PRESIDENT: Sometimes he does not put any name at all.

24 MISS BACON: Unfortunately, Mr. Nelson does not seem to have had any kind of consistent  
25 system.

26 THE PRESIDENT: That is the problem, is it not?

27 MISS BACON: That is the problem. I come back to my earlier submission, we are not saying we  
28 have a perfect record. There are some of the leniency applicants who had a much better  
29 record than Mr. Nelson. The OFT needs to do the best it can with the contemporaneous  
30 evidence that we have. We say, given that we have the word “cover”, it is not disputed that  
31 a cover was taken, there is only one name in the right hand corner, that of GMI, no  
32 Stainforth or anyone else. Then we have GMI written on the other contemporaneous  
33 document that has been given to us.

34 THE PRESIDENT: With no explanation of why it was there?



1 MISS BACON: One has to put several items of evidence together and come up with the most  
2 likely explanation, the most probable explanation. Mr. Nelson gives evidence that his  
3 documents are to be translated in the way that the OFT has. I will not take you back to  
4 Mr. Nelson's interview transcript, but his evidence is that, on the totality, these documents  
5 indicate that a cover was given by GMI to Irwins for this tender. We are not relying on  
6 some kind of consistent system. The document speaks for itself. Mr. Nelson had different  
7 ways of marking companies. Sometimes he put them all, sometimes he put one, sometimes  
8 he did not put any. We say, taking the evidence as a whole, the most likely, the most  
9 plausible explanation is that he got a cover from GMI.

10 There is one other bit of the transcript which I would like to take you to, which I do not  
11 think that you have seen. There were three tapes from Mr. Nelson, and unfortunately they  
12 are divided between two files. The first tape is in bundle 4 and Mr. Robertson has taken  
13 you to that. That is bundle 4, tab 1. I was not going to take you back to that. That is where  
14 Mr. Nelson starts off and explains how he generally recorded cover prices, and he explains  
15 the general nature of his tender register.

16 The second take is the one in our liability defence bundle, and that is where he talks about  
17 the specific tender, and I will not take you back to that.

18 The third tape is at bundle 4, tab 2, and there is just a small point on that which I would take  
19 you to, which is at p.8, and it starts around the point of the second hole punch. This was  
20 actually when he was talking about a different tender, and he makes some comment about  
21 Totty. Then the question comes:

22 "Who are or who were the general kind of group of contractors that you might  
23 have exchanged cover prices with?"

24 Yea, Yorkhouse particularly. Towards the end, Stainforths, the BMP ... So, the  
25 more, the most if you'd have looked towards the end. The guy at Yorkhouse.

26 GMI if, ah, if there was any, if I felt that they were just using us."

27 "They" presumably means the client. Then his evidence is there: "There are a lot of people I  
28 would chase around because I'd be prejudiced sometimes", and we know that Mr. Nelson's  
29 practice was to take a lot too much work and then take covers at the last minute. The only  
30 point I wanted to make on that is that that is consistent with the fact that he records taking  
31 cover from GMI on those two occasions in relation to the alleged infringement 101 and in  
32 relation to this occasion. He said specifically there that GMI is one of the companies who  
33 he would take a cover from on occasion.

1 So taking all of that together we know that Mr. Nelson is not a lawyer and does not express  
2 himself with the clarity that Mr. Robertson no doubt would, but his evidence does support  
3 what we say are the most plausible inferences to be drawn from the contemporaneous  
4 documents.

5 In relation to GMI's evidence, as I said at the start, what is odd is that in their affidavits and  
6 in the witness statement of Mr. Naylor, they do not make any categorical statements that  
7 they never gave cut prices during this period and what is even odder is that Mr. Naylor's  
8 affidavit that was sworn in June 2008 does not mention a tender at all. He accepts that it  
9 was a tender that he priced up, so from his evidence today – if it was correct – you would  
10 have expected him to make some kind of statement in that June 2008 affidavit that “I priced  
11 this tender but there is no way that I would have given a cover to Mr. Nelson on this  
12 occasion; it is inconceivable that I would have done so”, because that would have been the  
13 logical thing to say in response to the SO.

14 Mr. Shann does mention that tender. Mr. Shann said that Mr. Nelson was unreliable, he  
15 was an [Confidential], evidently there was this grudge between the two companies and so  
16 his evidence cannot be trusted. Mr. Naylor, who was the person he accepted priced up the  
17 tender, did not say anything about it at all. His witness statement, then made in April 2010  
18 (two years later for the purposes of this appeal) does say that if he had been asked for a  
19 cover price he would have referred it to Mr. Shann and then on to the client as he had done  
20 in the case of the Centurion Park tender. But, as I have said, there is no convincing reason  
21 why – he did that in the case of 2002 – but two years earlier when, according to his own  
22 statement, things were gradually changing in the industry, you would have expected him to  
23 be more enthusiastic about giving cover prices and apparently on his evidence two years  
24 earlier he would not have given that cover price. We say it just does not stack up. He says  
25 that he gave cover prices at least until the mid-1990s. He accepts that in 2002 he did not  
26 turn Mr. Nelson down, he did not say “It is just not our practice to do it; go away and find  
27 somebody else”, he gave a cover price to Mr. Nelson in 2002. Why is it that half way  
28 between those two periods in 2000 he would have said “No”? Why would he have turned  
29 Mr. Nelson down? There is no reason why he would have given a cover in 2002 and would  
30 not have done so in 2000.

31 In fact, we say the evidence in relation to the Centurion Park tender makes clear that in  
32 2002 GMI was entirely willing to give a cover price first of all, because it did give a cover  
33 price for that tender; and secondly, it did carry out the kinds of projects for which a cover  
34 could have been given.

1 THE PRESIDENT: But it was a pretty different type of cover price, was it not, it was given with  
2 the client's consent?

3 MISS BACON: We accept that this is an outlier. And, as I have said, it is quite clear from the  
4 oral explanation this morning, the reason it was an outlier was they had a very close  
5 relationship with the client.

6 THE PRESIDENT: And also they wanted to do down Irwins.

7 MISS BACON: They wanted to do down Irwins. It is inexplicable why there is no similar  
8 evidence in relation to 2000.

9 THE PRESIDENT: I think what he is saying is: "I can't remember it, but if I had received such a  
10 'phone call I would have done the same thing.

11 MISS BACON: We know that he didn't ask the client because he ----

12 THE PRESIDENT: He did not get the phone call, he cannot remember it, is what he said.

13 MISS BACON: His evidence was he cannot recall getting a phone call. What he does recall is  
14 that there was no other instance, and Mr. Naylor and Mr. Shann both gave consistent  
15 evidence on this, neither of them could think of any other case where they had gone to a  
16 client, but we know that companies were 'phoning them up and asking for cover during that  
17 period. So what they are asking the Tribunal to accept is that all through this period there  
18 were companies 'phoning them up all the time, and that they were consistently refusing,  
19 save for one occasion when they went to the client, and we say that that is just not plausible.

20 THE PRESIDENT: He said: "After a while people did not ring up much because they knew that  
21 we didn't give them."

22 DR. SCOTT: You say "all the time" but my recollection of the evidence was that "all the time "  
23 was not very frequently.

24 MISS BACON: Five or six times a year, they were still being asked five or six times a year, and  
25 eventually their case must be that on every single one of those occasions except for this one  
26 occasion in 2002 they consistently turned down the request for cover at a stage when  
27 everyone in the industry was doing it. They had not had any particular competition  
28 compliance training, there would have been no reason to turn down requests at that time,  
29 and no reason has been given.

30 THE PRESIDENT: No, he did give reasons, Miss Bacon. He suggested that why should they  
31 help competitors who they were trying to beat? And on one occasion he was only willing to  
32 give it because they thought that actually it would not do any credit to Irwins in the eyes of  
33 the client whom they were trying to win.

1 MISS BACON: That could have been the case for any number of other tenders, and obviously  
2 what they wanted to do was to make themselves look good in the eyes of the client. It is  
3 just very odd that this never, ever happened on any other occasion and that they are saying  
4 what they did on every other occasion was to turn down the request for cover. It would be  
5 in their interest to give a cover price because they would have one less competitor on the  
6 job.

7 THE PRESIDENT: Well I suppose you know you have one less competitor as soon as you are  
8 requested for a cover price, you do not have to give one, mark you.

9 MISS BACON: You have made jolly sure of it when you give them the cover price.

10 THE PRESIDENT: Unless they do not use it.

11 MISS BACON: You might give them a cover price that is so high that they decide not to tender,  
12 but certainly it is not hindering them if they give a cover price, it is actually helping them by  
13 eliminating one of the competitors.

14 THE PRESIDENT: They might lose you credit if the client comes to hear about it, I suppose  
15 there is that aspect of it, if you have a very good relationship with your clients and you start  
16 giving people cover prices.

17 MISS BACON: I accept that if the client ever came to hear of it, that is their explanation for why  
18 they went to the client on the one case. At the end of the day our submission is it is very  
19 odd. There is one occasion where they say they went to the client. We submit that it is  
20 most plausible that in relation to other cases when they were asked for a cover price they  
21 gave it and there is not really any good reason why they should not have done. If you put  
22 that together with the contemporaneous documentation we accept, as I said at the start, these  
23 are all cases where, by the very nature of this kind of infringement, the evidence is  
24 fragmentary, and it is likely to be recorded only on a single document, often a photocopy of  
25 a tender form, often a tender register consistent or inconsistent, or a note on an internal  
26 record sheet, and what we have here is two of those. We have an annotation on the tender  
27 form, and an annotation on the tender register which are consistent, and we say that there  
28 has not been a satisfactory reason given by GMI why it is inconsistent with the general  
29 practice at the time, and inconsistent with the fact they had given cover prices until mid-  
30 1990s, they should suddenly have not given one in 2000.

31 Sir, that is our submissions in relation to infringement 14.

32 THE PRESIDENT: Yes.

33 MISS BACON: Infringement 228, and that is the Leeds College of Art and Design. The OFT  
34 had, as you will have seen, one contemporaneous document – this tender – and that was

1 Totty's tender summary sheet, calculating Totty's tender price, recording the names of the  
2 competitors and containing the handwritten annotation in the corner "GMI (Cover) 4795".  
3 Mr. Robertson has made some submissions about the fact that we do not have the original  
4 for that. You will have heard the reason which is that the leniency applicant has not been  
5 able to produce the original; it is not that we have not asked them for it.

6 We are happy to assume for the sake of argument that the annotation "GMI (Cover)" was  
7 written using a different pen to the annotation "4795". We do not make any case that they  
8 were written using the same pen and at the time, and we could not because we do not have  
9 the original document in front of us. We have never made a case that "GMI (Cover)" was  
10 written in the same ink as "4795", so we are happy to assume for the sake of argument that  
11 Mr. Robertson is correct – as he said, we are happy to give him the benefit of the doubt,  
12 which is what he said we should do. But, we say, that does not make any difference to our  
13 case, which I will come to. We do not need to rely on it and we do not rely on that as being  
14 written at the same time.

15 DR. SCOTT: We do have on that document various dates.

16 MISS BACON: The dates we were taken to this morning, yes.

17 DR. SCOTT: We were taken to the dates and my recollection is that there was evidence on the  
18 face of the document that it was printed on 20<sup>th</sup> and the closing date for tenders was 22<sup>nd</sup>.

19 MISS BACON: 22<sup>nd</sup>, that is right.

20 DR. SCOTT: So in terms of your discussion earlier on about the point at which things happened,  
21 we are looking at the end of the period, or after that, that the annotation takes place, because  
22 GMI is not listed as at 20<sup>th</sup> in the list of competitors, so something strange seems to be  
23 happening. They have a list of competitors and yet there is then an annotation after it has  
24 been printed on 20<sup>th</sup>, which includes GMI.

25 THE PRESIDENT: Well we do not know it was printed on 20<sup>th</sup>, do we? It could have been  
26 printed after 20<sup>th</sup>?

27 DR. SCOTT: Oh it could have been printed after, yes. What I am saying is that in terms of the  
28 period the annotation appears to have happened on or after 20<sup>th</sup>, and we are towards the end  
29 of the period because they are running out of time.

30 MISS BACON: Our submission in relation to that would be what is going on here is that they are  
31 printing out this sheet to take along to their tender settlement meeting, and that is the  
32 evidence of, I believe, Mr. Miller, and I was going to take you to the relevant parts of the  
33 transcript in a minute. He would do all the calculations, go along to the settlement meeting  
34 and at that meeting he would know, for example, some of the competitors, and so he would

1 list them as being some of the competitors. That is entirely consistent with the suggestion  
2 that at some point after the meeting when he knew the price that they were going in at he  
3 gave a cover price to a competitor. Actually, the consistent evidence of the various leniency  
4 applications was that you could not give a cover price until you had reached your own price  
5 for it, because you might give a figure which would be the wrong and they could end up  
6 winning the contract or whatever. So you had to actually reach your own figure first, and  
7 then give the cover price. You will have seen in the decision that generally people said that  
8 they would ring up to get a cover price at the eleventh hour – either they would ring up  
9 earlier and say “We will ring back later” or they would always ring up at the last minute. In  
10 any case, when the cover price was given it was given at the eleventh hour, sometimes the  
11 day before the tender was due in, sometimes actually on the morning of the tender and in  
12 Mr. Nelson’s case he said he rang up after the tender, after the 12 o’clock deadline and got  
13 the cover price and then puts his in a bit late. Whatever happened it is certainly not the  
14 OFT’s case that the leniency applicant would have been able to give a cover price before the  
15 settlement meeting for which this particular tender summary sheet was created. So that is  
16 entirely consistent with printing it out. We know our competitors are top, Hornby, Newcon,  
17 Interserve, we go along to the meeting agree the price and after the meeting we have a  
18 conversation with GMI at which we give them the cover, write it in in hand, and what is  
19 quite apparent is that the annotation “GMI (Cover) 4,795” is of a different ilk to the  
20 annotation in the bottom left hand corner, which is: “These are the prices we know our  
21 competitors are going in with”. As you said, it is expressed in different ways, it is “4,795”,  
22 it is much more precise than the figures that he has given here, so he is certainly not finding  
23 out around the same time and in the same nature what the price is that GMI is going in at.  
24 We say that is all consistent with him giving a price to GMI at the last minute, and it does  
25 not really matter whether he wrote “GMI (Cover)” say on 20<sup>th</sup> and then on 21<sup>st</sup> wrote the  
26 figure in, or later on the same day, it does not really matter to us, to prove whether they  
27 were both written at exactly the same time and with the same pen. What is necessary for us  
28 to demonstrate is that there is logical reason why “GMI (Cover)” was written there and that  
29 is that cover was given to GMI.

30 THE PRESIDENT: Is it your case that it does not matter whether it was given by Totty or  
31 someone else?

32 MISS BACON: Sorry, can I just mention one point? Mr. Singla is just pointing out that it says  
33 “today’s date” on the top of the document is 15<sup>th</sup>.

1 DR. SCOTT: I appreciate that looks like an error in that you do not have the revision date of 20<sup>th</sup>  
2 so one assumes that that is not the date.

3 MISS BACON: Coming back to the President's question, the OFT's case is not that GMI  
4 obtained a cover price from somebody else. The OFT's case is as set out in the decision  
5 that GMI obtained a cover price from. As I will take you to in the transcript, Mr. Miller  
6 does confirm that Totty gave GMI a cover price. Mr Robertson said he did confirm. But,  
7 he did specifically confirm that he wrote it down and GMI obtained a cover price from  
8 Totty. That is our case. We do not have any evidence that GMI obtained the cover price  
9 from somebody else.

10 THE PRESIDENT: I think what he says is that Mr. Miller had no independent knowledge of that  
11 being given and his suggestions as to how it could have come about indicate that actually it  
12 is difficult to see who did.

13 MISS BACON: Perhaps we ought to go to Mr. Miller now?

14 THE PRESIDENT: Only in your good time.

15 MISS BACON: I was going to come to Mr. Miller anyway. I think that is a helpful point at  
16 which to come to Mr. Miller. Pausing though, and just before I go to Mr. Miller, there is  
17 one other point that I need to make on the actual figure. Mr. Robertson said, "Well, the  
18 difference between the figure of 4795 and Totty's own figure was only 4 percent, and that  
19 meant that it could not have been a price given by Totty because we have got various people  
20 from Totty who said that they would have given prices in a different range --" So, the three  
21 candidates referred to by Mr. Robertson are: Mr. Miller - 5 to 7 per cent; Mr Rhodes - 7 to  
22 10 per cent; Mr. Kirby - 10 per cent. But, it is not the OFT's case that we have to identify  
23 who gave the cover price. There were other estimators at Totty. It may well have been that  
24 another estimator gave the cover price on this occasion. 4 per cent is certainly within the  
25 range of cover prices that were given in relation to the infringements in this Decision.

26 THE PRESIDENT: By Totty?

27 MISS BACON: The general range. I am not saying that Mr. Miller, Mr. Rhodes, or Mr. Kirby  
28 gave cover prices consistently in the sort of 3 to 4 per cent range. We know that Mr. Miller  
29 said that 5 per cent was the bottom of the range. But, 4 per cent is not so far from that. But,  
30 in any event he has not said that he gave the cover price on this occasion. The point that I  
31 want to make is that there are other estimators at Totty. We have a fairly wide spread of  
32 percentage differentials already. It is entirely possible that another estimator gave a cover  
33 price which was only 4 percent. 4 percent is well within the range of cover prices given in  
34 the Decision. In fact, Mr. Nelson, when he was questioned about it, and said in his

1 transcript in relation to the other infringement, said that his cover prices were in the region  
2 of 3 to 4 per cent. So, it is not by any means implausible that a 4 per cent cover price could  
3 have been given. So, that is just a point that I wanted to make on the figure before we move  
4 on to Mr. Miller.

5 Mr. Miller is at Tab 8 of the liability defence bundle. Can I start by taking you to pp.8 and  
6 9 of the transcript? I do not think that you have seen those yet. At the top of the page,

7 “Would the contact always be by telephone?

8 Yes.

9 And would you record the contact?

10 I would mention it to my superiors that a company was after a cover price, and if  
11 we were going to give one, then, yes, we would write that they were going to take  
12 a cover on our tender register sheet.

13 Is that the same as a tender appraisal?

14 No, the tender appraisal is the initial .. but the tender is hot .. the final tender  
15 summary is where my net figure is”.

16 So, it looks like he is talking about this kind of sheet where this annotation was found. This  
17 was his tender register. Then there are some questions about when the cover would be  
18 given.

19 “Okay. Would a cover price then usually be around some days in advance of the  
20 tender deadline?

21 No, that would be awkward. If you wanted to give a cover price out that wanted  
22 to be realistic, you had to have a firm tender figure of our own first. If you gave a  
23 tender figure out a week in advance and then all of a sudden somebody made a  
24 mistake and they needed to add a load of money onto one of the subcontract prices  
25 that you’ve got, then they could end up lower than you. ...

26 How many days before the tender deadline would the initial contact take place?

27 Probably ... it tended to be about half the way through ...

28 And then the actual cover price, when would that be?

29 Uh, that would be usually the evening before the tender was due in. Usually a  
30 tender is due at noon on the day, so it would be the evening before or the Friday  
31 before the Monday”.

32 So, that answers Mr. Scott’s question to me about when this annotation could have been  
33 made.

34 Then, on p.9, about four lines down,



1 “And if, if Totty were providing a cover, how would you or one of your  
2 colleagues actually arrive at the figure to give them?

3 Uh, we’d do the second settlement with the directors and then we’d discuss what  
4 figure we would give to, to the opposition”.

5 Then he makes his 5 to 7 per cent point -- that for him he would give that 5 to 7 per cent.  
6 So, his evidence there is that you would put the figure that you gave your competitor on the  
7 tender register sheet, which is what we have seen in this case, and it would be done after the  
8 settlement meeting with the directors. So, that is why you have this typewritten sheet. We  
9 have got all the information that they know at that point. They go along to the settlement  
10 meeting, settle the price, and then you have the cover that is being given to the competitor  
11 and you write it on in hand because that is after the settlement meeting. That is entirely  
12 consistent with what the OFT says occurred in this case.

13 Then if you turn on to pp.10 and 11, the passage I wanted you to look at was the passage on  
14 the second half of p.11. So, after he is asked about the feedback comments - the TCG -  
15 which we have seen on the bottom left-hand corner - and he says, “So that was post-tender  
16 ... And that’s your handwriting”. Then the question,

17 “Uh, but when you put GMI cover, was that written down pre tender?

18 Yes, pre tender date, yes.

19 And are you happy to confirm , looking at that document, that you gave GMI a  
20 cover price, and that was the figure you gave them? \*\* I can’t recall who gave  
21 GMI the cover price ...

22 Okay, but looking at that document and what you recall about this job, you are  
23 happy to confirm that whether it was that you specifically made the 'phone call  
24 [then there was some overtalking and so we do not know the rest of the question]

25 Yes GMI received a cover from Totty Construction, yes.

26 And that that would have been written down pre tender, before the tender went in?

27 It would, as soon as we’d got to our figure, then we would have decided what  
28 figure to give to GMI”.

29 So, he is saying that although he cannot remember who made the specific 'phone call to  
30 GMI, he was the person who wrote the figures out. He is confirming it was a figure written  
31 down pre-tender. He is confirming that GMI received a cover from Totty. So, the only  
32 thing he is not doing is saying who specifically put in the 'phone call to GMI.. What he is  
33 saying is that it might have been Steve Rhodes or Justin Goodyear; it could have been

1 another estimator, he says. "I don't know, but I do confirm that GMI received a cover from  
2 Totty".

3 THE PRESIDENT: He is gauging that from what he is looking at in the document.

4 MISS BACON: What he is looking at. Also, he is saying that that was written down pre-tender.

5 "I confirm that GMI gave a cover price to Totty." He actually does have a direct  
6 recollection of the job because if you see on the previous page ----

7 THE PRESIDENT: At the bottom of the previous page ----

8 MISS BACON: Yes. Exactly.

9 THE PRESIDENT: "-- an extremely awkward job to price."

10 MISS BACON: Exactly.

11 "-- but after going what we thought was quite competitive, we ended up missing out  
12 on the job."

13 So, this is not one of the occasions, as with Mr. Nelson, where he says, "I just don't  
14 remember anything about it at all". He is saying, "I do remember about it, and I do  
15 remember that this was written down pre-tender. I am giving evidence that GMI received a  
16 cover from Totty".

17 THE PRESIDENT:

18 "I can't remember for the life of me ever speaking to GMI. It's not a company  
19 that I have spoken to in the past and I don't know any of the estimators there.  
20 That's not to say that one of our other estimators or, or directors hadn't received a  
21 'phone call."

22 MISS BACON: "But although I wrote the figure on there ----" So, he is saying he was the  
23 author. So, what he is saying is, "I didn't put in the call to GMI. I do not know anyone at  
24 GMI. It could have been one of the other estimators, but I wrote the figure. I wrote the  
25 figure and we gave a cover price to GMI". It could not be clearer what he is saying in this  
26 interview.

27 Can I then just take you briefly to the transcript of Mr. Kirby? I do not think Mr. Robertson  
28 took you to this.

29 DR. SCOTT: There is just one point here that Mr. Robertson has made - that is, that he explains  
30 the figure in terms of a conversation

31 That is subsequent to 22<sup>nd</sup> and, as I understand it, that point has never been put to any of  
32 these people - Mr. Miller, Mr. Rhodes -- The other estimator had left, as I recall.

33 MISS BACON: Mr. Miller did not actually give evidence on the other possibility that Mr.  
34 Rhodes mentioned which was that GMI had taken a cover from somebody else. Mr.

1 Rhodes said, "If we put GMI cover then either we would have given them the cover or  
2 someone else would have, but looking at it, I think it is most probable that we gave him the  
3 cover because we would not have had the value". That point was not put to Mr. Miller. It is  
4 true that he was not specifically asked at that point, "Well, was this the result of a post-  
5 tender conversation?", but his evidence is that he gave GMI a cover price. He does not say,  
6 "We got the price that GMI bid because we had a post-tender conversation". He is saying,  
7 "I remember the job. It was my handwriting. We gave GMI a cover price. I don't know  
8 who made the call". That was his evidence. That is completely inconsistent with the  
9 suggestion that he wrote down that price as a result of a post-tender conversation. Indeed,  
10 the GMI witnesses do not identify who it was at Totty they are supposed to have spoken to.  
11 Our submission will be that the post-tender conversation did not occur, and the most  
12 plausible explanation of all of this, including the very unambiguous evidence of Mr. Miller,  
13 who was the author of the particular annotation, is that it was not a post-tender  
14 conversation, but it was, as Mr. Miller says, a cover price given by Totty to GMI.  
15 Unless you have any more questions on that, can you turn up please, the transcript of Mr.  
16 Kirby's interview which was at Tab 5 of your Bundle 4, the skeleton bundle? I just want to  
17 take you to two paragraphs. The first is at p.3 where he talks about who is estimators were.  
18 This is just to answer Mr. Robertson's point, "Well, who did give the cover then?" If you  
19 go half-way down the page, around the first hole punch,

20 "But post the reorganisation you as the commercial manager, did you have like a  
21 team that worked to you? You were like their manager?"

22 Then he explains there were a couple of estimators that would report to him. Then the  
23 question comes,

24 "So on the pre-contract side who would be the people who reported to you?

25 The estimators.

26 Who were they, names, please.

27 Martin Miller and then, Justin wasn't with us, he left".

28 You will recall that his evidence was that there was a reorganisation in April 2005 and that  
29 Justin had left around that time.

30 THE PRESIDENT: That is Mr. Goodyear, is it, that one?

31 MISS BACON: Justin Goodyear, exactly. Then he says, "We took on Alan Brown and we took  
32 on Leona Mercer, so there were three". His evidence was that after that April  
33 reorganisation Mr. Goodyear had left, and who they had left were Martin Miller, Alan  
34 Brown, who they took on presumably to replace Mr. Goodyear, and Leona Mercer, and then

1 he explained that Leona started off as a clerk and wanted to become an estimating assistant.

2 So there were the two estimators, plus Leona.

3 I just take you to that because it could well have been that somebody who was not among  
4 the people being interviewed, such as Alan Brown or Leona Mercer, would have given the  
5 cover price.

6 It is, as I said, no part of the OFT's case to identify who it was, but Mr. Robertson certainly  
7 cannot rule out that a cover price was given by Totty simply by saying, "It was not  
8 Mr. Rhodes, it was not Mr. Goodyear, it was not Mr. Miller", because there were two other  
9 people who could have given the cover price.

10 That was the only point I wanted to make about that, to show you who else was working at  
11 Totty at the relevant time.

12 THE PRESIDENT: I was just going to let you know the time. Do you want to finish on this  
13 point?

14 MISS BACON: I could probably finish in five or minutes but you probably do want to stop now.

15 Can I just take you to one other passage from Totty, and that is p.11. It is still Mr. Kirby,  
16 and he is being asked:

17 "How did the exchange of covers actually work in practice?

18 ... would this contact be written down anywhere? Would it be recorded or not?

19 I don't think so.

20 It wouldn't be written on a tender summary sheet or anything like that?

21 [It] may be written on a tender settlement form that one of the contractors was after  
22 a cover or had been given a cover by us or whether we'd found out it was another  
23 ... But I think if there were at least five people tendering for a job and he knows  
24 that somebody had rung up and asked for a cover then he'd probably put it on the  
25 tender form that somebody had asked for a cover price."

26 So he is saying there that that is the way that estimators would probably have marked up the  
27 cover price, by putting it on that tender summary sheet.

28 I think I need no more than ten or 15 minutes tomorrow and then Mr. Robertson wanted a  
29 short reply. I am still very hopeful that we will be done on penalty by lunchtime tomorrow.

30 THE PRESIDENT: We will see where we get to. Thank you very much.

31 (Adjourned until 10.30 am on Tuesday, 13<sup>th</sup> July 2010)

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