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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1120/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 July 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) QUARMBY CONSTRUCTION COMPANY LIMITED
(2) ST. JAMES SECURITIES HOLDINGS LIMITED

Appellants

- and -

OFFICE OF FAIR TRADING

Respondent

*Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com*

HEARING

APPEARANCES

Mr. Mark Clough QC and Mr. Adam Aldred (both of Addleshaw Goddard LLP) appeared on behalf of the Appellants.

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

1 THE CHAIRMAN: Good morning. Yes, Mr. Clough?

2 MR. CLOUGH: Mr. Chairman, members of the Tribunal, it falls to me to continue and complete
3 my submissions from yesterday. I was proposing to turn now to the evidence on the three
4 infringements, if that is convenient after you have so kindly agreed to look at the
5 submissions in the skeleton argument and the evidence.

6 THE CHAIRMAN: We have.

7 MR. CLOUGH: Our specific submissions regarding the substantive infringements numbers 6,
8 214 and 233 are set out in annex 1 to our skeleton at paras.5.1 to 5.25, pp.22 to 28. I
9 believe that is bundle 4. The OFT responds in its skeleton at paras.40 to 48, pp.15 to 18.
10 If I can deal, first, with the burden and standard of proof, briefly, paras.19 to 21 of our
11 skeleton, again pp.14 to 16, respond to the liability defence, paras.56 to 79, pp.16 to 31,
12 with regard to the burden and standard of proof. Section 2.10 on p.7 and sections 7.1 to 7.8,
13 pp.23 to 24 of the notice of appeal also address the insufficiency of evidence and the burden
14 and standard of proof. Correspondingly, the OFT's skeleton deals with the standard of
15 proof issues at paras.40 to 48, pp.15 to 18.

16 I put all those references down because our primary submission is that there is no dispute
17 between the parties as to the relevant case law governing the burden and standard of proof
18 in competition cases. However, the nature of the evidence and the weight to be given to it
19 in the context of the balance of probabilities test has thrown up at least two areas of
20 disagreement. Very briefly, the first one, Quarmby submits that the company policy of not
21 engaging in cover pricing should require evidence stronger than that provided by leniency
22 applicants if the OFT is to prove a serious offence such as the three it alleges. We say the
23 OFT is wrong in saying that it is just another factor for the OFT to take into account. Our
24 evidence of the QCC company policy against cover pricing must increase the improbability
25 of its infringing Chapter 1.

26 THE CHAIRMAN: First you have to establish that there was a policy.

27 MR. CLOUGH: We do, sir, and we say that the evidence of Mr. Roger Nelson, despite the cross-
28 examination yesterday, has still clearly put before this Tribunal the evidence that Quarmby
29 had this policy. Miss Bacon of course challenged that, but Mr. Nelson equally confirmed in
30 his responses that that policy existed.

31 THE CHAIRMAN: That is a question of fact, is it not?

32 MR. CLOUGH: It is a question of fact for you, sir, yes I must accept that. But it is a consistent
33 factual issue that has been presented from the outset. When I say the outset, I mean from
34 the correspondence dealing with the fast track offer back in August 2009, after the

1 Statement of Objections, and of course in the response to the Statement of Objections itself.
2 It has been the consistent position that Quarmby's corporate policy was not to have
3 anything to do with cover pricing.

4 It is perhaps understandable, because the evidence makes it clear, that historically QCC did
5 most of its work for the parent company, SJS. So it was not actually going out into the
6 market, so there was no question of cover pricing. As I believe it is put, the corporate
7 image of Quarmby Construction Company was one that the company wished to maintain as
8 having nothing to do with that sort of practice, albeit it knew the practice was going on.

9 In fact, I should just say that I have not forgotten Mr. Summers, and indeed Mr. Chairman,
10 your request for us to put together the story for the history of the company. Perhaps while I
11 am just talking about it is a good moment for me to do that. I have got copies. (Pause)

12 THE CHAIRMAN: Do you want to leave that for the time being and hand them up later?

13 MR. CLOUGH: They seem to be here, sir. (Handed)

14 THE CHAIRMAN: Thank you.

15 MR. CLOUGH: This is a Google search, sir, that members of our team have carried out, so you
16 can see what you get in response to the two different companies.

17 THE CHAIRMAN: Yes, thank you, OK. I have read it quickly, but we will read it later.

18 MR. CLOUGH: Thank you very much.

19 THE CHAIRMAN: Special Projects is about a third the size of QCC in terms of turnover.

20 MR. CLOUGH: It is, yes. You see the history of how they work, under one parentage so to
21 speak.

22 THE CHAIRMAN: I have read it.

23 MR. CLOUGH: Effectively sold off.

24 THE CHAIRMAN: Yes, carry on.

25 MR. CLOUGH: Sir, I was just saying that the OFT, we submit is wrong to say it is just another
26 factor to take into account, i.e. the policy of no cover pricing and the evidence, assuming
27 that it is accepted, that the company's policy against cover pricing must increase the
28 improbability of its infringing the Chapter I prohibition and therefore increase the weight of
29 the evidence required to prove that it has nonetheless been guilty of an infringement of
30 Chapter I.

31 The second area of disagreement is that the OFT is wrong to have fallen into the trap of
32 treating the "endemic nature of cover pricing in the construction industry" (as it calls it) as
33 repeatedly alleged in the decision as evidence against QCC on the three individual findings
34 of infringement. We say they should be assessed discretely on the evidence available

1 against the parties involved in those individual alleged infringements. It follows that the
2 OFT is misguided at para. 41(d) of its skeleton, p.16:

3 “In assessing whether particular behaviour was probable or improbable, the OFT
4 was entitled to consider the surrounding behaviour of other companies in the same
5 way that one would be entitled to consider (to invoke Lord Hoffmann’s example,
6 cited in *Re D (Northern Ireland)*) the prevalence of lions in England when
7 considering whether a lioness had been seen in Regent’s Park ...”

8 – unless of course the lions are involved in a specific tender with which Quarmby is
9 concerned.

10 I submit that this is quite an important point because so much of the OFT’s case is what we
11 call, perhaps too tritely, “guilt by association”, but it comes again and again as a theme that
12 cover pricing was endemic therefore there must be a presumption against you being
13 innocent in a specific case and we will start off on that basis, and indeed were entitled to
14 take that into account as being evidence of a specific infringement.

15 We accept that that is part of the general background but it is not evidence in a specific
16 infringement, especially in the context of where our evidence is that we had a policy of not
17 committing these sorts of infringements. That is why we say we are perhaps in a rather
18 different position to some of the other appellants, because we do have a different story to
19 tell, and I very much hope that we are explaining that yesterday and today to the Tribunal.

20 If I may now turn to infringement 6, the first of the three infringements alleged to be on
21 3rd March 2000. QCC’s case is set out in the response to the statement of objections at
22 para. 2.11, that is your bundle 1, tab 3, p.57. I do not propose to take you there in the sense
23 that we have consistently said the same thing, that is largely our case until we comment on
24 the further evidence. That is repeated at para. 7.6(b) in the notice of appeal, and then para.
25 7.7 at p.24 of the notice of appeal refers to the further deficiencies in the evidence of one of
26 the leniency applicants which was identified by Mr. Roger Nelson in his witness statement
27 which is at bundle 2, p.41.

28 Let me move on to see how the OFT sets out its position ----

29 THE CHAIRMAN: We are now on to the limitation point?

30 MR. CLOUGH: I am not doing the limitation point until the end, Sir, I am dealing with the
31 evidence still – the evidence to infringement 6.

32 The OFT sets out its position as taken in the decision at paras. 64 to 68 of liability defence
33 which is your vol.3, pp. 19 to 23.

34 THE CHAIRMAN: Yes.

1 MR. CLOUGH: Then again at para. 43, p.17 of the OFT skeleton where it just says he has got
2 nothing further to add. Turning to para. 65 of the liability defence in Bundle 3, the OFT
3 sets out the evidence listed in the Decision at paras. IV.758 to IV.787 upon which the
4 finding of infringement 6 is said to have been based. An examination of this evidence,
5 which is included in your Bundle 5, the Quarmby chronological bundle, which I will turn to
6 in a moment, reveals the insufficiency of the evidence relied upon by the OFT for a finding
7 of infringement. That is our underlying submission.

8 If we turn, as they do, first of all, to the Strata tender form document, and the words 'From:
9 Quarmby Construction' which we have seen several times, which is in Bundle 5, Tab 1, p.1
10 -- You will recall from yesterday, sir, that it has at the top right-hand corner Mr. David
11 Ironmonger's tender return form. We have the words 'From: Quarmby Construction'. I
12 want to take this quickly. This is referred to in para. 65 of the liability defence. We have
13 visited this document before. This document was found during the OFT search of Strata's
14 premises, we are told, in a ringbinder file marked 'Strata Covers from January 2000 to
15 December 2001'. We were told in one of the interviews that comes later that Strata did not
16 acquire Weaver (which is the name that appears on p.1) until 2002 - at least, that was Mr.
17 Nelson's evidence. He thought 2002, but also Mr. Ironmonger believed it was at least 2001,
18 I think he said.

19 Secondly, we have the list of covers provided by Strata as part of its leniency application.
20 This is Bundle 5, Tab 1, p.2. This Leeds project has been one for which Strata had received
21 a cover price from Quarmby. That is p.2. You have this OFT document just recording the
22 allegation and using the words 'Quarmby Construction' in this specific example. Then, at
23 para (c) they refer to the interview with Mr. Ironmonger on 29th March, 2007. That, of
24 course, is after the fast track offer letter and therefore does not relate to our submissions
25 regarding the seven suspect tenders, but does, of course, come into play now that we are
26 looking at the actual findings of infringements. Here, when he was shown the form of
27 tender with those words on the top right - 'From: Quarmby Construction' - the OFT singles
28 out that he said, "Yeah, I've written in the top right-hand corner who we received a cover
29 from - Quarmby Construction". That is p.18 of his interview note. We start with a leading
30 question,

31 "From what we understand in this file was forms of tenders and, um, other
32 documents to do with contracts on which you have taken a cover
33 Yeah."

34 In other words, that is a leading question.

1 “So, you, you’d keep all, all the forms of tenders for the jobs that you’ve taken
2 cover on in that file ...”

3 Another leading question –

4 “... and then somewhere on those documents somebody ...

5 Top right-hand corner there possibly be a name of who we got it from.”

6 Then it goes on:

7 “... and this is how the estimating department kept a track of the covers that Strata
8 had taken on jobs?

9 Yeah, don’t know why we kept them, to tell you the truth.”

10 And he says it was either he or other estimators who put these documents in there.

11 Coming back to the OFT’s chosen extracts, the next one is that he, Mr. Ironmonger, said
12 that that indicated to him that he took a cover from Quarmby Construction. He also said
13 that this was his handwriting in answer to a leading question from the OFT, “That indicates
14 you mean cover from?” To this he replied, “Yeah”. He also said that the form of tender
15 with the annotation at the top that says, “From Quarmby Construction”, was found in the
16 covers file in which he put the form of tender for a contract when he had taken a cover.

17 I would like us to go to p.7 of the interview. This is to show that his memory is not very
18 good, and there is perhaps very good reason, in the middle of the page he says:

19 “And then a point, um, where, what, we the six months before I left, I would say
20 we were covering 90% of all the traditional tenders that came in.”

21 Four lines down he says:

22 “... which didn’t go down very well with me personally.”

23 He is asked:

24 “Is it still quite fresh in your mind, can you recall...?”

25 I’ve gone through this list and individual ... I find it very difficult to remember
26 individual jobs.”

27 He is then told:

28 “I’ve got some documents that I can show you ...”

29 Then he is told:

30 “Might not be that you’re going to be remembering, it might be that, if I show you
31 a document, you can tell me exactly what it means.

32 “So, hopefully, um, it won’t rely on your memory too much.”

33 He is shown the documents and asked to comment about them. Can we look at p.19, sir, of
34 the bundle.

1 THE CHAIRMAN: Should we not look at p.17 of the bundle if we are going to go through this
2 exercise?

3 MR. CLOUGH: I think we have done so yesterday, but I apologise for that.

4 MISS BACON: If you are looking at this transcript, so that I do not have to take you back to it,
5 perhaps you could start at p.16, or even in the middle of p.15, which is where Mr.
6 Ironmonger starts talking about this particular tender. I will avoid bringing you back to it in
7 my submissions.

8 THE CHAIRMAN: I have done that exercise, and one comes to the dénouement at p.17 of this
9 series of questions, and we have to form our own conclusions on the facts as to what he was
10 saying.

11 MR. CLOUGH: Sir, that is exactly what we invite you to do. In our submissions that I made
12 yesterday I said that these interviews are very unsatisfactory for a number of reasons. First,
13 it is clear that the witnesses, if that is what they can be called, for very understandable
14 reasons do not really remember what happened. They are then shown documents, which of
15 course is perfectly reasonable to jog their memories, and they then are surmising and often
16 we will see they use the words “surmise”, “suspect”, “may”, and it is not helped by the
17 leading questions. It is quite complicated because, I think to be fair to the OFT, in the
18 written lawyer’s leniency application documents they may say, “We accept a cover was
19 given to X company”, but they are still relying on the documentary evidence for saying that
20 rather than on the witness being able to say, “Yes”, I remember that that specific cover was
21 given. I am not suggesting that the OFT’s trying to mislead anybody, but we very strongly
22 submit that there is just not enough evidence here to meet the standard of proof.

23 THE CHAIRMAN: We really have got that point, Mr. Clough.

24 MR. CLOUGH: Thank you, sir, I do appreciate that. What I am just trying to do now is to show
25 you the bits that the OFT have picked out in their defence as being the key bits of evidence,
26 and our comments on them.

27 I will turn now to para.(d) of para.65. This is the general point that elsewhere in the same
28 interview as Miss Bacon was indicating, Mr. Ironmonger says that on certain of the tender
29 records he would write on the top right hand corner who he had got a cover from. Indeed,
30 at p.6 of the bundle we can see that.

31 A general explanation then by Strata of its participation in cover pricing is given in the
32 decision, para.IV-763, cross-referring to the leniency evidence section at IV-617 to 634.
33 Then, finally, the fact that Quarmby’s tender figure was the only figure below Strata’s
34 tender figure on which the OFT inferred that Strata could only have received a cover price

1 from Quarmby (decision IV-784) is relied upon. Our comment on that is that it can go
2 either way. If your covers are being given by somebody to another then they may have
3 been given by somebody totally different, and indeed there may have been several covers
4 from what appears to have taken place in other incidents in the decision.

5 Quarmby has already set out its objections to the finding of infringement 6 in the SO
6 responses I mentioned. We simply maintain our contentions that the OFT has failed to
7 consider other reasonable explanations for the annotation on the form of tender document
8 from Quarmby Construction, such as post-tender discussion, and that the post-tender
9 discussion provides a plausible alternative explanation in QCC's submission.

10 It should be pointed out, as I have perhaps said a number of times, the OFT has not
11 contradicted our approach and it has not sought to produce any evidence to contradict what
12 we are saying. It is sticking in its heels and simply relying on the documentary evidence
13 before the Tribunal.

14 If I may, I will turn now to the infringement, 214. QCC's submissions are set out in annex
15 1 to the skeleton, paras.5.6 to 5.21, pp.22 to 26. In case this is helpful for your further
16 reading, I should just point out that this is summarised in the chronological document, the
17 paragraph numbers for the pleadings are given, in this case under suspect tender 5,
18 infringement 214. These submissions are in addition to the original arguments made in the
19 response to the statement of objections at para.212, which was in your bundle 1, tab 3, p.60,
20 repeated in the notice of appeal at para.7.6(b), and the OFT position is set out at the liability
21 defence, paras.69 to 73, pp.23 to 26, and in their skeleton argument they have also made
22 some small observations.

23 The infringement concerns Humanities Research Institute, the University of Sheffield, and
24 our submissions are that the OFT relies upon the following five categories of document.
25 The first one, and this is bundle 5, tab 9, p.68, is a handwritten note which the OFT says is
26 contemporaneous. If you see that, sir, it has Humanities Building at the top and you see
27 Quarmby (Ilkley), so the name Quarmby is written there.

28 The second document is the Admiral memo. That is the BT standard version. The next
29 page of that bundle, p.69, which the OFT again says is contemporaneous. This, you may
30 remember, was put to Mr. Nelson in cross-examination. I beg your pardon, I am corrected.
31 It was put to Mr. Harrison in cross-examination. It concerns the allegations about the
32 telephone conversation with him. You will see his name on the page and Quarmby
33 Construction Company Limited, their phone number and address, and the various
34 indications that a call of some sort took place at 4.30 Wednesday.

1 Then we have all the other pieces of evidence which we have commented on already as
2 actually adding up to supporting more of a finding that there was a post-tender telephone
3 conversation rather than there was a pre-tender one. In our submission, there is clearly
4 different handwriting which must therefore have been made at different times. For
5 example, the left hand list of design etc looks different from the 1.487250 million pricing
6 figures, then “not silly distance away” looks like “ring 4.30 Wednesday” handwriting.
7 Again, sir, we have asked the OFT for the original of this document and, as we understand,
8 the OFT does not take original documents so it may be that it is not very easy for them to
9 find it. They have not found it so we are unable to see the original handwriting, which is a
10 problem for the OFT, we would say, rather than for us because they have the burden of
11 proof.

12 Then the third piece of evidence relied on for this infringement is the leniency application,
13 or Appendix 1 of it, which is at p.70 (the next page). That is accepted as not being
14 contemporaneous. At 5189, that is said to list Quarmby and D Harrison. I beg your pardon,
15 sir, I think it is actually p.73.

16 THE CHAIRMAN: Mr. Harrison’s name is at p.73 alongside Quarmby.

17 MR. CLOUGH: Yes, p.73. Yes, it must be p.73 which I thought was the next document.

18 THE CHAIRMAN: Are pp.72 and 73 the same document or different documents? Can someone
19 help us?

20 MR. CLOUGH: They are different. Yes, I think there must be some misunderstanding in the
21 mind of the writer of this paragraph (c). Page 70 does not name Quarmby and D Harrison,
22 but p.73 obviously does. The next piece of evidence is a leniency application listing D
23 Harrison and Quarmby as someone who contacted the leniency applicant about tenders.

24 THE CHAIRMAN: I presume pp.72 and 73 are part of Appendix 2, is it?

25 MR. CLOUGH: Page 73 is headed Appendix 2, so it is separate. I think Appendix 1 is Schedule
26 of Projects and Appendix 2 is Schedule of companies and, where known, individuals who
27 were either in contact or contacted.

28 THE CHAIRMAN: I understand.

29 MISS BACON: Sorry, the confusion might arise because this is a core bundle which contains
30 only extracts. The full copy of Appendix 1 is at tab 12 of the Liability Defence bundle. Sir,
31 that contains considerably more pages than is extracted at 72. So that was Appendix 1 and
32 Appendix 2 is just a list of contact names, of which your copy in that bundle is heavily
33 redacted, but in tab 13 of the Liability Defence bundle you should see an unredacted
34 version.

1 THE CHAIRMAN: Basically what it amounts to is this, is it not, that Appendix 1 contains a list
2 of allegedly offending contracts with the name of the company, and then Appendix 2 is a
3 separate appendix in which they were asked to put names to companies, contacts to
4 companies? So if one sees a name, for example the first name on p.72, somewhere in
5 Appendix 2 one might find a name of an individual relating to that named company?

6 MR. CLOUGH: Yes, sir, and indeed on p.72 (which is part of Appendix 1) you see the name of
7 the company, Quarmby Construction, at the bottom of the list. I am sorry, it is my fault, I
8 had not explained that properly to you. Appendix 1 is the first two pages, and then
9 Appendix 2 has the name Harrison and Quarmby as a separate document. That is why we
10 did not put in all the intervening pages because you do not really need to see them, I do not
11 think, for the point the OFT wishes to make.

12 That brings us to the interview with Mr. Andrew Clarkson which was on 30th March, so
13 again that is after the fast track offer. That is bundle 5 tab 10 p.74. I am going to deal with
14 that in a moment. First, the OFT accepts that the leniency application documents would
15 have been drawn up with the assistance of documents 5205 and 5206. That is the first two
16 documents, the handwritten note at p.68 of tab 9 bundle 5, and the Admiral BT memo
17 document at tab 9 p.69. As such, we submit that those documents do not add anything to
18 the probative value of the underlying documents, because the leniency applications do not
19 add anything; they are just recording in a different form what those original documents
20 indicate.

21 Second, the OFT asserts at its liability defence para.71 that there is no plausible
22 interpretation of the contemporaneous documents other than being a minute of a
23 conversation discussing cover pricing, when taken together with the interview of Mr.
24 Clarkson and his explanation of the contemporaneous documents.

25 In our submission, that conclusion is wrong for the following reasons. Mr. Andrew
26 Clarkson has no specific recollection of the project. We should be able to see this in his
27 interview.

28 THE CHAIRMAN: Yes, we have read his interview.

29 MR. CLOUGH: You have, thank you that is very helpful. He says there, the OFT asked him:
30 “Have you got any recollection of that job?” and he says “Not specifically.” He then
31 expresses a suspicion that Admiral took a cover from Quarmby when he says:

32 “Not specifically other than I suspect, again because it’s from the university,
33 [cough] a regular client that we’d a lot of work with, we got the enquiry from
34 them and didn’t have the capacity to give them a, a proper tender. And instead

1 of sending the information back, I suspect we took a cover on it, and that
2 Quarmby are the contractor that we took the cover from.”

3 This is after the fast track offer, and this evidence is still evidence of suspecting. This is
4 also consistent with the fact that Mr. Clarkson repeatedly expresses doubt or suspicion when
5 being interviewed about infringement 214. For example:

6 “I suspect, again I must have rung up a subcontractor. Yes, I suspect that
7 that Rawe with the question mark and crossed out was actually Hare and Ransom,
8 but it may well be that, um, [rustling] somebody gave me a name that sounded like
9 Raw when they spoke to me on the phone so I wrote it down there.

10 I suspect, and I may be wrong, but they just asked for one set of price bills on that.
11 I don’t know why that’s on there, I genuinely don’t.

12 I don’t know I’d be surmising if I say anything ...”

13 And that is about the annotation “not lowest” on that handwritten BT document.

14 “I don’t know what, unless it means they asked for one price bill”, and that is answer to the
15 question: “What ‘asked for one’ means?” “I don’t know. Well I presume for whatever
16 reason he just said ‘I’ve given you a figure’.” That is p.45 of the interview, which is p.79
17 of tab 10 – it is in the second big passage with “AC” against it.

18 “Ah, I suspect that the 1487250 [£1,487,250] was a figure that he gave me as our figure, as
19 our cover figure ...(pause).”

20 THE CHAIRMAN: Mr. Clough, what is happening here – I have read this interview more than
21 once.

22 MR. CLOUGH: Yes, Sir.

23 THE CHAIRMAN: What is happening here is that Mr. Clarkson is giving an explanation of what
24 he says is a contemporaneous document.

25 MR. CLOUGH: Yes.

26 THE CHAIRMAN: He does not say: “I suspect it might be a contemporaneous document”, he
27 says “It is a contemporaneous document with various annotations made on it at various
28 contemporaneous times” – yes?

29 MR. CLOUGH: Yes.

30 THE CHAIRMAN: And what he says in the interview really speaks for itself, does it not? It is a
31 question of what interpretation we put on it. I am not sure that going through the interview
32 in detail is going to add anything to the sum of our knowledge; we already have that sum of
33 knowledge.

34 MR. CLOUGH: I am obliged, Sir. Our case is exactly as you understand it. We say this

1 is not ----

2 THE CHAIRMAN: Well we have read it and we understand it.

3 MR. CLOUGH: I am very grateful. We say this interview is particularly bad in the sense that it
4 has explanations even given in the interview that totally support a post tender telephone
5 conversation conclusion and that is our main point. My learned friend just reminds me that
6 in the cross-examination yesterday Miss Bacon very properly put this question to Mr.
7 Harrison:

8 “So the OFT’s case on this, and I need to put it to you is that it is just not plausible
9 that this document was written as a result of post tender discussion. There is
10 nothing on it at all that would indicate that it was a post tender discussion and
11 everything would indicate that it was a pre-tender discussion designed to establish
12 not only the price but the various other elements in the specification?”

13 Mr. Harrison answered:

14 “I would tend to disagree with that, there is nothing on there to suggest to me that
15 this is a pre-tender ...”

16 That is obviously his view looking at that document. I think we accept what you kindly say,
17 Sir, and it is a matter for the Tribunal looking at that interview – all of it – to see what
18 conclusions you can come to and whether the OFT was justified in finding that there was an
19 infringement, bearing in mind all the hesitation and, indeed, contradictions that are in that
20 witness statement.

21 I will not take you through the rest of our comments on that interview after your helpful
22 indication. I think if I can conclude on infringement 214 Quarmby’s main submission is
23 that the interview with Andrew Clarkson is consistent with the BT telephone memo – the
24 Admiral memo – and its annotations with the inference that the document related to a post-
25 bid note and, in particular, Quarmby relies on p.44 where Mr. Andrew Clarkson said regard
26 the words ‘the lowest tender’: “That’s something I would normally ring up about after the
27 tenders had gone in. I don’t know what that means.”

28 Finally, at para. 44 of the OFT’s skeleton, the OFT admits that Mr. Andrew Clarkson
29 qualified his answers when interpreting the contemporaneous documents relating to
30 Admiral’s evidence. The OFT has also confirmed that the OFT has never denied that Mr.
31 Clarkson had no specific recollection of the projects in question.

32 I turn now to infringement 233, which is the final infringement. Here QCC sets out its case
33 on infringement 233, which is Eastbrook Hall in Bradford, again back in the response to the
34 statement of objections at paras. 2.8 to 2.9 and, in particular, 2.13 (bundle 1, tab 3, p.62)

1 and I would just refer you to para. 2.13. It is repeated at para. 7 by reference in the notice of
2 appeal.

3 The OFT's response is set out at paras. 74 to 79 of the liability defence, pp. 27 to 31 in your
4 bundle 3 and further elaborated at para. 45, p.17 of the OFT's skeleton – I am sorry, not
5 “further elaborated” save that it contends that the new evidence of Mr. France, in which he
6 expresses doubt that York House submitted a cover price for this tender is pure speculation
7 which cannot outweigh the totality of the evidence on which the OFT based its conclusion
8 that an infringement had occurred.

9 In this instance I would like very quickly to look at the paragraphs in the decision which
10 lists the evidence relied upon for the finding of infringement, that is IV.6499 to 6508. Here
11 again, we have just four main pieces of evidence, and again you are going to be quite
12 familiar with these from yesterday and no doubt from your reading, so I will take this as
13 quickly as I can.

14 The first one is an estimating programme document provided by York House as part of its
15 leniency application which consists of a print out of an electronic document with some
16 manuscript annotations indicating that a cover was obtained for Eastbrook Hall tender, and
17 stating ‘1/8 Quarmby’ beside the entry for the tender.

18 This, Sir, is the tab 12 of bundle 5, and it is 92.1, the page which Miss Bacon has very
19 kindly had blown up so we can all read it. At 15 it says: “15 COV. 0580 Eastbrook Hall,
20 Bradford.” That is the computerised programme.

21 THE CHAIRMAN: So this is on manuscript p.2?

22 MR. CLOUGH: It is the third page in your tab. This is simply saying “COV” but the key
23 document is p.27, which we have looked at before of the next group of documents, which is
24 on p.97. This is where we see the “1/8 Quarmby” down against “Eastbrook Hall,
25 Bradford.”

26 We looked again yesterday just above that at the other tender “COV Residential Morley”
27 which has the word “Quarmby” on the left hand column, and then the “?? Quarmby” on the
28 right hand side.

29 The other document is a handwritten list of covers provided by York House, that is a list of
30 their covers, stating that a cover had been taken from Quarmby from Eastbrook Hall. The
31 OFT accepts that this is probably not a contemporaneous document that was created for the
32 purposes of York House leniency application. That again simply, on p.112, has the number
33 “5080 Eastbrook Hall, Bradford” and “Quarmby” against it. That is a leniency period
34 created document.

1 Finally, there is an interview with Arthur Richardson, the estimator for York House who
2 confirmed that the two contemporaneous print-outs are to be interpreted as indicating that a
3 cover was taken from Quarmby for the tender.

4 So, the OFT says its case is based on two consistent contemporaneous documents, together
5 with leniency evidence corroborating the interpretation placed by the OFT on those
6 documents (para. 78, p.28 of the liability defence). The OFT responds to our objections
7 raised in response to the Statement of Objections at para. 77A to E on pp.28 to 29 of the
8 liability defence. At para. 78A to C it responds with three further arguments which you see
9 made in this Notice of Appeal. In particular, QCC contends that the OFT was not -- Sorry.
10 Document A0490 is the collection in which p.27 is included. It is our contention that that
11 document was not contemporaneous because the manuscript annotation "1/8 Quarmby"
12 appeared only on one page of the document. There is also a reference to "Quarmby" with
13 two question marks alongside the Morley Project, which cast doubt on the contemporaneity
14 of the document. The fact that there were twenty-odd other pages also casts doubt on the
15 timing of the handwriting of this particular page. As we saw yesterday, there is only one
16 other page which has handwriting on it which has initials ----

17 THE CHAIRMAN: Can we just look at p.27 again, please, Mr. Clough, because I think we might
18 like your assistance on this? The black bars indicate what?

19 MR. CLOUGH: My understanding, sir, is that they indicate the time period. If you look at the
20 top above the bars you will see it is an estimating programme. You see 27th June, 2005, July
21 2004 ----

22 THE CHAIRMAN: That means you have got until ----

23 MR. CLOUGH: Those are the weeks.

24 THE CHAIRMAN: You have got until, for Eastbrook Hall, it would appear, Monday, 25th July to
25 prepare the tender. Is that what it means? Is that your contention?

26 MR. CLOUGH: Yes.

27 THE CHAIRMAN: If we look up the page at line 10, which relates to an ambulance station,
28 which has nothing direct to do with this case, we have a blocked black section which leads
29 to, probably, Friday, 1st July for that ambulance station. Yes? Then we have a manuscript
30 hatched-in version which appears to extend that black block to Monday, 18th July. Now,
31 what are we to take that to mean? What is your submission? (After a pause): Let us just
32 go through that again. You are making a submission that this is not contemporaneous. So, I
33 think we have to look at the document in perhaps a little bit more detail than we have.

34 MR. CLOUGH: Certainly.

1 THE CHAIRMAN: Line 10. The ambulance station at Tenyas Brough. The estimation period,
2 programme period in the printed black, the computerised black block is Friday, 1st July,
3 2005 when it finishes.

4 MR. CLOUGH: Yes.

5 THE CHAIRMAN: But, then there is a manuscript extension and it looks as though originally it
6 was extended to the Friday of the week commencing 11th July, and then re-extended to
7 Monday, 18th July. Now, what are we to take from that in terms of contemporaneity?

8 MR. CLOUGH: Sir, there are a number of comments one can make about that. First of all, as I
9 am sure you have seen, there are different pages where the same projects have proper black
10 lines extended beyond different dates. I think there is probably one which goes beyond ----

11 THE CHAIRMAN: Presumably that is because this document is produced on more than one
12 occasion and circumstances alter.

13 MR. CLOUGH: Absolutely. So, it could well be that the black that you have pointed out - and,
14 indeed, maybe the squiggly black line below that which looks like another date ----

15 THE CHAIRMAN: Yes. The squiggly black line below that suggests that whatever was
16 happening in Mushroom Street, Leeds, the estimation period was extended into the middle
17 grass, the middle distance.

18 MR. CLOUGH: Indeed in all the entries like that one finds initials - the initials of the estimators
19 presumably.

20 THE CHAIRMAN: Yes. So, what is it if it is not contemporaneous?

21 MR. CLOUGH: Some of it may be. What we say finally, sir, is that the words that now relate to
22 actual or alleged infringements of cover pricing – Quarmby, Stainforth, Stainforth, 1/8
23 Quarmby - those have got no initials against them at all. They are nothing to do, if you like,
24 with the management of the tender processes which the other changes have, and no doubt
25 where the initials go down, that is indicating who is dealing with that.

26 THE CHAIRMAN: Except you cannot take it a column at a time, Mr. Clough. What we see if
27 we look at that line - I know these lines are not consecutively numbered - the Eastbrook
28 Hall line is that the manuscript contains “COV”, a squiggle, and then a date and the name
29 Quarmby. Now, if we take all those together, what inference do you suggest we draw or do
30 not draw from that?

31 MR. CLOUGH: Sir, I think one has to put this in context. These documents came to light at the
32 time of the leniency application. In our submission there is no reason to jump one way or
33 the other in terms of when these -- We cannot say, of course, when the handwriting was put
34 there. Our submission is that the OFT cannot say either. This is a very important

1 document . Quite frankly, we have again asked for a copy of the original and if the OFT
2 seeks to rely upon it - and, indeed, they do - and to draw the sort of inferences that
3 understandably you are considering, we submit that they really ought to get the original of
4 this document. It must exist - otherwise, they could not have got a copy of it. (After a
5 pause): Mr. Aldred has put it in a slightly different way from what I was submitting: our
6 submission - and we do not see any evidence against it - is that anything to do with the
7 cover prices on this document (or alleged cover prices) would be more likely to have been
8 put there at the time of the leniency application than at the time of the tenders themselves.
9 That is regardless of the fact that no doubt you are right, sir, that it is more likely that the
10 changes of dates could have been put down on the original document.

11 THE CHAIRMAN: Thank you. I understand.

12 MR. CLOUGH: When I say 'the leniency application' I mean that people are trying to remember
13 what was happening, and so they wrote these things down - hence the "??". The "??" would
14 be very surprising if it really was contemporary. Why would it have to be a question mark.
15 It is very interesting because, of course, Residential Morley is one of the suspect tenders
16 which was dropped by the OFT. That does again tend to support our approach that this is
17 more likely to have been written there in the context of the leniency application. However,
18 I do understand where you are coming from, sir. It is ultimately for the Tribunal to decide,
19 but we say this evidence is not sufficient to draw the conclusions of infringement.
20 Sir, the argument is set out at paras. 3.30 to 3.46 of annex 1 to our skeleton, which we
21 referred to yesterday, where we have explained why the evidence available to the OFT prior
22 to the fast track offer was insufficient to found a reasonable suspicion that QCC have
23 engaged in cover pricing on this Eastbrook Hall, Bradford project. It follows, we say,
24 inevitably that the evidence cannot be sufficient to satisfy the higher evidence burden for
25 finding an infringement. The evidence is simply not strong and compelling.
26 We set out, finally, our response to the liability defence, paras.5.24 at pp.27 to 28 in annex 1
27 to our skeleton. Here, if I may just briefly summarise, we say that since the fast track offer
28 more evidence has become available, and this is set out at tab 13. This the OFT's schedule
29 returned by the employer or client listing the tenderers, and you see Quarmby and the
30 amount tendered by the company and the fact that Ham is the winning tender. We say that
31 adds nothing to the evidence already there.
32 We have said perhaps too many times that it is QCC's corporate policy neither to give nor
33 take cover prices, and the OFT is not entitled to draw a conclusion that because other
34 companies are engaged in cover pricing that increased the likelihood that QCC was as well.

1 The OFT concludes at para.77(b) of the liability defence that a cover price may have been
2 given whilst the QCC estimators were genuinely unaware that a colleague supplied a cover
3 price to York House. We say that is fallacious. All those at QCC who were involved in the
4 estimating process and may have had access to sufficient information to give a cover price
5 have given witness statements to the effect that they did not give York House a cover. The
6 only people who had access to that information were the commercial director, the managing
7 director and the two estimators. We can see that in the fourth witness statement of Roger
8 Nelson, which is in bundle 2, tab 45, pp.601 and following.

9 The OFT has already accepted that QCC's directors were not involved in cover pricing and
10 accordingly it has not sought to increase any of QCC's fines for such an aggravating factor.
11 Finally, I want to turn to Mr. France's evidence.

12 Mr. Aldred has kindly found the word "he", and I think, in the light of our debate on the
13 interview of Mr. Richardson, p.123, it is the fifth box from the bottom where it says "AR".
14 This is in terms of the contemporaneousness of the handwriting.

15 THE CHAIRMAN: This is volume 5, tab 12, p.123, which helpfully is upside down, but I have
16 read the whole of that interview.

17 MR. CLOUGH: It is the fifth box from the bottom. That is the same as that, and according to
18 that, "he's put we have taken a cover from Quarmby". So that is, if you like, something
19 else.

20 THE CHAIRMAN: Yes, got that.

21 MR. CLOUGH: Then we come to Mr. France. He was the client's surveyor, and his evidence is
22 in bundle 2, tab 34. The first witness statement of Mr. France says that he would be
23 surprised if York House took a cover price and certainly there was no need for it to do so. It
24 could simply have returned the tender without penalty or submitted a bid that was
25 comfortably above the client's budget, safe in the knowledge that it would not be awarded
26 the contract.

27 The evidence of Mr. France in his second witness statement again confirms that he saw no
28 reason why York House should deceive him on this project and that he "doubts" York
29 House gave him a cover price and he remains "suspicious" of the suggestion that York
30 House gave one.

31 We submit that on the totality of the evidence there is insufficient evidence to find an
32 infringement in respect of alleged infringement 233, especially given that it is possible to
33 interpret the known facts in a way that is entirely innocent, and indeed the innocent
34 explanation is the most plausible explanation.

1 I say that, finally, on the basis of these two witness statements of Mr. Colin France. He was
2 neither deceived by any alleged cover price submitted by York on the Eastbrook Hall
3 project, but more importantly nor did he believe that a cover price had been submitted
4 because of all the circumstances and facts that he refers to in his statement. He says it was
5 totally unnecessary to do so in the light of his approach to the budget. There is a strong
6 implication that the budget would have been readily available to the tenderers if they had
7 either asked for or were told what the budget was. Here we have the employer saying not
8 just that it was unnecessary, he is saying, “I do not believe it was a cover price that was
9 submitted, if it was they were daft to do so”. Therefore, in terms of the evidential burden on
10 the OFT and the standard of proof, we submit that they have got a very high threshold to
11 cover here, because they have to show that the employer was actually talking nonsense, and
12 was in a position where his belief was incorrect.

13 Mr. Aldred has suggested that I read to you from the second witness statement, which is at
14 tab 44, bundle 2, para.9:

15 “There was, therefore, simply no need for any contractor to take a cover price.

16 Any contractor worth his salt would know that if he submitted a tender above the
17 budget, it would be very unlikely that he would be awarded the contract. In the
18 context of Eastbrook Hall, I made this very clear to York House and the other
19 contractors.”

20 Finally, and I apologise I am taking ten minutes longer than I had wished to, I want to deal
21 very quickly with the limitation period and pre-dates. I am not going to go into great detail,
22 but on the limitation period we have set out in relation to infringement 6, and it is the same
23 argument that applies to the four suspect tenders where the dates show that they should have
24 been statute barred. We do not accept the OFT’s argument that they were entitled to wait
25 until later to consider whether a suspect tender was statute barred. Our submissions are at
26 paras.12 to 14 on pp.8 to 11 of our skeleton argument, and paras.5.1 to 5.14 of the notice of
27 appeal. The OFT sets out its arguments, the liability defence at paras.14 to 32, their
28 skeleton argument paras.26 to 31. Also in the consolidated defence on penalties, paras.309
29 to 321, bundle 3, p.110.

30 Sir, our submission is that there is no limitation period in the Competition Act, there is no
31 clear statutory limitation period for competition cases in English law, and that that is an
32 automatic circumstance where s.60 of the Competition Act requires this Tribunal and
33 indeed the Office of Fair Trading to look to see what the position is under EU competition
34 law. We rely on Regulation 1 of 2003, Article 25, and perhaps equally importantly I have

1 brought, because I do not think they are in the authorities bundle, copies of Regulation 2988
2 of 1974, which has been referred to by a number of parties, including the OFT. This is a
3 very small point which we wish to draw to your attention. Indeed, this will not escape Miss
4 Bacon because she has already addressed this point, but I am not quite sure that the Tribunal
5 will have seen it in its full light. I would like actually to start with Regulation 2988 of 1974,
6 and look at the recitals. It is on the second page, and if you go to the first “Whereas”, the
7 very last line, it says:

8 “Whereas those Rules make no provision for any limitation period ...”

9 that is referring to the Competition Rules, and in the second paragraph of the preamble:

10 “Whereas it is necessary in the interests of legal certainty that the principle of
11 limitation be introduced and that implementing rules be laid down; whereas for the
12 matter to be covered fully, it is necessary that provision for limitation be made not
13 only as regards the power to impose fines or penalties, but also as regards the
14 power to enforce decisions ...”

15 and so on. Then it says:

16 “Whereas such provisions should specify the length of limitation periods, the date
17 on which time starts to run and the events which have the effect of interrupting or
18 suspending the limitation period ...”

19 At the very end of the last recital it says:

20 “... whereas it must also apply to the relevant provisions of future regulations in
21 the fields of European Economic Community law relating to transport and
22 competition ...”

23 There are two points I would like to draw your attention to here, sir. The first one is those
24 words at the end of the first recital, the beginning of the second, where competition law
25 makes no provision for any limitation period:

26 “Whereas it is necessary in the interests of legal certainty that the principle of
27 limitation be introduced and that implementing rules be laid down ...”

28 To avoid any confusion, as far as competition law is concerned, Regulation 2988 of 1974
29 has been effectively repealed and replaced by Article 25.

30 Could we turn to Article 25, this is Regulation 1 of 2003, which is in the authorities bundle.
31 Article 25 – we say this sets out the Rules very clearly and they should be applied by virtue
32 of s.60 of the Competition Act – says simply:

33 “The powers conferred on the Commission by Articles 23 and 24 shall be subject
34 to the following limitation periods:

1 (b) five years in the case of all other infringements.

2 2 Time shall begin to run on the day on which the infringement is committed.
3 However, in the case of continuing or repeated infringements, time shall begin to
4 run on the day on which the infringement ceases”

5 In our case, we think there is going to be no dispute, to the extent that this provision would
6 apply, that the dates of the alleged infringements are the dates that they were committed,
7 and certainly, not that it is relevant, they were the dates when the infringement ceased as
8 well.

9 Then para.3 sets out when interrupting activity can take place and what it can be.

10 Sir, in our submission, the application of those Rules is the most appropriate and logical
11 conclusion. I am not aware that this issue has come up before either the Tribunal or the
12 courts in this country before. No-one, I think, has come up with an authority for that
13 context. So I do offer my sympathy in that this Tribunal is being put upon perhaps to
14 decide this point. I do not think it is necessarily appropriate. It may be that you can
15 consider the possibility of making a reference to the European Court if you were to find it
16 difficult, but in my submission it is a straightforward application of s.60 Competition Act.
17 In the absence of silence, as we accept, of the Competition Act to deal with the question of
18 limitation in competition cases, then these rules should be applied. They are very clear and
19 easy to apply. In our case, they would lead to the result that infringement 6 would be statute
20 barred. So, turning the clock back, we say the first four suspect tenders would have been
21 statute barred as well.

22 THE CHAIRMAN: To what extent does the requirement of consistency in s.60 require exactitude
23 in the Member State, or is there a margin of appreciation, for example to enable a member
24 state, if it regards it as appropriate policy, to pursue an infringement within a reasonable
25 time of discovery thereof? Forgive me for interrupting you. If you take the analogy of a
26 prosecution of a criminal case (and there have been a lot of criminal analogies in this run of
27 cases) there is no limitation period for a criminal case because it is regarded as in the public
28 interest and sound public policy to start the case when you discover about it and then be
29 subject to abuse of process applications if appropriate.

30 MR. CLOUGH: Yes, sir. May I answer your question in two ways. First of all, we think that
31 consistency is most usefully implemented by this Tribunal in following what is done in the
32 European level, allowing obviously for any local or national idiosyncrasies if there is no
33 need to trample on them. To say that there is a margin of appreciation, I would not go to
34 that extent. I would say that the practice, and indeed in this case the very clearly set out

1 principle and implementing provisions after the 25 Regulation 1 2003 offer is a perfectly
2 rational and applicable system.

3 The second answer to your question – and I do not want to be accused of opening an issue
4 that we have not addressed before, but just in the context of the Decision - the Tribunal may
5 recall that the Decision holds that Article 81 does not apply in the present circumstances.

6 There may well be some parties who would dispute that, bearing in mind that the building
7 industry is an international industry – certainly a European wide industry. There is, to my
8 knowledge, one European company that was appealing this Decision. Leaving that on one
9 side, there are clearly in general going to be many cases where the OFT has to apply Article
10 81 alongside Chapter 1. If we are going to start talking about different limitation periods in
11 the context of each provision when those provisions are identical (apart from the geographic
12 jurisdictional scope) in my submission that would be very unhelpful and inappropriate.

13 Sir, in one sense it sounds a straightforward point. It has not arisen before, so there is not
14 any guidance that I can offer you, apart from stressing (as I perhaps have already) an
15 original regulation from 1974 that it is a direct consequence of the principles of legal
16 certainty and legitimate expectations that one should have a limitation period in competition
17 law proceedings.

18 In this case, it does go to strengthen the – not criticism but fact – that our first infringement
19 and this infringement 6 is over ten years ago, and whether it is appropriate to allow that sort
20 of infringement to be dealt with in this way. There may have been other ways that the
21 European Economics report canvassed that the OFT could have dealt with some of those
22 perhaps historic allegations.

23 Let me equally briefly deal with the submission that infringement 6 pre-dates the 1998 Act.
24 Here again our arguments were set out in our skeleton at paras.15 to 17, pp.11 to 14, and at
25 paras.6.1 to 6.21 of the Notice of Appeal, the OFT's Liability Defence paras.33 to 55 and
26 their skeleton paras.32 to 39. I am going to make two very short submissions, sir. That is
27 that if the agreement to provide a cover price was made and implemented before 1st March
28 2000, it clearly pre-dated the Competition Act 1998, whether or not it should have been
29 registered under the Restricted Trade Practices Act 1976. Second, if the agreement to
30 provide a cover price was made before 1st March 2000 but for the future to provide the
31 cover price after 1st March 2000 we say the agreement was still made before 1st March and
32 therefore not subject to the Competition Act 1998, and that there were not two registerable
33 restrictions accepted by two parties to a registerable agreement prior to the commencement
34 of the Competition Act because the restrictions were future restrictions, if any, within the

1 meaning of the RTPA 1976. So in that situation the transition provisions apply to the effect
2 that the Competition Act 1998 does not apply until 1st March 2001. That is our case.

3 My learned friend tells me that the *Tobacco* case decision was published yesterday and that
4 apparently also addresses this issue of the transitional period and the application of the
5 transitional period. We will give you a copy of that later in the day, I think.

6 Mr. Chairman, unless I can assist the Tribunal any further, those are our main submissions.
7 I apologise to Miss Bacon for going on a bit longer than I should.

8 THE CHAIRMAN: There is no need to apologise; you have been most helpful. Do you want a
9 ten minute break? I think we will probably have one anyway.

10 MISS BACON: I do not need ten minutes. I would be grateful for a few minutes.

11 THE CHAIRMAN: We will have a ten minute break. Can I put you on warning for your
12 domestic arrangements that we may have a shorter lunch break today. We need to rise for
13 reasons of my own not later than twenty to 4, absolutely not a minute later than twenty to 4
14 and if necessary we will have to go into another day. I suspect we probably can complete
15 the case by then. We will see. Twenty five to.

16 (Short break)

17 THE CHAIRMAN: Yes, Miss Bacon.

18 MISS BACON: Sir, I will make my submissions in the order set out in our skeleton argument, so
19 I will deal first with the preliminary issue concerning whether Quarmby was rightly
20 included as an addressee of the SO and the decision. I will then move on to the limitation
21 and timing arguments. I will then deal with the substantive evidence in relation to the three
22 infringements, and finally very briefly I will address the Tribunal on this short point about
23 whether the client was deceived in relation to infringement 233.

24 Starting with the preliminary issue. This is a point that has not been taken by any of the
25 other appellants in the 25 appeals before the Tribunal. The reason for this, we say, is that it
26 is a hopelessly bad argument both as a matter of principle and as a matter of the specific
27 facts of Quarmby's case. The first point to make is that by now the Tribunal will have well
28 on board the fact that the OFT had to conduct this investigation so as to make the best use
29 of its limited resources, and one of the ways it did this was to take the policy decision at a
30 certain point in its investigation to draw a line, look at the evidence that it had gathered up
31 to that point and decide which of the hundreds of the companies implicated by the evidence,
32 and the thousands of potential infringements it was going to investigate further.

33 The way it did that is set out in the decision, and I will just give you the paragraph numbers
34 for your note: II.1459 to 1507. Those paragraphs of the decision describe in particular the

1 steps that the OFT took between autumn 2006, when it started its process of consolidation
2 and 16th April 2008 when it issued its statement of objections.

3 Quarmby's case is that when the OFT carried out that process of consolidation it did not
4 have sufficient evidence in Quarmby's case of at least five suspect tenders. So Mr. Clough
5 says Quarmby should not have been brought within the door at all, the OFT should have
6 excluded it from its investigation at that point and it was therefore not entitled to take an
7 infringement decision against it.

8 Putting it quite starkly, Mr. Clough's case is that even if Mr. Nelson and Mr. Harrison had
9 come to the Tribunal yesterday and had admitted that Quarmby had given cover prices to
10 Strata, Admiral and York House on the three occasions alleged, the OFT was not entitled to
11 include it in its infringement decision, because of the way it had consolidated its decision at
12 an early stage. One can immediately see that if that were correct as a matter of principle
13 that there would be very serious concerns, but even leaving the principle concerns aside, the
14 real difficulty with Mr. Clough's case on this is that he is conflating two quite different
15 evidential standards. The first is the standard of reasonable suspicion at the FTO stage, and
16 the second is the quite different standard of evidence satisfying the balance of probabilities
17 so as to reach a conclusive decision against an undertaking.

18 The way that Mr. Clough tries to reconcile that problem is very ingenious but it just does
19 not work. He says that when you look at the FTO letter sent to Quarmby, you see a
20 statement there saying that in most cases the OFT's suspicions are based on the following
21 types of evidence, and then it is set out.

22 Then if you go back to the decision IV.127 it says the same thing. I have underlined the
23 word "most" deliberately because the OFT is not saying in either case that this is its test, or
24 that in all cases that it had that of evidence. What it is saying simply is that in most cases
25 this is the kind of evidence on which it based its decision.

26 Mr. Chairman, the best place to find this is behind tab 1 of the liability defence bundle.

27 That, I think, is in the latter half of the bundle – there was some confusion yesterday. I just
28 want to emphasise the word "most" there, really that is all that needs to be underlined.

29 THE CHAIRMAN: Yes.

30 MISS BACON: That is the first problem with Mr. Clough's argument. He ignores that, assumes
31 that the word "most" does not exist, assumes that this is setting out a test for the standard of
32 evidence that the OFT is applying and he says that since you have the same language used
33 in the FTO decision that means that the FTO must be adopting the same test for the quality
34 of evidence as in the decision, and that is what he said yesterday. He supports that by

1 saying that if you also look in the FTO letter, the OFT said it was intending to issue an SO.
2 So, he says, the OFT must have already had the evidence by that stage so as to issue the SO
3 and, by parity of reasoning, the evidence in the decision is of the same quality as the
4 evidence that it had at the time of the FTO letter. He claimed yesterday – I am sorry I do
5 not have the transcript note – that the OFT had never said that its evidence in the decision
6 was better than its evidence at the FTO stage.

7 With the greatest respect to Mr. Clough, this is complete and utter nonsense. If the OFT had
8 had enough information when it issued FTO to adopt an SO it would have done so. It
9 would not have spent another couple of years investigating the case. The reason why it
10 issued the FTO was that the OFT knew that there would be an enormous amount of work
11 still to do to get to the point at which it could issue an SO, and what it wanted to do was to
12 see if it could limit that in some way, and that is why it adopted this FTO process to see if
13 the parties would make admissions, and then it would rely on reduced evidence in the FTO
14 and it could shortcut the whole route for those parties who were willing to make the
15 admissions. So it was absolutely not the case that by the time of the FTO there was enough
16 evidence for the SO, let alone a decision.

17 What the OFT did after the FTO, as you have seen from looking through bundle 4 – the
18 core bundle of documents – was to collect substantial further information particularly
19 through interviews with leniency applicants, but also through seeking information from
20 clients of suspect projects. That further information was relied upon extensively in the
21 decision and just to give you one example relating to the first infringement of the three,
22 infringement 6, at the paragraphs of the decision that deal with infringement 6 (paras.
23 IV.763 to 765) the OFT sets out in detail the evidence that it had obtained from its interview
24 with Mr. Ironmonger, which took place after the FTO had been issued.

25 In my submission, a clear distinction needs to be drawn between two very quite different
26 questions here. The first question, which is the relevant one at the stage of the FTO: Did the
27 OFT have sufficient evidence to form a reasonable suspicion that Quarmby had been
28 involved in five or more suspect tenders? The second question is the one relevant to the
29 substantive infringements, which is at the stage of the decision did the OFT have sufficient
30 evidence to form the conclusion that, on the balance of probability, Quarmby had
31 committed the three infringements alleged? They are two quite different questions, two
32 different evidential standards.

33 Sir, if I can then go to the specific arguments why Quarmby says that in the case of the
34 suspect tenders on the OFT's list for Quarmby, these should not have been included in the

1 FTO. Those arguments have evolved over time in letters to the OFT, in the pleadings and
2 in the skeleton argument. There was at some point a debate about whether or not Quarmby
3 had actually tendered for various of the suspect projects. Just for your note it is common
4 ground that Quarmby did, in fact, tender for five out of the seven, and that is 1, 2, 3, 5 and
5 7. The express acceptance of that is set out in the second witness statement of Mr. Nelson,
6 at paras. 8, 10 and 12.

7 A second argument that was made in the pleadings and the skeleton argument, that seems to
8 have disappeared and certainly was not pressed to a great extent by Mr. Clough was the
9 argument that various tenders were statute barred, or time limited, and the Tribunal will
10 have seen the OFT's answer to that, that this is a legal and factual question which fell to be
11 decided at the time of the decision; it was not something that had to be resolved at the
12 necessarily early stage of the FTO when simply it was a question of reasonable suspicion –
13 as I said, Mr. Clough has not particularly pressed that point today.

14 The two other arguments are ones that he has pressed today, and the first of those is the
15 contemporaneity point. Just to clear some bats out of the belfry, the OFT's definition of
16 "contemporaneous" is exactly the same as the Tribunal's i.e. that the document was created
17 around the time of the infringement, even if not necessarily at the precise moment of the
18 infringement. It is not, as Mr. Clough suggested, that the document was found on a dawn
19 raid, because there are, of course, some documents that were contemporaneous that were
20 provided voluntarily by leniency applicants and not during a dawn raid – the dawn raid has
21 nothing to do with it – so it was a question of when it was created.

22 I fully accept that when the OFT is weighing the substantive evidence for an infringement,
23 the question of whether or not a document is contemporaneous is relevant to the weight to
24 be given to it. However, as I said, one has to draw a distinction between the factors taken
25 into account in assessing the quality of evidence for the decision and the factors taken into
26 account in assessing whether there was a reasonable suspicion at the FTO stage. When we
27 are looking at the FTO stage there are two points to be made about contemporaneity, and
28 the first is that the OFT never set a standard of having contemporaneous documentation at
29 the stage of the FTO. All that it said was in most cases that is what it had, but that was not
30 any kind of evidential threshold.

31 The second point is that that the FTO stage the OFT certainly did not set itself the test of
32 establishing whether, on the balance of probabilities, a particular document was or was not
33 contemporaneous, it was simply applying the 'reasonable suspicion' threshold. So even if
34 there had been some test of contemporaneity it would have been simply a suspicion, or

1 reasonable suspicion, that the document was contemporaneous, so in our submission this
2 contemporaneity point is a complete red herring.

3 The other point on which Mr. Clough focused, and to which he dedicated substantial time,
4 was this distinction between QCC and QSP. He says that for all except suspect tender 5,
5 when there was a contemporaneous document which specifically implicated his company,
6 and that is the famous “Admiral Memo”, the “BT Phone Disc” memo, he says all except
7 those, the evidence at the FTO stage did not establish conclusively that the Quarmby
8 referred to in the documents was QCC rather than QSP.

9 The OFT’s response to that is to confess and avoid. It is quite true that the evidence at the
10 FTO stage did not establish conclusively in relation to the six out of the seven suspect
11 tenders that it was QCC and not QSP, but that is irrelevant for the point I have just made
12 that the quality of evidence required at the FTO stage was reasonable suspicion standard,
13 not a balance of probabilities standard that would be required for the decision. So simply
14 the OFT did not need to establish that.

15 It is quite clear that when we got to the decision we did have to establish that the party
16 involved in the alleged infringement was QCC and QSP, and we have done that. As I have
17 said, Quarmby accepts certainly it tendered for all three of the projects involved in the
18 alleged infringement, in fact it goes further and accepts that in relation to five out of the
19 seven suspect tenders it did participate in the tender.

20 But, at the FTO stage, since the OFT standard was reasonable suspicion, the question is
21 whether the evidence allowed the OFT to suspect QCC and whether that suspicion was
22 reasonable.

23 So in response to Mr. Clough’s mistaken identity point, we say we did not have to identify
24 anyone, we simply had to suspect, and a criminal analogy can be made at this point. Let us
25 suppose Mr. Clough is walking down the street in Ilkley when he is hit on the head by
26 someone who he describes as “a seven foot man with bright orange hair and a wooden leg”.
27 Now, it so happens that in the town of Ilkley there are only two people fitting that very
28 unusual description as far as the police. The police therefore suspect both. Of course, at the
29 point at which the police suspect both and before they have interviewed either of them to
30 see whether they have an alibi for the moment at which Mr. Clough was clonked on the
31 head, it is not proven that either of them did it. But, they are both suspects and in each case,
32 due to the very unusual description and the fact that only two people correspond to that very
33 unusual description, I would say the suspicion would be reasonable. So, that analogy
34 applies precisely here. There are two Quarmbys in Ilkley. It is an unusual name. The OFT

1 therefore had reasonable grounds that when it saw the word “Quarmby” on a
2 contemporaneous note, it could suspect QCC. It had reasonable grounds to do so, whether
3 or not it also suspected QSP.

4 The other point that I should make - and I should say this is only something that I have
5 really realised overnight, is that the OFT did have grounds to distinguish between the two.
6 It did have grounds to suspect that the references to Quarmby meant Quarmby Construction
7 Company, Mr. Clough’s client, rather than QSP. The reason for that is that it did, of course,
8 have a number of documents implicating QSP because QSP is among the other companies
9 listed and subject to the infringement decision. In the cases where companies were
10 referring to Quarmby Special Projects, they did so habitually by saying “QSP” and not
11 “Quarmby”. You can pick this up in the Decision if you look at the infringements that are
12 listed in relation to QSP. If you look at paras. IV.4444 (which is one of the infringements)
13 and at IV.6745 you will see that in the contemporaneous document recorded there the
14 reference is to “QSP” and not “Quarmby”.

15 THE CHAIRMAN: Shall we just have a look at one of those.

16 MISS BACON: I am very happy to do that. The first one is IV.4444.

17 THE CHAIRMAN: QSP Construction.

18 MISS BACON: It is a short point. As I said, I do not need to make that point because my primary
19 point is that it is just a case of reasonable suspicion. Quarmby gave rise to a reasonable
20 suspicion that it was QCC. That is the other reason. That is the reason why, in relation to
21 all of the suspect tenders listed in Quarmby’s FTO letter, those suspect tenders were not
22 replicated in relation to QSP. In fact, I am told that for all but one of the suspect tenders
23 attached to QSP’s FTO letter, the evidence that the OFT had referred to QSP specifically
24 rather than Quarmby. The one exception is the suspect tender that was addressed to both.
25 That is our suspect tender 2, the High Street, Lincoln project, which was included in the
26 FTO letters for both QCC and QSP. On that case, and in that case alone, the note said,
27 “Quarmby”. What I understand to be the case is that this came in quite late in the stage and
28 the OFT was not quite sure and so it simply put it in both. For all the others there was a
29 distinction. Quarmby was addressed to Quarmby Construction Company and QSP
30 references went in suspect tenders for QSP. That is the reason why there was not complete
31 replication across the two and why the OFT, at that stage, thought on balance that if there
32 was something saying Quarmby it was QCC rather than QSP.

33 On those grounds, sir, members of the Tribunal, we say that this preliminary point is a
34 complete non-starter. There was plainly sufficient evidence implicating Quarmby in relation

1 to all of the suspect tenders. I am not going to take the Tribunal through all of the evidence
2 in relation to each. I am very well aware that you have read the contents of Bundle 4, and
3 you can go back to it. But, you will see there that there is absolutely sufficient evidence in
4 relation to each that the OFT could form a reasonable suspicion.

5 Sir, I am afraid I am taking this at brake-neck speed. Please do tell me if you would like me
6 to slow down.

7 THE CHAIRMAN: We will. Carry on at brake-neck speed - if only because it is very clear and
8 we have read all the papers.

9 MISS BACON: I am very grateful.

10 THE CHAIRMAN: Of course, it is much easier -- I understand why Mr. Clough took us through
11 things in some detail. You are responding, which one can do more quickly.

12 MISS BACON: Limitation arguments. The second of my list of four headings. Now,
13 Quarmby's limitation and timing arguments apply to infringement 6 only, which, as you
14 will all recall, involved a tender that was submitted on 3rd March, 2000. There is one other
15 case which raises a limitation point among the twenty-five. That is Galliford Try, which was
16 heard last Friday in Court 1. Galliford Try's argument was put on the basis of the five year
17 limitation period in Regulation 1, 2003. Its argument in that basis was put on two grounds:
18 the first was the legal certainty point; the second was the s.60 point. Quarmby raises both
19 of those arguments, although in Galliford Try's case it put this in the context of penalty and
20 Quarmby puts this in the context of its appeal against liability. It does not make much
21 difference. But, in addition, Quarmby raises a third argument which is that even if the
22 Commission limitation period (if we can call it that) does not apply, by some process of
23 analogy or consistency, it can still rely on the six year limitation period set out in the
24 Limitation Act as a matter of domestic law.

25 Canterring through the Commission limitation arguments, the first is the legal certainty and
26 fairness points. We say that these just do not get off the ground for the reasons set out in
27 the penalty defence at paras. 311 to 315 which, by the by, address the point which Mr.
28 Clough made this morning in relation to Regulation 2988 of 74. The headline point, just to
29 summarise, is that nothing in the EU law principles of legal certainty and fairness requires a
30 limitation period to be imposed for domestic law infringements of the competition rules.
31 Mr. Clough might say, "Oh, well, we think that there was an Article 101 point". Article 101
32 is what used to be Article 81. That does not get off the ground. He has not said that this
33 should have been an Article 81 case. He cannot take that point now. We are squarely in the

1 territory of domestic law. On that, looking at European law principles of fairness and legal
2 certainty tells us nothing.

3 The second, and more substantial, point - and this is the second of the Galliford Try points -
4 is the s.60 point of consistency. Can I just make one observation right at the start in
5 response to the Chairman's question about, "Well, does this mean that there should be some
6 degree of consistency across the Member States?" Just to remind you, the consistency
7 point is in the domestic statute - it is not in Regulation 1 of 2003. So, this is not about
8 trying to achieve consistency across the Member States. It is simply that when the domestic
9 Competition Act was enacted there was a provision which said that in certain contexts it is
10 desirable to preserve consistency with the approach taken in Europe. But that is all.

11 The real point on s.60 is whether there is a relevant difference or whether there is silence
12 which allows the courts to imply the European limitation points. Now, Mr. Clough says -
13 and Quarmby says in its pleadings and skeleton argument - that its big case here is *Pernod*,
14 where the domestic provisions did not provide for a right of third party complainants to be
15 heard. In the pleadings and skeleton argument it said that the absence of any limitation
16 period is analytically the same as that. I appreciate that Mr. Clough did not develop the
17 point this morning because of limitation of time, but I think I need to respond to that.
18 *Pernod* is not the right analogy at all. The reason is that in *Pernod* the effect of the
19 legislation was that the Director General could perfectly well have allowed a complainant to
20 participate. There was nothing unlawful about that. But, in the present case, if the OFT
21 were to fetter itself by saying that it could not make a finding of infringement against a
22 company because of a limitation period that exists in the Competition Act, that would be
23 wrong in law because there is no limitation period in the Competition Act. I tried to think
24 of a suitable analogy. Because I like bicycles and do not like cars, this is the analogy that I
25 came up with: Let us say that both domestic and EU law gives the regulator - in the
26 domestic case, the OFT; in the EU case, the Commission - the power to confiscate the
27 company cars owned by an undertaking that has entered into an anti-competitive agreement.
28 Now, let us suppose that English law says that the OFT can confiscate any company car
29 belonging to an undertaking that has breached the Chapter I prohibition. By contrast, EU
30 law says that the Commission can confiscate company cars belonging to undertakings that
31 have infringed comparable Article 101, but only the petrol cars. It cannot confiscate diesel
32 or hybrid cars. Now, is there silence or is there a relevant difference? We would say there
33 is a relevant difference. We would say that s.60, if you applied it to that, would not have
34 the effect that the OFT, contrary to the legislation, could only confiscate petrol cars as

1 opposed to diesel and hybrids because the OFT's statutory power is expressly and
2 relevantly different to the statutory power conferred by the Commission. Putting it another
3 way, it is inherent in the fact that the OFT's power is unlimited and extends to any car that it
4 is not taking anything away. It has an express power to attach and to expropriate all cars,
5 whereas the Commission's power is a limited one. That, we say, is not silence, but a
6 relevant difference. In our submission that analogy applies in the present case and it is a
7 complete answer to the s.60 point.

8 I have dealt with the first two of the three ways that Quarmby puts the limitation case. The
9 third limitation argument is a Quarmby-specific argument not adopted by Galliford Try.
10 That is, as I have said, the fall-back argument - that in any event the Limitation Act applies
11 and prescribes a limitation period of six years. The insuperable obstacle, we say, to this
12 argument is that both s.2 of the Limitation Act and s.9 of the Act impose a limitation period
13 in respect of an action: in the case of s.2 an action founded on tort; in the case of s.9 an
14 action to recover any sum recoverable by virtue of any enactment.

15 As set out in our liability defence in this appeal, all of the authorities - and there are a
16 number of them on - the meaning of the word 'action' in this context conclude that it means
17 litigation in a court or Tribunal. There is absolutely no authority at all to suggest that
18 action can be extended to mean the imposition by the OFT of a fine in circumstances where
19 it does not have to come to any court or Tribunal to impose that fine. The only authority
20 that Quarmby has been able to cite in its pleadings and skeleton argument is the 2009
21 version of Mr. Whish's eminent textbook on competition law where Mr. Whish offers the
22 opinion - again himself without citing any authority - that the imposition of a penalty under
23 the Competition Act is subject to a six year period of limitation under the Limitation Act.

24 I have the greatest respect for Mr. Whish, but in this case he is simply wrong. He does not
25 give any view in his textbook as to which specific provision of the Limitation Act he is
26 thinking of. It may be that as a result of that he just has not given any thought to the point
27 that the only sections of the Act that could conceivably be relevant apply to an action and
28 not simply an administrative penalty. Whatever the reason, we say that this is not authority
29 on the point, and Mr. Whish's opinion, no doubt helpfully offered, is wrong.

30 There is actually a good reason, we say, why the Limitation Act is confined in this respect
31 to judicial proceedings - that is, that public powers are generally not constrained by time
32 limits unless it is otherwise expressly stated. There are examples of this in the Competition
33 Act. I will not ask you to turn to them, but if you look, for example, at s.3(2) of the
34 Competition Act,

1 “The Secretary of State may at any time by order amend Schedule 1, not limited
2 by time”

3 and at s.6(1),

4 “If agreements which fall within a particular category of agreement are, in the
5 opinion of the OFT, likely to be [exempt agreements], the OFT may recommend
6 that the Secretary of State make an order specifying that category for the purpose
7 of this”

8 Various things that can be done under the Competition Act. No time limit specified. No
9 suggestion that there would be a time limit for that.

10 There are cases in a public policy context where policy considerations, such as legal
11 certainty, may mean that a public body’s powers have to be curtailed by some time limit. In
12 those cases the relevant statute makes express time limit provision for that. An example is
13 the time limit set out expressly in the Enterprise Act for the OFT’s intervention in relation
14 to a merger. There are time limits there and we say they are there for a purpose and they are
15 expressly stated. You find the same in other areas of law, such as tax where the Taxes Act
16 set out limited periods of time within which the Revenue can commence an inquiry into
17 matters such as an individual’s self-assessment return.

18 In our submission, if there had been a limitation period it would have had to have been
19 stated, and it would have been stated, in the specific provisions of the Competition Act. In
20 this case, the relevant power to impose a penalty is s.36(1) of the Act which enables the
21 OFT to impose a penalty. I will not ask you to turn it up, but if you do you will see that the
22 power is hedged about by express limitations. There are a number of them and they are set
23 out in all of the sub-paragraphs of s.36. By contrast there is no limitation as to time, so we
24 say, as a matter of statutory interpretation, the power must be read as being not constrained
25 by a time limit. In other words, the legislature could have specified a time limit. It did
26 specify various other limitations on the power to impose a penalty. It did not specify a time
27 limit, so that means, and that is to be interpreted as meaning, that there is no time limit
28 imposed on the OFT in relation to penalties.

29 Can I just add one point purely for completeness, because we say that everything that I have
30 said so far completely answers the point, but even supposing that Mr. Clough could get over
31 these problems with the definition of the word “action” and the policy reasons why, in my
32 submission, there should be an express limitation, if there is one, in relation to constraining
33 public powers, even if he could get over that, he still failed to explain how a penalty
34 imposed by the OFT could conceivably be regarded as an action “founded on tort” within

1 the meaning of s.2, or an action to recover a sum recoverable by virtue of any enactment
2 within the meaning of s.9. That is not explained in the notice of appeal, it is not explained
3 in his skeleton argument, and the reason why Quarmby is so coy on this point, I would
4 suggest, is that it is quite plain that the OFT's administrative procedure is not something
5 based on a tortious claim, and nor is it a procedure to recover a sum recoverable by virtue of
6 any enactment. What it is is a procedure allowing the OFT in its discretion to impose a
7 penalty on the basis of powers conferred by the Competition Act.

8 So the penalty imposed is not a tortious one, it is not a penalty recoverable by virtue of an
9 enactment, but is one imposed by virtue of the exercise of a statutory discretion and that is a
10 completely different thing.

11 THE CHAIRMAN: If that is so, and if the OFT acts in a way that is plainly unfair, perhaps
12 because of the passage of time, what is the remedy? Is there a remedy?

13 MISS BACON: In my submission, one would have to identify the substantive unfairness, and it
14 follows from what I have said that the unfairness cannot lie in the taking action beyond the
15 expiry of a particular passage of time, because there is not a particular passage of time
16 within which the OFT has to act. So one would have to identify a different substantive
17 unfairness.

18 THE CHAIRMAN: Is there something like a general right to allege that there has been an abuse
19 of process?

20 MISS BACON: That is a good question.

21 THE CHAIRMAN: Thank you!

22 MISS BACON: It is conceivable that a party might make that kind of argument. Certainly that is
23 not a point that has been taken in this case. I am also being reminded that there could be a
24 sort of general proportionality point.

25 THE CHAIRMAN: That is what I had in mind.

26 MISS BACON: If it were, say, 20 years down the line and nobody had any evidence of anything,
27 or maybe the OFT starts proceeding against someone for something that happened in, I do
28 not know, in 1970, then you get into problems that the Competition Act only entered into
29 force in 2000 anyway. That is perhaps why this really has not arisen.

30 THE CHAIRMAN: One could say it was arbitrary and disproportionate?

31 MISS BACON: If, say, in 2050 the OFT were to act in relation to something that happened in the
32 year 2000 and stopped in that year 2000 an argument could possibly be made. That is not
33 the way the case is put by any of the appellants in this case. At the very highest what they

1 do is rely on an EU argument of fairness and legal certainty, which we say, okay, maybe in
2 relation to the Commission, but there is no read-across in relation to domestic powers.

3 THE CHAIRMAN: Thank you.

4 MISS BACON: The other way in which we put our case, and we have yet one more argument,
5 and I think that is the last of the arguments on s.2 and s.9, which is that, even if they do
6 apply for some reason, this is one of the cases where they are trumped by s.32(1)(b) of the
7 Limitation Act, which is, as you will recall, the deliberate concealment provision. We say,
8 just as in any case where, for example, a civil claim is brought on competition law in
9 relation to a cartel and the claim is made, “This is a long time ago”, and the claimant
10 responds, “It is a long time ago, but I only just found out about the cartel”. We rely on this
11 point because it is a point continuously pleaded in civil claims brought on the basis of the
12 competition provisions, and it is obviously right that the OFT did not find out about it until
13 a long way down the line.

14 Quarmby’s only answer to this is to say that it did not conceal the fact that it had engaged in
15 cover pricing. Our response is that is completely untenable, not only was it concealed, but
16 Quarmby is still today and yesterday coming to the court and saying that it did not do it. So
17 there is no argument there that Quarmby did not deliberately conceal the point. Quarmby
18 never told the OFT that it had engaged in cover pricing, supposing it did. It did not come to
19 the OFT as a leniency applicant. It has continually denied engaging in cover pricing. It is
20 simply not open to it to say that there was no deliberate concealment. That is the last
21 argument that we make in relation to limitation.

22 That brings me on to the timing of infringement 6. This has occupied a vast amount of
23 space in the pleadings and skeleton arguments, but I think we can cut through all of that
24 because there is actually a very short answer is, and that is that whichever approach the
25 Tribunal adopts as the start date of the agreement, the infringement falls within the
26 provisions of the Competition Act. The starting point in this analysis is that the OFT has
27 found in the decision on the balance of probabilities that the cover price in relation to
28 infringement 6 was likely to have been provided after 1st March 2000. Just for pedantry, I
29 note that it should have said “on or after 1st March 2000”, because the Competition Act
30 entered into force on 1st March, not on 2nd March. The reason for the finding in the decision
31 that the cover price was probably provided either on or after 1st March 2000 was that
32 Strata’s evidence was that while the timing of the initial contact between the parties varied
33 from case to case depending on whether they knew at the start they were going to cover or
34 whether they got a long way down the line and took a cover at the last minute, the cover

1 price was taken in general the day before the tender was due in. For your note, that is set
2 out in the transcript of the interview with Mr. Throssell from Strata at your bundle 5, tab 2,
3 pp.4 and 5. That is the bundle numbering. If you want it, the full transcript of the interview
4 is at tab 6 of the liability defence bundle.

5 You will also have seen this by the by with infringement 214, the famous Admiral memo,
6 which had the words “Ring 4.30 Wednesday”. As I put to Mr. Harrison yesterday, that was
7 most likely the day before the tender was due in, which was a Thursday.

8 In this case, the tender due date was 3rd March 2000. So by taking that and the evidence
9 given by the particular leniency applicant, we say that, on the balance of probabilities, the
10 cover was provided on or after 1st March 2000. I do not understand that part of the analysis
11 to be disputed by Quarmby.

12 On that basis we know that the agreement certainly continued after the entry into force of
13 the Competition Act. The question is then when it started. The decision does not make any
14 findings as to when that particular infringement did start for the reason that it does not
15 matter. If the agreement started on or after 1st March – in other words, if the first telephone
16 contact was made on or after 1st March – then it falls squarely within the Competition Act,
17 and there is no issue about any transitional provisions. We do not get into transitional
18 provision territory at all. It is an agreement that has been commenced and ended after the
19 entry into force of the Competition Act.

20 The only case in which we even start looking at the transitional provisions is if there were
21 evidence that on the balance of probabilities the agreement started before 1st March. In that
22 case there would be a question as to whether the transitional provisions were engaged. Our
23 answer to that is that they are not, since the agreement would have been void under the
24 RTPA. That we say is just a complete answer to the point. It would have been void under
25 the RTPA. The relevant provisions are paras.19 and 20 of the Schedule 13 to the
26 Competition Act. Paragraph 19(1):

27 “Except where this Chapter or Chapter IV provides otherwise, there is a
28 transitional period ...”

29 Then 20(1):

30 “There is no transitional period for an agreement to the extent to which,
31 immediately before the starting date, it is –

32 (a) void under section 2(1) or 35(1)(a) of the RTPA.”

33 The relevant provisions of the RTPA are in the first authorities bundle at tab 2, starting at
34 s.1:

1 “Every agreement to which this Act applies by virtue of –
2 (a) section 6 below (restrictive agreements as to goods) ...
3 is subject to registration under this Act.”

4 Then if you turn over a couple of pages, s.6(1):

5 “This Act applies to agreements (whenever made) between two or more persons
6 carrying on business within the United Kingdom ...”

7 THE CHAIRMAN: Section 6(1)?

8 MISS BACON: Yes, that was the one referred to in s.1:

9 “... in the production or supply of goods, or in the application to goods of any
10 process of manufacture, whether with or without other parties, being agreements
11 under which restrictions are accepted by two or more parties in respect of any of
12 the following matters –

13 (a) the prices to be charged, quoted or paid for goods supplied, offered or
14 acquired, of for the application of any process of manufacture to goods ...”

15 That is the bit that we rely on.

16 THE CHAIRMAN: I am sorry, I am sure there is an easy answer to this, but why are we dealing
17 with goods and not services?

18 MISS BACON: That is good question.

19 THE CHAIRMAN: Thank you again. Section 11 deals with services.

20 MISS BACON: The OFT has relied on goods. Section 11, as you have just said, deals with
21 services. There is an almost identical provision in relation to s.11. I imagine it is because
22 one could classify this as either goods or services. Mr. Singla is giving me a helpful answer
23 here. At III-223 of the decision the OFT says that it:

24 “... considers that all of the infringements involving cover pricing which are being
25 pursued would (if they were concluded before 1st March 2000) have been void
26 under the RTPA as:

27 (a) the construction or carrying out of buildings, structures and other works by
28 contractors is a supply of goods for the purposes of RTPA.”

29 I think the point is a fair one. In some respects there may have also been the provision of ---

30 -

31 THE CHAIRMAN: It is s.43(3), is it not, which equates to goods and services. I think Mr.
32 Singla will probably give you a nod to that.

33 MISS BACON: In which case it is correct.

34 THE CHAIRMAN: There is a definition of goods in s.43.

1 MISS BACON: It includes ships and aircraft.

2 THE CHAIRMAN: Then s.43(3) --

3 MISS BACON: Yes, that is right: "This Act applies to the construction", yes. It was put there
4 before me. I am very grateful.

5 THE CHAIRMAN: I am sorry about that. It seemed an obvious question. Thank you.

6 MISS BACON: So there we have it. Section 6 is the one that we have relied on. Then if you go
7 forward a few pages to s.35(1), that is the provision that says:

8 "If particulars of an agreement which is subject to registration under this Act are
9 not duly furnished within the time required by section 24 above, or within such
10 further time as the director may ... the agreement is void in respect of all
11 restrictions accepted or information provisions made thereunder."

12 So we say s.1 agreements to which this Act applied are registerable; s.6 this is the kind of
13 agreement that is registerable; s.7(5) if it is not registered it is void. None of these
14 agreements was ever registered.

15 I must say I was surprised, because so far there has been no answer to this point, and right at
16 the end of his submissions today for the very first time, Mr. Clough offered up the point:
17 this is all about future restrictions. We say that is just not the case. If he is saying that there
18 was an agreement made before the entry into force of the Competition Act his case is that
19 there was a restrictive agreement made, otherwise, he would not be saying that there was an
20 agreement made at that point. So the premise of this argument is that there is an unlawful
21 restrictive infringing agreement that was entered into at that point, and then he turns round
22 and says; oh, but it is not within the RTPA because it is not restrictive; it is only a future
23 restriction. We say that just does not get off the ground. Either it was a restriction before
24 1st March in which case it was void, or it was made after 1st March, in which case it is
25 subject to the transitional provisional.

26 I would like to draw the Tribunal's attention to one further at footnote 2181 of the Decision
27 p.392. Please do not turn it up. There is a reference to a case where the Registrar of the
28 Restrictive Trading Agreements listed as a restriction cover prices, but that is just for
29 completeness.

30 The only other answer that has been offered up in relation to the RTPA, and it has been
31 made in the pleadings and the skeleton argument, is the *Tobacco* decision. Mr. Clough is
32 right to say that that is now out. There was an issue about this because at the time that the
33 argument was made the *Tobacco* decision was not published; it was only available in
34 confidential and embargoed form. It has now been published in non confidential form.

1 This is another red herring. The *Tobacco* decision concerned a different type of case on
2 very different facts concerning a different type of agreement: retail price maintenance. The
3 conclusions that the OFT reached in that case, such as they are, concerning the application
4 of the transitional provisions, are conclusions reached in a different factual and legal context
5 and whatever was decided there has absolutely no bearing on the legal and factual question
6 of whether the transitional arrangements are applicable in this case on different case and to
7 a different kind of agreement.

8 I think I am getting there and with a fair wind I should be finished by lunchtime. I am now
9 on to the evidence for the three infringements. I just want to make two preliminary points.
10 First, about the burden and standard of proof, and then the alleged policy regarding cover
11 pricing. Then I am going to turn to the evidence on the specific infringements, bearing in
12 mind I am aware that the Tribunal has read most of this for itself already.

13 Starting with the burden and standard of proof, as Mr. Clough fairly said yesterday and
14 today, there is a great deal of common ground between us on this question. Where we
15 differ is on a very small point and that is the way in which the Tribunal should take into
16 account the inherent probability or improbability of what is alleged.

17 Quarmby has continually been very exercised about the OFT's comments about the
18 endemic nature of cover pricing which it characterises (and Mr. Clough made the point
19 yesterday and today) as the OFT relying on guilt by association. Or, he says, it is a
20 presumption against Quarmby being innocent. My answer is that that is not at all what we
21 are doing here. Our position is merely that in circumstances where cover pricing was
22 endemic in the industry (which is acknowledged by Quarmby's own witnesses) Quarmby
23 cannot pray in aid a submission that this was a kind of inherently improbable infringement.
24 There may be cases on different facts where the OFT is alleging something that is
25 inherently improbable; it is novel, it is unusual, and it is inherently improbable that the party
26 would have done what the OFT is saying it did. I am not saying that the OFT has done that;
27 I am just saying that is the kind of situation in which a party might come along and say: no,
28 what you are alleging is simply improbable, and that should be taken into account in
29 looking at the evidence. But that is not this case. Cover pricing was very common, and it is
30 not in the mouth of any party to come along and say: a factor to take into account in
31 weighing the evidence is that this is simply improbable. That is a general argument on
32 probability.

33 The other way at which Quarmby puts this is its point on its own probability of engaging in
34 this, that is the Quarmby alleged policy not to engage in cover pricing. It puts enormous

1 weight on its claims that it had a specific practice or policy not to do this. In fact, it says at
2 para.7.5 of its Notice of Appeal that its directors:

3 “can say with utter conviction that the estimators were not allowed to give cover
4 prices and were specifically told not to”.

5 Unfortunately, in our submission, that simply was not borne out by Mr. Nelson’s evidence
6 yesterday. What Mr. Nelson actually said was that:

7 “At the time of the three infringements in issue Quarmby had no written policy
8 that its employees should not engage in cover pricing.” (see p.22 line 13 of the
9 transcript).

10 He also said at p.18 line 13 that he could not recall any meetings to discuss the policy
11 before the summer of 2004. He also said that he could not remember discussing the cover
12 pricing with Mr. Harrison before the summer of 2004 (p.18 line 22). He also said that after
13 his summer 2004 discussion he did not remember any subsequent discussions with Mr.
14 Harrison about cover pricing (p.21 lines 9 to 19 and p.22 lines 24 to 26). He also said he
15 did not follow up his discussion with Mr. Harrison with any discussions with the other
16 estimators.

17 THE CHAIRMAN: He said it was cultural, like saying that we Welsh like singing!

18 MISS BACON: Yes. That was the sum total of it: a culture of not doing this, which was not in
19 any written document, any email, any formal discussion except a single discussion that he
20 recalls having in the summer of 2004 with Mr. Jones, followed up by a single discussion
21 with Mr. Harrison. Mr. Singla is pointing out that he also accepted that any estimator may
22 have given cover prices without his knowledge (p.19 lines 22 to 23).

23 The other evidence put forward by Mr. Clough to show that there was a policy of cover
24 pricing, and relied on continually by Quarmby, is the collection of letters annexed to Mr.
25 Nelson’s first witness statement. You will know what I am going to say about this, because
26 I put it to Mr. Nelson yesterday. What I am going to say is that those letters do not provide
27 any evidence that before 2004 there was any kind of policy at all. Even after that date, all
28 they show is that Quarmby declined some tenders on the basis that it had insufficient
29 resources. So I accept that tenuously those letters could be relied upon to draw some kind
30 of inferences about taking cover prices after 2004. They do not say anything about giving
31 prices at all, and they certainly say nothing at all about any policy before 2004.

32 In our submission, the argument that there was some kind of policy at Quarmby, and
33 specifically the argument that it was so engraved in stone that the directors can say with
34 utter convictions that the estimators were not allowed to do this and were specifically told

1 not to, is simply not borne out by the evidence. That is a question of fact that the Tribunal
2 will have to decide. Those were the two preliminary remarks I wanted to make.
3 May I now turn to the evidence in relation to the three infringements. The first is
4 infringement 6. This was the cover given to Strata regarding 2 Water Lane, Leeds, 3rd
5 March 2000. You have seen the pre FTO document; you know that the main document
6 relied on is the Strata tender form with the words “from Quarmby Construction” in the
7 corner. After the FTO the OFT interviewed a number of employees at Strata, including Mr.
8 Throssell and Mr. Ironmonger. Mr. Throssell explained in his interview (your bundle 5 tab
9 2 p.5) that he recorded a case where cover was taken by him, the company giving cover, in
10 the top corner of his copy of the tender form. That was the point I made yesterday. He then
11 put the copy tender form with his annotation in a file marked “Covers”. His evidence there
12 was that that was the only way that he recorded the covers that he had taken.
13 Mr. Ironmonger said exactly the same thing. I will not take you back to his interview; you
14 have seen it. The relevant pages are 15 to 18 (using the bundle numbering at the bottom)
15 and that is again at bundle 5 tab 2. He gives evidence that his system was the same as Mr.
16 Throssell’s. He would record the name of the company on the copy tender form and put it
17 in the file of Covers. Most importantly, his evidence was that exactly that occurred in the
18 case of this tender, and that this indicated that the cover price was supplied by Quarmby to
19 Strata.
20 That, in our view, provides contemporaneous evidence incriminating Quarmby, followed by
21 interview evidence with two employees of the leniency applicant that explain what
22 inferences are to be drawn from where this document was found in the file marked Covers,
23 and the annotation in the corner, which was exactly the way they always marked up cases
24 where they had taken the cover from someone.
25 One last point to note about this tender, before I get on to Mr. Clough’s arguments about it,
26 was that Quarmby’s price was actually the only price below Strata’s. So that if Strata had
27 taken a cover, as it said it did, it could only have come from Quarmby. You will see that
28 from the table in the Decision at the start of its findings on infringement 6. You know what
29 they look like. They set out the prices and all the tenderers for a particular project.
30 Can I get on to Mr. Clough’s arguments now? His first argument was that the evidence is
31 insufficient because this was simply a process of reconstruction. Again, our answer is:
32 confess and avoid. We accept that the witnesses often had no direct and unprompted
33 recollection of specific projects. It was a long time ago, all of these tenders. But they could
34 give evidence of what their system was. In other words: this is the way I recorded a cover

1 price – I put the name of the party giving the cover in the top right hand corner, I put the
2 tender document in a special file, and I notice that you found that tender in that file and lo
3 and behold it has got Quarmby Construction in the corner, and the only interpretation of
4 that, based on my consistent system, is that we took a cover from Quarmby.

5 We submit that is absolutely sufficient: contemporaneous document witnessing, in fact in
6 this case two witness statements, identifying what that meant. So it is neither here nor there
7 that they were reconstructing rather than giving evidence on the basis of direct recollection
8 of the tender which actually would have been very improbable for the number of tenders
9 that they were doing, and the passage of time.

10 Mr. Clough’s second argument is that there could be other reasonable explanations for this.
11 What reasonable explanations? We have the evidence of the leniency applicants. There is
12 no reasonable alternative explanation that could explain finding this tender record in a file
13 marked “Covers” with Quarmby’s name written in the top right hand corner. Mr. Clough
14 has not put forward any plausible alternative explanation.

15 A subsidiary argument that has been taken at various points by Quarmby relating to this
16 tender was that it was a design and build tender, and that was in the evidence of some of its
17 witnesses. But I pressed Mr. Nelson about this yesterday, as did the Chairman, and Mr.
18 Nelson was driven to accept that it would have been possible for Strata to put in this tender
19 form without including detailed further proposals, and that is p.26 of the transcript, line 10.
20 As for Mr. Harrison, he accepted that if someone at Quarmby had given a cover price
21 relating to this tender they would have been able to provide the other details included on the
22 tender form. The reference for that is p.45 of the transcript, line 19, and in his words “...
23 that could be possible because there was very little on the form”.

24 The remaining question that might be asked is: “Who gave the cover price?” It might be
25 asked but we do not need to answer it because we do not need to establish who gave a cover
26 price and it is no part of our case to do so.

27 Just in case the Tribunal wonders about that point there are at least two possibilities. The
28 first possibility is Mr. Bell, who was the estimator working under Mr. Harrison at the time.
29 Mr. Bell has not come to the court to give any evidence, he has not put in a witness
30 statement, so there is no basis on which he could be ruled out, he quite plausibly could have
31 given a cover price and actually, right at the end of my questioning of Mr. Harrison
32 yesterday, he more or less accepted that at least in relation to that it was possible that Mr.
33 Bell had given a cover price.

1 The other possibility is Mr. Harrison himself. He said in evidence yesterday that he had
2 never given cover prices. I am afraid to say that the OFT simply does not believe that. The
3 very important point is that his evidence yesterday on this point was the first time that he
4 had ever said he did not give cover prices, and it is very noticeable that if you look at the
5 statements of Mr. Nelson, Mr. Jones and Mr. Buckler, they all contain, in almost identical
6 words, the same categoric denial that they have ever given cover prices. But if you look at
7 Mr. Harrison's witness statement, and I took him to it yesterday, Mr. Harrison does not
8 make any statement in his witness statement that he did not engage in cover pricing, and
9 that is very surprising because it is there in all the others, and it is not there in his.

10 What he does say at para. 13 of his evidence is "If I had ever given a cover price it would
11 not have influenced me." We say the only inference to be drawn from that is that he is not
12 ruling out that he has given cover prices, in fact, at the time he signed the witness statement
13 he knew that he had given cover prices, that is why he made the statement. If he had never
14 given cover prices he would have said so in his witness statement, everyone else did and it
15 is not plausible that at the time he knew that he had never ever given a cover price but he
16 just did not think to mention that in his witness statement.

17 I put that to him yesterday and he denied that was the inference to be drawn from what he
18 said, but we submit that that is the plain and obvious inference. So Mr. Harrison is another
19 suspect for who gave the cover price in that case but, as I said, you do not actually need to
20 establish that – we do not need to establish that – we simply need to establish that a cover
21 price was given by somebody at Quarmby, it does not matter who.

22 Unless the Tribunal has further questions, that is all I wanted to say about the first of the
23 three infringements.

24 The next one is infringement 214 and that was the cover given to Admiral in relation to the
25 Humanities Research Institute, Sheffield University, 23rd December 2004. You will recall
26 the pre-FTO documents and, in particular, the famous BT Phone Disc memo: "Ring 4.30
27 Wednesday". You will recall from the calendar that I handed up that Wednesday was, in
28 fact, the day before the tender was due to be submitted. That was the evidence, again with
29 another handwritten memo that had a list of various companies, including Quarmby – that
30 was the pre-FTO evidence that the OFT had.

31 The post-FTO evidence included interviews with a number of the employees of Admiral –
32 the leniency applicant – including Mr. Clarkson, who was Admiral's estimating director,
33 and he was the author of both of the handwritten memos. I will not take you to it ----

34 THE CHAIRMAN: We looked at it earlier this morning.

1 MISS BACON: You know where it is. Finally, I would like to take you to one document which I
2 do not think you have seen, which is the client information, which confirms the net prices.

3 THE CHAIRMAN: I am aware of this document, I was mindful of it this morning after my
4 homework last night.

5 MISS BACON: I am very grateful.

6 THE CHAIRMAN: But you will have to remind me where it is.

7 MISS BACON: It is at tab 10, and in the bottom right hand corner it is p.83.

8 THE CHAIRMAN: Yes, in fact I had highlighted that document, it is vol. 5.

9 MISS BACON: Tab 10, p.83, it is the last document in tab 10. Can I ask the Tribunal to have
10 this open and also to have their finger in the Phone Disc memo, which is the second
11 document in tab 9, and if you compare the two you will see that the figure submitted by
12 Admiral Construction £1,527,272 is the figure that has been worked out for BT Phone Disc
13 memo, and it is exactly that figure. The first point that I make on that is that the
14 correspondence of the two figures, the fact that this figure was worked out in the course of
15 this document is entirely consistent with a pre-tender discussion, it is completely
16 inconsistent with this document recording a post tender discussion. There would have been
17 no reason to work it out. Why would he have written down how he worked out his own
18 price as a record of a conversation with someone after the tender. What we would have
19 done is possibly write down the price that the other person had given him.

20 THE CHAIRMAN: Just to be clear what this document is. This is the university's document
21 recording the size of the amounts tendered by each of the company tendered on 12th May?

22 MISS BACON: Yes ----

23 THE CHAIRMAN: I do not think it is 12th May, it is 23rd December. 12.05 is probably the time,
24 they probably had to tender by noon, at a guess.

25 MISS BACON: That is right.

26 THE CHAIRMAN: Thank you.

27 MISS BACON: I am just being told that what we did was to send the client's pro-forma
28 schedules and just asked them to complete them, so they completed it in this way.

29 THE CHAIRMAN: So this is derived from the client's computation?

30 MISS BACON: No, the client completed it but they completed it on a pro-forma.

31 THE CHAIRMAN: They derived it from other documents, filled in the pro-forma and sent it to
32 the OFT.

33 MISS BACON: Absolutely. So the point I just made is that if you see that the amounts are the
34 same this memo could not have recorded a post-tender discussion.

1 THE CHAIRMAN: Yes, we understand that.

2 MISS BACON: I ring you up and I say: “What price did you put in?”, and I write down a price
3 that you give me, not the price that I worked out. The other point that I wanted to make,
4 and I want to make it on the basis of this client document is that you can see there that there
5 are two figures between Quarmby and Admiral in amount terms that Quarmby is £1.335
6 million, the next up is “Interserve £1.396 million” – quite a small distance between
7 Quarmby and Interserve. Then there is “Simpson Construction £1.448 million”, and then
8 there is “Admiral Construction £1.527 million.” I highlight that because there has been a
9 lot of debate about this “not lowest” comment and the OFT’s submission is that the most
10 plausible explanation for the “not lowest” comment is that on the first occasion when
11 contact was made between Admiral and Quarmby what they were told is: “You will not be
12 the lowest because somebody else has already asked us”, and we have this in a number of
13 other infringements in the decision. “Someone rang up and they are told they are not lowest
14 and we will put you next in line”, and you have somebody making a list of the people who
15 they are going to give covers to and say: “We will give Admiral this price, we will give
16 someone else that price and so on.” In this case you can see that there are two between
17 Quarmby and Admiral, so a completely plausible and, in our submission, likely explanation
18 is that Quarmby gave a cover price to somebody else, then gave a cover price to Admiral,
19 and that also explains the comment here: “Not silly distance away”, because they would
20 know that they were going to be two away from Quarmby so they want to establish that
21 nevertheless, they were not a silly distance away.

22 I do not have to prove that any of that is the case, that Mr. Clough has made a number of
23 submissions on this “not lowest” and there has been a debate about it. That is the most
24 likely explanation and I put it to Mr. Harrison yesterday that it was a plausible explanation
25 and he agreed with me.

26 I think that is all I needed to say about that infringement because at the end of the day Mr.
27 Clough’s case boiled down to saying that this document recorded a post-tender discussion
28 and we say that was completely implausible.

29 Moving on to infringement 233, and this was the cover to York House regarding Eastbrook
30 Hall. Mr. Clough’s case rests largely on his claim that the bar graph document was not
31 contemporaneous.

32 THE CHAIRMAN: Flag 12.

33 MISS BACON: That is at flag 12. This morning the Tribunal put various points to my learned
34 friend, Mr. Clough, regarding the annotations, and I would adopt all of them but I do want

1 to make one more point. I am afraid I have to ask you to look at this document because
2 there is some confusion as to why this document contains so much of the same thing, and as
3 the Chairman pointed out this morning this is probably because it was created at different
4 times. It was printed off at different stages of work in progress, and our submission is that is
5 exactly what occurred, and you can actually see the progression between the different
6 pages, how the situation developed in relation to particular tenders, and how it was amended
7 and then that amendment was carried through to subsequent documents. So can I ask you to
8 turn up the unredacted version that I gave you, which has the manuscript numbers in the
9 bottom right hand corner. I will just ask you to look at four pages of that to make good this
10 point. The first page is p.12 in the bottom, and you will see that there are various red boxes
11 drawn around. Underneath the first red box there is “*** 0567 junction 37 M1 Dodsworth”.
12 Then if you go down to line 16 “*** 0580 Eastbrook Hall, Bradford.” If you could just
13 highlight those two and then turnover the page half way down we have the same “junction
14 37 M1 Dodsworth” it is starred still. “Eastbrook Court, Bradford” it is still starred. Over
15 the page in a different place again those are still starred. There are a number of subsequent
16 pages I will not take you to which have the same stars.

17 Just pausing there, what the stars mean at this stage, in our submission the most plausible
18 explanation is that no estimator had been allocated, so it had neither allocation estimator nor
19 had decided to take a cover price, because where they had allocated an estimator, the
20 estimator’s initials appeared in the left hand side, so it is “ART”, “JWL”, or “GAJ”. When
21 they decided to take a cover that was also allocated in the left hand side “COV” and you
22 will see that from p.14.

23 Can I ask you to turn to the last page, which is the page that everyone is arguing about, and
24 that is p.27. At that point you can see that overwritten, over the stars in relation to both of
25 these projects “Junction 37”, which appears half way down, and “Eastbrook Hall” someone
26 has added in manuscript the letters “COV”. So on this document, at the time this was
27 created the person that decided in relation to those two projects a cover price was going to
28 be taken. The last piece of the jigsaw that is then the blown up document, if you then turn
29 back in tab 12, to the blown up A1595, which should be the third piece of paper in the
30 bundle and it does not have a number in the corner. Low and behold, four lines down,
31 “Junction 37, M1 Dodsworth COV” in typescript, and “Eastbrook Hall, Bradford COV” in
32 typescript. So what happened is – and this is also explained in the leniency evidence – the
33 bar chart was the old computer programme, various manual amendments were made to it.
34 When the leniency applicant, York House, went over to a new computer programme of

1 which this document is a print out, it entered in a lot of the information from the old
2 programme and its manuscript amendments into the new programme and then carried on
3 from there, and that is precisely borne out by this sequence. You see the stars meaning that
4 a project has been unallocated; the manuscript amendment showing that a cover price was
5 taken; and, finally, you have this document which my learned friend accepts is
6 contemporaneous - and Quarmby accepts expressly that this is contemporaneous - recording
7 that a cover price has been taken. The only place they could have got that is from the
8 manual annotations. So, if there were any doubt as to whether this was a contemporaneous
9 document, I would say that explains how those annotations came into being and where they
10 then followed through to.

11 Mr. Clough's case on this is that some of the annotations may have been contemporaneous,
12 but the leniency applicant, when it submitted its leniency application, went back and
13 decided that it was just going to add some names where it had not done so before. So, it was
14 going to add Quarmby, or it was going to add the letters 'Cover'. In the light of what I have
15 just shown you, showing how the document progressed, and the fact that there were lots of
16 manual annotations on this document - there were some manual annotations showing
17 extension of dates; there were some specifying the estimator-allocated; there were some
18 giving a manuscript date -- It is simply not plausible that a couple of years down the line,
19 yes, someone went back and thought "Oh! I do not want to be helpful to the OFT. I am just
20 going to write 'Quarmby' there so that it looks like Quarmby gave me the cover price. I do
21 not remember it, but I am just going to put them down. Then I am going to put
22 'Quarmby?'" It is just not plausible that someone went back and did that for the purpose
23 of making their leniency application.

24 Mr. Singla is pointing out to me that at para. IV.746 of the Decision the OFT extracts a
25 passage of the interview with Mr. Richardson who says that the programme is updated, on
26 average, on a weekly basis which could explain that if he printed it out every time he
27 updated it, it could explain why we have got loads of the same documents -- or loads of
28 very similar documents.

29 THE CHAIRMAN: Really para. IV.705 explains what he claimed to be the process.

30 MISS BACON: Yes. In any event, it is set out in detail in his leniency transcript.

31 I would ask the Tribunal please to perhaps read the full transcript of that interview at Tab 15
32 of the liability defence bundle because a number of the extracts on which I would have liked
33 to take you had I more time are in that, and not extracted in the core bundle. If I can just
34 give you some specific pages - pp.6, 10, 12 to 14, 23, and 25 to 27 --

1 The evidence amounts to two contemporaneous documents. They admit that there is one.
2 We say that there are two. The first establishes that York House took a cover. The second
3 establishes that it took a cover and it took it from Quarmby. We have detailed evidence
4 from the estimating director at York House confirming our interpretation - namely, that
5 those documents were to be interpreted as indicating that a cover price had been taken from
6 Quarmby.

7 Apart from the contemporaneity point, Quarmby have put forward a number of arguments
8 to suggest that a cover either was not taken at all or it was not taken from them. One of
9 those arguments is that York House appeared to have cost the project legitimately because it
10 attended site meetings. In fact, when I put it to him, Mr. Nelson admitted that it was just a
11 single site meeting and he accepted that York House might have pulled the plug at the end
12 of the process.

13 There was also some debate about the "annotation 1/8 Quarmby" and whether or not York
14 House could have spoken to Quarmby on that date. Our answer is that we are not saying
15 the "1/8" means that York House spoke to Quarmby on that date. The most probable
16 explanation, which I put to Mr. Nelson, was that this represented simply the first extension
17 of deadline. It was a week after the original deadline. We note actually the deadline was a
18 week later. So, it was extended twice and each time by one week.

19 As for Mr. Harrison's evidence, I make the same point as before: in the light of all the
20 evidence, his oral statements denying that he could have given a cover price on this project
21 are not credible.

22 There is one further witness - two witness statements - which deals with this project, and
23 that is Mr. France. You may wonder why I did not call Mr. France. That is because we say
24 that his evidence is completely irrelevant on this question of whether there was an
25 infringement. All he says is that he does not believe that York House took a cover. Our
26 response was to say, "Well, you did not believe it, but we have got lots of evidence showing
27 that they did, and York House said they did".

28 On infringement 233 - whether the client was deceived - this is again a point that they make
29 based upon the evidence of Mr. France. They say, "Well, even if Quarmby did provide a
30 cover price, the client was not deceived". They rely on both the statements of Mr. France,
31 who was the quantity surveyor appointed by the client. The short answer is, as we have set
32 out in our pleadings, that actually Mr. France's evidence shows exactly the opposite and
33 positively supports our case because he says, "I do not believe that York House took a

1 cover. I did not see it as a case of cover pricing and ‘I thought I had received five legitimate
2 tenders’”. At para. 30 of his first witness statement he says,

3 “I would not have thought about cover pricing in this case”.

4 In his second witness statement at para. 10,

5 “Given what I know and what the contractors were told I simply find it hard to
6 believe that York House would have thought it necessary to take a cover price on
7 Eastbrook Hall”.

8 So, the upshot of that is that if this Tribunal finds on a balance of probabilities that a cover
9 was given by Quarmby to York House, Mr. France shows that the client was thoroughly
10 deceived and is still deceived because he still does not believe that a cover price had been
11 taken. So, actually, we say that his evidence supports us, and that is why I did not call him
12 for cross-examination yesterday.

13 Those are all the submissions I had to make on liability unless the Tribunal has any further
14 questions.

15 THE CHAIRMAN: No. Thank you very much. Mr. Clough, do you want to reply? If so, do you
16 want to reply now or after an adjournment?

17 MR. CLOUGH: Sir, how long would you like to have for lunch?

18 THE CHAIRMAN: How long do you think you will be in reply?

19 MR. CLOUGH: I think probably not more than five or ten minutes?

20 THE CHAIRMAN: I think it may be neater to carry on now and then break for lunch.

21 MR. CLOUGH: Sir, the first topic that I would like to draw to the attention of the Tribunal is at
22 p.52, Tab 6 of Bundle 5, which is the interview of Graham Pearce. This is in relation to
23 suspect tender 3. There are two points here. The first one is that in the second box down,
24 against “AH”, it refers to the tender inquiry record, which is document AO395, which I will
25 show you at p.46 of Tab 5. If you look at p.46 you will see that there is a handwritten
26 tender form, or inquiry record as it is called, and then the estimator’s comments box is at the
27 bottom left-hand side where one sees what is clearly different handwriting. You see
28 “Quarmby” and figures and “GMI” and figures, and the words “Less 2,000. Cover less
29 5,000”. If you turn back one page to p.45 you will see the same document -- I say it is the
30 same document. It is slightly different. It is in relation to the same tender inquiry. I am
31 terribly sorry.

32 THE CHAIRMAN: Different schools.

33 MR. CLOUGH: It does not affect the point I was making. If you stick with p.46 there are the
34 two types of handwriting there. I just want to bring out the fact that you do get two people

1 writing on one of these so-called contemporaneous documents, and, indeed, it comes out, if
2 we go back to p.52 ----

3 THE CHAIRMAN: The witness, Mr. Pearce, is saying that the figures “£690,000 less £2,000”
4 are his writing.

5 MR. CLOUGH: Yes. I was going to come on to that if I may. He just says, earlier than that, in
6 the first big box, fourth down,

7 “Right yes again I’m guessing that the fill in general stuff is Chris ... ‘cos he did
8 most of them anyway by the looks of it. It looks like I have wrote figures at the
9 side of Quarmby and GMI. It’s not mine. Quarmby, GMI and Holroyd
10 Manchester is not my writing but the figures at the side of Quarmby and the
11 figures at the side of GMI looks like my writing, but I don’t know what I mean by
12 less 2,000 less 5,000 but I put the cover at each side of them. So I’m not sure as I
13 say we tended to just put them in just to jog our memory but it was more or less
14 short-term if we needed it that was all”.

15 But there appear to be three people who have written on this document at p.46. I suppose if
16 one looks at it, it is not totally a surmise to say that the words “Quarmby” and “GMI” look
17 as though they are different to the numbers. But, I would not like to put that too strongly.
18 My point is that here we have at least two, and probably three, different people writing on a
19 contemporaneous document at different times.

20 The second point on this p.52 is where you were taking us to, sir, yourself. There is this
21 paragraph which says,

22 “It looks like it but I mean we have got 690,000 less 2,000 cover I mean it might
23 be that we found out after the event what ... what their tender figures were because
24 if we found out we would write them at the side as well so just seeing figures
25 doesn’t necessarily mean we have given a cover ----”

26 I say that to contradict Miss Bacon’s point that on the contemporaneous document you will
27 not find things that are written which are post-tender as opposed to pre. or at the time of the
28 tender. That is evidence relied upon by the OFT.

29 My second main point was about the QSP and the Decision. I have tried to see whether
30 there are any other references to it in the Decision. Clearly we do not have any
31 documentation in relation to the QSP infringements, let alone their suspect tenders. But, the
32 only point I can make, which is a minor one, is that at least throughout the Decision,
33 consistently, the OFT in every other paragraph has set out the full name - Quarmby
34 Construction (Special Projects) Ltd. I do not think one can really say more.

1 The related point is that we do have the evidence of confusion that we have referred to -
2 first of all in Bundle 1 at Tab 6. That is the first statement of Roger Nelson in the response
3 to the Statement of Objections at p.117.

4 THE CHAIRMAN: Yes. We saw this letter yesterday.

5 MR. CLOUGH: Yes. Indeed, in Bundle 5 at p.67 we have another letter, sent this time by the
6 City of Bradford District Council to Quarmby Construction, regretting that we were
7 unsuccessful on this occasion. This letter had to be sent on to Quarmby Construction
8 (Special Projects) because we had never tendered for this.

9 THE CHAIRMAN: This is in 2009.

10 MR. CLOUGH: In 2009, yes. One letter was 2001 and this was in 2009.

11 The third point I would make briefly, sir, is that in the context of the evidence that
12 Mr. Roger Nelson gave, and the reference to the bundle of letters generally, the fact is that
13 the infringements, the alleged infringements, 214 and 233 were both significantly later than
14 July 2004. The policy is unlikely to have been changed suddenly in 2004, if it was not
15 being applied beforehand.

16 I think perhaps one last thing about Mr. Nelson. Mr. Nelson made it clear that he came
17 from Wimpey, where he had been for 20 years, with the same cultural policy of not getting
18 involved with cover pricing and therefore he understood and accepted on arrival at
19 Quarmby Construction Company that that was the culture and the practice, and he did not
20 therefore need to discuss it with anybody. I think that is rather important that from day one
21 that he was there that he was used to that policy, and indeed, as Miss Bacon emphasises we
22 do constantly repeat that that was the company policy of Quarmby Construction Company.
23 Sir, unless I can assist you any further, or those behind me want me to say anything, I think
24 that is all I want to say.

25 THE CHAIRMAN: Thank you, you have been most helpful, Mr. Clough.

26 MR. CLOUGH: Thank you very much, sir.

27 THE CHAIRMAN: In relation to this afternoon's hearing on penalty, we have carefully read the
28 papers and it seems to me, and it may be helpful if I say this now, that in relation to penalty
29 it seems to us that there are the following main points: first of all, the justice of the overall
30 penalty, which is connected with equal treatment and proportionality; next, the step 1
31 turnover; next, the 5 per cent starting point which is asserted to be too high; next, the
32 segmentation, and it is asserted by the company that the OFT should have segmented the
33 private housing market; next, unfair treatment by reason of OFT's choice of infringements;
34 next, there is a point made that the OFT should have excluded turnover relating to

1 negotiated contracts; the next point is the assertion that intra-group turnover as between
2 Quarmby and SJS should have been excluded; next the failure to adjust the fine
3 appropriately for other factors; and finally, an asserted failure to adjust the fine
4 appropriately for aggravating and mitigating factors. Those are broad headlines, and I
5 thought it might be helpful if I indicated on behalf of the Tribunal that we are aware that
6 those are the main issues and that we have read the papers.

7 Counsel can take as long as they like because we have got plenty of time, albeit not
8 necessarily this afternoon, but were counsel to take this largely on the basis that it is
9 additional points which are going to help us, rather than points covered in what I have
10 summarised and what has led to those summaries, then it might assist in the expedition of
11 the proceedings.

12 MISS BACON: Could I ask what provisional timetable the Tribunal had in mind in terms of
13 allocation of time that would enable us to finish by 3.40. I am presuming in that case the
14 50/10, 50/20 current allocation is not going to work.

15 THE CHAIRMAN: It rarely is the 20. I would have thought that – it is a matter for counsel, you
16 can have as long as you like so long as it is understood that we might spill over into another
17 day.

18 MISS BACON: I think it is in everyone's interests, both Mr. Clough's and mine, that we finish
19 today, so it would be helpful ----

20 THE CHAIRMAN: If we come back at about 1.45 – I apologise to the distant staff, who can hear
21 what I am saying, but they are working in shifts anyway, quite short shifts – if we come
22 back at about 1.45 then I would have thought that if each side takes about half an hour in
23 opening that will leave some slack, given that we have actually read everything.

24 MISS BACON: Yes, that would give about half an hour slack at the end. I am grateful.

25 THE CHAIRMAN: Thank you very much.

26 (Adjourned for a short time)

27 THE CHAIRMAN: Yes, Mr. Clough.

28 MR. CLOUGH: Sir, I have some good news for you. My learned friend and colleague Mr. Adam
29 Aldred is going to deal with our submissions on penalties, so that will give you a different
30 and more musical voice to listen to this afternoon.

31 THE CHAIRMAN: It is always a pleasure to hear from you, Mr. Clough. Mr. Aldred.

32 MR. ALDRED: If it pleases the Tribunal, on penalty the heart of the appellant's case is that the
33 OFT erred in fact and law and exceeded its margin of appreciation when applying its 2004
34 penalty guidance in that the penalty it imposed on the appellants was inappropriate having

1 regard to deterrence, equal treatment, proportionality, and the justice of the overall penalty.
2 You will have heard that often, and read it often.

3 The OFT's one-size-fits-all approach has meant that the guidance just simply has not been
4 followed as it should have been. The rigidity of the fining mechanism has resulted in fines
5 which, in the case of the appellants, have been disproportionate and are unjust. What I am
6 about to say, of course, only has bearing if the Tribunal finds against the appellants in
7 respect of the preliminary issue and finds that there has been one, two or three
8 infringements.

9 I have prepared a mini bundle which I would like to hand up so that we do not have to chop
10 and change between different bundles. (Handed)

11 THE CHAIRMAN: Thank you.

12 MR. ALDRED: Since our written submissions there have been two substantive developments.
13 First is, of course, that the *Tobacco* decision was published yesterday. The relevant extracts
14 appear in the mini bundle at pp.2 to 10. Those are the extracts that relate to penalty. The
15 extracts which relate to liability (which Mr. Clough referred to) we will have to provide to
16 the Tribunal subsequently.

17 The other substantive development is you have started hearing many cases like this. I have
18 read some of the transcripts of those and where it is appropriate I hope to be able to add
19 some comments, but we will have regard to the arguments that you have already heard, and
20 try to foreshorten those which I will give you.

21 With regard to *Tobacco* it is sufficient to say that in its decision under appeal that OFT has
22 imposed fines in respect of each infringement, it rejected submissions that it should not
23 impose separate penalties. This, of course, is in marked contrast with the recent *Tobacco*
24 decision where each retailer was found to have entered into two separate infringing
25 agreement and the manufacturers up to ten infringing agreements. Yet in that case, the OFT
26 imposed only one penalty on the parties. The OFT's reason for imposing only one penalty
27 and not two or ten appears at para.8.13 of that Decision on p.3 of your bundle:

28 "In order to reflect: (i) the underlying commercial rationale and common aim of
29 the Infringing Agreements, namely to enable the Manufacturers to specify the
30 relativities between the retail prices of competing linked brands; and (ii) the
31 restrictive nature of the Infringing Agreements, the OFT considers it appropriate
32 in this case to impose a single penalty on each Party for all of the Infringing
33 Agreements to which it was party."

1 THE CHAIRMAN: Presumably all the infringing agreements were contemporaneous in this
2 case?

3 MR. ALDRED: The infringing agreements in that case ranged over a period of two or three
4 years, from 2000 to about 2003.

5 There is, the appellants submit, an underlying commercial rationale and common aim to
6 single cover pricing which, we think, warrants and justifies a similar approach. There is no
7 compelling policy or other reason why the overall proportionality or justice of the
8 appellants' case requires that they be penalised separately in respect of each infringement.

9 In our skeleton, we make submissions with regard to a number of points which have now
10 been well rehearsed before you and we shall not add to your burden by adding more
11 comments on those. I am thinking, in particular, with regard to: the profit margins within
12 the industry being low; the OFT's fining policy being far too severe when compared with
13 penalties imposed on corporate crime for example, corporate manslaughter; project
14 selection; and negotiated turnover. All those points have been well rehearsed before you.

15 The remainder of my comments can be followed in the skeleton and I am just going to be
16 drawing comments from that. Our skeleton appears at QAB 3 paras.25 to 71. Of course,
17 we rely on our written submissions.

18 THE CHAIRMAN: Sorry, give the reference again, please, Mr. Aldred.

19 MR. ALDRED: Your bundle 4, the skeleton should appear in the front of that, paras.25 to 71. I
20 am now at para.28 which deals with step one, the starting point. As the Tribunal
21 appreciates, the appellants submit that the OFT has failed to calculate properly the starting
22 point for the following reasons, and we set out a number of reasons there, and the first of
23 those is the decision uses the incorrect year to determine the relevant turnover.

24 As you will appreciate the OFT has calculated its fine on the basis of turnover in the
25 relevant market in the year preceding the decision and we say it should have done so in the
26 year preceding infringement.

27 There are lengthy submissions set out there, and we would ask you to read those at your
28 leisure, but I would like to highlight five points if I may. The first is that the OFT's
29 approach before the 2004 order was consistent with the underlying intention of Step 1,
30 which, of course, was to determine the size of the market affected by the infringement, and
31 to ensure that, as a starting point, there is a direct correlation between the harm, the affected
32 market, and the fine.

33 The second point I would like to highlight is the turnover at Step 1 is used as part of the
34 assessment of the seriousness of the infringement, and the culpability of the undertaking.

1 These issues relate to the position of the undertaking at the time of the infringement, we say.
2 It is, therefore, logical that the turnover at Step 1 should be determined by reference to the
3 business year at the time of the infringement.

4 Thirdly, we would say the change between the OFT's original approach, and the approach it
5 adopted following the enactment of the 2004 Order is irrational and has never been, we say,
6 adequately explained.

7 Mr. Beard in JH Hallam took the Chairman to *Degussa* and quoted:

8 "…the objective of deterrence can properly be achieved only if regard is had to the
9 situation of the undertaking at the time when the fine is imposed."

10 Mr. Chairman, I think you responded by saying: "I am not sure how binding this is in law"
11 and, of course, there is a discussion around that, but I make two points: our complaint with
12 the application of the year of turnover in the year preceding the decision and the OFT's later
13 attempts to justify is that it has become an *ex post facto* justification. When, in this
14 investigation, it was pointed out to the OFT that it had changed its approach to turnover at
15 Step 1 for apparently no good reasons the OFT's response was to ask all 112 defendants of
16 the SO to provide turnover figures on both bases, the year before the end of the
17 infringement and the year prior to the expected date of the decision. That hardly
18 demonstrates a pre-existing, pre-determined underlying policy reason justifying the change.
19 If I may return to *Degussa*, and Mr. Beard bringing in the concept of deterrence at Step 1.
20 Deterrence – as I am sure you are now quite aware (it would have been submitted often) – is
21 for Step 3, it has no application at Step 1 which is concerned with the seriousness of the
22 infringement and the relevant turnover of the undertaking concerned.

23 I would also like to say with regard to the year of relevant turnover that it is notable that the
24 relevant provisions of the EC Guidelines, which specifically acknowledge that the
25 combination of the value of sales to which the infringement relates (that is the relevant
26 turnover, of course) and the duration of the infringement is regarded as providing an
27 appropriate proxy to reflect the economic importance of the infringement and the relative
28 weight of each undertaking in the infringement – that is at para. 6 of the EC Guidelines.
29 Likewise, the General Court considered that the reference to the turnover in the last full year
30 of the infringement allowed the Commission to assess the size and economic power of each
31 undertaking in the relevant sector. That certainly supports the proposition that, for good
32 policy reasons, you actually start with the seriousness of the infringement and the turnover
33 in the relevant market. Finally, we would also say in this particular case a good reason why
34 we should be having regard to the turnover at that time is simply because of the effluxion of

