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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 July 2010

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING
(DAY THREE)

APPEARANCES

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

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

1 MR. HOSKINS: Good morning. I would like to call Brian Sharpe, please, this morning.
2 MR. BEARD: Madam Chairman, members of the Tribunal, before Mr. Hoskins deals with the
3 formalities, Miss Bacon is not here this morning. She will be joining us later. She intends
4 no discourtesy to the Tribunal.
5 THE CHAIRMAN: Thank you.
6 MR. BRIAN SHARPE, Sworn
7 Examined by Mr. HOSKINS
8 THE CHAIRMAN: Please sit down, Mr. Sharpe. Someone will provide you with a glass of
9 water. It is very important that you speak clearly into the microphone with your answers
10 because we have people transcribing the proceedings and they need to be able to catch what
11 you say.
12 MR. HOSKINS: Would you state your full name, please?
13 A Brian Sharpe.
14 Q Hopefully, you can be provided with a bundle that is marked 3, infringement 220. If you
15 open that up you will see that there are various numbered tabs in it. Would you turn to tab
16 5, please. There should be a document with the title "Witness statement of Brian Sharpe".
17 A Yes.
18 Q Is that your signature at the bottom?
19 A It is.
20 Q Is this your witness statement?
21 A Yes, that's it.
22 Q Is what is stated in it true?
23 A Yes, it is true, it is all true.
24 Q Thank you very much. I think there will be some questions.
25 Cross-examined by Mr. BEARD
26 Q Mr. Sharpe, you worked in the construction industry for some time, you worked at Durkan
27 for over 20 years. How long were you an estimator for?
28 A It was over 22 years, or 23 years I think it was.
29 THE CHAIRMAN: I know it is very odd when Mr. Beard is asking you questions not to turn to
30 him to answer him, but it is best if you just listen to the question and then turn to me and
31 speak into the microphone.
32 A I was just being polite.
33 Q No, he is used to it. Do not worry, people are always very rude to him.
34 MR. BEARD: I will not be offended, Mr. Sharpe!

1 THE CHAIRMAN: He will not take offence, will you Mr. Beard?

2 MR. BEARD: Not at all, I am used to it. So 22 years. On average how many estimates did you

3 have to prepare in a year, say?

4 A I don't know, about two or three a month probably.

5 Q When you were going about doing the estimating, presumably that was a process that

6 involved looking at a description of the job and using your experience to assess what would

7 be required, talking to subcontractors and suppliers and so on about how much things would

8 cost, and then coming up with a figure. Is that a fair summary of the process?

9 A Yes, first of all, you got the tender from Guy Copeland, he gave the tenders out to me or

10 whatever, various estimators. Then you just send out enquiries to various subcontractors,

11 get prices back and then collate the figures.

12 Q So it was a discussion with others, consideration by you of the information you got back,

13 and then you applying your judgement to come up with a figure that would then be

14 submitted?

15 A Not necessarily. I mean, you can only build up the estimate to some degree and then Guy

16 Copeland and Jim Briggs would have a meeting to decide the final figure.

17 Q Right. You mentioned that there were others working with you. During your time at

18 Durkan presumably it varied, but about how many other people would be working in the

19 estimators' office with you?

20 A There was about four or five others as far as I know.

21 Q Mr. Sharpe, you worked in the industry for over 22 years. You were well aware that cover

22 bidding was widespread in the industry.

23 A Yes, it was. May I say the company, in 2004, had a new regulation that no covers or

24 connections with other companies were involved.

25 Q Certainly, I will come on to deal with that because you have mentioned that in your witness

26 statement. But just taking it in stages, as I understand it, the way it would work was if you

27 were giving a cover, a rival for a tender would ring you up and say something like, "We are

28 down on the list for this job. But, we do not want to do it. Can you give us a figure we can

29 use". If you had been doing the estimating, you could easily give them a figure a bit higher

30 than the one you were intending to put in. Is that not right?

31 A No. No. You couldn't do that. The first port of call on the various other contracts were

32 going to Guy Copeland. He was the chief estimator. Then he would say, "Brian Sharpe, or

33 whatever, he's dealing with a certain type of job".

1 Q Yes. But, in terms of the mechanism of giving a cover, it was a matter of someone ringing
2 up and asking for a number.

3 A Yes. If someone rings up the company and says, "Are you dealing with a certain job?"
4 "We are." "Could you help us on this project?"

5 Q Yes. And if you had done the estimate by then you could give them a sensible figure. If
6 you had not, you could not.

7 A No. I couldn't personally. I couldn't just give a cover. It would have to be agreed with the
8 directors, as such. You just can't give a cover. I couldn't give a cover myself. I could go to
9 the directors and say, "A company needs some help on this one. Do we give a cover or
10 not?" If it was agreed, we did.

11 Q So, you are saying that in every case where a cover was given by Durkan there had to be the
12 involvement of a number of people before a cover was ----

13 A Yeah. The estimators weren't allowed to just give covers, you know.

14 THE CHAIRMAN: This is the whole time you were working with Durkan, or was this just after
15 the policy in 2004?

16 A No, that was generally.

17 Q Generally.

18 A Yeah.

19 MR. BEARD: So, the process was that you would talk to other members of the team and say you
20 have been approached, and then when you had been approached you would talk to the
21 members of the team and say, "We have done the estimating here. We could give them a
22 cover". Generally if they were companies you dealt with, then a cover would be given. Is
23 that right?

24 A Yes.

25 Q Just to confirm, when you were giving a cover, the figure that would be given would
26 normally be towards the end of the process, once you had done the estimating. So, you had
27 a feel for what you were putting in.

28 A No, not what I was putting in.

29 Q Yes. Sorry. That was loose language on my part. The figure that would be given would be
30 given towards the end of the tender process once Durkan had worked out what it was going
31 to put in as a bid for a job.

32 A Yes.

33 Q The figure that would be given would be a little bit higher than the figure that you were
34 putting in, but in the same ball park.

1 A Hopefully within the same ball park, yeah, but slightly higher, yeah.
2 Q 5 to 10 per cent. Something of that sort.
3 A Approximately, yeah.
4 Q So, during your time as an estimator you were presumably aware of lots of occasions when
5 cover prices were given or taken. Is that fair?
6 A Yeah. What date are we talking about?
7 Q During the whole period of you being at Durkan?
8 A No, because after -- Before 2004 ----
9 Q Let us take it in two parts. Before 2004 you were aware of a lot of covers.
10 A Yeah, a lot of companies did it because it wasn't anything malicious about it. What it was,
11 if you had too much tenders to do, you'd tend to get help on certain things so you're staying
12 in line with your client.
13 Q So, during your time there you knew, at least prior to 2004, that Durkan gave out covers.
14 A Yeah.
15 Q Although I am not going to ask you about any particulars you were involved in a number of
16 those situations where cover prices were given out during your time there.
17 A Every estimator was, yes. It was just the way it worked at the time. It all depends what
18 workload you had.
19 Q How many would you estimate? You said you did two or three a month.
20 A Approximately, yeah. I mean, I don't know -- You may get through two or three months
21 where no-one has a cover, or you've asked for cover. It's just the odd occasion. Every
22 three or four months you might get one ...
23 Q As you have already mentioned, in your statement you say that you remember in August
24 2004 the policy not to exchange confidential information with competitors was introduced.
25 That is right, is it not?
26 A Yeah.
27 Q Now, I would struggle to remember precise dates and precise months going back five or six
28 years. How do you know it was August 2004?
29 A Because it's in the document that came round the office. A memo was sent round by Robert
30 Clark, as far as I can remember. He also came into our office to explain the position.
31 THE CHAIRMAN: Robert Clark you said.
32 MR. BEARD: Could you explain to the Tribunal who Robert Clark was?
33 A The managing director.

1 Q The managing director sent round a memo saying that this sort of activity that has been
2 widespread must now stop.

3 THE CHAIRMAN: Why do you not ask him what the memo said. We have not seen the memo
4 as far as I am concerned, so can you remember broadly what the memo said?

5 A Well basically it says that from today we don't get involved in any covers or help from
6 other companies, that's finished as far as we're concerned.

7 Q And did it give any explanation why?

8 A I can't remember.

9 MR. BEARD: You said Mr. Clark specifically came down to see the estimators and talk to you
10 about it?

11 A Yes.

12 Q And so when he came down to talk to you he explained how important it was not to engage
13 in cover bidding?

14 A Yes.

15 Q So it was never again after August 2004?

16 A Never again, no.

17 Q All right?

18 A Shall I tell you something? Say I'd still been working with the company and I'd gone
19 against procedure I would've been sacked straight away, which would have been correct.
20 Apart from looking after my wife I had to look after my daughter and twin boys, her
21 husband had run off, so I was in a position where there was no way I could do a thing like
22 that.

23 Q So it was emphasised how serious it was and it had serious consequences you are saying?

24 A Of course.

25 Q Yesterday we heard evidence from Mr. Mike Pudelek, do you know Mr. Pudelek?

26 A I know him, yes. He worked for another section, didn't he? Yes.

27 Q Yes, he ran with Colin Simmons the operations of Durkan Pudelek, and he was a director of
28 Durkan Limited, the company for which you worked?

29 A He was a director?

30 Q Yes.

31 A I wasn't sure.

32 Q Yesterday he described Mr. Clark's approach as being "on the moon" as far as he was
33 concerned, in relation to saying "cover bidding had to stop". Was Mr. Pudelek being
34 realistic that actually you needed to keep engaging in some sort of cover bidding?

1 A I never got involved with Mr. Pudelek at all, he was in another section on another floor. I
2 dealt solely with Mr. Jim Briggs and a Guy Copeland.

3 Q Yes, I think the point that Mr. Pudelek was making was rather that as a matter, in his view,
4 of realism, a company that was engaging in construction work and bidding for tenders
5 needed to engage in cover bidding and it would keep doing so.

6 THE CHAIRMAN: I am not sure that is quite an accurate précis of his evidence, Mr. Beard,
7 because I think he was drawing a distinction between private sector work and public sector
8 work, and I think he ----

9 MR. BEARD: He certainly emphasised that matter. I am putting to the witness the general point
10 about Mr. Clark being "on the moon" in relation to these matters which was a comment
11 directed to Mr. Clark who was a director of Durkan Limited. (To the witness): But you
12 would not accept that it was realistic that people needed to keep going with cover bidding in
13 Durkan Limited?

14 A How could we keep giving covers when we were told not to?

15 Q I want to just take you to some of the material that the Office of Fair Trading has relied
16 upon in relation to this matter and this particular infringement. You should have behind you
17 Bundle 2. It is from the original bundles and it contains extracts of the decision. I just
18 wanted to check which bits of this you have seen. The first piece I wanted to ask you about
19 is at p.494.

20 A Page 494, yes.

21 Q Is this material you have seen before?

22 A Not as far as I'm concerned.

23 Q No. Thank you. This is evidence from Mansell, who were obviously the recipients of the
24 cover bid in question.

25 A Right.

26 Q These are extracts, and can you find p.1499 at the bottom.

27 A Claremont Close, right.

28 Q This is the section of the decision dealing with the particular infringement 220, Claremont
29 Close. Have you seen this section of the decision?

30 A I haven't seen any of this, no. All I know is that someone has put my name on a document
31 regarding this project.

32 Q I will come to that shortly because it is in the bundle.

33 A That's very important.

34 Q Certainly. The tender in question is described in the first sentence of para.6159:

1 "... Newham London Borough Council sought tenders for external structural
2 refurbishment works at 13-42 Claremont Close, London."

3 A Yes.

4 Q That is correct, is it not?

5 A That's correct, yes.

6 Q Do you remember what sort of work that job involved?

7 A Not that particular job, because don't forget, over about three or four years I worked on that
8 project on different aspects of the work. That's the only reason Claremont Close came to
9 mind.

10 Q Because there were a number of jobs that came up?

11 A There were a number of jobs, different jobs, brick repairs, roof repairs, etc, over a period.

12 Q You do not remember that actually this job involved specialist concrete repairs?

13 A The project as a whole – as I say, there were various projects, roof repairs, concrete repairs,
14 window replacements, etc, on different flats down there.

15 Q If you turn over the page, there is a table. This is the Office setting out what it understands
16 from Newham Borough Council to have been the parties' tendering. Do you recall anything
17 to do with any of these companies in connection with this tender?

18 A Well, they were on the list because you get the list from the Builders' Conference.

19 Q You got the list from the Builders' Conference. Let us turn to that. A copy of that
20 document is in Bundle 3, Tab 7. It is not a fantastically good copy. We have had some
21 better copies produced. Could I pass one up for Mr. Sharpe to put in that file. (Same
22 handed) This is a Builders' Conference document, and I take it from what you have just
23 said that Durkan would have received this document as well?

24 A Yes.

25 Q It may be just worth explaining to the Tribunal that the Builders' Conference is a trade
26 association, is it not?

27 A Yes.

28 Q And it gathers tender information and circulates it to its members – that is correct, is it not?

29 A Yes, so you know actually who you're tendering against, yes.

30 Q So just going down through this Builders' Conference document --

31 THE CHAIRMAN: Can I just be clear? With this, is this something that the company subscribes
32 to, or do you have to ask for it for a particular tender?

33 A Yes, as far as I remember, you subscribed to it over the years, you know, then they send you
34 information on projects that you're going to tender for.

1 Q Do you tell them which projects you want this information for?

2 A No, I think you get - as far as I remember – you get a booklet that you fill in the
3 information on the job, then you send it to the Builders' Conference and then they compile a
4 list of people that are tendering for it. So you know your competition as such.

5 Q You still did that even after 2004, even after August 2004?

6 A 2004, I would have thought so. I mean, there's no implication of that. All you're doing is
7 trying to find out who you're tendering against, the competition, that's all. You better
8 check with someone. 2004, I assume that still went on, but you know, regarding the cover
9 prices, that didn't, that stopped.

10 MR. BEARD: So if we start at the top left hand corner, it is an interim job report issued by
11 Builders' Conference on 15th March and you can see that it is Newham London Borough
12 Council. Then the text is slightly obscured by a stamp that says "Mansell Construction
13 Services", and you will also see that in that stamp are written in handwriting the letters
14 "PH" and the date 16th March 2005. That is right, is it not?

15 A PH, what does that actually mean?

16 Q I think that is going to be a matter for submission in due course, but it looks like one of
17 those receipt stamps.

18 A Right.

19 Q Then the bit that is obscured is the submission date and that is the submission date for the
20 tender, is it not?

21 A Yes, 29th March apparently.

22 Q Yes. Then the next section under the line is some details about the council and contacts.

23 A Right, yes.

24 Q Then under the next line it says: "The following main contractors are known to be
25 competing" and there is a list and the second of those is Durkan?

26 A Yes.

27 Q Some contact details are provided, and in particular Guy Copeland's contact details because
28 he was the estimator manager.

29 A He was the chief estimator, yes.

30 Q Then next to Durkan we see someone has put a cross.

31 A What does that mean?

32 Q I think that may well be again a matter for submission in due course. At the bottom is your
33 name, then next to that is a number. Those marks, the handwritten marks on this document,
34 were put there by someone at Mansell.

1 A Were they?

2 Q So on the face of it, would you accept that this means that someone at Mansell knew that
3 although Mr. Copeland was the formal contact, you were the person dealing with this job?

4 A I was the person dealing with that project, yes.

5 Q The only relevance of your name to this job was the fact that you were the estimator on it;
6 you did not have any other role?

7 A No, that's the reason. You ring up Durkans, Guy Copeland is the first contact and they say:
8 who is dealing with so and so and they say Brian Sharpe, and he will just scribble a name
9 down. Anyone can do that.

10 Q Next to your name is the figure of £1,306,000. Does that figure have any particular
11 significance to you, as you recall, in the context of this job?

12 A Not really, no. It doesn't mean anything, no. It's a figure.

13 Q It is a figure. So on this document you have got someone marking Durkan with a cross,
14 identifying your name.

15 A Did this come from Mansells or where?

16 Q Yes.

17 A Did it? Right.

18 Q Could we turn on to tab 12 in the same bundle. This is the transcript of an interview with
19 Peter Goodbun.

20 A Who is he?

21 Q Peter Goodbun was at Mansell and he was an estimating manager there. If could you turn
22 on to p.8 . You can see on the left hand side there is a column at the top that is marked
23 "Q/A" and that is Question and Answer, and "SM" is an official from the Office of Fair
24 Trading. PG is Mr. Goodbun. I would just ask you to read from the second SM all the way
25 down that page and the first four sections on p.9. (Pause)

26 A What is "um", what does "um" mean?

27 Q It is just a literal transcription of someone saying um.

28 A So they are not sure what they are saying. OK, what does it all mean then?

29 Q From your experience of the industry, would you agree that that is a fair account of how
30 cover pricing worked?

31 A Like I say, a company would ring up, contact Guy Copeland and put him in contact with
32 me, or whoever was dealing with the project and they would say: we will need some help
33 on this project, can you help us. Then you would go back to Jim Briggs or Guy Copeland
34 and say such and such a person wants a cover, can we go ahead with it, and if so we did.

1 Q So if I am understanding correctly, your answer is that broadly this account is?
2 A It's similar, yes.
3 Q Yes. Just staying on p.9 could you look slightly further down the page, there are some
4 sections with slightly more text in, the first of which starts: "Just the way, that's fine".
5 Could you read that section and the next five. (Pause)
6 A SM, what else do I read?
7 Q SM, PG and then SM PG, SM PG. I am sorry, those six sections.
8 A Right.
9 Q Again, given the evidence you have already given, would I be right in thinking that you
10 would agree that that is a fair general description of how cover pricing worked?
11 A It's a fair description, but bear in mind that the estimator never gave over a cover without
12 permission from higher up.
13 Q Could you just turn over to p.11 and then, if you look about halfway down the page there is
14 a section that starts: "Okay" next to SM.
15 A Sorry, p.11?
16 Q Yes, on p.11, about halfway down it starts:
17 "SM: Okay, thank you. Now turning to the contract that I understand you're
18 aware of which is the external structural refurbishment of 30-42 Claremont
19 Close".
20 I just ask you to read from there down to the bottom of p.12. (Pause whilst read): Thank
21 you. That is the evidence that the OFT is relying upon in support of its interpretation of the
22 document that we have just seen - the Builders' Conference document - with the manuscript
23 marks. If you could just turn to p.13, about half-way down there is a large section of text
24 from PG - the volume of competition in London. If you could just read that? (Pause whilst
25 read): That is Mr. Goodbun recalling that this was a specialist job. Although you did not
26 specifically remember that, you would not disagree with what he is saying there.
27 A What does he mean by 'specialist job'? It doesn't explain it, does it?
28 Q In this context the specialism refers to the difficulties in relation to refurbishment and in
29 particular the fact that there was specialist concrete refurbishment work.
30 A There may well have been.
31 Q The reason we know that is because it is referred to in a document from Newham Borough
32 Council which is referred to in the Decision.

1 If I could just turn to ask you about your witness statements? The first of those is in
2 Bundle 3 at Tab 4. This is the one you were uneasy about signing because you did not want
3 to be involved in this case. That is right, is it not?
4 A Yeah.
5 Q This is a witness statement drafted by a lawyer for your approval; is that right?
6 A Yes. First of all I was told it would be in a letter form, which was okay. I said I would
7 sign that okay. But then a document came through about half inch thick - you know, a
8 legal document - for me to sign. I got very concerned about it. So, I got a solicitor involved
9 in it and he said, "Don't sign it. Send it back".
10 Q Now, this was prepared by a lawyer. It has been quite carefully worded, would you not
11 agree?
12 A This one? This is from Durkans, this witness statement, yes.
13 Q Although you did not sign it ----
14 A No.
15 Q -- if we could just turn to para. 7 it says here,
16 "I did not receive any requests for a cover bid in relation to the Claremont Close
17 tender from Mansell or from any other competitor; nor did I personally give a
18 cover bid to Mansell or to any other competitor for the Claremont Close tender".
19 A Right.
20 Q In the witness statements of Mr. Clark, Mr. Briggs and Mr. Copeland, which are in a very
21 similar form and, one would guess, probably prepared by the same lawyer, the phrase is
22 used 'to the best of my knowledge' or 'to the best of my knowledge and belief no cover bid
23 was passed'. But, these are different words. Was this because you were being careful here
24 and you did not know -- you did know that a cover had been requested, but you were not the
25 individual who had the call with Mansell to give the figure, and that is why you say, "I
26 personally --" here?
27 A I personally didn't. It would be up to the manager -- Guy Copeland, or whatever, to
28 authorise it.
29 Q Did you know or believe that a cover had been given to Mansell, but it was by someone else
30 in the office?
31 A I would know, yes, because it would be agreed that we're gonna give a cover to so-and-so-
32 and Jim Briggs or Guy Copeland would say, "Yes, we're gonna give cover to them".
33 (After a pause): We're talking, what, after 2004, are we?
34 Q In relation to Infringement 220, yes, we are talking about 2005.

1 A Well, after 2004 that would never happen.

2 Q So, the reason you are sure about this is just because of the date of the ----

3 A The date. I don't particularly know that particular job that we're tendering for. As I say, I
4 worked on various projects over the years. So, that's why the name stuck -- the road stuck
5 in my mind.

6 Q But in relation to this job did you know or believe that any covers had been given by
7 Durkan to Mansell by anyone in Durkan?

8 A Not as far as I know, no.

9 Q Not as far as you know. I am just slightly struggling to understand in those circumstances
10 why someone would end up at Mansell identifying your name and writing it down on the
11 Builders' Conference schedule ----

12 A Yeah. Right.

13 Q -- which related to that tender and putting a number next to it which turned out to be just
14 under the bid that Mansell actually submitted. The ordinary interpretation of those notes
15 would be that someone at Mansell had been in touch with Durkan. "Brian Sharpe is the
16 man doing the estimating. Durkan have given me the figure of £1,306,000". Would you
17 agree with that?

18 A Who gave the £1 million? Who gave the figure?

19 Q I am sorry. I am not trying to identify the individual. I am just asking if you would agree
20 that looking at that Builders' Conference Schedule would you agree the natural
21 interpretation of the notes on that document was that someone at Mansell had been in touch
22 with Durkan: "Brian Sharpe is the man doing the estimating. Durkan have given me a figure
23 of £1,306,000".

24 A I couldn't comment on that. I don't know. I mean, there was meself, Jim Briggs, Guy
25 Copeland and ... final figures. Anyone can ring up Durkans and get my name, for a start.
26 But, where they got the figure from, I don't know.

27 Q Now, in this context you say you have never heard of Phil Hart or Peter Goodbun.

28 A Don't know them.

29 Q No. If you look back at Tab 7 in Bundle 3 - so, going back to the Builders' Conference
30 report. This is a document that you say Durkan received and you were preparing the
31 estimate in relation to this tender. If you look down the right-hand side, there are two
32 names -- Under Guy Copeland is Peter Goodbun. So, you received this. You saw this. You
33 read this. You would have seen this name.

34 A Yeah.

1 Q You do not remember it.

2 A Yes, I remember it. I can see I read the name, but as far as I'm concerned I don't know the
3 gentleman.

4 Q You do not know him, but you knew of him.

5 A Well, only via the conference. You get various information about different companies,
6 yeah. Otherwise I personally don't know him.

7 Q You have explained that your job involved lots of gathering information, talking to people.
8 Calls presumably. It is surely possible that you may have forgotten that someone called
9 from Mansell in early 2005 asking about the possibility of a cover.

10 A Don't remember.

11 Q You do not remember.

12 A I couldn't relate to that, no.

13 MR. HOSKINS: I am sorry, madam. I could not catch that answer. Perhaps the question could
14 be repeated again?

15 THE CHAIRMAN: He said, "I don't remember. I couldn't relate to that".

16 MR. BEARD: So, if someone had called up and said, "I am Phil from Mansell. You are on the
17 Claremont Close job. We are not going to do it. Can you give me a number?" it is entirely
18 possible that you would have forgotten about that.

19 A I wouldn't have given the cover without approval - and, anyway, we're talking about after
20 this 2004 date, which didn't happen anyway.

21 Q So what we have is an account from Mr. Goodbun setting out an interpretation of this
22 document, his recollection of it. You say you wouldn't remember a call from someone like
23 Phil Hart or someone from Mansell, but because of the policy that had been set out you are
24 sure that you did not give any cover price?

25 A What's the point of me doing that?

26 Q Well, there might be a range of reasons why you might want to do that, but the question I
27 am asking you is whether or not you did give a cover price?

28 A I've given a statement and I'm truthful about what I'm saying, I did not.

29 Q And you have made clear that after the policy was rolled out that the sanctions upon
30 someone like you, if you admitted that you had given a cover price, would be very severe
31 and you could have lost your job?

32 A This is what I'm going to come to. If I'd have done that I'd certainly have been sacked,
33 which had been agreed because I was going against sanctions.

34 Q You would have been sacked if someone had found out about it would you not, Mr. Sharpe?

1 A Yes, I certainly would have been.

2 Q In those circumstances, if you had given a cover price, you had every reason not to tell
3 anyone you had given a cover price, did you not, Mr. Sharpe?

4 A What am I going to gain by that because I'd have been sacked anyway. I couldn't get
5 another job, I was not only supporting my wife, my daughter, and twin kids that her
6 husband left.

7 Q I can certainly understand from what you are saying that the matter would be very
8 serious ----

9 A It would be, yes.

10 Q But surely if it is very serious what you are concerned to avoid is being caught. Is that
11 correct?

12 A That's not the way I work. It's not the way I work, sorry.

13 Q You were under severe pressure because of the policy that had been instituted by Mr. Clark
14 not to admit to any ----

15 A Why was I under pressure ----

16 Q -- cover pricing, were you?

17 A I wasn't under increased pressure, you had to do as you're told. There's no point in going
18 against policy.

19 Q Certainly, it would be extremely dangerous for you to admit at any point to admit to Mr.
20 Copeland or Mr. Briggs, or Mr. Clark, that you had had any contact with someone from
21 Mansell?

22 A There's no way, I don't agree.

23 Q So it would be understandable that you did not want to confess any contact with Mansell
24 that you had had?

25 A I never had any contact with Mansell.

26 Q Mr. Sharpe, the Office's case is that Mansell was in contact with Durkan, you were the
27 estimator, Mansell received a cover price and submitted it. In the light of the
28 documentation it is obvious that you would be under pressure not to communicate any
29 contact with Mansell that you may have had. You may misremember matters but whether
30 or not it is the lapse of time, or a refusal to admit, in fact a cover price did move from
31 Durkan to Mansell, did it not, Mr. Sharpe?

32 A No, it did not. What's the point of Robert Clark coming 'round and giving us instructions
33 when we can override it, what's the point in that? There's no point. I worked there for 20-
34 odd years, there was no point in me doing anything like that, was there?

1 MR. BEARD: I have no further questions, the Tribunal may have questions for you.
2 THE CHAIRMAN: Yes, the Tribunal members now have some questions for you, Mr. Sharpe.
3 MR. PICKERING: Mr. Sharpe, what were relations like with Mansell?
4 A I don't know Mansell, I was never involved with Mansell.
5 Q You were never involved with Mansell?
6 A I personally was never involved with Mansell.
7 Q But they were quite significant contractors, were they not?
8 A They were, yes.
9 Q But you had never come across?
10 A Yes, of course I've heard of Mansell, of course I have, but I haven't done any personal
11 dealings with them.
12 Q But some businesses are known to be keenly competitive with others, and some businesses
13 just get a long quite happily with others?
14 A Right.
15 Q Which one of those two would best describe Durkan's relations with Mansell?
16 A As far as I was concerned, I was the estimator, and I just done my job. The hierarchy with
17 Mansells I don't know.
18 Q Did you have people reporting to you who would assist you with the estimation?
19 A Well Guy Copeland was the chief estimator.
20 Q You reported to him?
21 A Yes, reported to him.
22 Q Did you have people under you who helped you with the work?
23 A No.
24 Q So when Mr. Copeland asked you to price a particular job then you would deal with it?
25 A Yes.
26 Q Okay, fine. Can I ask you about the first draft of your witness statement? Did you write
27 this out or what sort of input did you ----?
28 A Whereabouts are you?
29 Q The first witness statement which is Tab 4 in Bundle 3, which is similar to the one that you
30 signed, but not identical. Can you just tell me, did you write this out?
31 A I put some of my views into it, but it was written by our solicitor, as far as I know.
32 Q Your solicitor or Durkan's solicitor?
33 A Durkan's.
34 Q Durkan's solicitor. Then when you received it you were unhappy with it?

1 A It came in manuscript as such, which frightened me really in that sort of form, so I got right
2 on to the solicitor involved, and he suggest that I do not sign it and just sign the simple
3 statement.

4 Q So the second draft, which you did sign, that was prepared under advice from your
5 solicitor?

6 A Yes.

7 Q Which obviously took the shape of the first witness statement, but removed bits that you
8 were unhappy with?

9 A Like I say, the first one was frightening.

10 Q Thank you, I understand that. Now, you said in your evidence today that it was Mr. Clark
11 who announced the policy in August 2004 not to give ----

12 A Yes, that's correct.

13 Q -- or accept covers. In your witness statement I think the implication in para.5, and I am
14 referring now to the one that you have signed, you say it was explained to you by Guy
15 Copeland?

16 A The information came from Robert Clark, and Robert Clark passed the information on to
17 the estimators' section. So Guy Copeland, being the chief estimator, he would have
18 complied with that and passed the information to us.

19 Q Was Robert Clark more senior than Guy Copeland?

20 A Yes, he was the managing director as far as I can remember.

21 Q Right, I understand that, and I can understand why the detail may then have been explained
22 by Mr. Copeland. But I think you said before 2004 if a cover was asked for then you would
23 not have given it but would have referred it up anyway?

24 A If someone wanted a cover from us, we would go to Guy Copeland or whatever, to get
25 approval to say: "We're going to give cover to so-and-so", and I usually put "Cover given"
26 or whatever, on the document to the various different people. But no estimator would do it
27 on his own accord.

28 Q No, but if the agreed policy in Durkan, above your level, was that a cover would be given,
29 then who would get back on the phone and ring up the company asking for the cover and
30 tell them what cover was suggested? Would it be you, or would it be Mr. Copeland?

31 A It would probably be Mr. Copeland, because I would go to a director and say: "We're going
32 to give cover to so-and-so, is that okay?" They'd say: "Yes" or "No". If it was "Yes", then
33 either Guy Copeland would give a cover, or whatever, somebody else. That was, as I say,
34 before 2004.

1 Q I am not asking you to talk about after 2004 in this context, but just to make sure I have got
2 the point correctly, you may have received a telephone enquiry for a cover before 2004. If
3 you did so, you would have referred it to Guy Copeland?
4 A Guy Copeland, yes.
5 Q And he would then?
6 A Say yes or no, give a cover or not to give a cover.
7 Q You would then have given the cover?
8 A I would probably – sometimes he said, “You can ring up”, or he would ring up and give the
9 cover.
10 Q So it could have been either of you?
11 A Either of us.
12 Q After 2004, you knew what the policy was?
13 A Yes.
14 Q And you say that, for very clear reasons, you would adhere to that policy?
15 A That’s right, yes.
16 Q Were you, in fact, after August 2004 ever telephoned by another company and asked to give
17 a cover?
18 A Not as far as I remember, no.
19 Q So it is suddenly stopped?
20 A It may have done, but I don’t remember any calls after that time. You’ve got to remember,
21 it was five years ago. I can’t remember yesterday.
22 Q Yes, which side of the break it was.
23 A As far as I’m concerned, no.
24 Q Thank you. A final question: cover pricing would only apply in relation to tendered jobs?
25 A Yes, tendered. What I explained earlier, you’d probably get a load of tenders in. You may
26 be busy at the time and say, “We can only do such and such”. To keep in with the clients –
27 there is nothing sinister about it – you’ve got a cover price, you send it in to the clients and
28 go from there.
29 Q I understand that. The question I wanted to ask your advice on was, the relative
30 proportions, roughly obviously, of jobs that you estimated that were actually tendered, as
31 opposed to negotiated?
32 A Tenders to negotiate – on the section I worked they were all tendered.
33 Q They were all tendered?
34 A Yes.

1 Q Thank you very much.
2 A Thank you.
3 THE CHAIRMAN: The Claremont Close contract that this relates to, can you remember whether
4 you were bidding to win that contract, or did you not really want to win it?
5 A All the tenders we put in we tried to win, that's the idea of it.
6 THE CHAIRMAN: I think Professor Pickering has asked all the questions I was going to ask.
7 PROFESSOR PICKERING: I am so sorry!
8 THE CHAIRMAN: Any re-examination, Mr. Hoskins?
9 MR. HOSKINS: I do not have any further questions, thank you very much.
10 THE CHAIRMAN: Thank you very much indeed, that has been extremely helpful, Mr. Sharpe.
11 Thank you very much for coming. I can release you now, so you do not have to stay in
12 court if you do not want to.
13 (The witness withdrew)
14 MR. HOSKINS: I would like to call Mr. Briggs.
15 Mr. JAMES PHILIP BRIGGS, Sworn
16 Examined by Mr. HOSKINS
17 Q Could you state your full name, please?
18 A James Philip Briggs.
19 Q Hopefully there is a bundle marked "Bundle 3, Infringement 220". Can I ask you to turn to
20 Tab 2 of that bundle. This should be a document with the title "Witness Statement of James
21 Briggs". Can I ask you to turn over the page to p.2, is that your signature at the bottom?
22 A Yes, it is.
23 Q Is this your witness statement?
24 A Yes, it is.
25 Q Can you confirm that the contents are true?
26 A Yes, they are.
27 Cross-examined by Mr. BEARD
28 Q Mr. Briggs, you have been at Durkan for a long time, since 1978 in various capacities – that
29 is right, is it not?
30 A Correct.
31 Q And presumably during that time you became well aware that cover bidding was
32 widespread in the construction industry?
33 A It was around. I wouldn't say it was widespread, but it was around.

1 Q In 2004 Robert Clark decided that, so far as Durkan Limited was concerned, things must
2 change – is that correct?

3 A Correct.

4 Q How did he express that?

5 A There were a number of articles within the trade press, particularly one in the Building
6 magazine, which I think was where this August 2004 came about. We had concerns about
7 it, but when this actual article came out he photocopied it, attached it to this memo, sent it
8 around saying, “From now on no more giving or taking of covers”, and that’s where it came
9 about.

10 Q Do you remember anything about the article, do you remember its title?

11 A No, it was in the legal pages. There’s a legal person standing up. I can remember the actual
12 lay-out of it but I can’t remember the name of it, but it was an actual article in the Building
13 magazine that sort of finally tipped the balance that we needed to do something to ban it
14 from our company works.

15 Q You say it was on the legal pages. Was this discussing the fact that very heavy penalties
16 had been imposed by the Office of Fair Trading in relation to other cover bidding by
17 construction and roofing companies?

18 A Yes, I think it was like a general summary of cover pricing, the way the law was going, and
19 it was now illegal under, I think, the Competition Act, and that was it, we had to abide by
20 the rules.

21 Q Otherwise there would be fairly significant sanctions?

22 A I should imagine so, yes.

23 Q You discussed the new policy with Mr. Clark?

24 A Yes.

25 Q And with the estimators as well?

26 A Yes. We would have discussed it at board level and then we would have spoken to Guy
27 Copeland, who was the estimating manager, and then I believe we had an estimating
28 meeting where we brought the estimators in, and it was discussed, and this was the policy
29 and it was cascaded down through the estimating department. I remember Guy regularly
30 would use the sort of terms, “We don’t give or take assistance from other contractors”.

31 Q You were in court when Mr. Sharpe was giving evidence and he explained his fear that if he
32 were caught giving a cover price – not just him, but anyone in the estimating department –
33 then they would face the sack. It was a serious consequence?

34 A A very serious consequence, yes.

1 Q Could I just turn to your witness statement, which is Bundle 3, Tab 3 – you may have it
2 open, Mr. Hoskins took you to it. At para.9 you say you do not recall having discussed this
3 job. You do not actually recall anything at all in relation to this job, do you, Mr. Briggs?
4 A Not specifically, no.
5 Q What you say in your statement is that the submission of a tender would need to be signed
6 off by you or Mr. Clark. As I understand it, it would come up from Mr. Copeland, he
7 having worked with an estimator, and you would then sign it off, you or Mr. Clark, before it
8 was submitted – is that correct?
9 A The way we submit tenders is that there would be a tender adjudication meeting that would
10 involve, in this case, Brian Sharpe, the estimator, Guy Copeland, and then either and/or
11 Robert Clark or myself. At this meeting we'd go through the tender for completeness and
12 fullness, and then we'd decide what level of profit and overheads goes on, and then the
13 tender form filled in, normally by Guy Copeland, signed either by Guy or one of the
14 directors, myself or Robert, and then it's sent off.
15 Q So what you were doing was effectively assessing whether a job was worth going for at that
16 stage in the light of the estimations that had been produced for you – is that right?
17 A No, I think, as Brian said, if we price a job we price it to win it, and at that stage we would
18 put our best price in to win the job.
19 Q Certainly, but presumably you were assessing whether or not you thought, on the basis of
20 the estimation, there was going to be a decent margin for that job, whether you were going
21 to be able to offer a competitive price, whether or not it is the sort of work that you would
22 want as Durkan Limited – is that right?
23 A No, I think we wouldn't have wasted four or five pricing a job to leave it to the last minute
24 to decide that we're not going for it. The decision to go for a job would have been taken
25 when it came in. The tender adjudication is to put what we believe is our best price in to
26 win the job, and to win it, to carry it out.
27 Q In the past were you aware of Durkan taking a cover bid in relation to any tenders with
28 which you were involved?
29 A Presumably by 'previously' we're talking about before August 2004?
30 Q At any time whilst you were at Durkan?
31 A Before the memo came out from Robert Clark yes, I would be lying if I said we didn't give
32 or take covers. It wasn't that regular though.

1 Q But if you were taking a cover bid, presumably you would not trigger the whole tender
2 assessment process, because you were not really going for it in relation to that. That would
3 be correct, would it not?
4 A Correct, yes.
5 Q If the question was giving a cover, then you would still go through the tender assessment
6 process for Durkan, would you not, because, as you have said, you only submitted tenders
7 where you wanted to win them? That is correct, is it not?
8 A Correct, yes.
9 Q Then it would still be open to Durkan to provide a cover after that tender process had been
10 completed, would it not?
11 A Correct, yes.
12 Q So in the circumstances, the tender process to which you refer in the witness statement
13 would not constrain the giving of a cover bid in any way, would it?
14 A No.
15 Q No. Thank you. You have obviously emphasised a distinction pre- and post-2004 in that
16 that was the watershed, but even with the new policy in place, it would still be possible for
17 employees within Durkan, once the estimating process had been gone through, indeed once
18 the tender approval process had been gone through, to provide a cover to another company,
19 would it not?
20 A Well, anything is possible, but I think as Brian made the point: why would he? What gain
21 could Brian Sharpe in this instance have of giving a cover? Possibly losing his job. So I
22 would say no, very unlikely.
23 Q Very unlikely. But there was a fairly ingrained culture in the industry, so there was a good
24 chance that it could still happen, particularly with those that had been in the industry for a
25 long time and perhaps had relatively close relations with companies such as Mansell?
26 A No, as I said previously, I can't see any, any circumstances where an estimator like Brian
27 would do that. So no.
28 Q Paragraph 6 of your witness statement you say that the Claremont Close tender was a
29 traditional and relatively straightforward tender for external refurbishment works, but you
30 would accept that in fact it did involve some specialised concrete repair works and you do
31 not remember the details of the job. Is that right?
32 A I should imagine and I subsequently read about it, it did involve some concrete repairs. So
33 yes.

1 Q Just to be clear, companies like Gunitite (Eastern) Ltd and Yoldings Ltd and Makers
2 Industrial Ltd, they were concrete repair specialists, were they not?
3 A Correct.
4 Q Thank you. I do not have any further questions for the witness. The Tribunal may have
5 some questions.
6 MR. BLAIR: Mr. Briggs, are you sometimes known as Jim?
7 A I am.
8 Q I suppose I ought to ask you to look at the document, Mr. Brian Sharpe's unsigned witness
9 statement Bundle 3 Tab 5, the cover compliments slip relating to that. Did you see a
10 document looking a bit like the one I am holding up to you?
11 A Yes.
12 Q This says: "Please find enclosed documents discussed with Jim." Might that be you, do
13 you think?
14 A It would be me, yes.
15 Q So you were helping Mr. Sharpe with his witness statement at that point?
16 A I think – because Brian had retired, I think it is probably a couple of years ago now, and I
17 was the point of contact really for Brian to get his statements and evidence really. So yes, I
18 was sort of keeping in contact with Brian mainly through the telephone, and this was a
19 compliments slip from Frances, one of our PA's.
20 Q So basically, the drift of that first draft witness statement was yours?
21 A No, no, it would have been Brian's. How it went is when this all came up I was charged
22 with making contact with Brian as he had retired, and I was basically speaking to him on the
23 phone and after advice from our solicitors really, just to get a statement from Brian about
24 this particular tender, which he didn't specifically remember itself, but he does remember
25 that, you know, he wouldn't have given a cover. So no, it was Brian's statement put into a
26 form of words by the solicitor and sent to Brian for his agreement or not.
27 Q You were just a telephone medium?
28 A I was a go between really.
29 Q Thank you very much. That is one question. The second is: I think you said in your
30 evidence that you were trying to win this particular contract, or was that a general remark
31 about contracts?
32 A Correct, yes. As I said, if we put a tender in, as I said, there was no point in going through
33 the whole, you know, a month or so and procedure of pricing it and not wanting to win it.
34 Yes.

1 Q But actually your bid was £1,200,000.

2 A It was a bit way off, wasn't it?

3 Q Against an estimate by the clients that it might be of the order of £900,000. But that is not
4 unusual, is it?

5 A No. It's very difficult to understand why some tenders are so far adrift, you know, when it's
6 a fairly straightforward job to price. It could only be that we got the wrong subcontract
7 prices from other subcontractors and other people would have got more competitive
8 subcontractors. Because really, we were really sort of assembling different quotes and
9 different suppliers and subcontractors, and a lot depends on who you go to as a
10 subcontractor, particularly some subcontractors will be more competitive than others at
11 different times, depending how busy they are, or their workloads, that sort of thing.

12 Q But it is not unusual that you should have been, as it were, the second highest tenderer in the
13 list?

14 A Unfortunately not, no.

15 Q Thank you very much.

16 PROFESSOR PICKERING: Mr. Briggs, Mr. Sharpe has told us that he did not determine the
17 tender price at the end of the day; he provided significant input but then others would decide
18 on the mark up for overheads and profits.

19 A Yes.

20 Q Is it not possible – and I am conscious that Mr. Hoskins has put me on a yellow card for
21 speculating the other day – that somebody might say: who was your estimator on this job;
22 can you give me a cover price? It might be that if a cover price had been given or was
23 believed to have been given by Mansell, that the name Brian Sharpe and the cover price
24 were not necessarily directly related in the way that has been inferred?

25 A Like I said, anything is possible. I think as Brian said, normally it would have come
26 through from the estimator or probably Guy Copeland.

27 Q Thank you.

28 THE CHAIRMAN: Looking at the situation before the change in policy in August 2004, if a
29 tender had come in were you one of those who was usually involved in the question of
30 whether you were actually going seriously to go for this?

31 A Yes.

32 Q If you decided at that stage that you were not going to go for the work, would you or Mr.
33 Copeland then be the one to decide that you should seek a cover price to put a bid in?

1 A No, really the first thing we would do is try and send it back, that's the first thing we can do,
2 but for various reasons that wasn't always possible. But it would be a decision probably
3 between Guy and myself.

4 Q If it had been decided to get a cover price, talking before August 2004, if you thought: we
5 have tried to give this tender back but actually we do need now to submit something, who
6 would, first of all, authorise getting a cover price, and who would then physically do it, do
7 you know?

8 A Physically getting it, it probably would have been Guy Copeland, because he would
9 probably know who to ring up. It would be in discussion with myself and probably Robert
10 Clark, but it would be the three of us, but Guy would, as he was the estimating manager, he
11 would be involved in that process.

12 Q After August 2004 when you decided not to give or take presumably you sent back more
13 tenders than you had previously.

14 A Yeah.

15 Q After that time did any estimators - either Mr. Sharpe or any others - come and say to you,
16 "Well, we have been asked for a cover price. What should we do?" or ----?

17 A Yes. We priced most of our jobs -- You know, we try and make it that we don't get too
18 many tenders that we can't cope with, but occasionally we do get inundated. But, there
19 was instances, since August 2004, where we did get requests. Guy would tell me -- you
20 know, he would tell me who -- you know, we were requested on this particular scheme from
21 X and he would always say, "No, we don't seek or give any assistance". So, yeah, it did
22 happen. I can't recall actual, individual schemes, but we did get requests. As I say, we
23 never got loads, but we did get, you know, two or three and then it gradually died out.

24 Q Yes. Did this cause any difficulties between you and other construction companies? What
25 we have heard in relation to other cases was that this was sort of going on generally. To the
26 extent that it seems to me that other companies would be rather surprised you were not co-
27 operating in this way as everyone else seemed to be, I just wondered whether this caused
28 any difficulties for you?

29 A As I said, we didn't do -- We weren't -- We didn't give many prior to 2004 - August 2004.
30 So, I don't think we were expected as one of the ones that always did it. So, no, I don't
31 think so. Yeah? Because I think by then people knew it was wrong, and I think a lot of
32 contractors weren't doing it in spite of what's been alluded to.

33 Q Thank you very much, Mr. Briggs. Any re-examination?

34 MR. HOSKINS: I have no questions, no. Thank you.

1 (The witness withdrew)

2
3 Mr. ROBERT ADAMS CLARK, Sworn

4 Examined by Mr. HOSKINS

5 Q Could you state your full name, please?

6 A Robert Adams Clark.

7 Q The same drill as the others, please. Can you take Bundle 2, Infringement 220? Go to Tab
8 3. You should find a document with the title 'Witness Statement of Robert Clark'.

9 A Yes.

10 Q Can I ask you to turn to the second page? Is that your signature?

11 A It is.

12 Q Is this your witness statement.

13 A It is.

14 Q Are the contents true?

15 A They are.

16 Cross-examined by Mr. BEARD

17 Q Mr. Clark, you have been involved with Durkan since 1983; is that correct?

18 A Since before. I came back in 1983.

19 Q Right. You have been involved even earlier than that.

20 A I have, yes.

21 Q You have been a director since 1987 and managing director since 1989.

22 A That's correct.

23 Q We are talking about Durkan Ltd. here, which focuses on the local authority public sector
24 work.

25 A Predominantly.

26 Q You were also briefly a director of Durkan Holdings. That is correct, is it not?

27 A Very briefly.

28 Q But you were involved in the running of Durkan Holdings?

29 A Not at all.

30 Q No. Why were you appointed as a director?

31 A My memory of that is that -- I think it was for a matter of days.

32 Q Yes. I think it was for around a week, if that assists.

1 A Right. I think it was for the purposes of signing some documents. I can't remember what
2 they were. It was either a land transaction or something to do with the bank. For whatever
3 reason there was not a Holdings director available.

4 Q Thank you. In your witness statement you say that the official policy of Durkan Ltd. from
5 August 2004 was that there should be no cover bidding - no giving and no receiving of
6 cover bids. Is that correct?

7 A That's correct.

8 Q Prior to that point, cover bidding had been common practice; is that correct?

9 A I think common practice is to over-state it. I think there were occasions when we gave or
10 received covers.

11 Q More generally in the construction industry you are aware of the widespread use of cover
12 pricing.

13 A Again, having worked for Durkan for so long, in a sense I've only got the experience of
14 Durkan. Therefore I can't really comment on what the rest of the industry was doing.

15 Q But presumably in your role as managing director of Durkan Ltd. you built up relatively
16 close relationships with other contracting companies. So, you had a broad understanding of
17 the construction market.

18 A No. In fact the opposite is the truth. There was very little contact between other
19 contractors. Anecdotally we came together with three other contractors to form a limited
20 company with one of our clients for a particular bid, and in fact the other two or three
21 contractors, shall I say, with the exception of one person, I'd never met any of the other
22 people. So, it was not in any sense common practice for people to meet in any form.

23 Q Right. In relation to the change in policy that occurred in August 2004 you say in your
24 statement that you had seen articles in the trade press and, in particular, a building magazine
25 article. Do you remember what that article was entitled?

26 A I don't. I do still have a copy of it, but sitting here today I can't remember what it was
27 called.

28 Q Was it something like 'playing on a level field'? Does that ring a bell?

29 A I can't remember. (After a pause): Suffice to say, as I recall, the contents of the article was
30 sort of moving -- Well, there was an explanation -- there was an interpretation that the cover
31 pricing was linked in some way to bid rigging. It was this sort of revelation, if you like, that
32 cautioned me to this current change in approach that we needed to recognise.

33 Q It was not just a definitional change, your revelation. It was the concern that there be severe
34 penalties imposed.

1 A I think that's obviously a function of that. But, I think it was the simple reality that cover
2 pricing was being viewed as something that shouldn't be engaged upon.

3 THE CHAIRMAN: If the article still exists -- I am not sure why we are speculating over what it
4 says. Can it not be -- Where is the article?

5 A I believe I have a copy of it in my records, somewhere.

6 Q I am surprised, if that is the case, that it was not appended to the witness statement, but
7 maybe it did not occur to anybody that it still existed. Anyway, go on.

8 MR. HOSKINS: Madam, obviously, if you want us to make inquiries, we will produce one.
9 There is nothing to hide. We are entirely in your hands.

10 THE CHAIRMAN: Yes. I think it would be helpful if we could see what it was.

11 MR. BEARD: I think that would be of assistance because trying to track this down is rather
12 difficult. (To the witness): Just to be clear, you talk about a revelation, but you knew
13 before 2004 that cover bidding was wrong.

14 A I had only read articles about bid rigging in the past, and I don't think there's been an
15 interpretation, not as far as I'm aware, if you like, that cover pricing was viewed as a form
16 of bid rigging.

17 Q But this change in perspective, and the threat of penalties was such that you were concerned
18 to ensure that Durkan Limited did not engage in this sort of activity?

19 A That's correct, yes.

20 Q And you were in court earlier when Mr. Sharpe was giving evidence?

21 A I was.

22 Q And you heard about his concerns about the sort of severe sanctions that people within
23 Durkan Limited would be faced with if they were caught having been involved in cover
24 pricing. Would you agree that those sorts of sanctions could follow?

25 A I think his analysis is correct.

26 Q So after August 2004 no more cover pricing at all in relation to Durkan Limited. But it
27 would be possible, would it not, for an estimator, or someone within the estimating team, to
28 provide a cover to a rival even with that policy in place, would it not?

29 A That is, of course, possible, but I can't really see the reason for it happening.

30 Q And given the severity of the sanctions that you had made clear anyone would face if they
31 were found to have given a cover price, there would be a significant disincentive against
32 telling you about it, would there not?

33 A When I introduced the policy there wasn't a footnote giving an explanation what the
34 sanctions would be if someone were not to follow it, it was simply a policy of the company.

1 I think it is fair to say that if anyone were to have breached that policy I think the view may
2 well have been taken that it was an act of gross misconduct, but it was not part of the policy
3 that "If you do not do this, it will be viewed as".

4 Q It was not stated in your memo?

5 A No.

6 Q But it was clearly understood within Durkan Limited that this was a very serious matter, and
7 might well amount to gross misconduct?

8 A It was apparent, or it was made apparent that as far as we were concerned this was very
9 serious – well, it was a policy that required to be adhered to.

10 Q There was a serious disincentive to telling you about it, it was still possible for estimators to
11 engage in the provision of covers, and we had an ingrained culture in the industry. There
12 was still every chance that this sort of activity could be going on within the estimation
13 department at Durkan Limited?

14 A I don't believe that to be the case (a) because it would be very difficult for an individual to
15 act alone; and (b) there is very little incentive for an individual to engage in anything like
16 that.

17 Q When you say there was very little ability for an individual to act alone, I think you would
18 agree that all that is required in order to provide a cover price to a rival is an assessment of
19 the tender that you will be submitting so that a figure that is slightly higher, but prima facie
20 plausible, can be provided as the cover price, is that right?

21 A I'm not sure what you are saying. If you are saying if someone knows the tender that we are
22 submitting, then obviously mathematically they can calculate a figure higher than that.

23 Q So when you say it is difficult for someone to act alone, so long as they know the Durkan
24 tender price they could provide a cover to a rival?

25 A That's physically possible. Obviously timing is an issue here, inasmuch as our tenders are
26 put together usually at the last moment for reasons of predominantly making sure that we
27 have the most effective quotes to put into it, to be given every chance for quotations, so it is
28 usually done on the last morning.

29 Q But all that is required is a telephone call to provide the cover price?

30 A That would be correct, yes.

31 MR. BEARD: Thank you very much, I have no further questions for you.

32 MR. BLAIR: Mr. Clark, you put in this new policy in 2004, and you say in your witness
33 statement that you circulated a copy of the article highlighting the requirement that we were

1 not to request or give covers. Do you think you still have a copy of that cover note of yours
2 as well as the article itself?

3 A No, the format, what I actually did was I photocopied the article a number of times, and I
4 wrote at the top of it the effect of "This is an article regarding cover pricing" and then
5 visited individuals to discuss the content and apply the policy.

6 Q So there was not a formal office memorandum?

7 A No, there was not.

8 Q It was done orally effectively, and there was a note?

9 A There was a note.

10 Q Yes. Do you have a copy of your manuscript additions?

11 A I don't.

12 Q You just have the pure article itself?

13 A I have the article, yes.

14 Q Well at least that is something, thank you. Secondly, I think you implied that you had seen
15 the Builders' Conference document at File 3, Tab 7, can you turn up Tab 7 in File 3? You
16 have seen that before?

17 A I have seen this before, yes.

18 Q To an outsider it might look as though this is a positive invitation to collude?

19 A As a document?

20 A Yes.

21 Q I think the purpose of the Builders' Conference was twofold. One, it was to give an
22 indication of who was tendering, but it is also an indication of subcontractors that are
23 tendering, and this is as much about informing subcontractors, because subcontractors, as I
24 understand it, are also members of the Builders' Conference, and so what it gave an
25 indication to is where you might be able to get a quotation for. Sometimes, let us say we
26 send a tender inquiry for a particular trade to a subcontractor, they didn't get back to us for
27 whatever reason, there was an opportunity here that we could contact another subcontractor
28 for them to give us a price.

29 Q Can a subcontractor offer the services to two or three of the main contractors or ----

30 A That's not unusual.

31 Q It is not unusual?

32 A It's not unusual anecdotally, shall I say, that we would get a subcontractors' price that
33 perhaps they wouldn't even have altered the address at the top. We would have made an

1 inquiry to them, so would contractor B and possibly contractor C, and we would actually
2 get a subcontractor's quote that would show that name.

3 Q So what is the purpose in the middle bit about main contractors offering the email addresses
4 and the telephone numbers of the contacts?

5 A That is the subcontractors can then contact all these people.

6 Q They say: "I am interested"?

7 A They say "I am interested and would you like my quote?"

8 Q So that the document is really aimed at the subs rather than at the main contractor?

9 A Well that is certainly one of the primary purposes, yes.

10 MR. BLAIR: Thank you very much.

11 PROFESSOR PICKERING: Mr. Clark, just staying with the discussion about the Builders'
12 Conference, does this organisation cover the whole country?

13 A I don't know.

14 Q It is a membership organisation?

15 A As I understand it.

16 Q And you pay a subscription to belong?

17 A I don't know. I surmise that we do, but I don't know.

18 Q I suppose Mr. Fraher would know?

19 A Mr. Fraher will be able to tell you.

20 Q Maybe Mr. Hoskins could tell us when he closes on that, please; I would be interested to
21 know. You presumably then do not know the level of membership?

22 A I have no idea.

23 Q So you happily take information from an organisation, but you do not really know much
24 about it?

25 A No.

26 Q I see. Could I ask you then, finally, regarding your article in Building Journal, do you recall
27 who initiated that? Did you approach the Journal, or did the Journal come to you and ask
28 you?

29 A It's not my article. It was an article in Building Magazine that I saw, so I am not the author,
30 I'm merely someone who read the article and, when I read the article, I recognised an
31 apparent change in approach that was being advised really through this journal and that's
32 the reason for my ----

33 Q Sorry for my misunderstanding on that. Do you understand the nature of the role of the
34 person who wrote the article? Was he or she a professional lawyer?

1 A My recollection is that it was a legal ----
2 Q No doubt we will find that out.
3 THE CHAIRMAN: Just thinking about the position before the change in policy, when the giving
4 and taking of cover prices was going on within Durkan Limited, you have referred to what
5 you call the timing issue to the effect that the adjudication of the tenders, the figures that
6 you were actually going to put in was usually done pretty much at the last minute. The
7 giving and taking of cover prices, was that generally the pattern in the industry, that it was
8 fairly last minute?
9 A I would presume so. Obviously the geography comes into it, if the tender has got to go to,
10 as sometimes they do, somewhere further north perhaps, so there is going to be an issue
11 about how do we get the tender there on time, then there were occasions when tenders are
12 dispatched perhaps the day before, but generally speaking they go the same day.
13 Q The pattern that is coming out, just looking at Durkan at the moment, is that, once the tender
14 has been received, at quite an early stage you will know whether you are really going to go
15 for it or not, and if you are not going to go for it, at that point then you might have tried to
16 give the tender back, that does not succeed, so at that point you know that you are going to
17 want to get a cover. You may think, "Well, there is no point in ringing up X now because
18 they probably do not know what their estimate is going to be, I need to wait until nearer the
19 time". I am just wondering, would there be then a contact, somebody ringing up from
20 Durkan to someone else saying, "We see that you are going to be bidding for this, once you
21 have settled your own bid could you then ring us to give us a cover", or was the request for
22 the cover delayed until the time that you think that they will have come up with what they
23 are going to bid? Do you understand?
24 A Yes, I do, it's probably more the latter, it's probably more leave it until ---- In terms of
25 returning tenders as well, I think the practice of returning a tender is difficult in some ways,
26 one, because it may be a tender that you have actively pursued from a marketing point of
27 view, and it's only when you receive the documents and you see the true scope of the
28 works, or whatever it may be, that you decide, actually, this is not something that we want
29 to actively pursue. We've had examples of that since 2004 where we've done exactly that.
30 I can recall our business development director having telephone conversations and having to
31 explain why it was that a job that we had seemingly been very interested in, we were now
32 returning because – capacity is one reason, but it can be the way in which the scheme is
33 presented to us.

1 Q But as far as the timing is concerned, your evidence is that even if you had decided fairly
2 soon after receiving the tender that you would want a cover price, you might wait until
3 shortly before ----
4 A I think probably that would be it.
5 Q The other thing that Mr. Sharpe said this morning was that if he got in a request, or if there
6 was a request for a cover price, again before 2004, he would ask someone more senior
7 whether they thought that a cover price should be given. Was that the case for all the
8 estimators or just ----
9 A Yes, I would say most certainly.
10 Q Were you one of the people to whom they would ----
11 A Yes, it would either be myself through the chief estimator, Guy Copeland, more recently, or
12 James Briggs.
13 THE CHAIRMAN: Thank you very much. Any re-examination?
14 MR. HOSKINS: I do not have any questions, thank you.
15 THE CHAIRMAN: Thank you very much, Mr. Clark, that is very helpful, thank you for coming
16 along, and I can also release you from the witness box, so you do not have to stay in court if
17 you do not want to.
18 (The witness withdrew)
19 MR. HOSKINS: I have taken instructions on the point that Professor Pickering raised. In relation
20 to the Builders' Conference Durkan ceased membership a few years ago, but when they
21 were members they paid an annual subscription which was based on and calculated on
22 annual turnover.
23 PROFESSOR PICKERING: (Without microphone) What proportion?
24 MR. HOSKINS: I need to ask another question. Would you like the answer?
25 PROFESSOR PICKERING: The amount that one pays into an organisation is perhaps indicative
26 of the value one expects to get back from it.
27 MR. HOSKINS: I am happy to ask that question.
28 THE CHAIRMAN: If it is available.
29 MR. HOSKINS: I am here to help rather than obstruct. (After a pause) We need to make further
30 enquiries. It is not something Mr. Fraher knows off the top of his head.
31 MR. BEARD: Madam, I am conscious that it is 12, and that this afternoon we are going to deal
32 with Mr. Copeland's witness evidence. I am also conscious of time constraints more
33 generally. I have discussed with Miss Bacon whether it might be sensible to actually

1 commence the decisive control submissions from the Office in the interim between now and
2 the departure for Jones Day for this afternoon's session.

3 THE CHAIRMAN: We could certainly do that. My thought was that if there are people who it
4 would be better for them to be back at Jones Day making the arrangements so that
5 everything kicks off smoothly at two o'clock – I am not quite sure how much logistics there
6 is in getting everybody from here to there.

7 MR. BEARD: My understanding is that arrangements have been put in place for all the relevant
8 bundles to be shipped across by everyone at one o'clock. That I believe is the position, so I
9 think trying to shift early would not be feasible, because the bodies are not here to do the
10 lifting and carrying. It was for that reason that I was suggesting that we might use the
11 interim time to deal with the start of the decisive control issue. Obviously if the Tribunal
12 would want to rise for a moment before that that is entirely a matter for you.

13 THE CHAIRMAN: Why do we not do that? Will it be you or Miss Bacon?

14 MR. BEARD: Miss Bacon is going to deal with these matters.

15 THE CHAIRMAN: Let us come back at 12.20 and make a start on the submissions.

16 MR. BEARD: Thank you very much.

17 (Short break)

18 MISS BACON: Madam, members of the Tribunal, what I propose to do is to just open the legal
19 test and framework of the appeal, and then we will get stuck into the evidence this
20 afternoon. To foreshorten matters and to save me having to take you to every document
21 again, which I hope you have, which sets out all of the references - or at least the key
22 references - as well as, to the extent that we have been able to do them overnight references
23 to the transcripts. So, let us start off with the legal test and the framework which are the
24 first two sections in my speaking note. This is not intended to be a thesis. You will see it is
25 written in note form so that it is easy for me to read and for you to follow as I am going
26 along.

27 Starting off with the legal test, I think it is important to understand that *Akzo* is not the be all
28 and end all. *Akzo* was the most recent in a long line of cases which discussed in general
29 terms the way in which subsidiary liability can be imputed to the parent. What the cases
30 make clear and as it appears from the extracts that I have set out in the first couple of pages
31 of my note, is that decisive influence is one of the ways in which imputability can be
32 determined, but it is not the only way. There are, in fact, a variety of different factors that
33 can be taken into account - things like the structural links between the companies, whether
34 relevant directors have been involved, and so on. I am not going to take you through all the

1 cases. The references are there. I have extracted the relevant bits from the earlier cases that
2 we rely on. These are all, with the exception of *Sepia Logistics* cases in the European court.
3 *Sepia Logistics* is a case from the Tribunal.

4 What we get from this is that one looks at a whole panoply of factors. One of the ways in
5 which immutability is determined is by looking at the decisive influence test. But that is not
6 the only way. That also appears from the wording of *Akzo* itself. I think it would be helpful
7 to turn up the *Akzo* case which is in Bundle 5B at Tab 30. I am not going to ask you to read
8 everything that Mr. Hoskins took you to. I just want to highlight a few paragraphs in
9 particular. If you would like to start at para.58,

10 “It is clear from settled case-law that the conduct of a subsidiary may be imputed
11 to the parent company in particular where, although having a separate legal
12 personality, that subsidiary does not decide independently upon its own conduct
13 on the market, but carries out, in all material respects, the instructions given to it
14 by the parent company having regard in particular to the economic, organisational
15 and legal links between those two legal entities”.

16 So, it is saying several things there. One is that if you are looking at whether the subsidiary
17 decides independently upon its conduct in the market you look at, in particular, the
18 economic, organisational, and legal links. But, the other thing it is saying is that this is not
19 an exhaustive test anyway. This is just one of the ways - and one of the particular ways. I
20 am not trying to say that if the Tribunal reaches a decision that this test of decisive influence
21 is not satisfied, it can then, nevertheless in this case go on to find in the OFT’s favour
22 because in the Decision the OFT’s case is put on the basis of decisive influence. The point I
23 am making is that this must be seen in the context of a number of cases in which it is quite
24 clear that you look at all the relevant factors. So, one needs not to get too hung up on the
25 strict legal question of, “What is decisive influence?” because this is really looking at the
26 whole economic context. That is quite clear even from this paragraph in *Akzo*. So, I would
27 not want you to be left thinking that this is the only way in which imputability can be
28 determined. Really that frames your consideration of what is necessary for decisive
29 influence.

30 The other paragraphs I wanted to take you to are, first of all, para.60. Having set out the
31 framework under which the court was going to assess the case there, the court goes on to do
32 two things in *Akzo*. The first is to say, “In the circumstances of the *Akzo* case where there
33 was a wholly owned subsidiary, there is a presumption [and that you can find at para.60] in
34 the specific case where a parent company has a 100 percent shareholding. First the parent

1 company can exercise a decisive influence; second, there is a rebuttable presumption that
2 the parent company does in fact exercise a decisive influence”. It is saying that on the facts
3 of this case - which are obviously slightly different from the present case because we have
4 51 per cent - in a 100 per cent case you have a presumption, and then the question is
5 whether that presumption has been rebutted. So, the Commission was right to apply the
6 presumption in that case. That is what they are saying.

7 Then, the second stage of the *Akzo* judgment. It goes on to say what factors are relevant to
8 deciding whether the presumption can be rebutted? That you will find at paras.72 to 74.

9 Paragraph 72, “As noted in para. 58 -- That is setting out the test again. Paragraph 73:

10 “It is clear, as the Advocate General pointed out in paras 87 to 94 of her Opinion,
11 that the conduct of the subsidiary on the market cannot be the only factor which
12 enables the liability of the parent company to be established, but is only one of the
13 signs of the existence of an economic unit”.

14 Then, at para.74,

15 “It also follows from para.58 of this judgment that, in order to ascertain whether a
16 subsidiary determines its conduct in the market independently, account must be
17 taken not only of the factors set out in para.64 of the judgment under appeal, but
18 also of all the relevant factors relating to economic, organisational and legal links
19 which tie the subsidiary to the parent company, which may vary from case to case
20 and cannot therefore be set out in an exhaustive list”.

21 What the court is saying is that you do not just look at the very narrow question of whether,
22 in relation to the particular infringement, the subsidiary has acted on the instructions of the
23 parent. That may be the case in some circumstances. It is not the only one. What you need
24 to look at is all of the circumstances which tie the subsidiary to the parent.

25 So, two stages in the *Akzo* test.

26 Before I move on to how that fits in with this case I think we need to look at paras. 87 to 94
27 of the Advocate General’s opinion which is at the next tab. That is actually very
28 illuminating. Advocate General Kokott makes the point that you do not need to look at day-
29 to-day management of the company, but rather a wide range of other factors are relevant.

30 So, if you could start at para.86, what has happened here is that the appellants have said that
31 the court of first instance was wrongly referred to all economic and legal, organisational
32 links. What they were saying was that the only relevant criterion was the exertion of
33 influence on commercial policy in the narrower sense - that is, on the determination of the

1 subsidiary's market conduct. What the Advocate General goes on to do is to reject that in
2 terms that are approved, as I have just shown you, by the court. So, at para.87 she says that,

3 "It should be noted in this regard that the absence of autonomy of the subsidiary in
4 terms of its market conduct is only one possible connecting factor on which to
5 base an attribution of responsibility to the parent. It is not the only connecting
6 factor".

7 Then she goes on to say that even if the autonomy of a subsidiary regarded its commercial
8 policy in the narrower sense - that is, a sense argued for by the appellants -- Even is she
9 wrong and you only do look at the commercial policy, the decisive influence of the parent
10 does not have to result from specific instructions, guidelines or rights of co-determination in
11 terms of pricing production and sales activities. Such instructions are merely a particularly
12 clear indication of the existence of decisive influence over commercial policy. Then she
13 goes on to say at para.90,

14 "Nor, *a fortiori*, can it depend on whether the parent company has interfered in
15 the day-to-day business of its subsidiary, or, equally, whether anti-competitive
16 activities engaged in by the subsidiary were attributable to an instruction from the
17 parent company or known to the latter".

18 So, she is saying, "Well, even if I am wrong and you do have to look at the parent's
19 responsibility for narrow commercial policy, even then you do not have to have day-to-day
20 interference or an instruction to carry out anti-competitive activities, or even knowledge of
21 the anti-competitive activities".

22 Then she goes on to say at para.91,

23 "A parent company may exercise decisive influence over its subsidiaries even
24 when it does not make use of any actual rights of co-determination and refrains
25 from giving any specific instructions or guidelines on individual elements of
26 commercial policy. Thus, a single commercial policy within a group may also be
27 inferred *indirectly* from the totality of the economic and legal links between the
28 parent company and its subsidiaries".

29 Then she gives a number of examples at para.92.

30 "For example, the parent company's influence over its subsidiaries as regards
31 corporate strategy, operational policy, business plans, investment, capacity,
32 provision of finance, human resources and legal matters may have indirect effects
33 on the market conduct of the subsidiaries and of the whole group. Moreover, as

1 the Commission correctly points out, even a company's mere membership of a
2 group may influence the subsidiary's market conduct ----"

3 So, this is comprehensively rejecting the suggestion that there needs to be any direct
4 influence or instructions over the subsidiary's commercial conduct.

5 THE CHAIRMAN: She does in para.91 though seem to be eliding the question of ability and
6 actual exercise, because she seems to be saying, "Well you can exercise decisive influence
7 even when you do not actually make use of your ability ----"

8 MISS BACON: Yes. I think what she is doing is making a very common-sense proposition that
9 even if you agree with what your subsidiary is doing and do not start waving around a big
10 stick, you can still be decisively influencing its conduct. You do not have to disagree or
11 exercise a right of veto. That is something that is quite apparent from the cross-examination
12 yesterday and on Monday. This is a common feature in a boardroom. There is an element of
13 consensus-making. The fact that a parent company does not say, "We are going to use our
14 shareholding rights and we are going to put something to a resolution at a shareholders'
15 meeting. We are going to decide that we are going to remove a director and control every
16 aspect of your policy does not mean that it is not actually exercising decisive influence in
17 the sense required for the attribution of subsidiary liability to the parent. That is the point
18 that she is making here and exactly supports the OFT's case. In fact, we have far more than
19 that because she is saying that all these things like guidelines or instructions are not
20 determinative. But, we do have guidelines. We do have instructions given by the parent
21 company to the subsidiary. We do have day-to-day consideration of matters such as
22 telephone calls, employees' terms of engagement, the circumstances under which an
23 employee's claim against a company is settled, how many thousands of pounds a claim
24 against a client is settled for. In this case - as I will come to this afternoon - we do have
25 interference in the minutiae. All those things that she said were not necessary. In our
26 submissions, we have got it in spades here. All of the things that we have she says you do
27 not actually need. But, I wanted to show you that, to show actually how low the threshold is
28 and how one really looks at the overall group strategy and the group organisational policy.
29 You can rest imputation of liability on merely that without the kind of day-to-day
30 management and interference that we have seen was commonplace within the Durkan
31 Group.

32 PROFESSOR PICKERING: May I just ask for my benefit, Miss Bacon: What is the status of an
33 Advocate General's opinion as an authority for a case like this?

1 MISS BACON: The Advocate General is a judge of the court. What happens is that the
2 Advocate General gives his or her opinion and the court decides whether it is going to
3 follow it, or not. In a case where the court does not follow the Advocate General's opinion,
4 then obviously it does not have very much status at all for the purpose of your deliberation.
5 In a case where the court does follow the Advocate General's opinion what it frequently
6 does is provide further elucidation of what the court had in mind, and, in particular, where
7 the court expressly approves a passage from the Opinion. There is often a case where the
8 court decides something and the Advocate General has decided exactly the same, but in
9 more expansive terms. Then there is obviously a bit of a debate between counsel as to
10 whether one can rely on a particular sentence of the Advocate General's opinion that is not
11 picked up in the court's judgment. This is not that case. The paragraphs I have taken you to
12 were expressly approved by the court and in those circumstances the effect of the Advocate
13 General's opinion is very persuasive for you because the court is saying, "For these reasons,
14 this is the reason why we have reached our judgment".
15 The reason why it is structured in this way is that the court has to reach unanimous
16 judgments there is no possibility of a minority report. So, the only background information
17 you have as to the reasons why, often, a very condensed judgment has been reached is
18 looking at the Advocate General's opinion.

19 PROFESSOR PICKERING: That is very helpful. Forgive me for having asked it as a non-
20 lawyer. But, it is certainly helpful to me to know the status.

21 MISS BACON: It is a question that is asked in the High Court and the Court of Appeal
22 frequently.

23 THE CHAIRMAN: I am reassured.

24 MR. BLAIR: While you are being interrupted, Miss Bacon, have you any observations about the
25 use of the word 'guidelines' in para. 91 in the context of the evidence - and perhaps you will
26 come to it this afternoon - of 'queries, observations, comments, questions and highlighting'?

27 MISS BACON: In our submission, what was going on here was not only instructions, in some
28 cases but certainly guidance. We had the evidence - the very candid evidence - from Mr.
29 Pudelek yesterday that when Mr. William Durkan says something, you do not ignore it. He
30 was, at the very lowest, giving guidance. In my submission, as you will see from the
31 evidence this afternoon, our case is that actually there was much more than guidance being
32 given, and in particular some of the meetings where the directors of Durkan Holdings were
33 saying, "Look! This is a real problem! You need to go and sort it out". The words 'sort it

1 out' appear also in the evidence of the Durkan witnesses when they say what was going on.
2 "Here was a problem, and we were being told to go and sort it out".

3 Having set that legal scene, before we break I want to explain what the framework is of this
4 appeal. There has been some discussion about the status of the presumption in this case.

5 Does it matter if it is 51 percent? Does it matter that there is a presumption at all? Now,
6 the starting point is that in the Decision the OFT found that two things taken together gave
7 rise to a presumption of decisive influence in this case. The first was a 51 per cent
8 shareholding; the second was the common board directorships. On the OFT's case, those
9 two together added up to a presumption. In our submission there is no material difference
10 for this purpose between 51 per cent and 100 per cent. If Durkan Holdings had wanted to, it
11 could have called a shareholders' meeting, put a matter to a poll, removed directors, and
12 assumed a majority control over the board, which it had anyway until about 1997 when it
13 was 3:2 and then 3:3 with the chairman having the casting vote.

14 However in our submission, that is entirely irrelevant. It had 51 percent of the
15 shareholding. It was intended to have 51 per cent of the shareholding. We had Mr.
16 Pudelek's evidence yesterday which was that they would not walk into the agreement unless
17 they had 51 per cent of the shareholding. For those reasons we say it does not really matter
18 whether it is 51 per cent or 100 per cent. In any event, where we are at is that the OFT said
19 a 51 per cent plus common directorships added up to a presumption. That presumption has
20 not been challenged by Durkan. Durkan is actually challenging the question of whether it
21 can rebut the presumption. The OFT approached its decision in the same way as Akzo - first
22 a presumption; then, second, as a matter of fact the OFT also found that there was the
23 exercise of decisive influence. Durkan's appeal is to the second part of the test. There is no
24 appeal against the presumption. Mr. Hoskins has not anywhere in his Notice of Appeal or
25 skeleton argument set out reasons why the presumption should not have operated or was
26 wrong in law. So, what the Tribunal is concerned with in this hearing is not whether the 51
27 per cent plus was a correct finding in law - whether the presumption was correctly applied -
28 but whether Durkan has successfully rebutted that presumption on the facts of the case.

29 That is why talking about a presumption is not irrelevant, as Mr. Hoskins suggested. What it
30 means is that the burden of proof is on him. He has to establish ----

31 THE CHAIRMAN: I do not understand that that is contested - that the burden of proof lies on
32 him.

33 MR. HOSKINS: Absolutely. We have brought our evidence here. That is what we are asking
34 you to decide.

1 MISS BACON: But that is why the presumption is not irrelevant because it actually switches the
2 burden of proof on to him to satisfy the Tribunal that contrary to the OFT's findings in the
3 Decision, Durkan Holdings did not in fact exercise decisive influence despite the
4 presumption. So, that is the framework of this appeal.

5 What I was then going to go on to do - and what I suggest we might do this afternoon, lest
6 you want me to start right now - is to look at the indicia of decisive influence ----

7 THE CHAIRMAN: Just on the point that you were making about whether there is a difference
8 between 51 percent and 100 percent, there may be a very significant difference in the degree
9 of control that that gives, depending on the voting requirements in the shareholders'
10 agreement. Clearly with 100 per cent there is always going to be the capability of decisive
11 influence. With 51 per cent the capability to exercise decisive influence depends on what
12 are the voting requirements for important decisions in the shareholders' agreement.

13 MISS BACON: Yes. Our case would be that in this case there was not such provision in the
14 shareholders' agreement; that the difference between 51 per cent and 100 per cent made any
15 material difference. But, going back to the point I made earlier, if Mr. Hoskins had
16 challenged that, and if he were to come along and say, "Oh, because of some provision in
17 the shareholders' agreement -- because of the way that this was structured, the 51 per cent is
18 actually a very material difference, and the *Akzo* first stage test did not apply", he would
19 have had to appeal on those grounds. It is not in his power to say, "Well, I am going to
20 keep my powder dry on all this until closing and I am then, somehow, going to make some
21 great big point about the shareholders' agreement". It is not in the appeal. He has not
22 appealed the presumption. So, if he had wanted to, that would have been a matter to
23 challenge. But, he has not. So, we start off from the position that the presumption is not
24 appealed. Effectively, the Tribunal has to go on the basis that for the purpose of the *Akzo*
25 test, 51 per cent plus, plus the common directorship is good enough. That is the framework
26 of this appeal.

27 I also made the point in opening that I was somewhat concerned that Mr. Hoskins was
28 raising various points about the extent of control and the shareholder voting and saying that
29 he was going to make these submissions in his closing. That is not a point that has been
30 canvassed in any of the pleadings or the skeleton argument. In our submission, if he wanted
31 to take that point now, it is not open to him because he has not ----

32 THE CHAIRMAN: Mr. Pudelek yesterday was taken through the shareholders' agreement in
33 cross-examination. So, we have his evidence as to what he thought was going on there. His
34 evidence was that he thought that that gave him and Mr. Simmons what they wanted, which

1 was control of the business. He was quite happy to concede that certain things were for
2 Durkan because there were things like issuing further shares and whatever that he could not
3 see would be relevant anyway - so, it did not harm him for those to be something that
4 Durkan had control over.

5 MISS BACON: Yes. What he said was, "We had to take a long, hard look at this. We had wanted
6 50:50 control. They would not give it to us. At the end of the day, we had to take a
7 pragmatic decision. We thought that this gave us enough. We were going into an agreement
8 in the sense that we were indispensable as a matter of fact for the business". It was a
9 commercial decision on his part. But the question was put to him. "They nailed you". They
10 did. The Durkans nailed him. They nailed him down and said, "We will not enter this
11 agreement -- we will not give you our facilities -- we will not give you our brand -- you will
12 not come under the Durkan umbrella unless we get 51 per cent". There is no doubt that that
13 was intentional. It was intentional from the start. He said in his evidence, "William Durkan
14 would not sign unless he had 51 per cent". So, he was quite aware that when push came to
15 shove they had the majority shareholding and they would have been able to control.
16 Actually he admits in his evidence -- They all admit -- The witnesses consistently admit
17 that the 51 per cent shareholding would have enabled the Durkan family to exercise control
18 if they had wanted to. What his case was was that they never actually did. Part of the
19 reason was, he said, that on a day-to-day basis he was indispensable; he was the driver of
20 the business. That may have been the case. He may have been the driver of the business
21 going forward, but it is accepted -- it is common ground that had Durkan Holdings wanted
22 to veto decisions of Pudelek and Simmons they could have done so.

23 THE CHAIRMAN: Thank you.

24 MISS BACON: I think that would be a convenient point to stop. We can all go over to Jones
25 Day and start again with Copeland. I think that will be relatively short. Then I will continue
26 with the evidence which will be from para. 8. You might have the opportunity to read some
27 of this.

28 THE CHAIRMAN: Yes. We should make sure that these submissions come along with us to
29 Jones Day.

30 MISS BACON: That would be helpful.

31 THE CHAIRMAN: Thank you, everybody. We will reconvene at two o'clock at the premises of
32 Jones Day.

33
34 (Adjourned for a short time)

1 (Via video link)

2 THE CHAIRMAN: Good afternoon, Mr. Copeland. I am Vivien Rose, I am the Chairman of the
3 Tribunal and on my right is Professor John Pickering, and on my left is Michael Blair QC.
4 We are the members of the Tribunal Panel who have been hearing this case from the
5 beginning of the week, and we have heard a number of different witnesses from Durkan
6 over the course of the week, and now it is your turn to give evidence. Counsel appearing
7 for Durkan is Mr. Mark Hoskins QC, and he is the next person you will hear from.

8 MR. HOSKINS: Can you hear me, Mr. Copeland?

9 MR. COPELAND: Yes, I can, thank you.

10 MR. HOSKINS: It is Mark Hoskins here.

11 Mr. GUY COPELAND, Affirmed

12 Examined by Mr. HOSKINS

13 Q I think you have just stated your full name, would you just repeat it, please, for the record?

14 A Yes, it is Guy Copeland.

15 Q I hope that you have some bundles in front of you, one of them should be Bundle 3, with the
16 title Infringement 220?

17 A Yes, that is correct.

18 Q Could you turn to Tab 1 of that bundle, please? There should be a witness statement of Guy
19 Copeland?

20 A That's correct.

21 Q Can you turn over the page to p.2, please? Is that your signature there?

22 A It is, yes.

23 Q Is this your witness statement?

24 A It is, yes.

25 Q And can you confirm whether the contents of it are true?

26 A Yes, I wouldn't have signed it or stated it if I didn't believe it to be true.

27 Q Thank you very much. That is me finished for the moment. I am going to pass over to Mr.
28 Beard who is counsel for the OFT. He is going to ask you some questions.

29 Cross-examined by Mr. BEARD

30 Q Mr. Copeland, you may not be able to see me very clearly. I am just behind Mr. Hoskins on
31 the screen that you can see.

32 A OK.

33 Q I have some questions for you. As I understand it, you worked as an estimator at Durkan
34 for about two years between 2003 and 2005, is that correct?

1 A Yes, that's true.

2 Q Whilst you were there you were what is called the estimator manager, is that right?

3 A That was my title, yes.

4 Q Could you tell us where you worked before you worked at Durkan?

5 A Yes, I did a short stint assisting a friend at Costain Construction in Chelmsford (I think that
6 office is now closed); before that I did some years at a firm called Walter Llewellyn &
7 Sons; previous to that I worked at Norwest Holst Construction in Watford; previous to that
8 it was with Constain, again in the Chelmsford office. How far back would you like me to
9 go?

10 Q I am interested in all the work that you did as an estimator, so were all of those jobs where
11 you were working as an estimator, or estimator manager?

12 A A combination of the two – either an estimator, a senior estimator, or an estimator manager,
13 yes.

14 Q Were there any jobs prior to that latter work at Constain where you acted as an estimator?

15 A Sorry?

16 Q Were there any earlier jobs than the Constain job where you acted as an estimator?

17 A Yes, previous to that I had worked at a contractor called J A Elliott who are in receivership
18 now. They went under on 14th February 1990. Essentially, previous to that I worked at a
19 small QS practice called Brian Duker Associates.

20 Q Thank you.

21 A That is it from 1976 to where I am today.

22 Q From 1996 did you say?

23 A 1976.

24 Q Oh 1976, thank you. So you have acted as an estimator in the United Kingdom for the best
25 part of 30 years?

26 A Yes, that's true.

27 Q Then in 2005 you moved to Canada and you are acting as an estimator manager there for
28 Chandos, is that correct?

29 A That's correct, yes.

30 Q Could you just explain what your role as estimator manager involved at Durkan?

31 A Yes. I had a team of gentlemen underneath me, and a couple of admin assistants. A project
32 would come in via the marketing department, I would review that to see whether I felt it
33 was something that we could have a reasonable shot at, or it fitted the profile of the type of
34 projects that we had experience in, and whether there was, you know, for the timing of the

1 project it fitted in with workload turnover. All those things being equal, as I say, I would do
2 a sort of précis, approximate value, if there were any risks on the contract conditions, that
3 type of thing, and then I would do a review with Jim Briggs, and then we'd make the final
4 decision whether we were actually going to look at the project or not.

5 Q So when you say that you would have a review with Jim Briggs before you decided whether
6 to look at the project or not, is that before the process of pricing the project was then
7 undertaken?

8 A That's correct, yes.

9 Q So then what would happen is you would give it to an estimator to do the pricing, is that
10 right?

11 Q Yes, we would decide who we felt was the best placed person, again with a combination of
12 what they already had on the go, or if they had done that type of project previously. We
13 made that decision fairly early on in the process because, you know, time was money and
14 we wouldn't want to do two or three weeks into a project and then have to drop it because
15 it's expenditure that we couldn't recover.

16 Q Understood. Did you carry out any estimating work yourself, even though you were an
17 estimating manager, in other words keeping your hand in?

18 A Yes, I still do in Canada because I believe that's important because I have to have the ability
19 to question guys on where, you know, they make an assumption on a rate and: what was
20 their logic behind that rate, and unless I'm still pricing it's difficult to have those sorts of
21 conversations.

22 Q Just taking one step back, you referred to the fact that there were a number of gentlemen in
23 the office. How many estimators worked in the office during the period whilst you were the
24 estimator manager?

25 A Probably five. I am just trying to work it out, sorry. I would say five.

26 Q Thank you. You described your role so far as making assessments and judgements on
27 which tenders to pursue, discussing that with Jim Briggs and then allocating it to the
28 estimators, but presumably as an estimator manager, part of your role was to make sure that
29 that team of five estimators and their assistants that you referred to worked well and
30 efficiently together, is that right?

31 A That's correct, yes. I mean, it was easier than some firms I've worked at, simply because
32 the guys below me were all experienced gentlemen, so it took less daily input. They were
33 all a fairly safe pair of hands and you could, you know, leave them alone but just keep in

1 contact with them on a, you know: how's that going; if you run into any problems, that type
2 of approach.

3 Q So Durkan was an example where the estimating team worked well together?

4 A Yes, I believe so, compared with other places that I've worked at, yes.

5 Q Part of that was making sure that you were acting as the point of contact for all the
6 estimators and ensuring that each knew what each was doing and so on, is that right?

7 A Yes, but, as I said, the guys, you know, there was nobody in the department less than 45, so
8 most people had been doing the job for 20 plus years. As I say, if you're working with a
9 junior or an intermediate estimator obviously you have to spend more time with those
10 people with reviewing and suggesting and mentoring and that type of thing. Obviously,
11 once someone reaches a senior estimator grade, from our perspective, it's obviously a lot
12 easier.

13 Q Pricing a job would generally take four to five weeks, is that a general benchmark?

14 A The total period could be four to five weeks. I would expect my guys to be handling two or
15 three projects in that period. The way it works, a project comes in, let's assume we decided
16 to work on it. There's the initial market, mark it up, get it out to the sub-trades. Then that
17 job goes quiet for probably a week and a half or so, so you're working on something else.
18 Then when the trade inquiries come back, that's when you pick it back up again and you
19 start asking questions.

20 Q Did you ever have to change the estimator in charge of a pricing job because of the way that
21 work flowed, because of the way things operated?

22 A I don't think so, no. I don't think so.

23 Q Presumably you were drawing on the knowledge of this experienced group of estimators
24 about which sub-contractors to use for particular types of jobs. You would have some
25 knowledge, they would have some knowledge, you could pool your knowledge on these
26 sorts of things?

27 A Yes, that would be – if we had a job that was, say, a new build project that had a basement
28 excavation, if I allocated the job I would say, "I know that Mike, for example, did a job like
29 that six months ago", so I would have a chat with him with respect to the piling contractor
30 or the groundwork contractor that he'd worked with at that time.

31 Q So you knew about everything that was going on in the office in terms of jobs being
32 pursued. Presumably, it is a relatively small office, everyone broadly knew what everyone
33 else was doing and got on with their jobs?

1 A Yes, I would like to think that I knew everything that was going on, yes, certainly, and I
2 believe I probably did. It was a pretty workable group, everyone got on. There were some
3 frictions when I initially started at Durkan, because everybody is apprehensive when a new
4 guy comes in. I worked hard to get over those.

5 Q I can understand that, as someone coming in new, you would possibly have to, particularly
6 when you have got a relatively experienced team. What I was focusing on was the extent to
7 which, because all of these people were experienced, they knew the ropes, they had their
8 own work, but each of them knew what each other was doing at any time?

9 A Yes, because you issue a weekly work programme, both within the department and also to
10 other departments within Durkan. For example, a particularly complicated project I would
11 liaise with either John Loughlin or Bob Barton, who were the construction directors,
12 because I may need a programme being prepared, and they may have a view with a project
13 manager who might help, "I've had had a look at it, and have you thought about building
14 the project this particular way?" Most of these jobs have to be a team effort.

15 Q In your witness statement you describe the process of a tender being decided upon and a bid
16 being agreed and then submitted. When a bid was submitted the documentation was in the
17 office. Presumably people in the office had access to the details of which sub-contractors
18 were being used for which tenders and what levels of bid were being put in, so they had that
19 sort of information to draw upon for their work – is that right?

20 A Yes. It was an open plan office, so people could walk around. For example, in the wing
21 that we were in, the buying department was the other part of the filing cabinets. If you were
22 working on a project it would be open on your desk or, if you were working on two, one
23 would be on your desk, one would be on your side desk.

24 Q Thank you. I think we have something of a picture of that.

25 Q This case is obviously concerned with incidents of cover bidding. Given your length of
26 time in the construction industry in the UK, you were well aware that cover bidding was
27 widespread in the construction industry, were you not?

28 A I'm aware of it as a practice, but I'm not – obviously there's evidence here, but my personal
29 experience would be that I wouldn't have used the term widespread. The reason I say that
30 is that in the various companies I have worked at I would perhaps give or receive maybe a
31 handful each year. In terms of maybe 150 projects that we would look at, I, personally,
32 would not regard that as widespread, but that is obviously open for interpretation.

33 Q Certainly, and when you say a "handful", do you mean literally five, or are we talking
34 between five and 20, something like that?

1 A No, I would say a handful.

2 THE CHAIRMAN: We know you said a “handful”, you are being asked to clarify.

3 A Sorry, madam, it’s difficult to be precise.

4 Q Is it more likely to be five a year or 20 a year?

5 A It’s more likely to be five a year.

6 MR. BEARD: Thank you. You refer to that experience being your experience during your
7 career, and presumably that was your experience right up and through to your time at
8 Durkan – is that correct?

9 A Yes, up until when the policy changed, yes.

10 Q Where Durkan was involved in giving or receiving cover prices, that would have been with
11 companies like Mansell who were companies who were going for similar jobs to the sorts of
12 jobs that Durkan Limited was going for – that would be correct, would it not?

13 A Well, it would depend on the owner, architect or QS who put the bid list together. You
14 wouldn’t necessarily get similar sized companies on the list. You might get some small
15 guys, you might get some bigger guys. I’m not quite certain how to answer that one.

16 Q In terms of obtaining or giving cover bids, you did not have any particular preference as to
17 whether you went to companies of a similar size to you or other ----

18 A Sorry, right, okay. If I was seeking one I would tend to select a company of a similar size
19 who probably had a similar overhead level, and whether or not I knew any individual at that
20 particular company.

21 Q So far as you are aware, do you know of any instances where the giving or taking of a cover
22 bid at Durkan was with Mansell?

23 A No, I don’t.

24 Q You have just referred to one of the factors you would have in mind in terms of giving or
25 taking a cover bid, selecting the company for that, would be whether or not you had any
26 contacts with that company. So far as you are aware, did anyone in the estimating
27 department at Durkan have any particular links with Mansell, having worked there or
28 having close friends there or similar?

29 A I honestly don’t know. I couldn’t really answer that one, I am afraid.

30 Q Did Durkan carry out any joint work with Mansell so far as you aware – for instance,
31 sub-contracting work or anything similar to that?

32 A I don’t believe so, no.

33 Q So far as you are aware there were not any close contacts with Mansell in the estimating
34 department at all?

1 A No, you meet people at industry functions and seminars and CPD type events, but apart
2 from that I wouldn't have said so, no.

3 Q Did you know Mr. Peter Goodbun at Mansell?

4 A I met him once or twice at some functions.

5 Q What were the sort of social functions you are talking about, building industry events?

6 A Yes, that's correct.

7 Q Would it have been you alone or other people from Durkan would have been at those events
8 with you?

9 A Well, there's an industry lunch – I don't know if it still happens. Each year there's an
10 industry lunch at either the Grosvenor House or the Connaught Rooms, or something like
11 that. So you would have 500 or 600 people from companies all over London in that
12 particular room at the luncheon.

13 Q I was really asking who would go with you. You would go ----

14 A It would be a departmental event.

15 Q So it would be other people from the estimating department who would come with you?

16 A That is correct, yes.

17 Q At any of these events that you have referred to, would Mr. Sharpe have come with you?

18 A Yes, Brian has been a couple of times to some luncheons, these Christmas luncheons, etc,
19 yes.

20 Q Do you recall whether when Brian was with you it was any of the occasions when you met
21 Peter Goodbun?

22 A It probably was, but I don't know, it pretty likely was.

23 Q One thing that I wanted to ask you just as a general matter, perhaps you could assist the
24 Tribunal and explain why it is that you would decide to give a cover price?

25 A We didn't always give cover prices in the event that a request was made I would pass it up
26 the line and get a sign off on that. I suppose it would increase the odds of you winning a
27 particular project.

28 Q So part of it was a guarantee that if you gave someone a cover you knew that they were not
29 competing with you on a particular job, is that right?

30 A I suppose "guarantee" could be the right word. I wouldn't really have thought of it like that.
31 I would've looked at it and said: "The odds have gone from a 1:7 down to a 1:6
32 opportunity", but I suppose "guarantee" could be a word that was used, yes.

33 Q I was referring to the person you gave the cover bid to just to be clear, you were
34 guaranteeing that they would not be competing, not that you would necessarily win?

1 A You would not necessarily win anyway, but yes, I suppose you then knew that that
2 company was not in opposition effectively, yes.

3 Q Is there something else here? Is there a sort of long term game of 'you scratch my back, I'll
4 scratch yours' going on, that if you do someone a favour because they don't want to put in a
5 bid you give them the cover and you might be able to pull that favour in with them later?

6 A I suppose so, if and when the need arose.

7 Q Yes, I was not suggesting there was a specific tally that people were counting up specific
8 instances, but there was just a broad understanding there between you and the person
9 requesting the cover bid, that would be fair, would it not?

10 A Yes. I think that's fairly safe to say, yes.

11 Q But you said that although this was something that went on you do not accept that it was
12 widespread, but there was a good deal of cover bidding going on, but in August 2004 Mr.
13 Clark, who was the managing director of Durkan Limited, said he wanted no more cover
14 bidding, is that right?

15 A That's correct, yes.

16 Q And so that was quite a big change, is that right?

17 A I think it was a big change in the industry generally. I think people had become more aware
18 that something that they considered to be matter of course was perhaps not as acceptable as
19 it once was and I think that probably kicked in in newspaper articles about roofing guys in
20 Birmingham, I think it was, and some ready-mix companies.

21 Q When you refer to "roofing guys" and ready-mixes" you are referring to the Office of Fair
22 Trading having imposed fairly significant penalties on people for being involved in cover
23 bidding, is that right?

24 A Yes, I think that was some time in 03, it made the obviously the industry press as you would
25 expect, and I think from that point on there was a general realisation that people shouldn't
26 be doing this, giving cover prices.

27 Q Mr. Clark emphasised this to you and Mr. Briggs, is that right?

28 A Yes, it was emphasised, we used to have a Monday morning meeting where all the heads of
29 department were present, and it was just we got these jobs going in and that job going in
30 and 'any other business' and under the 'any other business' that's when Robert would have
31 said something, and then it cascaded down through me to the other guys.

32 Q So it was not Mr. Clark or Mr. Briggs that talked directly to the estimators, it was you that
33 was talking to the estimators about Mr. Clark's change of policy, is that right?

1 A It was a combination of that and articles, and possibly a memo, I can't remember if there
2 was a memo which came around or not, but certainly articles that Robert circulated to us all.

3 Q But in terms of talking to your estimating team, was that done by you or Mr. Briggs, or Mr.
4 Clark?

5 A It was definitely done by me, but I would have anticipated and expected that both Robert
6 and Jim had also done it. As I say, it is an open plan office, they were walking into that
7 department on a fairly regular basis, and I'm sure they mentioned it in conversations as
8 well.

9 Q You say "mentioned it in conversations", but if one of your estimators or, indeed, you had
10 subsequently become involved in providing a cover price to somebody, did you understand
11 that the consequences of that would be fairly serious?

12 A Well, prior to the policy changing, no, but after the policy change it was something that just
13 didn't happen. I can't remember the name of the job or the name of the company but I do
14 recall having a request just before I left to come over here, from someone and I said: "I'm
15 sorry, I can't help you; it's not something we do".

16 Q So the only one that you recall following the change in 2004 was one instance where
17 somebody came in and asked you for a cover price, is that right, and you rejected it?

18 A Yes, that's correct.

19 Q When was it you left in 2005?

20 A 23rd September.

21 Q So the policy had been in place for just over a year?

22 A Yes.

23 Q And so normally you might have expected that you would get more than one request across
24 that year, would that be right?

25 A Previous it was, as I have already said, a handful in the previous year, but I think once
26 people woke up to the fact that what they were doing was a no-no, it sort of died out.

27 Q So you think there is no possibility that people were seeking cover prices from the
28 estimators themselves?

29 A I honestly don't believe there was, no.

30 Q But you cannot actually be sure, can you?

31 A No, I can't actually be sure, that's correct. But, as I say, I don't believe that was the case,
32 no.

1 Q You have already explained how many of the estimators had been in the business for a very
2 long time, and so when you were rolling out this policy you were essentially trying to
3 overcome an ingrained culture amongst estimators, is that fair?
4 A I would say that is probably a fair summation.
5 Q As I understand it, the process of giving a cover bid is a pretty quick and informal process, a
6 phone call to an estimator or his assistant, a quick request, a figure given, and there you go,
7 you have the cover bid. That is broadly right is it not?
8 A Yes, essentially it is just when it may happen in the process.
9 Q And that would tend to be towards the end of the process, near to the time when the bids are
10 due, because by that time people have worked up the estimates so there are some reliable
11 figures to work on the basis of, that would be right as well, would it not?
12 A Sometimes that happened. I personally would like to know that I had that particular
13 situation resolved significantly in advance. Hypothetically, if we had made a decision that
14 this was not a job that we were going to submit on but politically or for other various
15 reasons that we needed to return something I would actually make that call early on in the
16 process. I personally wouldn't leave it to a last minute thing, no.
17 Q But if you had decided you wanted to get a cover price you probably only received the price
18 late on in the process because the person providing it would need to have carried out their
19 own estimation process in order to work out a slightly higher figure that they would provide
20 to you as the cover, is that right?
21 A Yes, so probably that would come in between 9 and 10 o'clock in the morning. It would not
22 normally be much later than that.
23 Q And that is for submission for tenders by midday, is that right?
24 A Yes, that is pretty much the norm in the UK. It is noon cut off.
25 Q So looking at it in the round, you were trying your best to carry out company policy, but
26 you accept it was still possible for estimators to do a friendly company a favour at the last
27 minute?
28 A I think that is a possibility, yes.
29 Q The other possibility is that because of the seriousness of the new policy, and the concerns
30 of the repercussions for an estimator if they were found out giving a cover price, they would
31 not actually want to let you know because you were the sort of enforcer of the policy in the
32 department, were you not?
33 A Yes.

1 Q So whilst it may be true that you may not have known about a cover price being given by,
2 for instance, Brian Sharp, he could have done so and he would have an incentive not to tell
3 you about it, would he not?

4 A That is a possibility, it could equally have been somebody else because, as I say, it is an
5 open plan office, so yes, that is a possibility.

6 Q If we could turn back to your witness statement, which is at Tab 1 I think in the bundle you
7 probably still have open in front of you, Mr. Copeland?

8 A Yes.

9 Q Paragraph 8, your statement is to the best of your “knowledge and belief I did not receive a
10 request for a cover bid”?

11 A That’s correct.

12 Q And to the best of your knowledge and belief none of your team of estimators did?

13 A That’s correct, yes. I accept the suggestion that you are making but, as I say, I would be
14 quite surprised, I have to say that.

15 MR. BEARD: Thank you very much, Mr. Copeland. There are no further questions from me, the
16 Tribunal may have some questions, and Mr. Hoskins may also.

17 A Okay.

18 MR. BLAIR: Mr. Copeland, my name is Blair and I hope I can ask you perhaps two or three
19 questions arising out of your evidence, thank you very much. The first is about the normal
20 process, now that the policy was in place from 2004, if you had too much on your plate and
21 you wanted to turn business down, how did you do it during that last year that you were at
22 Durkan?

23 A We would just send it back with a polite letter declining it.

24 Q Even if that might cause ill will?

25 A Yes, yes pretty much. It’s a risk but we were aware of the change in atmosphere, and it was
26 much better to send it and to live with those consequences than, you know, be in this
27 position effectively.

28 Q Thank you. Secondly, was it, in your view, a rule within Durkan that the estimators
29 themselves could not give or take a cover price before 2004?

30 A Yes.

31 Q Or were they free to do it?

32 A No ad hoc, no. I would expect people to come to me and say: I’ve had an approach from X
33 who’s seeking assistance on this project, I would then discuss it up the line and if we agreed

1 to do it, we'd phone the company back and say: yes, you're OK, we'll give you a call on the
2 morning of the closing.

3 Q Thank you, but you said "expect"; it was not an enforceable rule that that was so?

4 A Previous to 2004? No, I think people just did it. I mean when I was just an ordinary
5 estimator and I had a request I'd go up and see the chief estimator and he would then see the
6 estimating director of whatever the firm was, and it would come back with yes, that's OK to
7 give them a number.

8 Q So it was an understanding in the estimating department rather than an iron rule?

9 A I would say it was an understanding, yes.

10 Q Thank you. I am sorry to go on. Finally, do you remember the details of this contract in
11 2005? Your estimate, as it turned out, was quite high. Were you serious about trying to
12 win this contract, or did you not much mind about it?

13 A No, I would say we were serious about the contract. I doubt that we would have put effort
14 into a project that we weren't serious about. It was 04, it was still a fairly buoyant market
15 then and you could put a much greater fee on a project than you could do currently. So I
16 suspect that, yes, we probably over egged it a little bit, but that's the way it goes sometimes.

17 Q So £1.3 million or £1.2 million or thereabouts on an expected price of £900,000 is not
18 unusual, not out of the way?

19 A That low number.

20 Q The London Borough of Newham expected the contract to be £900,000 and the winner I
21 think was £930,000.

22 A Yes, they placed the contract at £930,000. That could well have been the fact that they had,
23 you know, at that particular time, they had a slot in their workload that they wanted to fill,
24 to keep a site foreman or a project management team together. I mean, I have seen results
25 with that type of spread, yes.

26 Q Thank you very much. Thank you.

27 THE CHAIRMAN: A couple of questions from me, Mr. Copeland. Just before the change in
28 policy in 2004, I am just trying to get a sense of whether estimators like Mr. Sharpe would
29 be involved in the process of getting a cover price. You say that it was decided quite early
30 after you received the tender documents whether you were really going to go for it or not,
31 and if you were not going to go for it then you and your senior people would decide whether
32 you would try and get a cover price from someone. Is that fair?

33 A Yes, I mean, there were occasions prior to 04 -

34 Q Yes, I am talking about prior to 04.

1 A Yes. Prior to 04 some would still be sent back with a polite: thank you very much for the
2 invitation but we regret, and some, if we decided that for a variety of reasons we had to
3 submit something, then I guess the decision to seek a cover would be, as I say, fairly on in
4 that process.

5 Q If that decision was taken, who would then make the phone call or decide who was going to
6 be approached? Would it be you, or someone senior to you, or someone junior to you?

7 A Invariably, I would say it would be likely to be me. We would have a reasonable
8 understanding of the bidders list within four or five days of paperwork turning up, but
9 occasionally, you know, Jim might say: I know so and so in that firm, I'll give him a call.

10 Q But do you remember whether you ever asked one of your estimators, Brian Sharpe or one
11 of his colleagues, to do that, to get a cover price from somebody?

12 A To get a cover price, probably not. You know, if I am seeking one then I would make the
13 contact.

14 Q Right. Thank you. Was there ever an occasion when you were working for Durkan when
15 you discovered that one of the estimators had given a cover price without having got that
16 approved by you or somebody senior?

17 A No, I don't believe – I wasn't aware of that situation, no.

18 Q Thank you. I do not have any further questions. Anything from you, Mr. Hoskins?

19 MR. HOSKINS: I do not have any questions.

20 THE CHAIRMAN: Thank you very much for making yourself available, Mr. Copeland. That is
21 all the questions that we have for you, so you are free now to go back to your work. I do
22 not know if we can switch off the link. Thank you very much.

23 A Thank you.

24 (Video link closed)

25 THE CHAIRMAN: That now concludes all the evidence in the case, does it not? Yes. So now
26 do we pick up with you, Miss Bacon, in the submissions?

27 MISS BACON: Madam, that is the plan. Would the Tribunal mind if I remain seated due to the
28 lack of lectern?

29 THE CHAIRMAN: No, no.

30 MISS BACON: Madam, before we broke for the short adjournment I was up to the end of para.7
31 of my note. I hope the Tribunal has been able to bring along its copies of that, because I am
32 going to follow the structure of that note.

33 PROFESSOR PICKERING: Unfortunately, I have not. The file that I carefully put it in has not
34 come with me. If there is a spare.

1 MISS BACON: Mr. Beard is happy to donate his version.
2 PROFESSOR PICKERING: That is very kind. (Handed) Sorry about that. Thank you.
3 MISS BACON: I come now to the question of the various evidential indicia of decisive influence
4 in this case which goes to the question of whether Durkan has successfully rebutted the
5 presumption which it has not challenged.
6 Can I just check if this microphone is working for the purpose of the transcript. I hope that
7 someone will tell me in due course if the microphone is not working properly. I will just
8 continue for the time being.
9 The first question I wanted to address was the relevant time period, because the Tribunal
10 will be aware that there are documents in the files throughout the period 1992 to 2007, and
11 Mr. Hoskins in opening made some submissions that the relevant time period was the
12 period of the infringements. I do not want to go over the matters that were canvassed
13 during the disclosure hearing, but as explained during that hearing, and as accepted by the
14 Tribunal, there has been no suggestion by Durkan that the structure of management and
15 control within Durkan Holdings and Durkan Pudelek changed over the course of the period
16 1992 to 2007. So in order to ascertain whether, during the relevant period as in the period
17 of the two infringements, there was decisive influence, it is relevant to look at what
18 happened before, given that nothing is said to have changed.
19 It may well be the case that on some occasions there were more guidelines or principles or
20 suggestions made than at other times. But our case is not that decisive influence ever
21 waxed or waned; our case is quite clearly that from the outset there was a level of decisive
22 influence that was the intention of the Durkan Holdings parties and that remained the case
23 throughout the period 1992 to 2007. So we are not saying that at the outset there were
24 intentions crystallised which then changed, and we are also not saying Durkan Holdings
25 came, in Mr. Hoskins' words, somehow silently, unconsciously, to control Durkan Pudelek.
26 There was nothing silent or unconscious about this at all. Indeed, as you have seen from the
27 extracts of the board minutes, the Durkan Holdings' directors were not at all silent during
28 the board meetings. This was not a case of Durkan Holdings silently and unconsciously
29 coming to control Durkan Pudelek. What I think is going on is that the various witnesses
30 are not lawyers, they are making submissions as to what they understood to be the position.
31 In fact, all of their evidence goes to satisfying the test set out in *Akzo*. They may not have
32 realised that at the time, and they may not realise that now. The question is not whether
33 they think that on some legal basis they were being controlled by Durkan Holdings, but
34 whether the evidence they give satisfies the factual test set out in the case law.

1 With that by way of preface, the first of the factual indicators is, of course, the majority
2 shareholding in Durkan Pudelek. The relevant references are set out in paras.11 to 13 of my
3 note. I do not really need to take you to them. I also made a few comments about those this
4 morning.

5 In our submission, the motive behind the 51 per cent shareholding is not particularly
6 relevant in the sense that whether it was all to protect Durkan Holdings' investment or
7 whether it was intended from the start that there was going to be a veto that was exercised,
8 the fact is that there was the 51 per cent shareholding and the intent very much was to have
9 that shareholding so that the veto could be exercised. So there is a lot made in the evidence
10 about protecting Durkan Holdings' investment. In fact, that is as good a reason for having
11 decisive influence as any, whether the shareholders of Durkan Holdings wanted to protect
12 their investment or wanted to have hands on management of the company, the fact is that
13 they were exercising influence for one of those purposes. So it is really of no matter if
14 Mr. Fraher comes along and repeats in his evidence that he was doing certain things in order
15 to protect Durkan Holdings' investment. The fact is that he was doing those things, and he
16 was doing them as a director of the board of Durkan Pudelek. I will get on to Mr. Fraher
17 later, because there is obviously a question with him as to what his role, and the same with
18 some of the other directors.

19 That was the starting point, that there was a 51 per cent shareholding and it gave, as is
20 accepted by the Durkan witnesses, Durkan Holdings the power to control Durkan Pudelek if
21 it had wanted to.

22 The next factual piece of information is the shareholders' agreement, and it must be
23 remembered that that is a contract and must be construed as such. Mr. Pudelek made
24 various comments as to what he understood to be the effect of the shareholders' agreement.
25 That is really by the by, he was not commenting on specific clauses of the agreement. What
26 he was saying was what his understanding was of how, in practice day to day, things
27 worked. That is not relevant in construing the actual provisions of the agreement. He made
28 comments about nothing in the agreement as far as he was concerned gave Durkan Holdings
29 control over Durkan Pudelek, but obviously it did, there was a 51 per cent shareholding in
30 the agreement and provisions regarding the directorships and the composition of the board
31 at the outset, apart from anything else.

32 As you will have seen from the references at para.14 of my note, there was a right on
33 Durkan Holdings to nominate one of its directors as chairman of Durkan Pudelek. That is
34 clause 4.2. We know that Mr. Durkan remained the chairman of Durkan Pudelek

1 throughout. He had a right to a second or casting vote in the event of an equality of votes.
2 The shareholders' agreement also provided for Mr. Daniel Durkan and Mr. Fraher to be
3 appointed as executive director and finance director of DP. As I have already said, until
4 1997 what that meant was that DH did have a factual majority on the board.

5 There is also the provision in clause 5.1.4 requiring cheques in excess of £2,000 to be
6 signed by a person nominated by Durkan. Mr. Fraher's evidence was that he was usually
7 the Durkan nominated signatory. That is a standard kind of clause in an agreement of this
8 nature, and it often happens that they are required to be several signatories and he was the
9 Durkan Holdings' signatory.

10 Then we turn to the financial statements. You have seen those at numerous points during
11 the evidence. You will have seen that the Durkan Holdings' financial statements
12 consistently portray DP as an integral part of the Durkan Group. Perhaps you could just
13 remind yourselves of what they said. It is in similar terms throughout the DH financial
14 statements. Could you turn up Bundle 2A, and can I just ask you to turn to the very first of
15 the DH financial statements, Tab 15. If you look at p.2 there is a description of the
16 principal activities, review of the business, and future prospects. The Group's activities are
17 described. The description here talks about, in general terms, the division of different kinds
18 of work between different companies – that is the first paragraph beginning, "The Group's
19 principal activities". It then talks about Durkan Limited in the next paragraph, then Durkan
20 Pudelek Limited, and then Durkan New Homes Limited. They are portrayed as all being
21 one part of a big family with complementary commercial activities. There is no suggestion
22 there that Durkan Pudelek is in some way different from Durkan Limited or Durkan New
23 Homes Limited. Durkan New Homes Limited is what became Durkan Estates. That is the
24 Durkan Holdings financial statements.

25 The Durkan Pudelek financial statements are at the back of Bundle 2B. I will not ask you to
26 turn to those because I have extracted the relevant phrases as para.17(a) to (c) of my note.
27 What has happened over a number of years is that there are various different descriptions of
28 who is the ultimate controller of the Durkan Pudelek company. It starts off being Mr.
29 William Durkan and then moves on to being Durkan Holdings, described as the immediate
30 controller, and that is because, as you may have seen, the ultimate controller of the Durkan
31 Holdings is said to be various trusts, of which Mr. William Durkan appears to be a
32 beneficiary. So an exception was made not to state who the ultimate controller was, but
33 instead Durkan Holdings was said to be the immediate controlling party.

1 Mr. Fraher said, "This is just accounting jargon". It is not, because this statement was
2 something that is required by the relevant accounting standard, which is FRS8.

3 THE CHAIRMAN: I wonder if there is, though, something in what Mr. Fraher said, for this
4 reason: the *Akzo* test does seem to contemplate the presumption of actual exercise being
5 rebutted so that one can theorise a situation where, yes, Durkan Holdings holds 100 per
6 cent, say, of another company; and yet, for the purposes of the Article 101 test, it is not
7 exercising decisive influence. That is a test which is applied for a particular purpose, or a
8 number of particular purposes, but it might still be the case that even if that were true, even
9 if that were the case in a particular corporate group, nonetheless the accounting of it would
10 still describe the parent as the controller for these purposes because it is looking at it for a
11 different purpose.

12 MISS BACON: You are absolutely right, madam. What you are putting to me is that if this were
13 the only indication of control, it would not necessarily be decisive for the purpose of the
14 *Akzo* test, and I fully accept that. My point is twofold: first, that it is not just accounting
15 jargon because the FRS8 standard – I can give it to you if you want it. The relevant
16 paragraphs are extracted. It is not just jargon, but it is something that is required by the
17 accounting standards. It requires a judgment to be made as to whether there is the ability to
18 direct the financial operating policies of an entity with a view to gaining economic benefits.
19 It is not simply a shareholding test.

20 That is my first point, that one has to exercise a judgment at that point to decide whether a
21 parent company is listed as being the controller. The second point is, it is something one
22 adds to the mix. As I said, when you put everything together, we have it in spades in this
23 case, but it is a factor that is relevant along the way. There are many other relevant factors.
24 I absolutely accept your point, that if this were the only thing that you were relying on then
25 we probably would not be here today, but it is not the only thing that we are relying on.

26 THE CHAIRMAN: Particularly because this does seem to emphasise the ability to direct ----

27 MISS BACON: The ability, absolutely.

28 THE CHAIRMAN: -- rather than the actual exercise.

29 MISS BACON: It is a relevant factor, but not a decisive factor. One of the reasons for
30 mentioning it is that in *Sepia Logistics* the way that the controlling parties expressed was
31 found by the Tribunal to be one of the relevant factors. So it is not something that one
32 should just simply leave out.

1 Since we are looking at the financial statements, it might be included for completeness, it is
2 consistent with the whole picture, which we say is a consistent picture and it is all going in
3 one direction.

4 That is the shareholders' agreement, board membership, then the financial statements. Now
5 we come on to the question of group identity. As you will recall from the extract from the
6 Advocate General's opinion in *Akzo* this morning when she said that mere membership of a
7 group may be relevant to influence, our case is that in these factual circumstances DP most
8 certainly did recognise itself as being part of the Durkan Group. That is very relevant to the
9 question of decisive influence because, as you will have seen from my line of cross-
10 examination and Mr. Beard's line of cross-examination of the witnesses, it is our case that
11 there were a number of Group policies that conditioned the way that DP behaved.

12 Starting off with the way that DP represented itself, it is largely common ground that DP
13 represented itself as being part of the Durkan Group. What the witnesses say is, "We were
14 entirely happy to be perceived as part of the DP Group, that gave us added credibility, that
15 is something that we took advantage of as a matter of commercial activities, but in fact this
16 was all a sham, there was no Durkan Group", they said. There was never any Durkan
17 Group, there were a lot of separate companies with separate policies.

18 Madam, in our submission, when you look at the evidence of the witnesses and compare it
19 with the documentary record, they were, I am afraid, saying that black is white. If you look
20 at the documentary record, there are consistent references throughout things like the Board
21 minutes to the Durkan Group. It is quite clear that there was a Durkan Group.

22 Can I take you through the relevant evidence on *de facto* Group integration, which is set out
23 at paras.23 to 30 of my note, starting off with Group Health & Safety policy, it was
24 accepted that there was a Group Health & Safety manager, who was Mr. Cresswell. It was
25 also accepted that he prepared Group Health & Safety reports. You will have seen from the
26 reports attached to the board minutes that I took Mr. Durkan that the Health & Safety report
27 of Durkan Pudelek was simply a one page summary, or even a half page summary, and
28 behind that you will recall that there was a much more detailed Group Health & Safety
29 report that was prepared by Mr. Cresswell. That summarised Health & Safety aspects
30 across the Durkan Group, including Durkan Pudelek.

31 Mr. Durkan consistently tried to say, "We had our own Health & Safety policy", but he had
32 to accept, when pressed, that there were Group Health & Safety policies, there was an over-
33 arching Group Health & Safety strategy. That is quite clear from all the board minutes that
34 relate to that matter.

1 Mr. Durkan also claimed that there were no Group marketing strategies, and he said he
2 never got involved with the marketing of Durkan Pudelek. I took him to the passages in the
3 minutes which refer to, for example, Golf Day being to market the Group, and passages
4 which referred to promoting the company and its sister company. He was not able to
5 explain why that should have appeared in the board minutes if he was not, in fact, doing
6 anything to promote Durkan Pudelek.

7 I am not saying that there was a Group marketing strategy continuously in place that
8 encompassed the entire Group and which was adhered to at all times by the entire Group.

9 What I am saying is that there were obviously Group marketing policies and there were
10 discussions about marketing the Group, and that there were events to market the Group,
11 such as the Golf Day, of which Mr. Durkan appears to have been one of the organisers.

12 You will also recall seeing the minutes of the Group board of directors, and that referred to
13 Group marketing at several points in that. The references are here.

14 Then there is the question of commonality of bankers, solicitors and auditors. The witness
15 evidence started off making a positive point on this in favour of Durkan by saying that
16 Mr. Pudelek and Mr. Simmons did not want to use the same bankers as Durkan Holdings,
17 so went off and did their own thing. In fact, when I took Mr. Durkan to the relevant
18 financial statements, it was the opposite. They started off doing their own thing with
19 Barclays and after a few years they switched to the same bankers as Durkan Holdings and
20 stayed with the same bankers. There were changes in the bankers throughout between 1997
21 and 2007, but every time they changed they remained with the bankers that Durkan
22 Holdings was using.

23 Similarly, with the solicitors, the same solicitors throughout; and the same auditors as
24 Durkan Holdings. You will have seen from the table that I handed up that when Durkan
25 Holdings switched to Grant Thornton, Durkan Pudelek switched too.

26 So they have the same year end and for the period 1997 to 2007 consistently the same
27 bankers, solicitors and auditors, which, as I think was put to Mr. Hoskins, would have been
28 odd if they had been wanting to go off and do their own thing and set up their own
29 company. Why would they have had exactly the same, I think it was, either solicitors or
30 auditors? Why would they have had the same professional advisers if they really wanted to
31 mark themselves out as being separate and distinct?

32 When you then look at the way even the witnesses themselves described the Durkan Group,
33 it is very revealing. I have not extracted every instance when the five witnesses referred to

1 the Durkan Group, but I have extracted a few cases just to show you what they are trying to
2 do and what they are not succeeding in doing. Mr. Simmons:

3 “There was no such thing as the Durkan Group ... there was no managerial,
4 financial, organisational thing called the Durkan Group.”

5 That is clearly the line that he wants to take. Later on in the very same bit of evidence:

6 “Mr. Fraher – I invited Mr. Fraher to come along to no more than, I guess, half a
7 dozen meetings over the course of the 15 years of Durkan Pudelek being part of the
8 Durkan Group”. He cannot help himself. He knows that there was a Durkan
9 Group.”

10 He knows that Durkan Pudelek was part of it.

11 Fraher refers to the Durkan Group. Mr. Pudelek refers to the Durkan Group very candidly.

12 The last extract in this paragraph is very revealing:

13 “The whole idea of getting into bed with the Durkans was to have the financial
14 comfort of the Durkan Group – sorry, Durkan Holdings (I mustn’t say Durkan
15 Group)!”

16 So he knows that he is not supposed to refer to this as Durkan Group, but he cannot stop
17 himself, he knows that there was a Group.

18 Finally, on the issue of the Group integration, the question that the Chairman put to William
19 Durkan about the nature of his investment gave a very revealing answer. Madam, you will
20 remember, you asked Mr. Durkan, “What was your investment that you were trying to
21 protect?” and he answered that it was not a capital investment, as such. Obviously at the
22 start there was a nominal shareholding, but it was not a capital investment, it was the fact
23 that he was assisting Messrs. Pudelek and Simmons to set up the company using the
24 services of the Durkan Group. That is what he was saying. Essentially, he was saying, “We
25 are allowing Mr. Pudelek and Mr. Simmons to manage a subsidiary under the umbrella of
26 the Durkan Group, using the Durkan Group brand, shared resources and administration”.

27 That was the investment, as such, because it was not a capital up-front investment. That
28 was Mr. Durkan’s view of the matter.

29 THE CHAIRMAN: So they put in a small amount of money as the initial share capital. We do
30 not know, I do not think, what Messrs. Simmons and Pudelek paid when they bought out
31 the 51 per cent share, but we are told it was quite a successful company. You say that what
32 Durkan Holdings had put in to entitle them to that amount of money when they finally
33 cashed in their investment was what exactly?

1 MISS BACON: The services that they were providing. They provided all the start-up. They
2 provided the back office administration, they had the office space. You will have seen all
3 the services that were provided. I went through them with Mr. Durkan.

4 THE CHAIRMAN: Was that not subject to a management charge?

5 MISS BACON: Yes, but Mr. Pudelek and Mr. Simmons could not have ever done that
6 themselves, and that was what the Horvath Report said, they did not want to do that
7 themselves. It was not just that those services happened to be available with Durkan Group,
8 and Mr. Pudelek and Mr. Simmons were then able to use that conveniently and just pay the
9 management charge. They did not want and they could not. They had never run a business
10 on their own account before. What they were doing was coming in and saying, "We want
11 to run something under your umbrella and using your brand, using your administration, you
12 have got it all there already, you have got the office, you have got the estimators, you have
13 got the bonds, you have got the insurance, you have got everything set up, you have got a
14 common brand. We will come along and we will make use of your brand. We will come
15 along and make use of those services and we will use that to branch out into an area which
16 you currently do not service that much because you are, in the main, in the public sector".

17 THE CHAIRMAN: What were the two operational directors putting into the pot? Why could
18 Durkan not have just done this themselves?

19 MISS BACON: I do not know, to be honest. It is not a question that was asked of the witnesses.
20 Certainly what Mr. Pudelek and Mr. Simmons were saying was, "We have experience in the
21 private sector, you do not because you are predominantly public sector". As you will recall,
22 it was not quite right, because Mr. Durkan did accept that Durkan Limited, or Durkan
23 Brothers, as it was then, had done a small amount of work in the private sector. It already
24 this Durkan Brothers small works division or company that did small private sector jobs. In
25 the main it was concentrated on the public sector.
26 Their evidence was, "We have experience in the private sector as managers, we have not
27 ever run our own company, we come to you, you have got your own company, you have got
28 everything, and we will come along and we will use that and we will then set up this private
29 sector wing of Durkan". It was always a wing of Durkan. They were never calling
30 themselves Pudelek and Simmons, they called themselves Durkan Pudelek to use the
31 Durkan brand. That is what they were doing. That, as I understand it, was essentially what
32 the Durkans were putting in. They had come along with their contacts. Mr. Pudelek said
33 that he used his contacts. He accepted that he got some work through the Durkans, but he

1 was coming along with his contacts and his effort and his drive and they were going to do
2 the hands on management of the business.

3 That was really the investment. That actually enables you to make sense of the whole thing
4 and to see why this really was a group. It was not a venture capital investment. They
5 certainly had venture capital funding “that we could have gone to, we did not, we chose
6 instead to get into bed with the Durkans because they had done it”. He referred to
7 Mr. Durkan as a “master”, he has been there, he has done that, “we wanted to be part of that
8 and draw on the structure that they had built, the administration they had built and their
9 services, their financial clout, their ability to get insurances and bonds, and so on”.

10 Mr. Singla has helpfully passed me Mr. Pudelek’s answer which may answer the question
11 that you have just raised. He said, and this is yesterday’s transcript, p.86, lines 13 to 19:

12 “They were investors. We didn’t, they couldn’t contribute. I mean, Bill is a
13 fantastic businessman and he can build and sell houses like nobody else I know.
14 And Danny equally. But, they can’t dig a hole in the ground and put a double or
15 triple basement in; they can’t build 25 storey blocks of flats. That’s what I cut my
16 teeth on. That’s what we were there to do. I was the guy that went out and got the
17 business.”

18 That is what he was saying they potentially put in.

19 MR. BLAIR: As you are on para.30, can I ask you this: in the second line the words “was
20 willing to allow” do not get you home on their own, do they? That does not necessarily
21 imply control. This is just part of your whole ----

22 MISS BACON: Durkan Holdings was willing to allow, they did allow, in fact. My note is not to
23 be read as a statute perhaps.

24 MR. BLAIR: Did he actually use those words? I have not checked the transcript.

25 MISS BACON: No, this is my paraphrasing of his evidence. I can you, if you want to look at it,
26 the relevant bit of evidence.

27 MR. BLAIR: I thought he was a bit stronger than that.

28 MISS BACON: If you look at it, it is yesterday, p.60, line 13 ----

29 THE CHAIRMAN: We have not got those with us, but we will check them.

30 MISS BACON: It is over a whole page.

31 “What I am asking you, Mr. Durkan, is that you have said a number of times and
32 Mr. Fraher said before you, that what you thought you were doing was protecting
33 Durkan Holdings investments, so what I am trying to explore a little bit is what
34 you saw that investment as being?”

1 And then he answers:

2 “The investment at the early stages – how shall we put it – our facilities that we
3 provided for them, and I guess that was our investment at the early stages. You
4 couldn’t get bonds, we got credit, credit was outside, and all that sort of thing until
5 they got strong enough to be able to get their own bonds.”

6 Of course, I should mention the website, I did not specifically take you to that bit of my
7 note ----

8 THE CHAIRMAN: No, we saw you have mentioned the corporate branding.

9 MISS BACON: The point about the website is that this is one of the instances where they say:

10 “We were happy to be part and be perceived as being part of the Durkan Group, and that is
11 why we went on their website, this was all really a sham because we were actually our own
12 company in reality.”

13 The next theme then is common administration and financial management; you have heard
14 extensive evidence as to the services that were provided in particular by Mr. Fraher, also by
15 the Durkan Limited company and Durkan Holdings generally. That is one of the reasons
16 why I say Mr. Pudelek and Mr. Simmons went into this because they needed those services
17 to be provided, and they were provided as a group.

18 There is a point leading on from that which is how they were paid for, and this goes to the
19 statements in the witness statements that “We were all terribly independent, we paid for all
20 this via arms’ length transactions”, nothing of the sort. In fact, for the first few years
21 nothing was paid for the services, nothing at all. You will have seen from the extracts of the
22 board minutes that I took you to that there were some quite, let us say, full and frank
23 exchanges of views about the services and Mr. Fraher said quite candidly that he had a bit
24 of an argument with Colin Simmons about this, it was a candid discussion. His view was
25 that by 1995 that Durkan Pudelek ought to be contributing properly, that was recorded in
26 the board and then there was discussion as to exactly how much they were going to be
27 contributing, and the fact that it was felt to be inequitable. You will remember that extract
28 from the minutes, it was felt to be inequitable that Durkan Pudelek should be there, not
29 paying a dividend and not paying a penny in contribution for all the services that they were
30 using, and then there was the question as to: “How much eventually was agreed to have
31 been paid and when was it paid?”

32 The doubt lies as to whether there was anything paid to the year ending 31st January 1996.
33 It is quite clear that until 31st January 1995 not a penny was paid. There was a question
34 mark as to what was paid the next year, so during the calendar year, 1995 Mr. Fraher said

1 there was something paid. Certainly, the minutes agreed that a figure of, I think, £107,000
2 was budgeted for that calendar year, for the year ending 31st January 1996. What we do not
3 see is a mention of this in the related party transaction section in the financial statements.
4 There has not really been any explanation of that. I am not going to hang my case on
5 whether or not a contribution was paid in that year. We simply say there may have been a
6 contribution paid in that year, there may not have been; it is certainly not recorded as a
7 related party transaction in the financial statements.

8 What we do know is from the year ended 31st January 1997 management charges were paid.
9 We also know the way that they were calculated, and this was not a subject of annual arms'
10 length negotiation. Mr. Fraher explained quite clearly how they were calculated, and it was
11 calculated by getting together the pot of overheads and then divvying it up between the
12 various Durkan Group companies according to their predicted turnover. What he said was
13 there was a reconciliation at the end of the year according to actual turnover, but after that it
14 was felt that one should stick by the original estimates of turnover. So that was the formula
15 that was applied, there was no sense of annual negotiation. He did not say that there was
16 any such negotiation he said over the course of about a page and a half of his evidence that
17 there was this formula, and that is what was applied.

18 THE CHAIRMAN: I think he said that the negotiation took place over what overheads they were
19 actually using and therefore what costs should go into the pot that was being divvied up.

20 MISS BACON: Yes, but this was not every year Mr. Pudelek and Mr. Simmons coming in and
21 aggressively negotiating down or up the percentage, there was a formula, and actually that
22 adds to the picture of Durkan Pudelek being part of the Durkan Group because it was
23 treated in the same way as the other companies, there was a set of costs that were shared out
24 between the companies and those costs were apportioned, according to Mr. Fraher, between
25 the companies pursuant to an equitable formula.

26 The final point on the administration, this could go in financial statements, but I have stuck
27 it in under common administration, is the point about whether there were loans made
28 between the Durkan companies. The position on this is somewhat murky because Mr.
29 Fraher, you recall, started off categorically denying that there were any loans made. First,
30 he agreed with the statement in his witness evidence that if there were loans made they
31 would have been at 2 per cent above LIBOR, and then I asked him: "Were there any?" and
32 he said "No, definitely not". Then we went to the financial statements and lo and behold
33 there is an unequivocal statement that a loan was made by Durkan Pudelek to Durkan New
34 Homes, and it was an interest free loan. So whatever he may say about the financial

1 statements not recording the position accurately these are audited statements and they
2 record Durkan Pudelek as having made a loan interest free to Durkan New Homes during
3 the year ended 31st January 1997. There also seems to have been a similar loan in the
4 following year, though it is not recorded whether or not that was interest free.

5 PROFESSOR PICKERING: Could I just ask you a question which I think flows on from para.
6 35, which is the financial statements' record for a goodly number of years of sums
7 outstanding that are owed to Durkan Pudelek by other companies in the Durkan Group ----

8 MISS BACON: Yes.

9 PROFESSOR PICKERING: -- at the balance sheet date, but they seem not then to find their way
10 into related party transactions in the following year.

11 MISS BACON: No. I was wondering whether one can make anything of this. I think the point is
12 that there were clearly sums of money going backward and forward, and one sees this from
13 the various explanations about the loans, for example, the pension funding, the FURBS, the
14 management charges to Durkan New Homes, and that is something I meant to put on my
15 note actually. The explanation given was that one paid an enormous management charge to
16 Durkan New Homes and then that found its way into a property that was put into the
17 pension of Mr. Pudelek, Mr. Simmons and Mr. Durkan. This is a classic example of money
18 zinging around between a group, absolutely what you would expect in a group. His
19 explanation was that this was all about tax avoidance. One may say tax avoidance, or tax
20 management or tax planning or whatever, that is a common feature you would expect to see
21 between companies in the same group. That may explain many of the outstanding balances
22 as between the parties. At the end of the day one sees that sums of money are owed and
23 paid between Durkan Pudelek and the other members of the group, and that all adds to the
24 picture of this being a group rather than an independent company that was run on an arms'
25 length, stand alone basis, so I am very happy to adopt Professor Pickering's point, there
26 were obviously sums of money, whether they were loans or not. Certainly the financial
27 statements looked to have let us say not always reflect the factual reality of the transactions
28 according to Mr. Fraher.

29 THE CHAIRMAN: Well it may actually have been a loan, strictly so called, but because he knew
30 it was being loaned for some particular purchase he thinks of it relating to that, and not a
31 loan in the sense of "Give me some money for my day to day expenses", it is actually a
32 loan, but in his mind it is related to a particular transaction which is not what would
33 commonly be thought of as a loan like you go to a bank and get a loan of money to deal
34 with your general expenses.

1 MISS BACON: His view is that it was not a loan at all, in fact it was some different kind of
2 transaction, but you are right it may in formal terms have been a loan if, even now at this
3 juncture and with hindsight, he does not think of it as a loan. Certainly in relation to the
4 management charges that were paid to Durkan New Homes Limited, and you will
5 remember one year management charges of around £660,000 that were in fact more than the
6 management charges that were being paid to Durkan Limited, and his evidence was that this
7 was not management charges at all, this was all about transferring money from Durkan
8 Pudelek to Durkan New Homes, which would then make its way via a property into the
9 pension scheme of three of the directors of Durkan Pudelek. His evidence was that the
10 entry in the related party transactions relating to this sum of money was not at all
11 management charges, it was described as something quite different.

12 I think the point to be made at the end of the day is however these various transactions are
13 described they are the kind of transactions that one would expect to see within a group and
14 they are not the kind of transactions that you would expect to see if Durkan Pudelek were
15 being operated as a standalone company with its own entirely separate commercial policy
16 and independent financially from Durkan Holdings, Durkan Limited and the other Durkan
17 group companies.

18 The next theme I wanted to get on to was the operational scrutiny by the board. I do not
19 think I need to go in detail through this, the relevant points are set out on my note. The
20 thrust of what we are saying is that although there were numerous descriptions in the
21 evidence of the board operating at a very high level, receiving only very high level
22 summaries of Durkan Holdings being a silent partner, you have now seen enough of the
23 board minutes, probably too much of the board minutes to know that that was not what was
24 going on and there was, in fact, quite intense scrutiny down to the administrative minutiae,
25 and that is not surprising for several reasons.

26 The first reason is, as Mr. Fraher says in his witness evidence, when Mr. Pudelek and
27 Simmons came to the Durkans they had not been engaged in running a business on their
28 own account before so it was natural at the start there should be quite close scrutiny of what
29 they were doing, for example coming to the board for approval of credit worthiness of
30 particular clients for example, another of the safeguards that were put in place. So it is clear
31 that from the start the Durkans really wanted to know what was going on on the ground.

32 Another reason there was particularly close scrutiny was that certainly towards the end in
33 the last five years or so there were very frequent concerns about Durkan Pudelek's
34 commercial strategy, and you will have seen the continued references and continued

1 complaints really being made in the board minutes about under values, over due retentions,
2 profit margins, whether the managers of Durkan Pudelek should be more commercially
3 minded and so on, and that explains to a great extent why there was particularly close
4 scrutiny, and actually the scrutiny increased over the period we are looking at because you
5 will have seen that the earlier board minutes were somewhat more sparse, and did not
6 condescend to the same level of detail. One by one, as we get more people on the board the
7 construction director, for example, starts doing construction reports and listing out
8 individual problem contracts. Then we get a surveying report that comes along, where we
9 have consideration of the over values and retentions on particular contracts, those were not
10 there at the start. They were there at the time of the relevant infringements, and that is why
11 you will have seen those reports in the extracts to which I took Mr. Durkan. The scrutiny
12 became more intense over the period 1992 to 2007 with more details being provided rather
13 than less.

14 THE CHAIRMAN: The thing that slightly concerns me at the moment, Miss Bacon, is the
15 confusion about the capacity in which people were sitting around the table during these
16 board meetings. At one point one of the witnesses said these were in effect shareholders'
17 meetings, although of course not everybody who was there was a shareholder. But certainly
18 Mr. Fraher seemed to be suggesting that in some instances where he was intervening, or
19 where Mr. Durkan was intervening, he regarded that as part of the services that DL was
20 providing to DP in exchange for the management charge, and so he was helping them out
21 providing his assistance in that capacity rather than with his DH shareholder hat on, or even
22 is DP director hat on.

23 MISS BACON: I am afraid our submission is that one has to take comments like that with a
24 degree of scepticism. Mr. Fraher trotted out this line about being there providing services
25 from DL to DP consistently, but that is not consistent with what was actually minuted. He
26 was there, he was the finance director of DP, he was providing a report as a director of DP
27 to the board meeting. He was actually one of the people who was giving the report, he was
28 not just the recipient of a report, he was giving a report. He was fulfilling all of the
29 functions one would expect of a finance director.

30 THE CHAIRMAN: I know you took Mr. Daniel Durkan through, at the beginning of his
31 evidence, as to what services were in fact being provided by DL to DP, and I know Mr.
32 Pudelek's evidence that actually they were able to stand on their own feet with regard to
33 some of these services rather quicker than they had expected to at the time they entered into
34 the shareholder agreement, which is why they felt that 5 per cent of turnover was too high

1 for what they actually in the event needed to buy from DL. But is there anywhere set out,
2 apart from in that oral testimony what they were actually paying for in the management
3 charge from year to year?

4 MISS BACON: It appears in a number of the witness statements, it appears in Mr. Fraher's two
5 witness statements, it appears in Mr. Pudelek and Mr. Simmons' witness statements, so one
6 has to put them altogether, there is no table of the services that were being provided.

7 In relation to your question, madam, about the services that were initially provided and then
8 not, as I understand it, there was estimating which was provided for a few months and then
9 not, and then at some point, I believe around 1998 buying services were not provided so
10 Durkan Pudelek set up its own accounts with suppliers, and there was, if you recall, a
11 discussion about the dissatisfaction with Durkan Holdings or Durkan Limited's buying
12 department, and the unfortunate Mr. William Nash who left. Those were two services
13 provided at the outset and then not. In fact, as far as I was able to ascertain from Mr. Daniel
14 Durkan's oral evidence, the other services, such as providing bonds, providing insurance,
15 were consistently provided throughout and some things were provided later on and not at
16 the start, for example car hire, or car leasing.

Comment [C1]: Confidential

17 THE CHAIRMAN: HR, for example. You have made the point "Goodness, they were involved
18 in such detailed discussion about how much compensation would be paid to somebody, and
19 we also saw on the website that if you wanted to go and work for Durkan Pudelek the
20 contact name was the group person's name.

21 MISS BACON: It was the group recruitment person, yes, exactly.

22 THE CHAIRMAN: What I am not sure about is how one reads that. Whether one says "Clearly
23 DL was providing HR services to DP and that was covered by the management charge", I
24 take your point – query, how arms' length that was. But if that was the situation how does
25 one then interpret Mr. Daniel Durkan - and I cannot remember whether Mr. Fraher was also
26 a director of DL at any point -- As I say, is he doing that because that is part of the service
27 that DL is providing? Or, is he doing that because he is there for protecting DH's interest in
28 managing the business?

29 MISS BACON: This brings me back to the points I made at the start. Actually at the end of the
30 day the motivation is not that relevant. Part of it is that he is coming to the Tribunal and he
31 has got a fixed line that he wants to convey - that all this was being done not as finance
32 director of DP, but (1) as protecting the interests of the shareholders (he was not a
33 shareholder himself) and (2) pursuant to the shareholders' agreement under which DL had
34 to provide services to DP. So, the interpretation of his evidence must be seen in that light.

1 That is clearly the line that he wants to give. But, whether or not that is correct actually does
2 not really matter because my point is that this was a group under which there are group
3 overheads, and group administration, and group services. That was entirely normal. This is
4 the way it operates.

5 THE CHAIRMAN: That is one point - that you seem to be also relying on this for a second point
6 about the closeness of scrutiny by those on the board who were also the DH directors.

7 MISS BACON: Yes. My point about that at the end of the day is that the board was operating in
8 the way that you would expect a board to operate. It was extraordinary. I put it to Mr.
9 Fraher at one point that -- I said,

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

12 His answer was, "No, I wasn't". Why on earth would he say that? He would say that
13 because he is worried about giving the impression that he was doing a good job as a director
14 of the board. He was patently a conscientious member of the board of DP. He was a very
15 conscientious man. He raised issues where he perceived there to be problems. He
16 conscientiously fulfilled the duty of preparing the minutes, preparing the cash report,
17 highlighting any issues, bringing to the attention of the board any issues that he thought the
18 board ought to know about and ought to discuss. He was obviously conscientiously doing
19 his job. It is extraordinary that he should have denied that in response to my question. All
20 this is really going to show - apart from the point that I made about the group overheads
21 being a normal working of the group - is that the board was doing the normal job of the
22 board, which is to oversee the running of the company rather than to actually run it on a
23 day-to-day basis. It is not the function of a director of the board to go out and get the work.
24 It is the function of a director of the board to see whether profit margins are too low, or
25 whether the day-to-day managers are not chasing up payments and therefore the cashflow is
26 not as healthy as it ought to be. All of those kinds of things are normal jobs of the board
27 and indicate the degree of decisive influence that satisfies the *Akzo* test. That is really
28 where we get to.

29 Now, the last of my main themes in relation to decisive control is to look at the specific
30 involvement of Durkan Holdings' directors. Can I just preface that by saying that, of
31 course, this is all really the icing on the cake. I do not really need to show this, but they are
32 indicia of control in this case. Starting off with Mr. William Durkan, he was probably the
33 least involved out of the three DH directors, not least because, as he said, from 2001 he did
34 not come to London so often. But, it is quite clear that his influence was considerable. I

1 have set out the relevant references at para. 39. He did attend the majority of board
2 meetings until the end of 2001. He suggested client opportunities. He made proposals
3 about budgeting. He visited DP's sites which meant meeting clients on behalf of DP. He
4 called a board meeting at short notice, which is extremely significant because he is getting
5 everyone together in 1995 and saying, "Things are already going wrong and here are a
6 number of points that I would like you to focus on, including profitability and profit
7 margins". Even when he was not there, he was clearly discussing issues with Mr. Fraher
8 which were passed on at the board meetings. He accepted in oral evidence quite candidly
9 that he did not always sit silently at board meetings. He did make proposals. He did make
10 suggestions about DP's commercial strategy. He was keen to ensure that DP was run
11 effectively. He wanted to ensure the success of DP. One would have expected nothing less
12 from the chairman of the board of directors of DP.

13 Then there are the comments from Pudelek.

14 "Every opportunity to learn from the master should not be turned away. When
15 Bill reminds you of things, you do well to remember that he's been there and done
16 it. So, I was happy for him to say what he said."

17 This was not the evidence of a man who had simply ignored the comments and proposals
18 and guidelines that were being passed to him by the chairman of the board. This was the
19 evidence of a man who held the chairman of the board in the highest regard.

20 THE CHAIRMAN: Other than his betting tips!

21 MISS BACON: I had refrained from mentioning the betting tips. Save for the betting tips, he
22 held Mr. William Durkan in the highest regard and regarded him as a master and someone
23 from whom he could learn and someone from whose experience he could benefit and did
24 benefit.

25 Daniel Durkan was an executive director of DP in title. He accepted that he was sometimes
26 referred to as 'the deputy chairman'. I am not going to get into a debate as to who chaired
27 the meetings, but it is quite clear from the minutes that on several occasions he acted on
28 behalf of his father - for example, in welcoming new directors to the board. His evidence
29 was that he had attended all board meetings without any exception and that is also our
30 understanding from going through all of the minutes. We could not find a single one where
31 he was not present. So, he was obviously extremely diligent in attending. There were
32 occasions when Mr. Pudelek and Mr. Simmons did not attend. There was not a single
33 occasion that is minuted when Daniel Durkan did not attend. He gave evidence about
34 recruiting a marketing consultant who subsequently carried out work for DP. He gave

1 somewhat equivocal evidence about the golf day. The Tribunal will have to take that with a
2 degree of judgment. I put to him that he was in fact marketing DP. He denied it, but it was
3 plain from the documents that he was trying to promote DP. He accepted that he was
4 involved in chasing up at least one bad debt.

5 So, this was not somebody who was sitting silently and doing nothing, and just simply
6 getting the reports that were given to him.

7 The main Durkan Holdings director who was directly involved with the operational
8 business of Durkan Pudelek was obviously - and as the Tribunal has indicated - Alan
9 Fraher. He was the finance director and the company secretary of DP. He claimed
10 repeatedly that this was only a nominal role. With respect, that is just not borne out by the
11 minutes. His role was far from nominal. He was performing very substantial tasks for DP.
12 I have listed them at para. 31(a). I have not repeated them at para. 43. He accepted also
13 that he was presented to others as being DP's finance director. Mr. Simmons also accepted
14 that in relation to infringement 135 - that he took along Mr. Fraher to show that DP had a
15 finance director.

16 Mr. Fraher appears to have attended almost all of the DP board meetings. In fact, we found
17 one minute of a meeting where he was not present. That is not in the file. But, we found
18 one out of all of the ones that we have. We know that he took over responsibility for doing
19 the minutes around January 1995. He was the one who signed the FTO letter on behalf of
20 DP. But, most significantly, we say he was directly involved in infringement 135. He
21 admits directly participating in it. What he does not admit is participating in it with
22 knowledge. In our submission, if you look at the totality of the evidence and the claim that
23 he did not know what this was for is entirely implausible. He knew that this debt from
24 Mansell was not a debt for work done. If there had been work done, there would have been
25 records on DP's system. He would not have needed to ask Mansell what the details of the
26 job were. DP would have known and DP would have invoiced. This would be chasing up a
27 debt following an invoice that had not been paid - not going along to get details which he
28 would then use to invoice Mansell. So, his evidence was that he knew that this was some
29 sort of arrangement in connection with a tender.

30 Mr. Simmons' evidence was that he and Mr. Fraher spent ten minutes during together to the
31 Swallow Hotel, of all places, in Waltham Cross to meet Mr. Percevel of Mansell. If their
32 story is to be believed, not only in setting up that journey, but entirely during that journey
33 there was absolutely no discussion of why they were going there. That is simply incredible.
34 Mr. Fraher was a conscientious man. Of course he would have asked why they were going.

1 Of course he would have asked why he was being brought in to play the hard man, to
2 collect this debt.

3 Then there is the point that the Mansell payment was, on any basis, a very large sum of
4 money. As Professor Pickering extracted from Mr. Simmons, I believe, this represented
5 around 10 per cent of DP's retained profit for that year. That was, admittedly, the *annus*
6 *horribilis*, as he described it. That was the year that they made a catastrophic loss. They
7 actually made a loss in that year, but the retained profit was still of the order of between
8 £500,000 and £600,000 going forward. So, this represented 10 per cent of that. It was a
9 very large sum of money. It was not a piddly sum that was trivial in comparison with the
10 kind of work that Durkan Pudelek was doing.

11 In addition, both Mr. Fraher and Mr. Simmons accepted that this was a very unusual
12 situation, and when pressed, (and I did press him) Mr. Fraher could not give any coherent
13 explanation why Mansell would have needed to give DP the details of the job that was to go
14 on the invoice.

15 Then look at what he did say about what he thought was going on. His comments are very
16 revealing:

17 "... how could I visualise something like that would happen? It had happened
18 on a few occasions, a smaller sum ... but it's not unusual for somebody to lead
19 you down the track and then suddenly pull the plug and do it themselves, or
20 give it to somebody else. They may reimburse your costs or compensate you in
21 some way for the loss of the opportunity."

22 He was saying there had been occasions when they had been compensated. Whether or not
23 he is saying that there were compensation arrangements in the sense referred to in the
24 decision does not matter; he is saying that there were occasions when they had been
25 compensated. He said it again at p.47:

26 "...that wasn't with respect, unusual. They would say 'We spent an awful lot of
27 money on that job, he's pulled the plug on the job, he can't get his guarantee',
28 and a two stage tender ... is a costly exercise, tendering. So you rightly say: 'I
29 want my pound of flesh'."

30 He accepted that he was on very dodgy ground. He said candidly this was not a case where
31 there was a contract signed. He used the phrase "dodgy ground"; he knew that he was
32 doing something extremely dubious.

33 Taking all that together, and his concessions that there had been occasions when
34 compensation had been paid of some sort and this was not unusual, it is, in our submission,

1 quite clear that he knew what was going on, whether or not Mr. Simmons had sat down and
2 explained it to him. So whether or not it was a case of: ask no questions get no lies (as the
3 Chairman put to him – in fact, I wanted to use that phrase myself), he knew what was going
4 on. Even if you take Durkan’s case at its very highest, it must be a case of wilful blindness
5 rather than simply lack of knowledge through no fault on his part.

6 THE CHAIRMAN: You accept that his involvement was, if you are right that he knew or must
7 have known, as a director of DP rather than as part of DH, so I do not think there is
8 anything in the Decision that relies on his involvement as fixing DH as a participant directly
9 in the infringement.

10 MISS BACON: It is part of the picture, because if there is a situation when a director of the
11 parent company is involved in the conduct of a subsidiary, then that is a strong indication
12 that liability should be imputed to the parent. But when he went along to collect the
13 payment, let us say, he was collecting that payment in his capacity as the finance director of
14 DP. That must be right. The point is that he also sat on the board of DH; he was the
15 finance director of DH at the same time. So he had two hats, and he was wearing his DP hat
16 when he went along to the Swallow Hotel in Waltham Abbey.

17 THE CHAIRMAN: But did the fine imposed for infringement 135 include the 5 per cent uplift
18 for involvement of a director?

19 MISS BACON: I do not believe so. I will just turn up the relevant paragraph. The relevant
20 paragraph is para.VI.462.

21 THE CHAIRMAN: It will be in the table.

22 MISS BACON: It was, it was 5 per cent.

23 THE CHAIRMAN: What number were they?

24 MISS BACON: It is VI.462.

25 THE CHAIRMAN: I am looking at the tables.

26 MISS BACON: The tables at the back.

27 THE CHAIRMAN: Page 1749, yes, so there was a 5 per cent uplift.

28 MISS BACON: Yes, because he was a director of Durkan Holdings who had participated in the
29 infringement, but there was also the involvement of Colin Simmons who was also a director
30 of DP. So in some cases the infringement would have been committed by somebody – for
31 example, if a cover price had been given, it might have been given by an estimator who was
32 not at the level of director, and in this case the two people directly involved in the
33 infringement were Colin Simmons, who was a director of DP, and Mr. Fraher, who was
34 both a director of DP and a director of DH, as, as it happens, a director of DL.

1 THE CHAIRMAN: Yes. So the penalty, there is no challenge to the 5 per cent in the appeal
2 against the penalty because of Mr. Simmons' involvement. Is that right, Mr. Hoskins?
3 MR. HOSKINS: I would need to go back to the detail to check. I do not want to give an answer
4 now.
5 THE CHAIRMAN: No, no.
6 MISS BACON: You also may want to look at the table at p.1907 which lists the directors
7 identified in the infringements, and the directors in this case are Mr. Fraher and Mr.
8 Simmons.
9 I think your question was when he went along to the meeting in the hotel, was he portraying
10 himself as being a director of DH? I think the evidence was unequivocally that he was
11 portraying himself as being the finance director of DP.
12 THE CHAIRMAN: My question was really: are you relying on this point about what he knew or
13 was known in considering in what circumstances the Tribunal needs actually to resolve that
14 factual dispute? Is it relied on as simply one of the indicia of involvement?
15 MISS BACON: It is, yes.
16 THE CHAIRMAN: Or is it relied on for some other more unique purpose, if I can put it like that?
17 MISS BACON: No, it is one of the indicia. If you look at the Decision at p.99 it is set out as one
18 of the indicia. Paragraph II.417.
19 THE CHAIRMAN: Yes, it certainly is, but is it anything more than that I think is what I am
20 asking.
21 MISS BACON: If you read that paragraph it says:
22 "This is clear evidence of a director and employee of Durkan Holdings taking
23 business, financial and operational decisions for and on behalf of Durkan, even
24 to the extent of having direct involvement in respect of an infringement."
25 It is one of the indicia; it is not unique among the indicia. It is the one case in which there is
26 a director of Durkan Holdings, a parent, who has been directly involved with an
27 infringement, and we say not only involved but knowingly involved.
28 You will have got the point that Mr. Fraher's involvement in this, and indeed his conduct
29 generally, is evidence that there was an employee of Durkan Holdings who held a senior
30 operational management post within Durkan Pudelek, and we say it was Mr. Fraher. He
31 was the finance director of Durkan Pudelek and it was not a nominal role.
32 THE CHAIRMAN: Thank you, Miss Bacon.
33 MISS BACON: The final part of our argument on decisive control looks really at the
34 counterfactual case and it is this. Let us suppose that Durkan is right, and let us suppose

1 that they were separate economic entities. What is the consequence of that for competition
2 law purposes? The consequence is that if there are agreements or concerted practices as
3 between Durkan Holdings and Durkan Pudelek, then they can be infringements of the
4 Chapter I Prohibition, because one of the purposes of the single economic entity doctrine is
5 not only about imputing liability from subsidiary to parent; the other purpose is for setting
6 the circumstances in which you do not find an infringement where there is an agreement or
7 concerted practice between companies in a group. It is a common sense point. If you have
8 got a group they obviously have to make certain kinds of agreements as to group strategy
9 and group policy which, in normal circumstances if made between separate and
10 economically independent companies, would be an infringement of the Chapter I
11 Prohibition.

12 Two points are to be made in that regard. The first point is that there was on any account a
13 classic market sharing agreement right at the outset of the establishment of Durkan Pudelek
14 which seems to have been adhered to. That was that Durkan Pudelek and Durkan Brothers
15 (which subsequently became Durkan Limited) got together and decided how they were
16 going to divvy up the work between them. They agreed that Durkan Pudelek, if it got a
17 public sector invitation, would pass it over to Durkan Brothers, and Durkan Brothers, if it
18 got a private sector job, would pass it over to Durkan Pudelek. There is no suggestion that
19 this only operated for a short period of time. This was the modus operandi. It was the way
20 in which the group was structured: that Durkan Pudelek would do one kind of work, and
21 Durkan Brothers would do another. By any account, that must be regarded as a market
22 sharing agreement, and if Durkan is right, it would be a flagrant breach of the Chapter I
23 Prohibition.

24 The second way of putting it is more general. That is that there were numerous interlocking
25 directorships which meant that people have fingers in many different pies. So Mr. Fraher,
26 Mr. William Durkan and Mr. Dan Durkan were all directors of the holding company. They
27 were directors of Durkan Pudelek, they were directors of Durkan Limited. Mr. Pudelek was
28 director of not only Durkan Pudelek but also Durkan Limited and Durkan Estates. Maybe
29 one needs to leave aside Durkan Estates because he said this was all because of the tax
30 avoidance scheme regarding his firm. But whatever, he was certainly a director of Durkan
31 Limited for a period 2001 to 2005.

32 He gave evidence about one of the reasons why that was, because he was the second most
33 senior person, Mr. Durkan relied on him to go along to the board and support the board of
34 Durkan Limited. Had these been independent companies there would have been a degree of

1 information sharing that would again have been a flagrant breach throughout the period of
2 operation of Durkan Pudelek of the Chapter I Prohibition. This could not have happened. It
3 is not permitted for two companies to be sharing information of this level: their suppliers,
4 their profit margins, their contracts, their clients, the way they work, everything. This
5 would be a concerted practice which would be in breach of the Chapter I Prohibition.
6 So either we accept this nonsense that the two companies were breaching the Chapter I
7 Prohibition throughout, because actually the whole group structure was a complete sham
8 and they were independent, economic entities; or one accepts the totality of the evidence
9 that this was a normally functioning group, with a normally functioning board, normally
10 functioning members of the board, and a very normal finance director who carried out
11 diligently and conscientiously the tasks one would have expected of a finance director.
12 That all points to the single economic entity doctrine applying in this case. This was a
13 single economic entity; Durkan Holdings did have decisive influence within the meaning of
14 the *Akzo* test, and Durkan Holdings therefore, sadly for it, is liable as party to this
15 infringement on the basis of the conduct of its subsidiary.

16 Unless the Tribunal has any further questions, those are my submissions.

17 PROFESSOR PICKERING: We heard quite a lot in evidence yesterday, Miss Bacon, that the
18 Durkan Holdings/Durkan Limited directors on the board of DP were there to look after the
19 shareholder interests and not by virtue of their position at DL or DH specifically. I wonder
20 whether you, and no doubt Mr. Hoskins in due course, have any comments to make about
21 the significance of that distinction, bearing in mind the ownership structure for Durkan
22 Holdings, and whether that would impinge upon the way in which we viewed this set of
23 arguments.

24 MISS BACON: No difference. If anything, it goes in my favour because as a shareholder you
25 would want to know that the company was being run properly, and you would want to be
26 exerting your influence over it. That was Mr. William Durkan's evidence, that he wanted
27 this company to do well, he wanted it to be a success. Mr. Pudelek said that they were all in
28 it to make money. What they wanted to do at the end of the day was to build this up into a
29 business with long term value and sell it to make a profit. So as a shareholder one would
30 have expected the Durkan Holdings directors on the board, if only to protect their
31 shareholder interests, to be exerting their influence, guiding this company in the way that it
32 ought to go, so that at the end of the day they made something out of what they put into the
33 business.

1 PROFESSOR PICKERING: What I am trying to feel for is whether there is any respect in which
2 there is a separation between actions of shareholders and actions of Durkan Holdings in this
3 case.

4 MISS BACON: It is not our case that there is any meaningful separation. Durkan Holdings was
5 a shareholder; they were there as directors of Durkan Holdings. In the case of Mr. William
6 Durkan and Mr. Dan Durkan as direct shareholders or beneficiaries; in the case of Mr.
7 Fraher he was not a shareholder, but he said he was protecting the shareholders. At the end
8 of the day, there is no legal distinction to be made for the purposes of the *Akzo* test between
9 whether they were there as directors of Durkan Holdings or as shareholders. As I said, even
10 if they were there purely to protect their shareholding, that would have been a very strong
11 motivation for them to have exercised decisive influence over the subsidiary.

12 THE CHAIRMAN: Yes, and when they talk about protecting their shareholding, I did not
13 understand them as meaning the value that they put in when they initially subscribed.

14 MISS BACON: No, because there was not an enormous venture capital stake put in. Actually, if
15 there had been that kind of stake put in, one might have said: we really want to know about
16 very large events that are going to affect the value of our shareholding. But that was not the
17 case; they were being told about £500 here and there, which, on any view, is not going to
18 impact on the value of the shareholding as such. What they were interested in was whether
19 this was a business that was being run well, that was going to go on to accrue long term
20 value and to be sold at a profit.

21 THE CHAIRMAN: Yes, what they hoped to gain was not just the return of the money they had
22 initially put in, but 51 per cent of the end value on the investment being made liquid.

23 MISS BACON: Yes, and Mr. Beard has reminded me that in any event, all directors are obliged
24 to act in the interests of the shareholders; they owe fiduciary duties to the shareholders.

25 MR. BLAIR: On the evidence of Mr. Pudelek, he thought it was a five year work up and sell, but
26 I do not think there was any evidence about that from any of the Durkans?

27 MISS BACON: No, their description was this was a building up of this business with long term
28 value which would eventually be realised.

29 MR. BLAIR: So maybe they had different aims at that point.

30 MISS BACON: Yes.

31 MR. BLAIR: My question arises on 54. I think I know the answer. Although this point about the
32 Chapter I Prohibition was in your skeleton argument, none of us put it to any of the
33 witnesses. Am I right in saying that?

34 MISS BACON: It is a legal question. I would not have expected the witnesses to answer it.

1 MR. BLAIR: Shall we leave it to Mr. Hoskins to deal with tomorrow?

2 MISS BACON: The point that was put to the witnesses was whether there had been a market
3 sharing agreement, that factually what had happened as regards the market sharing, and it
4 was clear from the evidence of Mr. Daniel Durkan that what happened was exactly as I have
5 described it. I have set out the relevant passages. There was an agreement that work would
6 be passed over between the two companies. As a matter of fact, that is what I needed to
7 establish from the witnesses. The point was there in our defence, and it was there in our
8 skeleton argument. We have not regarded it as an appropriate question to put to Mr. Durkan
9 whether he considered that he was in breach of the Chapter I Prohibition. The evidence was
10 that actually, when they were engaging in cover pricing they did not know that they were in
11 breach of any competition provisions. It is a legal question at the end of the day.

12 THE CHAIRMAN: But it might have been, just to push a little bit further on that, a question to
13 say: if you are out, as you said, just to build up the value of this business, why did you
14 accept (as you apparently did) that there would be lucrative contracts, tenders coming in to
15 you for public sector work that you would then have to hand over to another company in the
16 group?

17 MISS BACON: But at the end of the day, really the evidence was there that they got together and
18 there was some feeling of uneasiness on the part of Durkan Limited; they wanted assurance
19 that their work stream was not going to be affected by Durkan Pudelek. Mr. Pudelek said at
20 the start there was an uneasy relationship. I think he used the words departmental
21 astigmatism, whatever that may mean.

22 MR. BLAIR: Shortsightedness.

23 MISS BACON: Yes.

24 PROFESSOR PICKERING: It is a squint.

25 MISS BACON: My point was I was not sure what the phrase meant in context, but I think what
26 he was saying was that there was an uneasiness and they wanted to be reassured. Certainly
27 that was Mr. Daniel Durkan's evidence, that this was their area of work. Durkan Pudelek
28 was coming along to do different things, therefore they would get the private sector work
29 and it was seen as being one of the reasons why Durkan Pudelek was there, so that they
30 could pick up private sector work.

31 I am not asking the Tribunal to make a finding of a Chapter I Prohibition.

32 THE CHAIRMAN: No, no.

33 MISS BACON: I am putting it in as a kind of reduction ad absurdum, which is: that is where Mr.
34 Hoskins' case would lead if he is right.

1 MR. BLAIR: We will hear from him tomorrow about this, I am sure.
2 THE CHAIRMAN: Yes, thank you very much. Is that all your submissions? Yes, thank you.
3 We are at ten past 4. Is that what we had planned for today?
4 MR. BEARD: That is what we had planned for today. The arrangements for tomorrow as
5 currently planned are that the OFT will move to deal with the Infringement 220 issues
6 tomorrow morning and then Mr. Hoskins will start his closing tomorrow afternoon,
7 covering both decisive control tomorrow afternoon and then Infringement 220 on Friday.
8 So at the moment, having heard us both on decisive control, you will then get us on
9 Infringement 220 and then decisive control from Mr. Hoskins, then Infringement 220. That
10 is unless, of course, the Tribunal would like matters arranged differently.
11 THE CHAIRMAN: No, that is fine, and then the penalty. Let us see how we go, but I would
12 hope if we finish all the liability submissions a little earlier on Friday than at one o'clock
13 then I hope we would be able to go straight on with dealing with the penalty. So that if we
14 do not go the whole of Friday afternoon that would be welcome.
15 MISS BACON: Mr. Hoskins has indicated that he needed a day, so it may be a little optimistic
16 for anyone to expect to have an early afternoon on Friday.
17 THE CHAIRMAN: Are you going to be the whole of tomorrow morning on Infringement 220?
18 MR. BEARD: I would hope not. There are one or two evidential issues that need to be covered
19 because obviously the Office did not make opening submissions in relation to legal tests and
20 those will need to be done.
21 THE CHAIRMAN: Very well. Thank you particularly to Jones Day for making the
22 arrangements and to all the staff for making it all work so smoothly this afternoon. We will
23 reconvene in the Tribunal tomorrow morning at 10.30. Thank you.

24 (Adjourned until 10.30 a.m. on Thursday 22nd July 2010)
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