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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1122/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

THE HONOURABLE ANTHONY LEWIS
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

AH WILLIS & SONS LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Matthew Cook (instructed by Field Seymour Parkes) appeared on behalf of A.H. Willis & Sons Limited.

Mr. Daniel Beard and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

1 THE PRESIDENT: Good morning ladies and gentlemen.

2 MR. COOK: Sir, good morning. I, of course, appear on behalf of the appellant, A.H. Willis &
3 Sons Limited, who I will refer to as AH Willis or Willis throughout. My learned friend,
4 Mr. Beard, appears on behalf of the Office of Fair Trading.

5 Sir, this is, of course, an appeal against both liability and penalty. Subject to your
6 agreement, sir, what Mr. Beard and I have discussed is that we should deal with liability
7 first. You will hear all the submissions on liability and then hear all the submissions on
8 quantum and penalties afterwards.

9 Starting then with the issue of liability, we have of course put in a witness statement from
10 Mr. Mark Willis, which is exhibited to the Notice of Appeal. The OFT has confirmed that
11 they do not wish to cross-examine Mr. Willis. On that basis, unless you wanted me to
12 formally call Mr. Willis to confirm the truth of that statement ----

13 THE PRESIDENT: I do not think we need you to do that.

14 MR. COOK: Thank you, sir. Sir, of course, AH Willis has set out its position in some length in
15 writing already, both in the Notice of Appeal and in the skeleton argument. It will not
16 surprise you to know that I do not intend to repeat all of those submissions today, and would
17 not be given an opportunity to do so if I tried.

18 THE PRESIDENT: We are very grateful to you, and we have read them.

19 MR. COOK: Thank you. Obviously, I am not going to make all those points, but I would say
20 now that we do stand by all of those points and we rely upon them in full. I am just
21 basically going to try and hit some of the high notes in front of you orally. Turning then to
22 the alleged infringements, the OFT's case is that AH Willis was involved in three cover
23 pricing infringements, each in relation to a single tender and in each case the basic allegation
24 is the same - that AH Willis was approached by Mansell for a cover price and AH Willis
25 agreed to, and did in fact, provide a cover price to Mansell and Mansell bid for the tender on
26 that basis. In each case there are a number of other parties to the tender, and it is not
27 suggested that they were involved in any way in an agreement with either Mansell or Willis.
28 In relation to two of the alleged infringements - that is, 188 and 215 - that is essentially the
29 whole of the allegation against AH Willis - that an unspecified person at Mansell
30 approached an unspecified person for whose actions Willis is legally liable at some
31 unspecified date a cover price was requested and provided. Now, the position in relation to
32 alleged infringement 224 is quite different. In relation to infringements 188 and 215 AH
33 Willis has done the investigation internally and simply has not found any story to be able to
34 tell. As far as it can tell there was no contact with Mansell at all. That is as far as the

1 investigations have managed to go. In relation to infringement 224 the investigation has
2 uncovered what went on and in fact, as the OFT has rather seized upon that and bases its
3 case upon what AH Willis has discovered.

4 THE PRESIDENT: This is Mr. Elbourn.

5 MR. COOK: That is the Mr. Elbourn story, of course. The third party contractor, Mr. Elbourn,
6 was hired to prepare costings. He was the one who spoke to Mansell. In relation to this, of
7 course, the OFT is not challenging the evidence. They in fact accept and rely upon that
8 being what happened. They also accept that Mr. Elbourn is a third party contractor who runs
9 his own business and he works for a number of companies in addition to Willis. It is also
10 not suggested that in dealing with Mansell that Mr. Elbourn was acting with the knowledge
11 or actual authority of any director or employee of AH Willis. So, what is said here is that
12 we are liable either because Mr. Elbourn is part of the same undertaking as Willis, or that he
13 had ostensible authority to act on AH Willis's behalf. Now, when one talks about
14 ostensible authority - I will come to deal with that in more detail - it is important to think
15 about ostensible authority in relation to Mansell. There may be a distinction between
16 ostensible authority that you have in relation to one party based on the representations that
17 have been made about the authority in relation to another party or in relation to the world at
18 large. So, the key must be that Mr. Elbourn had ostensible authority as in relation to
19 Mansell to deal on behalf of Willis.

20 THE PRESIDENT: Ostensible authority to give a cover price or to do what?

21 MR. COOK: Well, it is said effectively that he had authority to enter into
22 arrangements/agreements on behalf of AH Willis. That appears to be the assumption.

23 THE PRESIDENT: Unlawful ones, yes.

24 MR. COOK: Of course, authority to enter into an unlawful agreement, yes. I would accept that,
25 in reality, if he was given authority to deal with Mansell on behalf of AH Willis the fact that
26 he chose to exercise that in an unlawful fashion would unfortunately be no way out for me.
27 He did not have actual authority, but did he have ostensible authority to enter into
28 transactions with Mansells on behalf of Willis.

29 THE PRESIDENT: Just one question on the facts. I think I saw two slightly different versions in
30 the skeletons maybe, or maybe in the appeal and the defence, but it is common ground that
31 the request for a cover price came after the submission of the tender documents. The first
32 conversation related simply to getting an extension of time from the architect.

33 MR. COOK: Yes.

34 THE PRESIDENT: But not for a cover price?

1 MR. COOK: I think it is being said that effectively there were three relevant contacts, relevant in
2 the sense that they happened, only one of them was relevant for the cover pricing. The first
3 one was a contact that presumably would have happened before the date of submission and
4 that was simply a request that Mr. Elbourn should join in in seeking a general extension.
5 Then we have the request for a cover price which, factually, Willis say is “based on what
6 Mr. Elbourn has told us”, that happened after Willis had submitted its bid. Effectively the
7 OFT does not put forward any evidence to the contrary. Factually that is the only evidence
8 that there is. It appears to be that that is the position. Then there is reference to the fact that
9 some time later, after the bids had been submitted, the University of Reading comes back,
10 Willis is the winning bid, Mansells comes second. In those circumstances, after a bit more
11 of breakdown, it appears that Mr. Elbourn helped out Mansells by providing them with a bit
12 more of a breakdown.

13 THE PRESIDENT: The one on which the infringement is based is the middle one, is it not?

14 MR. COOK: Yes, absolutely, Sir.

15 I must start by dealing with 224, which is the Mr. Elbourn infringement. Mr. Beard has to
16 establish either that Mr. Elbourn is part of the same undertaking or that he has ostensible
17 authority, and I need to show you that neither stands.

18 Turning first to the undertaking point, and before looking at this in detail, Sir, I would invite
19 you to take a step back for a moment and just recognise that in this kind of industry the
20 extent to which sub-contractors are used, particularly for what is a small business, as
21 AH Willis is, where it has a relatively small pool of staff, and in practice will sub-contract
22 out a huge number of what one might refer to as specialist trades. So, depending on
23 Willis’s requirements, the nature of the job, etc, they might use a variety of sub-contractors,
24 say plumbers, heating engineers, painters, electricians, the whole variety, scaffolders,
25 roofers, a whole variety of specialist trades that might be engaged on a sub-contract basis.
26 They may be engaged one, they do not do a very good job, will never be engaged again, or
27 they may be engaged once because that is a very specialist trade that will not be required
28 again, or it may be that they do a good job. If you are an electrician, for example, you
29 might be required on most jobs. They may end up being engaged once or many times, but it
30 will always be on a case by case basis, job by job basis, to provide particular specified
31 services agreed for the purpose of that job.

32 Willis of course also uses other forms of professional rather than just trade sub-contractors.
33 They use cost estimators of course, which is what Mr. Elbourn is, and no doubt in

1 appropriate circumstances it will use a variety of other professionals, structural engineers,
2 lawyers or accountants.

3 It is important also to recognise that this does not just work one way. The nature of the
4 business that AH Willis has also involves the fact that AH Willis is regularly a sub-
5 contractor to other parties, and one of the key people it provides sub-contracting services is
6 in fact, Mansell, and this is through the Civil Groundwork Division of AH Willis, you see a
7 mention by Mr. Willis in his statement that there is volume of business about £200,000 a
8 year in the past that AH Willis has done for Mansells. There is a huge number of sub-
9 contractors doing a variety of jobs both across the industry as a whole and in the context of
10 a business like Willis, and you may be the contractor on one job and sub-contractor on
11 another or vice-versa.

12 It is an obvious point but it is important to recognise, that any sub-contractor, any party
13 contracted to provide services, is at some level required to comply with the instructions of
14 the party it is contracting with. That may seem like an obvious point, but they are obliged
15 to do the job they have been hired to do, to carry it out in the way that they are directed, at
16 least in general terms by Willis, which is very important on building sites where issues like
17 Health & Safety will make it vital that the job is carried out in a particular way in a
18 particular manner. So any sub-contractor is in practice obliged to comply with instructions.
19 It may be that the instructions do not need to be wholly specific because to some extent you
20 are hiring a professional in to do the job in the right way, but they are obliged to comply
21 with those instructions.

22 It is also important to recognise that each of those businesses is effectively running its own
23 independent business, and the viability of that business will depend on its ability to acquire
24 work from Willis and a variety of other builders out there, and they are assuming the
25 financial and commercial risks of that wide business. But in the context of a single job, if
26 you have an electrician that is hired in to do the electrics on a building project that
27 electrician is only taking the financial and commercial risk associated with the electrics on
28 that job, he is not taking any wider risk on the job as a whole, because he is not agreeing to
29 do the job as a whole, he has a deal with Willis to provide just the electrics, Willis is the one
30 that is taking the general risk on the job.

31 The reason I start looking at this as a general point, it is important when one comes to look
32 at Mr. Elbourn to see him not simply as being a single example, but to see him as being
33 what he is which is one of many sub-contractors that AH Willis contracts with, and to see
34 the extent to which Mr. Elbourn is in some special category – either all those sub-

1 contractors are part of the same undertaking as Willis, which will be extraordinary and have
2 some quite extraordinary consequences, or there must be some special factor which makes
3 Mr. Elbourn part of the undertaking which no other sub-contractor would be. It is important
4 to recognise what the impacts of the undertaking question actually has.

5 First off it has the obvious consequence that the contractor is liable for the actions of the
6 sub-contractor, even though he is doing things that he never should, could or would have
7 been permitted to do. Strictly, it works both ways. If you are part of the same undertaking
8 then strictly you are both liable for the infringement, which leads to the position where the
9 sub-contractor is equally technically liable for the infringement if it is committed by the
10 main contractor. That is the logical consequence of what is being said here. If you are part
11 of the same undertaking you must be part of the same undertaking both ways round.

12 The other effect of treating two businesses as being part of the same undertaking, and one
13 sees it all the time with parents and subsidiaries, is you look at the entire turnover of the
14 undertaking, meaning the turnover of both businesses for the purposes of determining
15 penalty. One starts adding up turnovers by doing that and again one can get the old
16 situation conceivably where a sub-contractor might be part of an enormous organisation and
17 suddenly by treating the sub-contractor as part of a wider business that turnover issue can
18 massively inflate well beyond anything associated with the turnover of that particular job or
19 the turnover of the main contractor.

20 The other consequence which is fundamental in this situation is to recognise that the one
21 thing that you cannot do if you found that both two businesses are part of the same
22 undertaking is find that they are party to an anti-competitive agreement with each other,
23 because an anti-competitive is an agreement between undertakings. If therefore you are part
24 of a single undertaking you cannot have an anti-competitive agreement because that is
25 internal.

26 So, by stretching the definition of 'undertaking' you in fact prevent anti-competitive
27 agreement existing. I made the point earlier that, of course, AH Willis provides
28 subcontracting services to Mansell. The logical extension of that would be that AH Willis
29 could not have committed an infringement with Mansell if it was part of the same
30 undertaking as Mansell. Now, I am not suggesting that that is the right answer here today.

31 I am saying that that is the absurd development ----

32 THE PRESIDENT: If it was a subcontractor to Mansell on a particular job and it was therefore
33 part of the same undertaking, then they could not be.

1 MR. COOK: Yes. If it is right that merely being a subcontractor is enough to treat you as being
2 part of the same undertaking. But, I am saying that all of these propositions end up creating
3 very real problems, particularly one can create situations where, as is often the case, there
4 might be one subcontractor offering services to a variety of potential bidders - something
5 specialist where there might be one, or only a few, subcontractors who can provide that
6 particular field. So, it may be offering services, or offering to provide services, to a
7 number of potential bidders creating a very confusing scenario.

8 So, we say it would obviously create extraordinary results if every subcontractor was treated
9 as being part of the same undertaking as the company it contracts with. That clearly cannot
10 be right. Of course it is not right. The question ultimately, as the OFT says in para. 22 of its
11 liability defence, is the extent to which the subcontractor is carrying out an independent
12 economic activity and the relevant principle which is cited at para. 23 of the OFT's liability
13 defence (which we do not dispute) is of course taken from *Marlines S.A. v. Commission*.

14 The passage reads,

15 “-- where an agent works for his principal, he can in principle be regarded as an
16 auxiliary organ forming an integral part of the latter's undertaking bound to carry
17 out the principal's instructions and thus, like a commercial employee, forms an
18 economic unit with this undertaking”.

19 To be clear, we do not dispute in any way at all that there are some situations in which the
20 relationship between two technically separate businesses will be such that one business can
21 be regarded as an auxiliary organ forming an integral part of the latter's undertaking. That
22 is the touchstone that needs to be addressed.

23 Much of the case law in this area has dealt with sales agents. Particularly on the continent
24 that is because you have a category known as a commercial agent where it is commonplace
25 for sales agents to be theoretically self-employed, but in reality almost akin to employees.
26 So, you have situations in which an agent will be an exclusive agent and all he will do is
27 this business. In some cases he may do that for his entire life - or many years of his
28 professional life - working for and selling the products of a particular company. In those
29 circumstances the reality is that you will often have situations where, sometimes for
30 historical reasons, there will be a spread and, in some regions of Europe they will use a
31 sales agent and in other cases it will be their in-house salesmen. But, their relationship with
32 them, while technically distinct in terms of employee or self-employee will be very similar
33 and have very similar features, including potentially the way in which they are paid. Both
34 may be primarily or exclusively on a commission basis. In terms of the extent to which one

1 is taking risks of an independent business will be in practice very little different between the
2 two situations. Certainly in those circumstances one can readily see why the courts have
3 held that the sales agent is, in practice, an auxiliary organ of the company which is really an
4 integral part of the entire business.

5 In the case of Mr. Elbourn though we are certainly - there can be no doubt - in a very
6 different category from somebody who is effectively an employee. He is running his own
7 independent business. He works for companies and businesses other than Willis. So, he is
8 certainly not in that category of being the paradigm example. I will come back to whether
9 he is sufficiently close to be an auxiliary organ in any event, but he is certainly not within
10 that sort of paradigm example of somebody who will be treated as, you know, effectively
11 akin to an employee.

12 What then is the characteristic which would render Mr. Elbourn, who is obviously carrying
13 out his own independent economic activity, being different from all the other subcontractors
14 who are carrying out their own economic activities such that he should be treated as an
15 auxiliary organ forming an integral part of Willis's business?

16 The OFT focuses on a couple of points. Firstly, it focuses on the fact that Mr. Elbourn was
17 bound to carry out AH Willis's instructions. But, as I have already submitted, that in
18 practice is true of any contractor that is used - because in practice any contractor is bound to
19 do as it is instructed to do by the party that has paid it to provide services. It is not being
20 suggested that Mr. Elbourn was in some way in some completely different category. He
21 was being paid to provide particular services in the same way as an electrician or a plumber
22 was being paid to provide services, and to do so in practice to do the job he was being paid
23 to do, but to some extent how he chose to do that, when he chose to turn up to work, what
24 tools he chose to use in his job -- all those matters as one would when one hired any
25 subcontractor, the specific way one chose to do the job would be down to the contractor, but
26 in accordance with the instructions on the part of the employer.

27 So, there is nothing in that which distinguishes Mr. Elbourn from any other subcontractor in
28 the industry.

29 What is also being said by the OFT as its second point is that Mr. Elbourn was part of the
30 same undertaking as AH Willis because he assumed no financial or commercial risk in
31 relation to the contract in question, which was a contract with the University of Reading that
32 was being tendered for. The reason they say he was not really taking a financial or
33 commercial risk was because he was not himself offering to provide the contract services.
34 But, again, all they are doing is identifying a factor which is true of every single

1 subcontractor. The subcontractor is not offering to provide the contract as a whole. All he is
2 offering to do is his little bit of it as a contract with Willis - whether that is the electrics or
3 the plumbing or whatever else. So, any subcontractor is taking, effectively, the commercial
4 risk, the financial risk associated with the service that he is providing. That is the nature of
5 his business - but no wider financial or commercial risk, and certainly not a wider
6 commercial and financial risk in relation to contract as a whole. So, again, all they have
7 done is identify a feature that is true of every single subcontractor.

8 Where does that leave their case? In my submission it leaves them with somebody who is
9 simply the same as any subcontractor. He is an independent business and therefore there is
10 simply no rational basis to treat him as being part of an auxiliary organ integral to AH
11 Willis's business. That is the test. The question is whether you are effectively so integral to
12 the business that in practice you should treat Willis as being liable for the actions. That is
13 the impact of what is being done here. You are saying that there are times when
14 subcontractors are effectively so integrated within the business that you can properly start to
15 say," They are so close to being within your business that you should be responsible for
16 their actions as opposed to the general position where, if somebody is outside the business
17 they are responsible for their own behaviour effectively". That, we say, is the touchstone
18 that the OFT simply has not managed to address in relation to Mr. Elbourn to identify any
19 factor - simply because there is no factor - which takes us out of the standard run of
20 subcontractors.

21 It is also important to note that the OFT just did not have the confidence of its own
22 convictions in this argument. It relies upon the notion that Mr. Elbourn is part of the same
23 undertaking, but it does not follow it through to the logical extent of what that would mean.
24 As I have already submitted, if Mr. Elbourn is part of the same undertaking, he should be
25 the addressee of the Decision because he is part of that undertaking. Equally, if he is part of
26 the same undertaking, his turnover should have been relevant. It may be that he does not
27 have any turnover in the specific market under consideration, but certainly when he came to
28 address the MDT his turnover should have been included as total turnover. In practice it
29 may have made no difference to Willis's fine because the fine was much higher anyway, but
30 that is beside the point. That will be the consequence of the argument the OFT wishes to
31 run. The flaw in it is shown by the fact that the OFT itself was not willing to go that far.
32 The reason why we say that the undertaking point simply cannot stand - unless one can treat
33 every single subcontractor as being part of the same undertaking as any company it works
34 for, and the rationale for doing that will be simply extraordinary because what you are doing

1 is saying that you are responsible for anyone that works for you regardless of how tiny a
2 little job they do -- The fact that it is a one-off is simply, in my submission, absurd and, to
3 be fair, it is not something that even the OFT suggests is the right conclusion.

4 The next line of argument is the ostensible authority issue. The point being made is that
5 Mr. Elbourn acted with the ostensible authority of Willis, and so we are vicariously liable
6 for his actions in dealing with Mansell. Important points to note: one, it is not being
7 suggested that he had actual authority; two, the OFT are not suggesting that there is any
8 form of assumed understanding in the industry about the kind of authority that a third party
9 cost estimator will have. This is not a situation in which ostensible authority is based “cost
10 estimators always have this kind of authority”. It is not being suggested that it is based on
11 that kind of general understanding.

12 Also it is noticeable that the OFT has not sought to advance any direct evidence from
13 anyone at Mansell about how they saw Mr. Elbourn in this context. You are invited to draw
14 inferences based on comments in the documents, but the OFT has not done the obvious
15 thing of asking the individuals involved what they thought Mr. Elbourn could or would do,
16 or was in a position to do.

17 How does the OFT advance its case? What it does is make the point, and this we agree is
18 factually absolutely correct, that AH Willis gave Mr. Elbourn specific authority to submit
19 the tender return. We say that, in practice, that was basically an administrative process, but
20 AH Willis had decided what level of bid to go ahead with, but since the documents were
21 most conveniently with Mr. Elbourn he was given authority to sign and post the tender
22 return to the University of Reading. It is contended that that, in practice, is sufficient to
23 give Mr. Elbourn ostensible authority against all third parties in relation to this tender. So
24 that is the reason why it is treated as being good enough as against Mansell. It is against all
25 third parties based on that permission to submit the tender to the University of Reading.

26 Sir, it is quite helpful to see how the OFT puts its case in this regard and in particular the
27 liability defence at paras.25 to 27. Picking it up at para.25, I start by referring to footnote
28 39, which we see in the fourth line of para.25, because that sets out what I would agree is an
29 absolutely correct, unsurprisingly, since it is from **Bowstead & Reynolds**, statement of the
30 law of agency in this regard.

31 THE PRESIDENT: Sorry, which bit?

32 MR. COOK: It is footnote 39, which is a quote from **Bowstead & Reynolds**, a leading textbook
33 in this area, which has a summary of the principles in Article 72 set out there:

1 “Where a person, by words or conduct, represents or permits it to be [represented]
2 that another person has authority to act on his behalf, he is bound by the acts of
3 that other person with respect to anyone dealing with him as an agent on the faith
4 of any such representation, to the same extent as if such other person had the
5 authority that he was represented to have, even though he had no such actual
6 authority ...”

7 Certainly we would agree with that as an absolutely correct statement of the law.

8 Breaking that down though, what it involves, therefore, is, firstly, a representation, a
9 representation which is either made by Willis or which Willis permits to be made. So it has
10 to be a representation that derives from Willis in some way. Secondly, the counterparty
11 needs to deal with the agent on the face of that representation. So the important thing is that
12 the counterparty is the one that needs to be aware of and rely upon that representation.
13 If we now go to para.26 we see, applying those principles, how the OFT seeks to make good
14 its argument. They start off by making the point here about the representation – that is
15 para.26(a), so we have:

16 “... Willis explicitly consented to Mr. Elbourn generating and signing tender
17 returns ... Willis thereby represented that Mr. Elbourn that Mr. Elbourn was
18 authorised to act on its behalf in relation to the submission of its tender for
19 Redlands Road.”

20 It is significant to note that what the OFT does not grapple with is who was that
21 representation made to. The only person it was made to, since it is not suggested that
22 Mansell would ever have seen this tender return, or would have any reason to do so, the
23 only person it could have been made to was the University of Reading. So it is not a
24 representation that goes anywhere near Mansell.

25 THE PRESIDENT: The relevance of Elbourn to Mansell was that he knew what the figure was?

26 MR. COOK: Yes, absolutely, he knew what the figure was. We have made the point, he knew
27 what the figure was and in reality he was somebody who no doubt might have had half an
28 eye on getting some work from Mansell who were one of the bigger players in the area.
29 That was the only reason. That is a point we would very much make, Sir, that was all they
30 were doing, they were going to somebody who would get them the information, and the
31 notion that they were going to him because he was in a position to do anything on behalf of
32 Willis is simply absurd.

1 THE PRESIDENT: It is difficult to see how they could be relying on any representation. Why
2 would they be interested? The just wanted to know the figure, or a figure which was higher
3 than the figure.

4 MR. SMITH: Mr. Cook, I see that in para.26 of the defence and in your submissions there is a
5 reference to “ostensible authority” and “vicarious liability”. Are you equating those two
6 principles, or do you see them as distinct?

7 MR. COOK: It depends what you mean. The term “vicarious authority” means different things
8 in the context of whether you are talking about an employee or whether you are talking
9 about an agent. Certainly one of the disagreements between the parties, and arises in part
10 from the *HSBC* decision, is in the context of that difference, and in the context of an
11 employee you are vicariously liable for effectively anything that the employee does that is
12 connected ----

13 MR. SMITH: In the scope of his employment, yes.

14 MR. COOK: Yes, related to the scope of his employment. In the context of an agent – and that is
15 the second part of footnote 39 – you are looking at “is the agent acting within the scope of
16 their actual or ostensible authority?” It is only in those circumstances that it is brought
17 home to the principal. Vicarious liability is co-terminus with authority, actual or ostensible,
18 in the context of an agent, it is not in the context of an employee.
19 Turning then to para.26(a), that is the representation. The representation simply does not bit
20 in any way to do with Mansell.

21 The next point that is being made is 26(b), which is:

22 “Mr. Russ’ evidence that ‘Willis’ was approached for a cover, and the
23 contemporaneous document records the cover being obtained from ‘AH Willis’
24 rather than Mr. Elbourn. This indicates Mr. Russ’s (accurate) perception that
25 Mr. Elbourn was acting for Willis in relation to this tender.”

26 Again, in relation to this, there is an acceptance in the OFT’s liability defence at para.17(a)
27 that it appears that unsurprisingly that Mr. Russ, who might well not have been the person
28 actually involved in these, has no direct recollection of many of these tenders. What he is
29 doing is looking at his documents and saying, “Yes, that seems to be Willis because that is
30 what it says”. The notion that one can draw anything from the fact that Mr. Russ looked at
31 the document and thought it was Willis, in my submission, is simply wrong.

32 One is left then with a contemporaneous document recording the cover being obtained by
33 AH Willis, and if the work book records “AH Willis” in brackets it means it is a cover from
34 Willis.

1 The notion that that can be treated as saying that Mr. Elbourn was acting with actual or
2 ostensible authority in relation to Mansell is simply absurd. Sir, as you said, the point is
3 that this was a price that was coming from Mr. Elbourn but the important thing was that it
4 was a price that reflected what another bidder was doing, and that other bidder was
5 AH Willis. So, in practice, the only interest from Mansell's point of view was the fact that
6 it was a price based on Willis's price, not that it was coming with actual or ostensible
7 authority from Willis.

8 THE PRESIDENT: You mentioned Mr. Russ, Mr. Cook. At some point, it does not relate
9 necessarily to this issue, I would be interested to hear your submissions on what weight we
10 should give to the interview notes. We have not got a statement from Mr. Russ, and he is
11 not giving evidence, as I gather. It may be that you will be coming to that anyway.

12 MR. COOK: I will come to Mr. Russ in more detail when we come to the other two alleged
13 infringements. The suggestion is that you can infer from this that Mr. Russ is saying that
14 Mr. Elbourn had ostensible authority to act for Willis. That, in my submission, simply
15 cannot be right. If the OFT wanted to make good that point, it could have asked Mr. Russ
16 that question easily enough, and it chose not to do so.

17 The other point made in sub-para.(c) is the point, and this refers back to the first transaction
18 that we talked about earlier on today, which is the first interaction between Mansell and Mr.
19 Elbourn which was talking about the extension, and again it has been suggested this
20 provides evidence that Mansell consider that Mr. Elbourn had authority, represented AH
21 Willis; again in my submission that simply does not follow. The reality was that Mr.
22 Elbourn may well have been an appropriate person to talk to in the context of this because
23 he will be the person who would know who to ask at Willis, but there is simply no
24 suggestion they were going to him in the belief that Mr. Elbourn had authority to make
25 decisions on behalf of Willis himself unless they believed he had that authority, that was
26 simply asking somebody to act as messenger and that is an entirely different matter. Again,
27 the evidence does not stack up to suggest it was more than simply asking Mr. Elbourn as a
28 suitable messenger.

29 Again, in my submission, on the second limb of argument there is no basis to suggest that
30 Mr. Elbourn was acting in any way with the ostensible authority to act for Willis, and just
31 stepping back from the legal test, in my submission that clearly must be right. If you are
32 talking about the kinds of people that one would expect an employer to make sure are aware
33 of competition law requirements, to carry out compliance training with one expects people
34 to do that with employees, directors, in order to make sure that you are not liable. One does

1 not realistically expect any company to go out and every single time it employs a
2 subcontractor, even if that subcontractor is coming in for an hour or two hours to fit a bit of
3 wiring, or a boiler, to ensure that the compliance chain has been gone through because
4 realistically one is treating those as separate businesses, compliance is their responsibility
5 for their business and you take responsibility for your own business. Simply to treat AH
6 Willis as being responsible for people in the sub-contracting status of Mr. Elbourn is, in my
7 submission, simply unrealistic, as well as being legally wrong.

8 Turning now to alleged infringements 188 and 215. In relation to these infringements we
9 just have an unparticularised case that AH Willis is legally responsible, and was asked to
10 provide and did provide a cover price to Mansell. We say that the only evidence that the
11 OFT advances in practice is a single document and that is Mr. Russ' (of Mansell) work
12 book, so this is the stage at which I can address the point about what weight you should give
13 Mr. Russ' evidence.

14 The reason that I say you should give, in practice, no weight to Mr. Russ' evidence is you
15 see the sections that we quote in our notice of appeal, it is quite clear and accepted by the
16 OFT at para.17(a) of their liability defence, that Mr. Russ, it appears, has no direct
17 recollection of any one of these individual tenders. So while he can assist in terms of
18 explaining what the notations should mean, and certainly we do not disagree with that
19 reliance to that extent, he does not provide, and cannot provide any direct evidence to say
20 "Yes, I remember I talked to somebody at AH Willis" or "I was told that I talked to
21 somebody at AH Willis". All, in practice he is doing is looking at the document in the same
22 way that we can look at the document and say: "If that document is right then this is what
23 happened", or "probably would have happened". But ultimately his evidence is essentially
24 wholly parasitic upon the accuracy or non-accuracy of that underlying workbook document.
25 The same is even more fundamentally true of the second piece of evidence that the OFT
26 relies upon, which is Mansell's leniency application, because again there is no suggestion
27 that that is anything other than a wholly parasitic document prepared by lawyers who have
28 taken, with no direct knowledge themselves, the workbook, looked at it and said: "That is
29 what the workbook says and if that is what the workbook says this will be the position."
30 Ultimately all of the evidence comes down to the single reference in the workbook.

31 In the context of that single reference in a workbook ultimately the one of the questions the
32 Tribunal needs to consider is: "How reliable is that kind of evidence available?" Of course,
33 the OFT makes the point that it has been shown to be reliable in other cases and reference is

1 made to the variety of other infringements that decisions have been made in part based upon
2 the workbook; in some of those situations it has proved to be correct.

3 The point I make in relation to the work book, obviously there is a reference to AH Willis, it
4 is in brackets – that is a notation that has been explained. So if that reference is right, then
5 that indeed would be very strong evidence. The problem is it is difficult to be reliably
6 confident that it is right, and the reason for that is that this is a document that is on its face
7 unreliable. The reason why I say that it is on its face unreliable is in relation to
8 infringement 224, which is the one we have just been dealing with, the Mr. Elbourn
9 infringement, there is a statement in brackets. There is an “AH Willis” firstly in brackets,
10 and we have a second statement, which is also in brackets which, in itself is slightly
11 misleading because we are told that brackets means it is cover price, but it is a statement in
12 brackets saying “HN Edwards won it”. It is agreed and accepted by the OFT that HN
13 Edwards not only did not win that contract but was not even participating in the tender.

14 THE PRESIDENT: Is it helpful just to have it in front of us while you are making your
15 submissions?

16 MR. BEARD: Sir, we are conscious that the copy of the workbook that is at annex 1 of the
17 defence is not the easiest document to read so we have copies of a clearer version of this
18 and they are on A3. I have provided a copy to my learned friend, that is effectively annex 1,
19 so that is the copy of the workbook that is relied upon in relation to these matters. So if Mr.
20 Cook wants to make submissions it might be useful to refer to that version.

21 MR. COOK: I think it is helpfully highlighted, so if we pick it up on the first page. My learned
22 friend will want to say on the first page you have “(JJ McGinley)” they are in brackets and
23 that is an example of another infringement which is effectively not being challenged. You
24 see there at the bottom of the page and highlighted just “(JJ McGinley)”.

25 THE PRESIDENT: Yes.

26 MR. COOK: If we now go to the penultimate page and we see there the second section that is
27 highlighted, there is “(AH Willis)” there in brackets and “HN Edwards won it”. One can
28 start to draw some reasonable conclusions given the same references above potentially
29 about how that mistake came to be made – the specific way it came to be made may be a
30 different matter but ----

31 THE PRESIDENT: They were not in it, were they?

32 MR. COOK: HN Edwards were not in that infringement, but there is a very similar reference
33 above, and it may be that it was duty payment from that, but the problem this shows is that
34 this is a document that is unreliable, and I would say that reference is doubly wrong, and it

1 is doubly wrong because HN Edwards not only did not win it, it was not participating, and
2 the price was not coming from Willis it was coming from Elbourn. Certainly in relation to
3 HN Edwards that is just a point that establishes ----

4 THE PRESIDENT: No, sorry, which of the infringements – is that 224?

5 MR. COOK: That is 224, yes.

6 THE PRESIDENT: That is infringement 224, 12 and 16.

7 MR. COOK: If one goes up the page, the other highlighted “14 Redlands Road”, will be one of
8 the other infringements.

9 MR. BEARD: 215.

10 MR. COOK: 215, thank you. Willis is, unsurprisingly, not in a position to do much testing of
11 this document generally. The vast majority of these tenders it will have nothing to do with,
12 it is not in a position to know much about them. But on the very small number where we
13 can look there is immediately an acknowledged and admitted error. In my submission, that
14 casts a considerable amount of doubt upon the reliability that we can place upon this
15 document. In many ways it is not surprising that a document of this kind would not be
16 scrupulously accurate, this is not a formal or official document where you need to be taking
17 a significant amount of care to ensure it is right. It is not being suggested these final
18 comments were in practice of great importance going forward. Moreover, we had
19 confirmation from Mr. Russ himself that in practice he only filled the workbook in weekly.

20 THE PRESIDENT: Did he always fill it in? Is that the position – no one else did it, he did it?

21 MR. COOK: It is his workbook, yes, so Mr. Russ would be the one who would fill it in. He also
22 says that in some cases he might put the name in one or two weeks early based on the party
23 that he expected to provide a cover price – so the name might go in in anticipation of
24 something that never happened, or go in some time after something is thought to have
25 happened.

26 The other issue is that it is not suggested by the OFT that Mr. Russ was directly involved in
27 any of these tenders himself. His evidence records that he had a four man team of
28 estimators and that business unit managers were also involved in the tender process. So,
29 that is multiple people who might have been involved in any form of wrongdoing that was
30 going on. In my submission there is a clear scope there for Chinese whispers getting around
31 in terms of exactly what had happened; who was providing things. The conversation could
32 easily be, “I tried Willis. They weren’t around. So, I got somebody else”. You know, that
33 gets wrongly recorded as Willis. The point is that the reliability of this document is, in my
34 submission, significantly in doubt.

1 Set against that, then, we have the evidence that AH Willis itself can put forward. In
2 relation to this, ultimately all AH Willis can say is that it has carried out an investigation
3 itself and it simply cannot find any evidence basis for concluding that there was any contact
4 with Mansell or certainly any contact that constituted an anti-competitive agreement.

5 THE PRESIDENT: It was your client's investigations that gave rise to the Elbourn details.

6 MR. COOK: Yes. Exclusively. I would say that is very important because what it does show -- I
7 recognise the Tribunal will see, or may have seen, parties coming before the court who, in
8 practice, committed the infringement and are now trying to conceal it. I would suggest it is
9 important to recognise that AH Willis has, in practice, found a story, confessed to those
10 facts, brought them out before the OFT -- Legally I may be right or wrong. You may decide
11 I am right or wrong in terms of whether those facts mean that we are guilty and responsible.
12 But, Willis has tried to provide a full and comprehensive story, even when that might have
13 disadvantages for it. You should view the fact that Willis simply cannot find anything in
14 relation to these other two alleged infringements through the prism of that knowledge that
15 Willis has provided information where it could discover --

16 If we start for a moment just by assuming that AH Willis is innocent, it is important to
17 recognise what it is that an innocent party could do in terms of trying to show that it did not
18 commit the alleged infringements. The reality is that proving a negative is impossible. We
19 cannot prove that every single telephone call that was made to our offices during a period
20 six/seven years ago did not come from Mansell. One would not even begin to know how
21 one would start to find the telephone numbers of everyone who called us that kind of period
22 ago. So, we cannot prove the negative. All an innocent party could ever do - all we could
23 ever do - is say, "We carried out the investigation. We have asked all the people who could
24 possibly have had access to this information. They are telling me that nothing happened".
25 That is the only answer that can sensibly be given.

26 Part of the reason why that is the only answer we can give is because the OFT has chosen
27 to present a wholly unparticularised case. Now, it is important to recognise that this is not
28 a situation in which the OFT has turned every stone and has put before the Tribunal the best
29 evidence it could conceivably have got. On the contrary, despite having effectively fully
30 co-operation from Mansell as part of the leniency application, Mansell had to provide any
31 assistance the OFT reasonably required. It made no attempt, the OFT, to identify which
32 individual was involved in obtaining a cover price on the part of Mansell; which individual
33 at AH Willis is said to have been involved; when it might have happened. This is not a
34 situation where the OFT is trying to get those answers and has not managed, some years

1 after the events. On the contrary, if you look through the transcripts it is apparent that none
2 of those questions were ever even asked.

3 Now if we had specific allegations, in those circumstances you would expect Willis to be in
4 a position, at the very least, to try and meet those allegations. If it is said that a particular
5 individual is involved, then you can try and see if they were out of the country, if they were
6 in hospital, and put evidence from them directly before the Tribunal saying, “No, that is
7 simply not true”. But, without that particularisation all we can put forward - all any innocent
8 party could ever put forward - is simply a case that says, “We cannot find any evidence. We
9 do not believe we did this”. That is what Willis indeed puts before the Tribunal.

10 So, the situation is ultimately this: you have a single documentary reference in relation to
11 these infringements. There is no supporting material behind that because all the material
12 that does exist is effectively purely parasitic. That single documentary reference comes
13 from a document which is shown, on its face, to be unreliable and inaccurate in places. At
14 times I would accept it has been shown to be right. That example shows that it is not
15 always right. Then you are faced with Willis’ clear evidence - which I would suggest and
16 submit you should see as being reliable for the reason I have already suggested - that Willis
17 does not believe that it did anything wrong and cannot find the evidence that there was
18 contact of any kind.

19 Ultimately the question is: Has the standard of compelling evidence been met? In my
20 submission, it has not in this context.

21 Sir, unless I can assist further, those are my submissions on liability.

22 THE PRESIDENT: Thank you, Mr. Cook. Mr. Beard?

23 MR. BEARD: Mr. Chairman, members of the Tribunal, in relation to liability I will deal with it
24 in a series of four topics, if I may. First, the nature of the relevant evidential test; secondly,
25 the evidence relied on in relation to infringements 188 and 215; thirdly, the points relating
26 to infringement 224 - the Cyril Elbourn points, if one can put it that way; and, finally, one
27 or two wrap-up points.

28 Firstly, turning to the relevant evidential test, the appellant’s submissions are scattered with
29 references to the need for strong and compelling evidence. In his closing there my learned
30 friend referred to the need for compelling evidence - language which has previously been
31 used by this Tribunal, in particular in the *Napp* case at para. 109. Just for your notes that is
32 in Bundle 2, Tab 31. Obviously, that statement in *Napp* by the Tribunal was subject to
33 clarification and consideration in *JJB*, which for you notes is at para. 204, Volume 3, Tab
34 42. I will take the Tribunal to that case in due course. Since that time there has been at least

1 one important House of Lords authority dealing with matters of relevant evidential test. It is
2 therefore perhaps appropriate just to spell out the position because I understand that
3 although there have been the pleasure of many hearings before various constitutions of the
4 Tribunal, there has not actually been any particular consideration of these authorities.
5 The burden of proving an infringement of the Chapter I prohibition is on the OFT. The
6 standard of proof is the normal civil standard - balance of probabilities. As to the quality of
7 evidence required to satisfy this standard the seminal statement of the law is in the speech of
8 Lord Nicholls in *Re. H (Minors)*, which is at Volume 1, Tab 24. It is quoted in our liability
9 defence at p.2, para. 4. For your notes, this is at p.586. I will just read it out, if I may.

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

23 So, what we have here is the relevant standard is always the balance of probability, and
24 evidence required to meet that standard may differ according to the context - hence the
25 reference to whatever extent is appropriate in the particular case - with stronger evidence
26 being required for an allegation that is inherently improbable. But, there is no presumption
27 that conduct attracting a penalty, even a severe penalty, is inherently improbable. Rather, as
28 Lord Nicholls emphasised, context is essential. The improbability of an event must be
29 judged on the facts of each case.

30 This was a matter that was considered rather vividly by Lord Hoffmann in *Secretary for the*
31 *Home Department v. Rehman* which is in Volume 2 of the authorities at Tab 36.

32 THE PRESIDENT: This the lion in Hyde Park.

33 MR. BEARD: Lions and alsatians. I will simply read, if I may, the relevant paragraph.

1 “The civil standard of proof always means more likely than not. The only higher
2 degree of probability required by the law is the criminal standard. But, as Lord
3 Nicholls of Birkenhead explained In re. H (Minors) (Sexual Abuse: Standard of
4 Proof) at p.586, some things are inherently more likely than others. It would need
5 more cogent evidence to satisfy one that the creature seen walking in Regent’s
6 Park was more likely than not to have been a lioness than to be satisfied to the
7 same standard of probability that it was an alsatian. On this basis, cogent evidence
8 is generally required to satisfy a civil tribunal that a person has been fraudulent or
9 behaved in some other reprehensible manner. But the question is always whether
10 the tribunal thinks it more probable than not”.

11 Since that exposition (which is quoted again in the liability defence) there have been two
12 House of Lords cases. The first is *re. D (Northern Ireland)* which is at Volume 4, Tab 61.
13 But the case I was going to take the Tribunal to is *In re. B*, which is in fact in an additional
14 bundle of authorities. One would not have thought it possible with the twelve volumes that
15 an additional one was needed, but we overlooked this.

16 THE PRESIDENT: More probable than not.

17 MR. BEARD: I do not know in what form it comes?

18 THE PRESIDENT: Could it be Bundle 13, I wonder?

19 MR. BEARD: It may well be.

20 THE PRESIDENT: We have that now.

21 MR. BEARD: I will leave the court to read the headnote at the court’s leisure. It is vastly
22 different circumstances. It is to do with child custody and a particularly statutory test. The
23 context really is not of great significance or assistance here. The important consideration
24 begins on p.17. In this section Lord Hoffmann is giving an exposition and consideration of
25 a range of authorities concerned with the burden and standard of proof. Through the early
26 paragraphs - and in particular form para. 5 onwards - he considers various strands of case
27 law that have considered the relevant burden and standard of proof. I am not going to place
28 any emphasis on those paragraphs. If one turns on to para. 12 at p.20 Lord Hoffmann is
29 explaining there that a degree of confusion has arisen in relation to some of the case law and
30 the manner in which it should be interpreted, but he then goes on at the bottom of para. 12
31 to quote Dame Elizabeth Butler-Sloss in *In re. U*. That quote is, itself, essentially an
32 approval of, and quotation of, the passage to which I have already taken the Tribunal to
33 from *In re. H*. Then at para. 13 Lord Hoffmann says,

1 “My Lords, I would invite your Lordships fully to approve these observations. I
2 think that the time has come to say, once and for all, that there is only one civil
3 stand of proof and that is proof that the fact in issue more probably occurred than
4 not”.

5 Then he says he is not going to try and disprove particular statements of Lord Steyne, and
6 so on. Then he goes on at para. 14 to quote specifically that part of Lord Nicholls to which
7 I have already referred the Tribunal.

8 “The court will have in mind as a factor, to whatever extent is appropriate in the
9 particular case ----“

10 At para. 15,

11 “I wish to lay some stress upon the words I have italicised. Lord Nicholls as not
12 laying down any rule of law. There is only one rule of law, namely that the
13 occurrence of the fact in issue must be proved to have been more probable than
14 not. Common-sense, not law, requires that in deciding this question, regard
15 should be had, to whatever extent appropriate, to inherent probabilities”.

16 That is an emphatic and clear statement of the law. It is given a further exposition by
17 Baroness Hale in her judgment. If one turns on to p.32, para.62, starting at the bottom of
18 the page, handily sub-headed “The standard of proof”, she again quotes from *Re H*, and then
19 rehearses again in some detail some of the preceding case law which Lord Hoffmann had
20 already referred to. The part I would direct the Tribunal to is at para.70 on p.35:

21 “My Lords, for that reason I would go further and announce loud and clear that the
22 standard of proof in finding the facts necessary to establish the threshold under
23 section 31(2) ... is the simple balance of probabilities, neither more nor less.
24 Neither the seriousness of the allegation nor the seriousness of the consequences
25 should make any difference to the standard of proof to be applied in determining
26 the facts. The inherent probabilities are simply something to be take into account,
27 where relevant, in deciding where the truth lies.”

28 Paragraph 71 is rather particular to that case. Then 72:

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

1 all improbable. Nor are serious allegations made in a vacuum. Consider the
2 famous example of the animal seen in Regent's Park. If it seen outside the Zoo on
3 a stretch of greensward regularly used for walking dogs, then of course it is more
4 likely to be a dog than a lion. If it is seen in the Zoo next to the lions' enclosure
5 when the door is open, then it may well be more likely to be a lion than a dog."

6 That is the approach to be adopted. One looks at the circumstances of the case and whether
7 or not a particular allegation is inherently improbable, not the seriousness of the allegation,
8 not the seriousness of the consequences.

9 The second point to stress is that it is also well established that in proving an infringement
10 of the Chapter I prohibition the OFT does not have to rely on a specific type of evidence,
11 nor is there any general rule as to the volume of evidence required to prove an infringement.
12 A single item of evidence or wholly circumstantial evidence may well be sufficient proof of
13 a prohibited agreement, and it may well be necessary to draw inferences from fragmentary
14 and sparse evidence of unlawful conduct. It is necessary to take account of whether any
15 other plausible explanation has been offered. In that regard I would take the Tribunal to
16 volume 3 of the authorities, tab 42. This case is sometimes referred to *Allsports* and
17 sometimes referred as *JJB Sports*. It was, in fact, both of those cases. It is just that in
18 certain skeletons it is referred to as one thing and in others it is the other, but it is the same
19 case. The page I would refer the Tribunal to is p.59. This is a section of the judgment
20 which was dealing with issues to do with the burden and standard of proof. For your notes
21 it starts at para.164. There was consideration of *Napp* and consideration of various other
22 judgments. With due respect to the Tribunal, following that recent House of Lords
23 authority I think it is unnecessary to revisit all of that. The authority is now extremely clear,
24 and therefore the conclusions at para.204 about "strong and compelling evidence" and
25 "standards", and so on, should be read properly in the light of the judgments to which I have
26 taken the Tribunal.

27 The material I wish to refer the Tribunal to in relation to this second point, the nature of the
28 evidence in these sorts of case, is to be found at para.206. It is focused in particular here on
29 price fixing cases, but the same rationale applies in relation to all unlawful agreements and
30 concerted practices. In particular it is the quotation from *Aalborg Portland v. Commission*,
31 which is approved by the Tribunal, that is of crucial importance. At paras.55 to 57 of the
32 judgment of 2004 it is said:

33 "55. Since the prohibition on participating in anti-competitive agreements and
34 the penalties which offenders may incur are well known, it is normal for the

1 activities which those practices and those agreements entail to take place in a
2 clandestine fashion, for meetings to be held in secret, most frequently, most
3 frequently in a non-member country, and for the associated documentation to be
4 reduced to a minimum.

5 56. Even if the Commission discovers evidence explicitly showing unlawful
6 conduct between traders, such as the minutes of a meeting, it will normally be only
7 fragmentary and sparse, so that it is often necessary to reconstitute certain details
8 by deduction.

9 57. In most cases, the existence of an anti-competitive practice or agreement
10 must be inferred from a number of coincidences and indicia which, taken together,
11 may, in the absence of another plausible explanation, constitute evidence of an
12 infringement of the competition rules.”

13 That account applies equally in relation to bid rigging and cover pricing. As is emphasised
14 in *Apex*, and I will take the Tribunal to it in due course, here we have a situation where
15 effectively the parties to the cover pricing arrangement committed deception on those
16 receiving the tender. They know full well that these are not matters you should not be
17 engaging in. Although there have been in a number of the appeals expressions of righteous
18 indignation that textbooks, and so on, somehow suggested that cover pricing was a
19 permissible activity, in fact it is clear that these cover pricing activities were not ever
20 declared to tenderers, not in relation to any of the infringements.

21 THE PRESIDENT: We have got one example in one of the cases that we have had where
22 someone rang up the client and said, “So and So wants a cover, is it all right if we give them
23 one?” and the client said, “Fine”.

24 MR. BEARD: There were cases in the course of the investigation where such things were
25 identified, and they were not actually pursued in general as infringements.

26 THE PRESIDENT: We have looked at those.

27 MR. BEARD: Absolutely, but the point is a simple one: here you were not declaring it to the
28 person receiving the tender. You engaged in the deception. You engaged in the deception
29 in relation to a matter where you would not necessarily hold a great deal of documentary
30 material, and therefore the *Aalborg Portland* principles and analysis apply in the context of
31 these sorts of arrangements.

32 *Aalborg Portland* itself, again, unfortunately is not in the bundle. There is a copy of the
33 Advocate-General’s opinion in *Aalborg Portland* in the supplementary bundle. I actually

1 have copies of *Aalborg Portland* itself if the Tribunal wants them. They do not add a great
2 deal, frankly, to the quoted passage. So unless the Tribunal ----

3 THE PRESIDENT: If you have got copies why do you not give them to us.

4 MR. BEARD: I will provide them to Mr. Bailey and Mr. Cook.

5 THE PRESIDENT: We are probably going to rise for ten minutes at some point this morning so
6 that might be a good time.

7 MR. BEARD: Perhaps I could press on with this introductory section and then we could pause
8 for ten minutes and I will then move on 188 and 215, if I may.

9 THE PRESIDENT: Of course.

10 MR. BEARD: Applying these sets of principles, the principles from in *Re B*, applying in *Re H*
11 (*Minors*) and the *Allsports' Aalborg Portland* analysis to the present case, three comments
12 need to be made. First, the Tribunal, in assessing the quality of their evidence will
13 undoubtedly need to take account of the fact the infringements found by the OFT are
14 serious ones, for which, in many cases, substantial penalties have been imposed.
15 Nevertheless, the Tribunal will also need to take into account the fact that the findings of
16 infringement are made in relation to conduct which was extremely widespread. The
17 Tribunal is well aware of the extent of the investigation that was undertaken by the OFT and
18 the process by which it actually had to be narrowed down, that at one point there were
19 thousands of potential or suspected infringements which amounted to, in total, just in
20 relation to the value of the contracts at issue, around £3 billion.
21 In the construction industry there has been now an admission by vast numbers of
22 undertakings. Many people came in for leniency, many people accepted the fast-track offer.
23 This is not, therefore, a case where the infringements at issue can be regarded as inherently
24 improbable.
25 Secondly, the nature of the infringements involved are such that there is very little
26 documentary evidence of the unlawful conduct, but that does not prevent the OFT from
27 reaching conclusions as to what probably occurred on the basis of the totality of the
28 evidence before it.
29 Thirdly, the OFT is required to prove that the instances of cover pricing found in the
30 decision occurred. It is not required to prove the precise date on which they occurred, the
31 specific individuals involved in those infringements. The absence of those details does not
32 prevent, and has not prevented, the OFT from demonstrating the existence of conduct
33 constituting an infringement of the Chapter I prohibition – and in parenthesis, nor has it ever
34 prevented the European Commission from doing so either.

1 All of those points taken, it should not be suggested that the OFT took any deliberate
2 decision to advance an unparticularised or general case; nor that no attempt was made by
3 the OFT to identify how unlawful arrangements were made, as Willis has sought to suggest.
4 Rather, it reflects that the reality of the evidence available for this infringement, and indeed
5 most infringements, has not enabled detailed evidence to be elicited. The OFT's evidence
6 against Willis was derived not only from contemporaneous documentation, as had been
7 preserved by Mansell and to which I will come in relation to the specific infringements, but
8 also from lengthy interviews with Mansell's group commercial director and managing
9 estimator in Mansell's North-East region, a chief estimator in Mansell's Nottingham office,
10 a senior estimator in the Nottingham office, the estimating manager of Mansell's London
11 office, and Mr. Barry Russ, who was the managing estimator in Mansell's Slough office as
12 well as being the author of the workload reports. So questions were asked of a wide range
13 of people about how Mansell went about dealing with cover pricing. The fact that specific
14 recollection of specific events and specific individuals could not be recalled by these people
15 and, therefore, no further questions were asked about specific events, does not in any way
16 detract from the force of the evidence. As I will go on to show, that material clearly shows
17 that on the balance of probability the infringements which are found against Willis were
18 committed by Willis and Mansell, and in those circumstances it is right that the OFT made
19 findings of infringement and imposed the penalties.

20 I would intend now to the specifics of the infringements, so if now is a useful for the
21 Tribunal?

22 THE PRESIDENT: We will have a ten minute break. Thank you very much.

23 (Short break)

24 THE PRESIDENT: Yes, Mr. Beard?

25 MR. BEARD: I was turning to deal with the evidence in relation to infringements 188 and 215.

26 The Tribunal will recall that infringement 188 which, for your notes, is at decision IV.5182,
27 concerns a tender for refurbishment of a farmhouse and cottage in Didcot which is owned
28 by the University of Reading. Willis, Mansell and two other companies were invited to
29 tender, the winning tender was that of Cavendish Construction, Willis' bid was the second
30 lowest, Mansell placed a higher bid, the decision finds that Willis gave Mansell a cover
31 price in relation to its bid.

32 Similarly, infringement 215, that is decision IV.6018, concerns a tender for the conversion
33 of flats of a building owned by the University of Reading. Willis, Mansell and a number of
34 other companies are invited to tender, the winning tender was Crown Construction, Willis

1 and Mansell bid, Mansell's bid was higher, again the decision finds that Willis gave
2 Mansell a cover price in relation to this bid.

3 As set out in the decision at some length in relation to infringement 188 from p.1328, and in
4 relation to infringement 215, at p.1475, the OFT bases its finding of infringement in both
5 cases on the following matters. I was not going to go through the details of that.

6 THE PRESIDENT: No, all right.

7 MR. BEARD: The following matters are: a general explanation by Mansell's representatives of
8 Mansell's participation in cover pricing. I have referred to some of the interviews that were
9 carried out already this morning. The relevant passages there are in paras. IV.470 to
10 IV.502, which starts at p.494 of the decision. That sets out much more of a background of
11 how Mansell operated in the industry more generally and provides support for the specific
12 material then provided by and relied on by Mr. Russ and used by the OFT. Indeed, the OFT
13 does rely on a table submitted by Mansell as part of its leniency application listing both
14 tenders as instances ----

15 THE PRESIDENT: Is this the second piece of evidence you rely on?

16 MR. BEARD: I was going to say this table is a distillation of information from the interviews and
17 from Mr. Russ' workbook, it is actually annex 2 in the defence, but it was provided
18 pursuant to the leniency application and it draws very heavily upon Mr. Russ' workload
19 reports.

20 THE PRESIDENT: Yes.

21 MR. BEARD: What it clarifies are the directions of cover pricing and so on in relation to those
22 matters.

23 THE PRESIDENT: Annex 2.

24 MR. BEARD: Yes. We have larger copies of that as well.

25 THE PRESIDENT: Yes, that would be very helpful.

26 MR. BEARD: (Same handed) I am not going to refer to this table, but just so that the Tribunal
27 has them.

28 THE PRESIDENT: What does it tell us about Willis that the workbook does not tell us?

29 MR. BEARD: Into this has been input the basis on which the particular projects were either
30 received a cover price or passed a cover price and sets out some more details about the
31 reasoning, but it does not take matters a great deal further than the workbook itself,
32 certainly in relation to the specifics.

33 THE PRESIDENT: We will need to know exactly what it says about Willis, so do take us to it
34 because I do not have it in my mind at all.

1 MR. BEARD: If one looks at the fuller page what you have here is a distillation of the various
2 project names by reference. On the left hand side you have Mansell's own internal
3 reference number, the relevant tender date is the next column, then you have the project
4 name or reference, which is the same as is used in Mr. Russ' workbook, those first three
5 columns one will see come out from Mr. Russ' workbook. There is "Project type", that is a
6 broad categorisation by market which is different from Mr. Russ' workbook, there was no
7 such designation there. The project bid value is an outturn price. Mr. Russ' workbook
8 provides more detail and I will explain that in a moment.

9 Then it has the name of the company provided with pricing information, so this is the
10 counterparty column, so it is a summary. Then you have two columns indicating whether
11 Mansell was giving or receiving the cover.

12 In relation to the three infringements we are concerned with they are all receipts, but there
13 are a number of "G"s one can see as well, and the next column is the part of Mansell which
14 was dealing with the relevant projects, so that is not of great relevance. Then the final
15 column is a reason for the cover pricing. That is input by way of the comment of the
16 Mansell employees who assisted their lawyers in providing this table which was submitted
17 as part of the leniency application. So in some ways it is more detailed than Mr. Russ'
18 workbook, it does have some input from the interviews, and therefore does contain relevant
19 information that was used by the office in the consideration of infringements relating to
20 Mansell.

21 THE PRESIDENT: I have just had a very quick look through, I cannot be sure but is Willis only
22 mentioned on p.1?

23 MR. BEARD: No, I think the three particular infringements we are dealing with are found, if one
24 uses the numbers down the left hand side, 19, 24 and 41.

25 THE PRESIDENT: Yes, we are not dealing with 10 ----

26 MR. BEARD: No.

27 THE PRESIDENT: -- because although that is Willis that is not ----

28 MR. BEARD: Yes, and 23 is also Willis, and 42 is also Willis.

29 THE PRESIDENT: The ones we are dealing with – you did mention them?

30 MR. BEARD: 19, 24 and 41. So taking them in turn, 19 correlates with infringement 215, 24
31 correlates with infringement 224, and 41 correlates with infringement 188.

32 MR. COOK: Sir, my version of 19 is blanked out.

33 THE PRESIDENT: It is not on ours.

1 MR. BEARD: No, I am sorry. It should have a document number in the corner B1351. Here is
2 another copy. I should say that this contains confidential information, I have provided it to
3 my learned friend but it has not been passed to those behind him. Obviously it is the figures
4 that are confidential in relation to these sorts of matters, and the same is true of Mr. Russ'
5 workbook. It does contain certain relevant information. Just working through the material
6 relied upon. First we have the general explanations from Mansell's representatives, then we
7 have the leniency submission that is this, and then we have the electronic workload reports
8 from Mr. Russ, the Mansell managing estimator. I passed up earlier an enlarged and clearer
9 copy of those, they are at annex 1 when my learned friend was making submissions earlier.

10 THE PRESIDENT: Yes.

11 MR. BEARD: It should have in the top right hand corner "B3539", which is the OFT internal
12 document number. If the Tribunal wants to mark this as effectively "annex 1" to the
13 defence, that is what this is.

14 THE PRESIDENT: And who prepared this?

15 MR. BEARD: This is Mr. Russ' document. The one we have just been looking at is the leniency
16 document which is at annex 2, and that was compiled presumably by Mansell and its
17 lawyers.

18 THE PRESIDENT: Forgive me for asking, is this the actual document? It is not a typed up
19 version, it is the actual document?

20 MR. BEARD: No, this is the printed downloaded version that was provided to the OFT and this
21 is copies of it. That has been confirmed by those who dealt with this behind me.

22 THE PRESIDENT: Yes.

23 MR. BEARD: We have that table but, in addition, there is evidence from interviews with Mr.
24 Russ who explained how he recorded cover bids in his workload reports. In other words,
25 we got an explanation of this from Mr. Russ, part of which is quoted in the defence. The
26 important points to note from that explanation ----

27 THE PRESIDENT: The interview notes?

28 MR. BEARD: Yes, and they were just going in this regard to explain how he had filled in the
29 document, and if one looks at that document what one sees is matters that Mr. Russ
30 explained in his interviews. The first point is that where Mansell actually tendered a job, in
31 other words put in a real bid, he would put a figure in the left hand numbered column which
32 is bid, because what we have on this table is on the left hand side a column which is the
33 internal reference numbering for Mansell, then we have job descriptions, then we have a
34 description under the heading "Our Bid", and it is "bid net provision percentage margin"

1 and then “other bids”, “result” and some “remarks”. The crucial parts of the document for
2 these purposes are obviously the “location and description” in order to specify with what we
3 are dealing. The net and bid columns and the remarks column are relevant because where
4 Mansell -- Mr. Russ explained that where Mansell was actually pitching in for a bid it
5 would put a proper figure in the bid column, but where it was taking a cover it did not. So,
6 you see instances where there is no entry in the bid column and there is an entry in the net
7 column. Perhaps the most relevant of these for our purposes is the penultimate entry on the
8 page, which is numbered 72597 - High Wycombe - Repairs to 13 Wimpey. No fines.
9 House”. There you see there is a gap in the bid column; there is an entry in the net column;
10 and if one works one’s way across one sees in parentheses the name ‘J.J. McGinley’. The
11 other thing that Mr. Russ explained about how he filled in this table was that when he had
12 received a cover in relation to a tender he would put the name of the person who provided it
13 in parentheses in the remarks column.

14 So, what you have here, on Mr. Russ’ account is, in relation to the High Wycombe job,
15 which they had internally numbered 72597, they had received a cover (they had not put in a
16 real bid, but had received a cover) and therefore had not filled in the main bid column, and
17 that cover was from J.J. McGinley. The reason I highlight that particular row -- I am sorry,
18 sir. You look troubled by that analysis.

19 THE PRESIDENT: No. No.

20 MR. BEARD: The reason I draw attention to that is because that particular job is actually relates
21 to infringement 91. So, infringement 91, which is not concerned with Willis, but is an
22 infringement involving J.J. McGinley and Mansell, was actually evidenced by this. In our
23 skeleton argument we have listed out the various jobs that resulted in infringements where
24 Mr. Russ’ table was used. I have just got a navigation for that list in the skeleton which I
25 hope is of assistance to the Tribunal. I have provided it to my learned friend. (Same
26 handed)

27 THE PRESIDENT: Thank you. So, this is a slightly expanded version of what you have got in
28 your skeleton.

29 MR. BEARD: Essentially it is the skeleton. So, it picks up the infringements where Mr. Russ’
30 workbook was used as evidence. This is in addition to the other material I have already
31 referred to - the interviews and leniency, and so on. These are the cases where Mr. Russ’
32 workbook was referred to. What we have done is to list out the infringements. I should note
33 that there is a variation between this list and the skeleton because we realised we had made
34 a mistake. 153 in the skeleton is 154 here. We have then included the references in the

1 Decision, both the paragraph and the page numbers, just for your notes and assistance we
2 hope. Then we have listed out the parties giving the cover. So, these are the counterparties
3 to the infringement. Then the final column is just the reference. It was intended that this
4 might assist the Tribunal in considering the consideration of Mr. Russ' workbook.

5 Having that on one side - and I will come back to that full list - what we have got here is a
6 situation where we have a table from Mr. Russ. I have shown you infringement 91, which
7 is the McGinley one, which is the fifth in the navigation table. If one turns on two pages
8 you will see that there is a highlighted line across the middle.

9 THE PRESIDENT: Yes. Oxford Re-Roofing.

10 MR. BEARD: That is infringement 154.

11 THE PRESIDENT: That is the one that is 153 in your skeleton.

12 MR. BEARD: Yes. It is 154. The person providing the cover bid was Apollo. Of course,
13 Apollo did not just provide one cover bid. If one turns over the page you will see
14 highlighted four lines on that page. The first is Didcot, Willington Down Farm. That is
15 infringement 188. Since that is one of the infringements at issue, just to focus on that for a
16 moment -- What we have there is Didcot, Willington Down Farm. No entry in the bid
17 column. Entry in the net. Read across: (AH Willis).

18 THE PRESIDENT: "Less prov". What does the column mean after net. You did explain, I
19 think.

20 MR. BEARD: Less provision. That is the provision they are making presumably in relation to
21 their account.

22 THE PRESIDENT: They have that in some of the covers and not others, do they not?

23 MR. BEARD: Yes. There is an explanation of that.. Mr. Woolf points out that in the transcript at
24 annex 3 at pp.21 to 22 -- I will perhaps leave the Tribunal to refer to that. It does not in any
25 way undermine the fundamental analysis which is where you have a gap, a net entry and
26 then parentheses at the end. There was a consistent approach by Mr. Russ that those were
27 accepted cover bids, and they were cover bids provided by the person mentioned in the
28 parentheses.

29 The next one down that has been highlighted -- I should say that these highlights were not
30 on the original document. We have just provided this to navigate the way round.

31 Hillington, Sutton Court shops, external refurbishment. Again, gap in the bid column.

32 Reference in the net column. Apollo. That is infringement 199.

33 The next highlight is Bracknell, Mount Pleasant, Phase 4 - window replacement. Again, a
34 gap in the bid column, an entry in the net column, Apollo. That is infringement 203.

1 Where it says Price Schedule Calls that was where a bid had gone in and then the person
2 seeking the work had actually said, “Well, we want a more detailed price schedule
3 provided”. Of course, if you have been cover bidding then you have got to do something
4 about getting some more details in, which explains why it is noted.

5 The next one highlighted on that page - Sunninghill Refurbishment - 10-12 Bowden Road..
6 Gap. If one reads across - Francis. That is Francis and Barrett. Infringement 208. Then,
7 one turns over the page again. There are two further highlights. Reading University, 14
8 Redlands Road. Gap in the bid column. Entry in the net column. AH Willis. That is
9 infringement 215.

10 Finally, for these purposes, one sees the highlighting on Reading University,
11 Refurbishment, 12 & 16 Redlands Road. Gap in the net column. At the far side - ‘(AH
12 Willis)’. This is where there is an additional parenthesis saying that HN Edwards won it,
13 which it is accepted is not correct. But, I will come back to that.

14 THE PRESIDENT: Infringement 224 is ----

15 MR. BEARD: That is Mr. Elbourn.

16 THE PRESIDENT: Then where a price schedule was called for, was it not?

17 MR. BEARD: Yes. But, that is not marked. What that shows is how the material was used for a
18 number of the infringements that one finds in the navigation table I have provided to you.
19 The only reason I have not taken you to the earlier ones in the navigation table. It is simply
20 because they are in another section of Mr. Russ’ workbook. It is not just the 3539. There is
21 another document which covers the earlier ones.

22 But, just working through then that navigation table, what we have is infringement 22 where
23 Connaught was the party giving cover. There, apart from the more general evidence from
24 Mansell, there was reliance on Mr. Russ’ workbook and Connaught did not dispute the facts
25 alleged against it. It took the FTO.

26 If one takes infringement 42, the party giving cover was Try Accord. Again, reliance on the
27 workload report. Galliford Try, the parent company, accepted the OFT’s FTO and did not
28 withdraw it when this infringement was put in the SO. Of course, it is worth noting that
29 Galliford Try is the parent company that has brought a penalty appeal and has not sought to
30 challenge anything to do with fining of liability here.

31 The next up is 43 on that table - relying on Mr. Russ’ workbook. In its response to the SO
32 J.J. McGinley specifically admitted hat it engaged in cover pricing activities on this tender
33 and did not seek to challenge any liability.

1 Infringement 69. The party giving cover was Francis. That was a case in response to the
2 SO. Francis did not contest the OFT findings. Again, penalty appellant before this
3 Tribunal, no challenge being brought on liability.

4 Infringement 91. J.J. McGinley. Again, specifically admitted in relation to the SO
5 response.

6 Infringement 97. The same thing. J.J. McGinley specifically accepted that it engaged in
7 cover pricing.

8 Infringement 154. Apollo. Again, relying on Mr. Russ' workload. Another penalty
9 appellant, not challenging liability in relation to this finding.

10 Infringement 188. Willis.

11 Infringement 199. Apollo again. The same point.

12 Infringement 203. Apollo again.

13 Infringement 208. Francis is giving the cover. Again, a penalty appellant. No challenge.

14 Infringements 215 and 244 - we are back with Willis.

15 So, what we have here is a situation where Mr. Russ' workbook sheets approach this matter
16 in a consistent manner. Sometimes in cartel discussions one talks about looking for the
17 document that is a smoking gun, the confession. Those things very, very rarely exist.

18 Normally, one is trying to tally different people's diary entries or understand obscure codes
19 and pricing formulae. Here we do not say, "This is a smoking gun in the sense that it is a
20 direct evidence of communication between two parties at a particular time", but we do say
21 that this is powerful evidence that here we had a situation where cover prices were being
22 taken from the particular companies concerned. The corroboration of that document comes
23 in part from the fact that it is being consistently applied; it is not challenged; it works as a
24 basis for understanding whether or not cover pricing is being accepted here. So, the OFT's
25 case is based upon a reliable contemporaneous report, implicating Willis in cover pricing.

26 Of course, in addition to that report, we have the background evidence from Mansell. We
27 have Mr. Russ' account of how he compiled the report. The fact that certain entries were
28 made at different times does not alter the strength of the entries. The entries are reliable.

29 They are good evidence. When one is assessing whether or not it is more likely than not ----

30 THE PRESIDENT: Can we just touch on this? I am afraid, I have read the interview, but, as you
31 know, we are in a lot of cases and it was a little while ago. Is it correct, as Mr. Cook said,
32 that Mr. Russ says that he sometimes put them in in anticipation of what he expected to do?
33 Or that he expected someone else perhaps ----

1 MR. BEARD: In relation to the particular cases that he was asked about here, he said he had no
2 direct recollection of cover pricing. That was not really surprising given the lapse of time.
3 One can see from this schedule that there was quite a lot going on even just in relation to
4 Mansell - because I have only highlighted the particular infringements which arise on the
5 basis of Mr. Russ' workbook in the Decision. When one goes through it one can see there
6 are all sorts of parenthetical entries all the way down all the pages. Mansell's leniency
7 application made that very clear. There was an awful lot of this going on with an awful lot
8 of other companies. So, it is not surprising that he does not remember the particular
9 instances. He does say that he considers that this table is accurate and sound, and he does
10 so in relation to these particular infringements.

11 THE PRESIDENT: You see, we have not got him here giving evidence and being cross-
12 examined. We have got to do the best we can. However, just to ask you again, does he say
13 that on occasions ----

14 MR. BEARD: Yes. He says that there were circumstances where he would. That was not the
15 normal course of the way that he operated in relation to this table. He does not say that in
16 relation to these particular infringements relating to Willis.

17 THE PRESIDENT: He only says that in respect of certain infringements, does he?

18 MR. BEARD: He makes a general point that he may on occasion have done so, but in relation to
19 these infringements he does not say that.

20 THE PRESIDENT: I am sorry, I am not clear what you are saying. Are you saying that he made
21 a general point that on occasions he put them in anticipation, but that he expressly excluded
22 these instances.

23 MR. BEARD: No, it was not express. It was not express, but these were not instances where he
24 said he thought he had put these in ----

25 THE PRESIDENT: So he said that in respect of specific infringements?

26 MR. BEARD: No, he made a general comment saying, "There may have been occasions where I
27 put the entries in in anticipation of actually receiving the cover bid". In saying that, he did
28 not suggest that there were any circumstances where he made the entry before he received
29 the cover bid but then actually did not get a cover bid. There is no suggestion of that in his
30 interview. What he said was that there were circumstances where he made the entry before
31 the cover bid was actually received. He did not specify that there were any particular
32 entries of that sort, and he did not say that in relation to any of these infringements. I hope
33 that assists in answering the question.

