Neutral citation: [2007] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1061/1/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

22 February 2007

Before:

Marion Simmons QC (Chairman)
Michael Blair QC
Vivien Rose

Sitting as a Tribunal in England and Wales

BETWEEN:

MAKERS UK LIMITED

Appellant

and

OFFICE OF FAIR TRADING

Respondent

Mr. Aidan Robertson (instructed by DLA Piper Rudnick Gray Carey) appeared for Makers UK Limited

Mr. Tim Ward (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Heard at Victoria House on 30 October 2006

JUDGMENT

I INTRODUCTION

1. By a Notice of Appeal dated 21 April 2006, Makers UK Limited ("Makers") appeals to the Tribunal against Decision No. CA98/01/2006 taken by the Office of Fair Trading ("OFT") on 22 February 2006 ("the Decision"). The Decision was taken under section 2(1) of the Competition Act 1998 ("the Act") which prohibits agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

2. In the Decision the OFT concluded that various roofing contractors, including Makers, had infringed the prohibition contained in section 2(1) of the Act ("the Chapter I prohibition") by colluding in the making of bids tendered for flat roof and car park surfacing contracts using mastic asphalt in England and Scotland. Thirteen contractors were found to have been involved in various individual agreements or concerted practices each of which had as its object or effect the fixing of prices for a particular building project requiring the supply of asphalting services for flat roofs. Penalties were assessed by the OFT against all of those contractors.

3. Makers was found to have colluded with other contractors in relation to one bid, that relating to the re-roofing of the car park at premises known as Elliott House in London. A penalty of £526,500 was imposed on Makers in respect of this infringement. Makers' appeal challenges both the finding of infringement and the level of the penalty imposed.

II THE STATUTORY FRAMEWORK UNDER THE ACT

4. Section 2 of the Act provides, so far as material:

> "(1) … agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited …

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions …"

5. Section 25 of the 1998 Act provides that where there are reasonable grounds for suspecting that there is or has been an infringement of the Chapter I prohibition, the OFT may conduct an investigation. For the purposes of an investigation, the OFT may require a person to produce specified documents or specified information and may also enter business premises in connection with the investigation (see sections 27 and 28).

6. Following an investigation under section 25 of the Act, the OFT may, pursuant to section 31(1)(a), make a decision that the Chapter I prohibition has been infringed. Before doing so, the OFT must give the person or persons likely to be affected by the decision the opportunity to make representations: see section 31(2). The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No 2751) ("the OFT's Rules"), which came into force on 17 November 2004, provides that a Statement of Objections must be served on each person whom the OFT considers to be a party to an infringement of the Chapter I prohibition.

7. Section 36(1) provides that, on making a decision that conduct has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay a penalty in respect of the infringement. Any party to an agreement in respect of which the OFT has made a decision may appeal to this Tribunal against, or with respect to, that decision: section 46(1) of the Act.

8. Section 60 of the Act provides, so far as material:

"(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the [European] Commission."

9. By virtue of section 60 of the Act, section 2 of the Act is to be interpreted in a manner consistent with Community law. Section 2 is closely modelled on Article 81 of the EC Treaty.

III THE FACTUAL BACKGROUND

10. Makers is a private limited company that provides contract services in the specialist field of concrete repair and preservation and structural refurbishment. It also carries out other construction work involving specialist trades. It trades in Coventry, West Midlands and from two other sites. The ultimate holding company of Makers is the Keller Group PLC.

11. Asphaltic Contracts Limited ("Asphaltic") was a private limited company whose ultimate holding company was WIMHold Limited. It carried on business as a paving and roofing contractor and erected roof coverings and frames. Its registered and trading address was at Bow in London. Asphaltic was put into voluntary liquidation on 10 August 2004.

12. Rock Asphalte Limited ("Rock") was a private limited company, the principal activity of which was to act as a holding company for its subsidiaries, Asphalte Solutions Limited and Elstow Roofing Products Limited. The principal activity of Asphalte Solutions Limited was the supply and installation of mastic asphalt roofing

and vehicular deck waterproofing systems. The principal activity of Elstow Roofing Products Limited was the manufacture of mastic asphalt and slates. The registered and trading address of Rock was in Hammersmith, London.

13. The services of contractors who specialise in the installation, repair, maintenance and improvement of coverings for flat roofs and vehicular decks are usually procured through a competitive tendering process. This involves inviting a number of contractors to submit sealed competitive bids for the provision of the tendered materials and services. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently.

14. The kind of collusion at issue in the present case is that of cover bidding or cover pricing. This occurs when a contractor that is not intending to win the contract submits a price for it after communicating with the designated winner. The price is decided upon in conjunction with another contractor that wishes to win the contract. Cover pricing gives the impression of competitive bidding but, in reality, contractors agree to submit token bids that are higher than the bid of the contractor that is seeking the cover. The issue in this case is whether Makers had been involved in cover pricing with either or both of Asphaltic and Rock.

15. This is not the first case in which the Tribunal has had to consider how section 2 of the Act applies to cover bidding. In *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 ("*Apex*"), the Tribunal noted that when an undertaking (which for whatever reason does not wish to win the tender) opts to put in a cover bid rather than declining to bid, it deprives a bidder with the genuine intention to win the tender of the opportunity to take its place and put in a competitive bid. The CAT said:

> "the tendering process provides for the tenderee to receive independent bids following the acceptance of an invitation to tender, alternatively for the invited tenderer to decline the invitation to bid so that the tenderee has the opportunity to

replace that undertaking with another competitor. … The effect of the conduct … was to deprive the tenderee of a similar opportunity. In this respect also the concerted practice has as its object or effect the prevention, restriction or distortion of competition."

The Elliott House contract

16. On 22 May 2002, Andrews, Kent & Stone Limited, Engineering Consultants ('AKS'), invited four contractors to tender for a fixed price contract for waterproofing works to the asphalt car park and perimeter barrier renewals at Elliott House, Victoria Road London, NW10. The tender documents specified polymer modified asphalt but did not mention a branded product. Those invited to tender were Asphaltic, Makers, Dew Pitchmastic plc and Rock. The return date for the tenders was 19 June 2002. According to AKS the four companies would have received individual invitations to tender and should not have known who the other companies in the competition were.

17. AKS received the following tenders excluding VAT:

Contractor	**Bid received (£)**	**Date bid sent**
Asphaltic	£338,511.60	19 June 2002
Makers	£318,710.00	18 June 2002
Dew Pitchmastic plc	£304,893.71	24 June 2002
Rock	£254,705.62	18 June 2002

18. AKS sent a report on the tenders to its client, Osborne Investments Limited, on 17 July 2002. It included a breakdown of the figures in the tenders supplied by the four companies. AKS invited all the tenderers to interviews. Makers attended the interview with AKS on 27 June 2002. Asphaltic was unable to attend on the allotted day and showed no further interest; therefore it was dropped from the competition. Although Rock had submitted the lowest tender, it had omitted contingencies and had used a lower specification in one area. Accordingly, it had effectively lowered

its tender by £50,000. After further consideration of Dew Pitchmastic plc's and Makers' tenders, the contract was awarded to Dew Pitchmastic plc, and the losing tenderers were so informed by letters dated 25 July 2002.

IV THE OFT'S INVESTIGATION AND DECISION

19. The OFT's investigation into the infringements which became the subject of the Decision began in July 2003. An unannounced visit to the premises of Rock took place in August 2003. Further visits to the premises of other contractors, including Asphaltic, were carried out in January 2004. A pre-announced visit to Makers was conducted by OFT officials in September 2004. We consider what took place during this visit further below since it is material to one of the issues we have to decide.

20. On 6 April 2005 a Statement of Objections under rule 4(1) of the OFT's procedural rules was issued to all the parties including Makers.[1] Again, we consider in more detail the correspondence which took place between the OFT and Makers between the delivery of the Statement of Objections and the adoption of the Decision.

21. The evidence on which the OFT relied in finding that Rock, Asphaltic and Makers had infringed the Chapter I prohibition was the following. Rock provided to the OFT a copy of a fax together with its transmission sheet. The fax had been sent by Barry Abbott who was at that time the Managing Director of Rock to Joe Kelly who was at that time the acting Managing Director of Asphaltic. The Decision gives the timing of the sending of the fax as 1:13 pm on 18 June 2002.[2]

22. The fax comprised seven pages. On the front sheet was handwritten "Joe, Numbers attached Best Wishes as always Barry." The subsequent six pages consisted of three sets of two sheets. The first sheet of each set was headed "Schedule of Rates" and the second, "Tender Summary." All the sheets had "Andrews, Kent & Stone

[1] A supplementary Statement of Objections was issued in October 2005 but is not relevant to the current proceedings.

[2] The printed fax cover sheet provided a space for the sender to include the time and the time written by hand on the sheet is 2:10 pm. However the transmission sheet gives the time of transmission as 1:13 pm and in the event nothing turns on the time difference.

Limited" written in the top right hand corner and at the bottom right hand corner the following reference: "Elliott House/014031/AJ/NLA/APRIL 02." The transmission sheet to Fax number 02089839841 said "OK." That was the number of a fax machine that was in Joe Kelly's office.

23. Each of the pages headed "Schedule of Rates" contained a printed template listing the 16 elements of the job with a short description of the element. The contents of the first three columns were printed and the figures in the final column headed "Rate" were hand written. The second of the sets of figures faxed were as follows:

Item	Description	Unit	Rate
A	Removal of existing crash barriers	/m	75.00
ii)	Unit cost of Stanchions	Item	Included
B	Cost of crash barriers per linear Metre	/m	205.00
C	Construction of concrete block up stand per linear metre	/m	25.00
D	Construction of concrete block wall and up stand to stair enclosures	/m	25.00
E	Cost of flashing per linear metre	/m	72.50
F	Cost of taking up asphalt	m^2	8.50
G	Cost of laying new asphalt	m^2	27.50
H	Cost of perimeter up stand in asphalt	/m	22.00
I	Cost of expansion joints	/m	330.00
J	Cost of white lining	Item	1,500.00
K	Cost for making good screed	$/m^2$	5.00
L	Cost of cutting out perimeter joint Sealant	/m	6.00
M	Cost of installing Korpak and new perimeter polysulphide	/m	40.00
N	Cost of demolishing Link metal Staircases	Item	5,000.00
O	Cost of up stand localised repair	Item	2,500.00

24. The other two Schedules of Rates were identical except that the hand written costings in the final column were different in each Schedule.

25. Each Tender Summary page showed a list of 17 items. The first five were grouped under the heading "Prelims" and the rest were grouped under the heading "The work". At the bottom of the sheet was a space for the "Grand Total". Again, each of the three Tender Summary sheets faxed were identical save that the figures in each of the three sets differed, the total price shown corresponding to the total in the relevant Schedule of Rates. The first Tender Summary totalled £316,011.60, the second totalled £318,710.00 and the third totalled £324,412.59.

26. The OFT compared the figures set out in the three faxed sets of Schedules of Rates with the figures included in the bids submitted by the parties under investigation to AKS. The figures in the Schedule of Rates submitted by Asphaltic were identical to one of the sets of figures faxed to Joe Kelly on 18 June 2002 as was the Tender Summary, which had a figure for the Grand Total of £316,011.60. However, the final figure for Asphaltic's tender was £338,511.60, which included £22,500.00 for contingencies.

27. The Schedule of Rates forming part of the tender submitted to AKS by Makers had figures that were identical to one of the summaries mentioned in paragraph 25 above. The total figure for Makers' tender was the same as the figure in the second Tender Summary, namely £318,710.00. The OFT found that an entry in Makers' Tender Book for 18 June 2002 showed the same figure.

28. The second source of evidence relating to the Elliott House project was the statement given by Barry Abbott as part of Rock's application for leniency. Rock had taken advantage of the scheme operated by the OFT whereby parties to infringements can benefit from a substantial reduction in the penalty imposed if they cooperate fully with the OFT in providing evidence of the existence and operation of the cartel. Barry Abbott's evidence regarding the Elliott House project was cited by the OFT in the Decision in the following terms (footnotes omitted):

> "268. In his statement dated 2 September 2003, Barry Abbott said that Rock's products were not specified in the tender for the Elliott House Car

Park. It was a generic specification but he was interested in the contract. Barry Abbott said that Asphaltic had called him but it was not interested in the job because it knew that Rock was in the running for the contract for the Elliott House Car Park. Barry Abbott said that he had given Asphaltic rates to quote for Flexiphalte car park products in the fax dated 18 June 2002, to Joe Kelly.

269. Rock was asked through its solicitors whether faxes that it sent to competitors with figures to use as cover for Rock were sent after prior discussions or speculatively so they were received out of the blue by competitors. The following was said in reply: "According to Mr Abbott, and to the best of his recollection, no faxes were ever sent unsolicited or out of the blue. The faxes were always sent after discussion."”

29. The OFT's analysis of the evidence in relation to the Elliott House agreement was set out in paragraphs 270 to 283 of the Decision:

“**OFT's analysis of the evidence as set out in the Statement of Objections**

270. From the evidence contained in the fax dated 18 June 2002, the fact that Asphaltic's tender used the same figures as were in that fax and the statement of Barry Abbott, the OFT is satisfied that there was an agreement and/or concerted practice in breach of the Chapter I prohibition between Rock and Asphaltic to provide non-competitive prices in relation to the tenders submitted for works at the car park at Elliott House.

271. The evidence also demonstrates that Makers must have received a copy of the second "Schedule of Rates" and "Tender Summary" that was sent by Rock to Asphaltic on 18 June 2002, from Rock or Asphaltic, thereby colluding with one or other of them in submitting cover bids to AKS. If Makers had received the "Schedule of Rates" from Rock it would have been after some prior discussion. The OFT has no reason to believe that the same would not have happened if Makers had received it from Asphaltic. The OFT considers that there is no other reasonable and innocent explanation for Makers submitting a tender containing the precise figures that were faxed by Rock to Asphaltic in the second "Schedule of Rates" than that Makers was also involved in collusive tendering.

272. The OFT does not have to decide whether there were two bilateral agreements and/or concerted practices between Rock and Asphaltic and Rock and Makers, or agreements and/or concerted practices between Rock and Asphaltic and Asphaltic and Makers or one trilateral agreement and/or concerted practice between all three of the Parties. There is a strong

inference that there was either direct contact between Rock and Makers or indirect contact (via Asphaltic) on prices, both of which are prohibited.

The Parties' representations

Asphaltic's representations

273. Asphaltic states that the allegations against it are "purely based on hearsay, taken from various files of other roofing companies …"

Makers' representations

274. Makers refuted the allegation of collusion. It said that the OFT's evidence against it was that Makers' bill of quantities used in the tender for the Elliott House contract was found in a competitor's files. Makers had carried out its own investigation but could not account for it as those employees who were involved had left Makers. However, Makers suggested two explanations. First, that the document was the subject of a sub-contract enquiry to a competitor on the basis that Makers was contemplating not tendering for the works. Secondly, that Makers wanted a sub-contract price for that part of the work in which Makers did not have a strong expertise.

275. No representations regarding this contract were made by Rock.

The OFT's response to the representations and conclusions on the infringement

276. Asphaltic claimed that the allegation that it colluded with Rock in relation to the Elliott House contract was "purely based on hearsay, taken from various files of other roofing companies." The OFT understands that to mean that Asphaltic is claiming that there is insufficient evidence of its involvement in collusion.

277. The OFT is satisfied that the allegation of collusion was substantiated. A copy of the Schedule of Rates that was faxed from Rock to Asphaltic was provided by Rock but that Schedule of Rates was submitted by Asphaltic to AKS as the main contractor. The OFT considers that the copy of the Schedule of Rates, that did come from another roofing company, namely Rock, together with the tender submitted by Asphaltic to AKS to be strong and compelling evidence of collusion. In addition, Barry Abbott, in his statement, said that he had given Asphaltic rates for the Elliott House contract which would have been after contact with Asphaltic (see paragraph 268 above).

278. Makers suggested that the reason that its bill of quantities was found on Rock's file was because it was the subject of a sub-contract enquiry to Rock on the basis first, that Makers was contemplating not tendering for the works and secondly, that Makers wanted a sub-contract price for that part of the work in which Makers did not have a strong expertise. The OFT has not concluded that the bill of quantities was Makers'. Rather that the figures in a bill of quantities produced by Rock and faxed to Asphaltic, were used by Makers in its bill of quantities for the tender for the Elliott House contract that it submitted to AKS. Nevertheless, Makers appears to accept that it was its bill of quantities that was found on Rock's file and the OFT is willing to accept that representation.

279. Makers have provided no evidence of a formal sub-contracting relationship with Rock. In any event, the OFT does not understand why Makers would wish to make a sub-contract enquiry and provide Rock with a copy of its bill of quantities, if it were contemplating not tendering for the works. On the other hand the OFT is well aware that when undertakings provide cover prices, their bills of quantities often originate from the undertaking requesting cover. In this instance that would explain why Rock had a copy of the bill of quantities that was ultimately submitted by Makers to AKS as its tender for the Elliott House contract.

280. Makers' second explanation is that it was seeking a sub-contract price for part of the works in which it did not have strong expertise. On that basis Makers would not have needed a complete set of figures from Rock, merely figures for those areas that it did not have expertise in. The OFT finds it surprising that Makers did not have expertise in any of the areas covered by the figures in the bill of quantities, particularly, as, according to a letter dated 17 July 2002 from AKS to Osbourne Investments Limited, Makers' turnover in car park work "... is in excess of £8.0 million …". The total contract was for around £300,000 which included specialist mastic asphalt work. The bill of quantities that Makers submitted to AKS as part of its tender included all the figures provided by Rock, not just the specialist mastic asphalt aspects of the work. If Rock were to act as Makers' subcontractor for all of the works at Elliott House, the tender it submitted to AKS using all of the figures provided by Rock, would not have provided for any profit for Makers. In the circumstances of a sub-contract between Rock and Makers, the OFT would expect Makers to have submitted a tender to AKS with the addition of a percentage for its profit.

281. The OFT does not consider that either Asphaltic or Makers have provided any facts or explanation to rebut the evidence and analysis in paragraphs 255 to 272 above. The OFT is satisfied that there is strong and compelling evidence against both Asphaltic and Makers of collusion with Rock either directly or indirectly.

282. The OFT is satisfied that the evidence above meets the test set out by the CAT in *Apex* and *Price*, namely that there was contact which:

(a) shows that the conduct of Asphaltic, Makers and Rock, was not unilateral, as evidenced by the fax sent from Rock to Asphaltic in paragraphs 257 to 262 above and the figures emanating from Rock being used by Makers in its tender. In addition, evidence from AKS and Barry Abbott at paragraphs 263 to 265, 268 and 269 above confirms that the tender for works on the car park at Elliott House was subject to collusion. At no stage was there any resistance from Asphaltic or Makers, as evidenced by their subsequent conduct;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Rock and Asphaltic, as set out in paragraphs 257 to 262 above demonstrates that the Parties did not determine their tender prices independently. The fact that Makers used figures that had emanated from Rock shows that Makers also did not determine its tender prices independently. The OFT considers that, in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids. No alternative credible explanation as to why this contact took place has been advanced by the Parties; and

(c) constitutes direct contact between Asphaltic and Rock and direct or indirect contact between Makers and Rock, which had as its object or effect:

(i) the disclosure by Rock of a course of conduct that it had adopted or was to adopt or was contemplating adopting in the tendering process, as evidenced by the direct contact Rock had with Asphaltic regarding the tender rates that it had used or would use and the direct or indirect contact with Makers. This disclosure by Rock meant that Asphaltic and Makers knew that Rock would submit a lower bid; and

(ii) influenced the conduct of Asphaltic and Makers on the market. The OFT notes that Makers submitted a cover price (see table in paragraph 263 above) in relation to this contract which was identical to the cover price provided by Rock and Asphaltic submitted a cover price that included all the figures provided to it by Rock.

> 283. Accordingly the OFT concludes that the totality of the evidence set out and analysed at paragraphs 255 to 281 above establishes that bilateral or tripartite agreements and/or concerted practices were in place between Asphaltic, Makers and Rock, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for works on the car park at Elliott House. Irrespective of which scenario set out in paragraph 272 above actually occurred, each Party was in breach of the Chapter I prohibition."

30. In the hearing before us the OFT did not seek to rely on the disputed suggestion that a bill of quantities from Makers had been found on the files of one of Makers' competitors. We were not shown any such document and we have not given it any further consideration.

31. The OFT's case against Makers, therefore, rested solely on the fact that the figures submitted in Makers' tender bid were identical to one of the summaries of figures faxed by Mr Abbott to Mr Kelly on 18 June 2002. There was no evidence of direct contact between Rock and Makers and Mr Abbott had not implicated Makers in the information he gave the OFT as part of Rock's leniency application. The OFT based its conclusion that Makers had infringed the Chapter I prohibition on the assertion that "there is no other reasonable and innocent explanation for Makers submitting a tender containing the precise figures that were faxed by Rock to Asphaltic in the second "Schedule of Rates" than that Makers was also involved in collusive tendering."

V THE GROUNDS OF APPEAL

32. Makers lodged its Notice of Appeal accompanied by three witness statements all dated 19 April 2006:

    a. A statement by Mr Rob Bowman who was at the relevant time the estimator at Makers responsible for drawing up the bill of quantities for the Elliott House project

b. A statement by Mr Peter Cowlard who was working for Makers in an engineering/technical and marketing role as Director of Marketing and

c. A statement by Mr Kevan Whitehouse who was the Finance Director and Company Secretary of Makers at the time of the OFT investigation.

33. In this Notice and the witness statements Makers put forward its explanation as to how the figures included in its tender to AKS were arrived at. In summary the explanation was as follows:

(a) Makers was, at all times, attempting to win the Elliott House contract and it would not have been necessary or commercially sensible for Makers to take a cover price.

(b) Makers did not have the capacity to carry out mastic asphalting work itself so would have to sub-contract this element of the Elliott House works.

(c) Makers made sub-contract enquiries of its normal contractors but it had problems in securing any or satisfactory sub-contract quotes.

(d) As a result it contacted Asphaltic (with whom it had not previously dealt) to obtain a price for the asphalt works.

(e) Asphaltic was only prepared to offer Makers a price for the whole job, not just a sub-contract price for the asphalt element of the works. Asphaltic provided the figures on 18 June 2002.

(f) At its internal meeting later on 18 June, Makers decided to submit a bid incorporating the Asphaltic figures without adding a profit margin for itself because its aim all along was to get to the next stage of the tender procedure. Makers' strategy was to put in a bid that would enable them to get to the table to meet the client and negotiate alternative specifications that Makers could do itself using its systems and technologies. This would have provided them with an opportunity to give the client cost savings and for Makers to realise a margin.

(g) At the post tender meeting with AKS on 27 June 2002, Makers discussed its bid and its alternative specifications. However they were unsuccessful in persuading AKS to change the specification to use Makers' proprietary product as an alternative to mastic asphalt.

(h) At no time did Makers know that the figures that were provided to it by Asphaltic came from Rock; or that they were anything other than a genuine sub-contract quotation.

(i) Makers did, however, know at the time it received the quotation from Asphaltic that Asphaltic was involved in the Elliott House tender process because when Makers offered to send Asphaltic the details of the specification to enable it to quote for the mastic asphalt work, Asphaltic responded that it already had the documentation. Makers did not know at that time whether Asphaltic was one of the main contractors asked to tender by AKS or had simply already quoted as a sub-contractor to another main contractor.

34. In response to this explanation the OFT put its case in two ways. First it invited the Tribunal to reject the explanation set out above as "simply not credible". The OFT maintains that the conclusions reached in the Decision are correct, notwithstanding the matters now relied upon. The correct inference from the undisputed facts is still, the OFT contends, that the contact between Makers and Asphaltic did not arise in the course of a legitimate sub-contracting arrangement but amounted to the knowing substitution of practical cooperation for the risks of competition.

35. Secondly, the OFT argued that even if the Makers' explanation were true, Makers had still infringed the Chapter I prohibition because the figures it put forward in its bid were influenced by figures provided to it by another contractor who it knew was involved in the same contract either as a main tenderer or as a sub-contractor.

VI THE JURISDICTION OF THE TRIBUNAL

36. The Tribunal's jurisdiction in cases involving allegations of an infringement of the Chapter I prohibition is wide. The appeal is a full appeal on the merits.

37. Paragraph 3 of Schedule 8 to the Act provides, so far as is material:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
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> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-
>
> (a) remit the matter to the [OFT],
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> …
>
> (e) make any other decision which the [OFT] could [it]self have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the [OFT].
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

38. The appeal is conducted by reference to written evidence and to oral evidence where appropriate, under the discretionary control of the Tribunal: see Rule 19 of the 2003 Tribunal Rules and *Napp v Director General of Fair Trading* [2001] CAT 3 ("*Napp 2001*"), at [75].

39. As the Tribunal observed in *Napp v Director General of Fair Trading* [2002] CAT 1 ("*Napp 2002*"):

> "117. If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of "prosecutor" and "decision maker", becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to

> the traditional rôle of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case "on the merits" and may, if necessary and appropriate, "make any other decision which the Director could have made": paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts (see Schedule 8, paragraph 9 of the Act, and Rule 17 of the Tribunal's Rules) and may do so even if the evidence was not available to the Director when he took the decision: see Rule 20(2) of the Tribunal's Rules.
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> …
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> 133. …in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit.
>
> 134. However,… it is virtually inevitable that, at the judicial stage, certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director."

40. Although the Rules cited in *Napp 2002* were the Competition Commission Appeal Tribunal Rules 2000 (2000 SI No 261), the current version of the Tribunal Rules is not materially different.

41. We note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the OFT but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the OFT, it is at this judicial stage of the proceedings that the appellant may apply to test by cross-examination the evidence of all relevant witnesses: *Napp 2001* at [76].

42. We consider that the Tribunal is entitled to draw whatever inferences it sees fit, as regards the credibility of the evidence, from the fact that evidence and explanations advanced before the Tribunal were not advanced during the administrative procedure.

43. The first case management conference was held on 22 May 2006. Much of the discussion at that hearing concerned the disclosure of the figures used by the OFT in the calculation of the penalties imposed in the Decision. There was a second case management conference on 21 June 2006 following which the Tribunal delivered a ruling on the confidentiality of the penalty calculations. These aspects of the proceedings are discussed further below in relation to Makers' appeal against penalty.

44. The hearing on 22 May set the date for the substantive hearing of the appeal to take place at the end of July, though it was recognised that the hearing was contingent on the outcome of the appeals then awaiting judgment by the Court of Appeal in *Argos & Littlewoods v OFT* and *JJB Sports v OFT*. When it became clear that the Court of Appeal was not going to hand down that judgment before the start of the new Autumn term, the hearing in this case was postponed until 30th October. (The Court of Appeal's decision is now to be found at [2006] EWCA Civ 1318).

VII THE BURDEN AND STANDARD OF PROOF

45. An important preliminary issue in cases involving alleged breaches of the Chapter I prohibition concerns the correct standard of proof sufficient to discharge the burden on the OFT of proving the alleged infringement.

46. Both parties agreed that the burden of proof lies on the OFT and that the standard of proof is the civil standard, the balance of probabilities, taking into account the gravity of what is alleged: see *JJB and Allsports v OFT* [2004] CAT 17 paragraphs 195, 197. The standard is not akin to the criminal standard but the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to

overcome the presumption of innocence to which Makers is entitled: *JJB and Allsports* paragraphs 200 –204 and *Burgess v OFT* [2005] CAT 25, paragraphs 115 and 116.

47. Particularly relevant to the present case where the OFT's Decision rests largely on inference rather than on evidence of direct contact between Makers and the other contractors is the statement of the Court of Justice in Cases 204/00 P etc *Aalborg Portland v Commission* [2004] ECR I-123 where the Court said:

> "57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence[3] of an infringement of the competition rules".

48. We accept that it was open to the OFT to draw the inference that Makers was involved in an agreement or concerted practice with either Rock or Asphaltic from the identity of the set of figures faxed by Rock to Asphaltic on 18 June with the figures set out in Makers' bid to AKS.

49. Makers accepted that, if the Tribunal rejected the explanation put forward in its Notice of Appeal and witness statements, the facts as found by the OFT constituted an infringement of the Chapter I prohibition.

50. We therefore consider that the question that the Tribunal has to ask itself in relation to the first way the OFT puts its case is whether the evidence before us provides a "plausible" explanation for the events other than collusion.

51. The questions that this Tribunal has to address are as follows:

(1) In the light of the explanation now put forward by Makers, can the OFT still rely on inferences drawn from the fact that the figures submitted by Makers in its bid were

[3] In citing this case in the *JJB and Allsports* judgment, the CAT noted that the French text in which this judgment was originally drafted uses the expression "la preuve" and stated "We would have thought that, in this specific context, 'proof' would have been an apt translation".

the same as one of the sets of figures faxed by Rock to Asphaltic as proof that Makers must have knowingly submitted a cover bid for either Rock or Asphaltic?

(2) Did Makers infringe the Chapter I prohibition by basing its bid on figures provided to it by a potential sub-contractor when Makers knew, at the time it received those figures, that the sub-contractor was involved in competing for the project work either as a main tenderer or as a sub-contractor for another main tenderer?

52. The first of these questions requires us to find whether the explanation put forward by Makers does amount to an alternative and innocent explanation for the inclusion of the Rock figures in Makers' bid. This largely depends on whether the Tribunal accepts the evidence given by Mr Bowman in his witness statement and during his cross examination at the hearing before us. The second question is a matter of law.

VIII THE CREDIBILITY OF MAKERS' ACCOUNT

53. With regard to the Tribunal's assessment of the credibility of Mr Bowman's evidence, there are three subsidiary questions for the Tribunal to address.

    a. First, is the credibility of the explanation now given undermined by the fact that Makers did not put forward this positive case during the OFT's administrative procedure before the adoption of the Decision?

    b. Secondly, is Mr Bowman's evidence supported by contemporaneous documents or by the evidence of his colleague Mr Cowlard?

    c. Thirdly, does the Tribunal, bringing to bear its relevant expertise, regard Mr Bowman's evidence as consistent with how an undertaking is likely to behave?

(a) Makers' conduct during the administrative phase of proceedings

54. The OFT's first submission in relation to the explanation put forward by Makers is that, in weighing that evidence, it was highly material that the parties were given an opportunity during the administrative phase to explain their conduct. Makers' new case was set out for the first time in the Notice of Appeal and the witness statements served with it. None of those statements had been placed before the OFT at the administrative stage. The very fact that the new case was first advanced in the course of this appeal renders it, in the OFT's view, incapable of belief.

55. Makers' case as to why they had not put forward the explanation on which they now rely during the administrative stage rested on two grounds. The first was that Makers had been confused about the allegations that the OFT was making and that they were so sure of their lack of involvement in any collusive practices that they were convinced that the OFT would not make any findings against them.

56. The second was Mr Bowman's evidence that he had forgotten about the conversation he had had with Asphaltic in which he asked them for the sub-contract quotation for the mastic asphalt works. Since Makers had not won the contract, it was not a project which stuck in his mind – as he stated in evidence "When one loses a job one tries to file and forget". Nothing occurred to trigger his recollection of what happened until he was attempting to reconstruct the events of June 2002 for the purpose of providing a witness statement for the appeal. At that point, in April 2006, he contacted Makers' usual sub-contractors Rio, Guaranteed and Total to ask if they had any documentary evidence to show that he had sought quotations from them in June 2002 for the mastic asphalt element of the work. What jogged his memory was

> "… the act of reconstruction. It was like me reading an old book, a book you haven't read for several years and pick up; some chapters you remember well and some chapters you remember sparingly".

57. We must therefore examine what happened during the administrative stage and whether it is plausible that Mr Bowman's recollection of his conversation with Asphaltic was triggered only in April 2006.

58. Makers were informed by letter of 15 September 2004 that the OFT was going to visit their offices. The letter was expressed in very general terms. It did not refer to any specific contracts, stating only that the OFT had reasonable grounds to suspect that Makers had entered into collusive tendering agreements or concerted practices "in relation to the supply and/or installation of flat roofing and/or waterproofing and/or cladding services in England."

59. The visit took place on 22 September 2004 at Makers' premises in Coventry. We have seen the Attendance Note dated 23 September 2004 drawn up by one of the officials at the OFT who conducted the visit. Mr Bowman attended on behalf of Makers having been duly authorised by the divisional director Simon Lamb and Mr Whitehouse, the Finance Director and Company Secretary. The Attendance Note records a general discussion about Makers' practice in dealing with tenders. Makers produced its tender book to the OFT investigators and one of the contracts pointed out by the OFT official was the Elliott House contract:

> "EL [one of the OFT's officials] tells [Mr Bowman] that the Oft [sic] have narrowed their investigation to the Elliott House contract. He asks if there is any communication with Ashphaltic [sic] Roofing or Rock Asphalt Ltd and any emails or faxes? RB replies that any such documents would have been kept in the sub-contractor files. Emails and faxes would be in the contract files but not very well kept. He leaves to search for them."

60. The Note then records that Mr Bowman returned and stated that the only documents not destroyed were those sent out to the sub-contractors asking to return a price to Makers. Mr Bowman then left to search the computer records for contemporaneous documents and to print them off. The Note continues:

> "EL explains OFT procedure and self incriminatory questioning to RB. He tells him that the OFT is in possession of documents from a third party with identical figures to Makers. Adding that AKS had a tender document with identical figures, this gives the OFT concern as we would expect these figures to be different. He gives RB a copy and tells him that for today the matter is closed. RB volunteers to reply that he cannot answer, other than to say that there has been a mistake."

61. It appears from this account that the OFT official did not in fact ask Mr Bowman at that meeting for an explanation as to why the figures in the AKS document were identical to the figures in the third party document. On the contrary, the Note records that Mr Bowman's statement that "there has been a mistake" comes after the OFT official has told him that "for today the matter is closed", implying that he is particularly not asking Mr Bowman to respond on the spot. This exchange occurs only about 20 minutes after the OFT's first indication to Mr Bowman that the Elliott House contract is the focus of the OFT's concern.

62. Mr Bowman's witness statement also describes the OFT's visit on 22 September. He states that at the time of the OFT's visit he did not understand the OFT's allegations and did not bring to mind the explanation that he now sets out in his statement. He had expected to talk about flat roofing as this was what the OFT had mentioned in the letter notifying them of the visit.

63. Since the OFT official did not ask for an explanation of the AKS document during the course of the visit, it seems to us inappropriate to draw any adverse inference from the fact that Mr Bowman did not proffer an explanation at that point.

64. We have not been shown any further correspondence between the date of that visit and the service of the Statement of Objections. Mr Whitehouse in his witness statement describes what happened:

> "I remember that Rob Bowman reported back to me after the OFT's visit and said that the OFT had focused on the Elliott House project but that Makers was not implicated in any wrongdoing. We then put the OFT's visit on the "back burner" as we did not think anything further could happen as Makers could not be implicated in any infringement of the rules".

65. The Statement of Objections served by the OFT on Makers in April 2005 recites the existence of the Rock fax of 18th June and sets out the figures given in the first and second Schedules of Rates. It states that the tender submitted to AKS by Makers had

figures which were identical to those set out in the second Schedule of Rates and in the second Tender Summary. It then states (omitting footnotes):

> "233. The evidence also demonstrates that Makers must have received a copy of the second "Schedule of Rates" and "Tender Summary" from Rock or Asphaltic that was sent by Rock to Asphaltic on 18 June 2002, thereby colluding with Rock and/or Asphaltic in submitting cover bids to AKS. If Makers had received the "Schedule of Rates" from Rock it would have been after some prior discussion. The OFT has no reason to believe that the same would not have happened if Makers had received it from Asphaltic. The OFT considers that there is no other reasonable and innocent explanation for Makers submitting a tender containing the precise figures that were faxed by Rock to Asphaltic in the second "Schedule of Rates" than that Makers was also involved in collusive tendering. However, it is not necessary for the OFT to split up the conduct by treating the actions of these Parties as separate infringements".

66. The Statement recited the OFT's powers to impose penalties under section 36 of the Act. In the final paragraph of the Statement the OFT stated:

> "560. The OFT proposes to impose a penalty on the Parties listed at paragraph 4 [which include Makers] in relation to the infringements considered above in respect of which each Party is found to have participated in collusive tendering arrangements. In accordance with section 38(8) of the Act, the OFT will have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty…"

67. The Statement of Objections asked that written representations from the parties should be sent to the OFT no later than 3 June 2005.

68. Mr Whitehouse sent a letter to the OFT on 14 April saying that the Statement of Objections had been handed to him for action. He stated in that letter:

> "We continue to examine the documents and we will revert when we have had the opportunity to absorb all the contents. From our initial internal enquiries we refute the allegation that Makers were involved in any collusive practices in connection with any of the matters raised in your documentation."

69. Mr Whitehouse's evidence in his witness statement explains how Makers went about putting together its response:

"After I wrote this letter I read the OFT's Statement of Objections again and also passed it to Rob Bowman and Simon Lamb to review and give me their comments on it.

During my review of the OFT's Statement of Objections I did not find any reference in it to anyone, such as Rock, Asphaltic or AKS, accusing Makers of wrong doing and in my view I did not think there was any evidence to respond to".

70. In cross examination Mr Whitehouse confirmed that he would have no first hand knowledge of the Elliott House project and so was reliant on what he was told had happened by Mr Bowman and Mr Lamb. Mr Whitehouse had given the Statement of Objections to them when it arrived and had arranged to meet them seven weeks later when they had had a chance to absorb the contents. His witness statement takes up the account as follows:

"16. … I had a meeting with Rob Bowman and Simon Lamb to discuss the OFT's Statement of Objections and look again at the documents that the OFT took away with them when they visited us in September 2004. We all tried to come up with an explanation for why the OFT was suggesting that Makers must have received a copy of the Rock schedule of rates and tender summary from Rock or Asphaltic. We did not know why the OFT were suggesting this and thought its suspicions were misconceived.

17. I remember that I had a discussion with Rob Bowman and Simon Lamb about the OFT's allegations and tried to find what information we could about it. I remember that we found some sort of tender correspondence and costing summaries and I now know that we found letters in relation to tender prices for the concrete repairs element of Elliott House.[4] We discussed where the prices on our tender bid to AKS had come from and I recall discussing Asphaltic and that it had provided Makers with a sub-contract price. We were trying to work out what the OFT's allegations might be, and also what Makers had been trying to achieve in terms of the tender we submitted to AKS.

18. I recall that we discussed whether we had been fed prices in order to keep us out of the tender race and I wondered whether this was an attempt by Rock and Asphaltic to stitch us up because they knew we had alternative technologies that could be offered to AKS which could have given us the edge in winning the tender.

[4] This refers to another aspect of the Elliott House project where, at the beginning of July 2002 Makers was asked by Asphaltic to provide a sub contract quote for some concrete repair work.

19. However, we were still very unclear about what might have happened and we had no firm evidence of our suspicion that maybe Rock and Asphaltic were trying to keep us out of the competition. This is why I did not put these details in my letter to the OFT. I also firmly believed that we did not have a case to answer to the OFT and that my letter would explain this."

71. In his oral evidence before us he described that further meeting with Mr Bowman and Mr Lamb:

"I think it's fair to say there was a lot of confusion; there was a lot of guesswork. We really didn't know what you guys were getting at. I think that the people that attended the initial meeting were told that the investigations surrounded collusive practices".

72. Makers' substantive response was sent to the OFT on 6th June 2005. The first of the three substantive paragraphs of this letter emphasised how limited Makers' alleged involvement in the investigation was and stated that Makers' business in the markets covered by the investigation "is very minute". The remainder of the letter said:

"We have carried out our internal review and as a result we are confident that there have been no collusive practices carried out in the asphalt / roofing market sector by Makers UK.

The substantive evidence that your investigation reveals against Makers is our bill of quantities used in the tender was found in a competitors files, which after investigation can not be accounted for as a number of employees who were involved in this tender have now left the Company. Possible explanations for this may be the document was the subject of a sub contract enquiry to a competitor on the basis that we were contemplating not tendering for the works or we wanted a sub contract price for that part of the works in which Makers UK did not have a strong expertise.

We again reiterate that Makers UK refute any allegation of wrong doing or entering into collusive practices."

73. In his witness statement Mr Whitehouse explained that the reference to a Makers bill of quantities being found in a competitor's files was intended to be a paraphrase of what they understood to be the OFT's case against them, namely that the figures in their tender submitted to AKS were the same figures as were found in a document belonging to one of their competitors. He also stated that the second part of the penultimate sentence of the letter should have read:

> "… on the basis that we were contemplating tendering for the works and we wanted a sub contract price for that part of the works in which Makers UK did not have a strong expertise".

74. The point made by Mr Whitehouse in this letter, to the effect that Makers' attempt to find out what had happened was hampered by the fact that relevant people involved in the tender had since left the company, was not something that was subsequently mentioned or relied upon in any of the evidence or submissions before us.

75. Mr Whitehouse was challenged by Mr Ward on behalf of the OFT as to why the version of events now put forward by Makers was not described in the letter of 6th June. When it was put to Mr Whitehouse that the passages in the Statement of Objections set out above made it clear that the OFT was looking for an explanation as to why Makers' bid figures were the same as in the Rock fax, he confirmed that at the time the 6th June letter was written he did not know how the rates had got into the tenders:

> "I think that it did start to dawn on us how serious this issue was, and we were very, very busy at the time. The company in the previous year had just posted a very large loss. It was on its third Managing Director in as many years. It was a very hectic time. The business was being put back on the rails. We had a limited amount of time to look at this – again, naively and inadvisedly – which we thought was something that would go away, because we hadn't been a part of it. I think as the whole thing went on we realised how serious it was, and the deeper we dug, the more information we unearthed."

76. There was little further correspondence between Makers and the OFT other than exchanges of letters concerning Makers' turnover figures.

77. On the basis of this sequence of events we do not find Makers' assertion that it did not understand the allegations being made against it at all convincing. The Statement of Objections served on Makers explained the nature and scope of the investigation. Although the document covered many contracts in which Makers was not involved, it should have enabled Makers to focus on the one allegation being made in relation to its conduct. The Statement also made clear the risk of penalties

being imposed. It must have been apparent to Makers from this that the key question they had to address was whether there was an innocent explanation for how the figures faxed by Rock to Asphaltic came to be included in the bid Makers tendered to AKS.

78. It is important to note that in the internal discussions described by Mr Whitehouse and in its correspondence with the OFT, the explanation relating to a sub-contract enquiry was raised as a possibility. However, at that stage there was no explanation put forward as to why the same figures appeared in the tender submitted to AKS as are found in the document belonging to one of Makers' competitors. In any event it does not explain why all the figures, and not just those which relate to work in which Makers did not have a strong expertise, were repeated in the tender submitted by Makers.

79. Further, we think that if the events which Mr Bowman described had indeed taken place, his recollection of them would have been triggered by his consideration of the Statement of Objections. He had two months in which to think about the single allegation being made against Makers and he attended two meetings with his senior management who were looking to him to provide an explanation as to how the Makers bid had been arrived at. We do not accept that it is possible that, having failed to recollect these events fully at any point in 2004, he would then recollect them two years later when considering the appeal. His evidence that his recollection was triggered when he contacted Makers' sub-contractors in 2006 to prepare for the appeal is not credible, in particular given the reference to that as a possible explanation in the 6 June 2005 response by Makers to the OFT. We conclude that the fact that Makers did not put forward a positive case during the administrative procedure casts doubt on the veracity of Mr Bowman's evidence.

(b) Were the Asphaltic figures a quotation for sub-contract work?

80. We therefore turn to whether, nonetheless, the version of events now put forward by Makers is sufficiently plausible to undermine the inferences drawn by the OFT from

the facts. The key question for us to determine is whether, assuming that Makers acquired the figures from Asphaltic on 18th June, they used them in their own bid believing that they constituted a genuine quotation from Asphaltic for carrying out the work as a sub-contractor on the project. There are a number of reasons why we find it impossible to accept that this was the case.

81. First, there is the question of how Makers came to seek a sub-contract quotation from Asphaltic. Mr Bowman stated that having failed to get a usable quotation from his usual subcontractors, Makers identified Asphaltic as a possible alternative supplier. We are somewhat sceptical of Mr Bowman's evidence that Makers found Asphaltic from a Yell.com entry. As Mr Ward put it on behalf of the OFT, it would be a remarkable coincidence if having contacted Asphaltic by chance, Makers were doubly unlucky in happening upon a company which was not only another main contractor invited to bid for the contract but which was also involved in bid rigging. Mr Bowman sought to explain this by saying that there were very few companies who could carry out polymer modified asphalt work. However, we think it is inherently unlikely that Makers should have accidentally contacted a company which turned out to be another contractor invited by AKS to bid and who supplied it with figures acquired from a third potential main contractor. Since as we explain below we do not find Mr Bowman's evidence convincing, we do not accept this explanation.

82. The second indication that there was no request for a sub-contract price is that the contemporaneous documents in which Asphaltic records the requests for quotations it receives makes no mention of the request from Makers. The OFT showed us an extract from Asphaltic's record of the requests it receives for quotations for different jobs. This covers the period in June 2002 during which Mr Bowman claims that Makers sought a sub-contract quotation from Asphaltic. Although there are about 20 requests listed over the period 10 – 18 June, including some from a different division of Makers, there is no mention of the Elliott House job.

83. Mr Bowman suggested in cross-examination that Asphaltic might not have recorded it because, as we now know, Asphaltic had no intention of being involved in the project and were submitting their own cover price. However, notes included in the list that we were shown indicate that the list includes even those requests where Asphaltic has no interest in carrying out the work. We think the omission from this record of the request from Makers on 18th June is significant in failing to corroborate Mr Bowman's account.

84. The third difficulty that Makers face is to explain why they did not include a profit margin on the quotation when they submitted it as their own bid to AKS. Mr Bowman's witness statement dealt with this point as follows:

> "20. During the Makers internal adjudication process the Asphaltic quote was clearly the lowest available quote. However we were uneasy about using Asphaltic's prices for the whole job as we were unsure of Asphaltic's status in the tendering process. As as result it was decided that there was to be no mark up by us on the prices when we submitted it to AKS. I believe Asphaltic would have expected us to do this.[5] It is possible that Asphaltic may have been trying to give us a price that would not win the contract. In the event it did give us a realistic price.
>
> 21. Our strategy was to put in a bid that would enable us to get to the table to meet the client and negotiate alternative specifications that Makers could do itself using our […] systems and technologies. We did not offer an alternative specification during the tendering process because we wanted to present these alternative technologies directly to the client where their full benefit could be explained. These technologies are in direct competition to asphalt, but would have provided us with an opportunity to give the client cost savings and for Makers to realize a margin."

85. The commercial justification put forward by Makers for the apparently illogical submission of the Asphaltic sub-contract as their own main contractor bid therefore depends on whether they thought they had a realistic prospect of persuading AKS to change the specification of the works in a manner which would enable Makers to carry out the work profitably. In that regard we do not think that Mr Bowman's evidence is supported by the other evidence available.

[5] Mr Bowman in his oral evidence clarified that he meant that Asphaltic would have expected Makers to include a margin for profit.

86. The primary evidence on this aspect of the case was given by Mr Cowlard who was working, in June 2002, in an engineering / technical and marketing role for Makers. He describes Makers' practice whereby when invited to tender for an asphalting project they would submit a sub-contract price provided by a specialist contractor "as a way of getting to the negotiating table with the client". Makers would then try and persuade the client to change the asphalt specification so that they could do the works using their alternative systems.

87. Mr Cowlard's involvement in the Elliott House project started in early December 2001. On 11th December he had a site meeting with Audley Johnson from AKS to discuss deck waterproofing of asphalt and expansion joints. He describes the meeting in his witness statement as follows:

> "15. … I recall that there was a particular type of beam susceptible to water and there was an expansion joint at the top of the ramp not located in the correct position. I recall advising that it needed to be relocated in order to perform correctly and generally on concrete repairs, also how Makers could handle the job. I was aiming to demonstrate Makers' additional capability and trying to make the project more tailored to those capabilities and our more specific business of overcoating asphalt car decks.
>
> 16. On 23 April 2002 I had a meeting/ or conversation with Audley Johnson regarding the roof membrane. I suggested it would be possible to use an alternative (Makers) system but I was informed that the building owner wanted asphalt. I understood that it would be difficult to persuade the client to change its mind. It was my impression that the car park owner was driving the Elliott House project and that he wanted value for money. However, I introduced a tile we had used on a previous project in Aldershot that I believed would help with the soundproofing issues at the Elliott House car park. I suggested AKS visit the Aldershot project to see that they thought."

88. Makers did not include any reference in their tender to AKS to alternative specifications. However, the bid that they submitted to AKS was sufficiently attractive to get them to the next stage of the process and both Mr Bowman and Mr Cowlard attended a post-tender meeting with AKS on 27th June 2002.

89. A key element for Makers in this part of their account of events was whether, having succeeded in getting into a face to face negotiation with AKS following the submission of the tender, they did in fact try to persuade AKS to use a different specification. As to this, before the oral evidence at the hearing, there was very little evidence. Mr Bowman's account of the post-tender meeting on 27th June 2002 in his witness statement simply states "At the meeting we discussed our bid and our alternative specifications." Mr Cowlard gave a fuller account of the meeting in his witness statement. But both he and Mr Bowman accepted in cross-examination that the account of the meeting given in Mr Cowlard's witness statement did not evidence any attempt by Makers to persuade AKS to use an alternative specification.

90. Mr Cowlard also exhibited to his witness statement a page of handwritten notes he had taken at the meeting. He and Mr Bowman also accepted that these notes did not refer to Makers attempting to persuade AKS to change the specification. Mr Cowlard's explanation for this was that the notes were not intended to be minutes of the meeting but "they are there really as aides-memoire to us going back to the office predominantly to trigger the response letter which Mr Bowman wrote." Since their attempts to change the specification had been "dismissed out of hand" by AKS there was no reason to make a note of it.

91. Again we find this is inconsistent with the picture that Makers is trying to portray of a company desperate for work which was going all out to win this contract. We find that, given the discussions that had already taken place between Mr Cowlard and AKS in December 2001, Makers could not have had any real expectation that AKS would change the specification to one which would enable Makers to carry out the work at a profit. We find it extraordinary that, if the main purpose of the meeting of 27 June from Makers' perspective had been to put forward alternative products to AKS, this would not have been mentioned in Mr Cowlard's witness statement and have been referred to, however, briefly, in the contemporaneous note taken by Mr Cowlard.

92. We do not therefore accept that the reason given by Makers for why it passed on the Asphaltic figures without a mark up in its own bid is true. Given that it makes no commercial sense otherwise for Makers to put forward a sub-contractor's quotation as its own bid, this seriously undermines Maker's explanation of how it viewed the figures given to it by Asphaltic. We reject the suggestion, which Mr Bowman referred to for the first time in cross examination, that they would have been able to substitute a cheaper vehicle barrier and make a turn on the contract in that way.

93. It is not necessary for us to make a finding as to whether Mr Bowman acquired the figures from Rock or Asphaltic or whether, if Makers acquired them from Asphaltic, they knew that they had originated with Rock. In all the circumstances summarised above we agree with the inference drawn by the OFT that Makers knew, when they incorporated the figures into their own bid to AKS, that the figures represented a cover price for another bidder. We are also satisfied on the material before us that Makers submitted the tender without any expectation that they would actually carry out the work. This appears to us to be the only reasonable explanation of the events. We accept Mr Ward's submission that Makers' attendance at the meeting of 27th June and its subsequent correspondence with AKS is explicable on the basis that Makers wanted to keep up the pretence, in AKS's eyes, of being interested in the contract.

94. Having rejected Makers' explanation of the events it is not necessary for us to consider the OFT's submission that even if Makers' explanation was true, Makers had still infringed the Chapter I prohibition. However, for the sake of completeness we consider the OFT's submissions below.

95. The OFT's submissions are set out in paragraph 17 of its Defence:

> "Even if Makers' account of the facts … is accepted, the OFT contends that the proper inference from the totality of the evidence is that Asphaltic and Makers knowingly substituted practical cooperation between them for the risks of competition, with the object and/or effect of influencing Makers' conduct on the market. Thus, Makers' bid was the result of improper collusion between Makers

and Asphaltic, rather than a legitimate sub-contracting relationship between those parties."

96. At the hearing of the appeal, the OFT set out the elements which must be established to make good this alternative ground:

    a. The OFT accepted that it was essential that both Makers and Asphaltic knew, at the time that Asphaltic gave Makers the figures, that they were both involved in the tendering process in this project. Mr Bowman's evidence was that he knew Asphaltic were involved most probably as a sub-contractor but possibly as a main contractor because they said he did not need to send them a copy of the specification. Clearly, once Makers had asked Asphaltic to provide a sub-contract quote, Asphaltic were aware that Makers were also competing for the work.

    b. The OFT also accepted that it was essential that the figures given to Asphaltic had in fact influenced the prices that Makers submitted in its tender. This was clearly the case here since Makers had used precisely those figures in its tender. Since the Asphaltic figures covered all the works required in the project, Asphaltic must have realised that the figures it was giving would influence the level of Makers' bid, even if Makers had added a mark up.

    c. It is not necessary, according to the OFT, to show that Makers understood that the figures quoted by Asphaltic were the figures which it had quoted or would quote to any other undertaking seeking a sub-contract, or that they were the figures it would use if it were submitted its own bid as main contractor.

97. Mr Robertson submitted that Makers' version of events did not contain the necessary elements for establishing a breach of the Chapter I prohibition. He cited the Court of Appeal's decision in its recent judgment in *Argos Limited and Littlewoods Limited v Office of Fair Trading* and *JJB Sports v OFT* [2006] EWCA Civ 1318 ("*Argos & Littlewoods*"). At paragraph 141 of that judgment, the Court of Appeal described

what is necessary to establish a concerted practice where parties have disclosed to each other their price information.

> "… if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so."

98. Mr Robertson submitted that Rock was in the position of A, Asphaltic was in the position of B and Makers was in the position of C. It was an essential element in the Court of Appeal's description that Makers "may be taken to know" the circumstances in which Rock had provided the information to Asphaltic. Since Makers has not conceded that it knew either that the figures given to it by Asphaltic had originated with Rock or that Asphaltic and Rock were colluding, the second element was not satisfied here. There is no reason to suggest that Makers should be taken to know the circumstances in which the information was disclosed by Rock to Asphaltic.

The Tribunal's assessment

99. We do not agree that the analogy with the *Argos & Littlewoods* case is a valid one. That case concerned the disclosure of pricing information by an undertaking operating at the retail level of the market to an undertaking operating at the supplier level of the market, followed by the subsequent disclosure of that information by that supplier to a different retailer. That was why the triangular relationship, involving the expectation on the part of A that the information will be passed on and the use in fact of the information by C, has to be established in an *Argos & Littlewoods* type

case. A simple disclosure of retail pricing information by a retailer to a supplier cannot be treated, without more, as an agreement to fix the retail price.

100. This case, by contrast, involves the direct disclosure of pricing information from one competitor to another. We do not consider it necessary therefore for the OFT to prove that, in passing the pricing schedules to Asphaltic, Rock knew that Asphaltic would pass them on to Makers; nor that Makers knew that the figures had come from Rock.

101. We remind ourselves of the definition of a concerted practice established in the case law of the European Community Courts. In Case 48/69 etc *Dyestuffs* [1972] ECR 619, the European Court of Justice discussed the concept of "concerted practices" in the context of Article 85 (now Article 81), the wording of which is materially the same as section 2 of the Act. In that case the Court of Justice observed that:

> "64. Article [81] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.
>
> 65. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants."

102. In Cases 40/73 etc *Suiker Unie* [1975] ECR 1663, a case concerned with restrictions on those to whom sugar would be supplied, the Court further considered the features of a concerted practice:

> "26. The concept of a 'concerted practice' refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market.

27. Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of …the freedom of consumers to choose their suppliers.

28. In a case of this kind the question whether there has been a concerted practice can only be properly evaluated if the facts relied on by the Commission are considered not separately but as a whole, after taking into account the characteristics of the market in question.

…

173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells."

174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

175. The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors."

103. The application of these principles to collusive tendering was considered by this Tribunal in the *Apex* case cited above. At paragraph 206 the Tribunal, after reviewing the case law of the Community Courts, set out 12 principles to be derived from that case law:

(i) decisions constituting purely unilateral conduct on the part of an undertaking escape the prohibition contained in Chapter I of the Act;

(ii) the concepts of agreement and concerted practice are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves;

(iii) the term concerted practice itself refers to a form of coordination between undertakings which knowingly substitutes, for the risks of competition, practical cooperation between them;

(iv) the criteria of coordination and cooperation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells;

(v) the requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market;

(vi) in particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market;

(vii) reciprocal contacts are established where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it;

(viii) it is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part;

(ix) a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two;

(x) subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period;

(xi) although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition; and

(xii) it follows from the actual text of Article 81(1) that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

104. The Tribunal then went on to state as follows:

"207. The foregoing principles are applicable generally to concerted practices. Their specific application to a tendering process involving cover bidding has not, however, been the subject of Community case law or Commission decisional practice. Before considering their application to the present facts it is important to consider the nature of a tendering process.

Nature of tendering process

208. The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. A tendering process is designed to produce competition in a very structured way.

209. The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. This is important from the standpoint of the customer, since the

tendering process is designed to identify the contractor that is prepared to make the most cost-effective bid. The competitive tendering process may be interfered with if the tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants. Such behaviour by undertakings leads to conditions of competition which do not correspond to the normal conditions of the market.

210. When the tendering process is selective rather than open to all potential bidders, the loss of independence through knowledge of the intentions of other selected bidders can have an even greater distorting effect on the tendering process. In a selective tender process the contractors invited to tender will in general be those considered most likely to have the required specialist skills. The Tribunal understands that selective tendering is commonly used by local authorities (and others commissioning construction and maintenance work). Selective tendering processes ensure that the workload involved in analysing the various bids submitted can be kept within manageable bounds.

211. Accordingly, since the selective tendering process by its nature has a restricted number of bidders, any interference with the selected bidders' independence can result in significant distortions of competition.

212. The Tribunal notes that the Form of Tender used for the Dudley Contracts requires the tenderer to certify that "the amount of this tender has not been communicated to any other person or adjusted in accordance with any agreement or arrangement with any other person" and the invitation to tender states that "Any tender not complying with these requirements will be rejected." This highlights the importance in the tendering process of independence and open competition.

213. As the Tribunal understands it, local authorities recognise the possibility that a contractor who is invited to submit a bid as part of the selective tender exercise may find himself in a position, for instance because of other commitments, where he cannot undertake the work to which the bid would relate. The tender process normally provides that such a contractor may, within a specified (and usually short) period, decline the invitation to submit a bid. This gives the tendering body the opportunity to replace that contractor with another so that the number of competitive bids for the work will remain the same. …"

105. What was said there by the Tribunal about the Form of Tender used for the Dudley Contracts applies to the Elliott House project. The Form of Tender which AKS provided to those invited to bid included a declaration by them that they are not parties to any scheme or arrangement under which they communicate the amount of their tender to any third party before the contract is let or under which their tender

prices are adjusted directly or indirectly to the prices of any other tenderer for the works.

106. In the case of the Elliott House contract the version of events put forward by Makers is that:

(a) Makers contacted Asphaltic to ask for a sub-contract price for the asphalt elements of the works;

(b) In the course of that conversation it became apparent to Makers that Asphaltic were involved in the tendering procedure either as a main contractor or as a sub-contractor and Asphaltic clearly became aware that Makers was a potential main contractor in the project;

(c) Asphaltic sent Makers a set of prices for the whole of the works with the intention that these figures would influence the figures that Makers would use as the basis for its bid;

(d) The figures that Makers did use for its bid were in fact based on the Asphaltic figures.

107. We are satisfied that those facts do disclose an agreement or concerted practice which contravenes the Chapter I prohibition. At the point when Makers submitted its bid, the figures it included had been influenced by the figures provided to it by Asphaltic. This was therefore conduct of the kind described in *Apex* at principles (iii) (iv), (v) and, above all, (vii). It is true that Asphaltic could not have been sure, on this version of the facts, that the figures that Makers would submit (if indeed they submitted them at all) would be exactly the same as those it provided – it might have expected that Makers would adjust the figures in some way, or add a small profit margin to the quote or, it was submitted, it might have realised that it was possible that Makers would be prepared to make a loss on the project. But the obtaining of a quotation by Makers when both parties knew that the other was involved in the bidding process infringed against the principle that each undertaking must determine

independently the policy it intends to adopt on the market. Makers took account of the information it had received in the course of its conduct on the market: Asphaltic should not have given the figures to Makers and Makers should not have received and used them.

108. In this case it is clear that Makers in fact submitted a bid which was influenced by the figures provided by Asphaltic. We leave open for another case the question whether the parties would have committed an infringement of the Chapter I prohibition if Makers had decided, on receipt of the sub-contract quotation from Asphaltic, not to submit a bid to AKS.

109. However, it is an essential element of this concerted practice that the items of the contract works included in the figures given by the sub-contractor to the main contractor were a large proportion – in this case in fact the whole – of the items included in the ultimate tender. It must have been obvious that the incorporation of those figures into the Makers bid would influence the overall price at which Makers bid for the contract.

110. It follows that even if we had accepted Mr Bowman's version of events, we would have upheld the OFT's decision on liability.

IX MAKERS' APPEAL AGAINST THE PENALTY.

(a) The statutory framework

111. Section 36(1) of the Act provides that, on making a decision that conduct has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay a penalty in respect of the infringement. Under section 36(3), such a penalty may be imposed only if the OFT is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the OFT may exceed 10% of turnover of the undertaking as determined in accordance with provisions specified by an Order made by the Secretary of State. At the material time, that Order was the Competition Act 1998 (Determination of

Turnover for Penalties Order) 2000 (S.I. 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (S.I. 2004/1259) ("the Penalties Order"). According to that Order, the undertaking's turnover for the purposes of section 36(8) is its worldwide turnover for the business year preceding the date on which the decision of the OFT is taken.

112. Section 38(1) of the Act requires the OFT to publish guidance as to the appropriate amount of any penalty. Under section 38(8) the OFT must have regard to that guidance when setting the amount of the penalty. The OFT's published guidance at the material time was the *OFT's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, December 2004) ("the Guidance as to Penalty").

113. Makers' Notice of Appeal challenges the penalty of £526,500 on the grounds that it is discriminatory and disproportionate. The starting point for the quantification of penalties is the Guidance. The Introduction to the Guidance provides as follows:

> "Policy objectives
>
> 1.4 The twin objectives of the OFT's policy on financial penalties are:
>
> • to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
>
> • to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.
>
> The OFT has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities, and serious abuses of a dominant position. The OFT considers that these are among the most serious infringements of competition law. The deterrent is aimed at other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition, as well as at the undertakings which are subject to the decision."

114. According to the Guidance, there are five steps to be followed in determining the amount of the penalty. Step 1 sets the starting point figure based on an assessment of the seriousness of the infringement and the turnover of the undertaking in the

relevant product and geographic market identified in the decision. Step 2 is an adjustment to take account of the duration of the infringement - the starting figure may be multiplied by not more than the numbers of years of the infringement, in cases where the infringement has lasted for more than one year (paragraph 2.10 of the Guidance). Step 3 is an adjustment for other factors, in particular to ensure that the penalty has the appropriate deterrent effect and to take account of any special characteristics of the undertaking in question (paragraphs 2.11 to 2.13). Step 4 is a further adjustment for aggravating or mitigating factors, examples of which are listed in paragraphs 2.14 to 2.16. Step 5 provides for an adjustment to ensure that the maximum penalty permitted under the Penalties Order is not exceeded and to avoid "double jeopardy" in a case where a fine for the same conduct has already been imposed by the European Commission or in another Member State.

115. Any reduction in the penalty as a result of a leniency application is applied to the figure arrived at after the five steps described above.

116. Makers' challenge concentrated on the uplift that had been applied at Step 3 of the OFT's calculation. According to the Guidance on Penalties, Step 3 involves consideration of a number of factors:

> "**Step 3 – Adjustment for other factors**
> **2.11** The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.

> **2.12** The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step.
>
> **2.13** In exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step."

(b) The role of the Guidance in the assessment of penalty by the OFT and by the Tribunal

117. This Tribunal has previously held that the OFT retains a margin of appreciation, both as to the interpretation and as to the application of the Guidance in any particular case. In *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 at paragraph 168 the Tribunal stated:

> "We observe, first, that the Guidance is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the Guidance…"

Similarly, at paragraph 102 of the Tribunal's judgment in *Umbro & ors v Office of Fair Trading* [2005] CAT 22 the Tribunal stated:

> "in our judgment it is implicit in the fact that the Guidance is just that – i.e. guidance, rather than precise statutory rules – that the OFT retains a margin of appreciation, both as to the interpretation of the Guidance, and as to its application in any particular case."

118. The Court of Appeal in its recent judgment in *Argos Limited and Littlewoods Limited v Office of Fair Trading* and *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318 (dismissing appeals against the Tribunal's decisions in *Argos Limited* and *Umbro & ors* cited above) confirmed this approach stating (at paragraph 161 of the judgment) that:

> "The language of section 38(8) is general in nature. It does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general principle, the OFT must give reasons for any significant departure from the Guidance."

119. The Court of Appeal also considered in that case the relevance of the Guidance to the Tribunal's consideration of a penalty. In *Napp 2002* the Tribunal had said as follows:

> "497. We observe first, that the Tribunal is not bound by the Director's Guidance. The Act contains no provision which requires the Tribunal to even have regard to that Guidance.
>
> 498. Schedule 8, paragraph 3(2) of the Act, provides that "the tribunal may confirm or set aside the decision which is the subject to the appeal, or any part of it, and may … (b) impose, or revoke, or vary the amount of, a penalty … or (e) make any other decision which the Director could have made."
>
> 499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.
>
> 500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties."

120. This passage in the *Napp 2002* judgment was cited with approval by the Court of Appeal in *Argos Limited* as being an appropriate approach for the Tribunal: see paragraphs163 and 182 of that judgment.

(c) The importance of deterrence

121. This Tribunal acknowledged the importance of deterrence under the Act in its judgment in *Napp 2002* when it stated at paragraph 502:

> "We agree with the thrust of the Director's Guidance that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a

serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements. As the Guidance makes clear, the achievement of the necessary deterrent may well involve penalties above, often well above, 10 per cent of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order."

(d) The OFT's Decision on penalty

122. Applying this Guidance to its findings against Makers in the Decision, the OFT considered that the starting figure at Step 1 of the calculation should be 5 per cent of Maker's turnover in the market for mastic asphalt in England in the year ended 31 December 2004. That turnover was £130,000, giving a starting figure of £6,500. There was no adjustment made for duration at Step 2.

123. With regard to Step 3, the OFT said

> **"Step 3 – adjustment for other factors**
> 846. As noted at paragraphs 734 and 743 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigations in other cases have already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to Makers because both that sum and the relevant turnover taken into account in Step 1 each represent an inadequate proportion of Makers' total turnover in the year preceding this decision. In accordance with paragraph 737 above, and in order to achieve the objectives described at paragraph 734 above, the OFT considers that it is necessary to increase the penalty figure reached at the end of Step 2 above to give a figure that represents a significant sum for Makers. The OFT notes that at the time of the infringement in 2002, the car park division of Makers, which would have carried out the work if Makers had won the contract, had a turnover in excess of £8million. Taking into consideration the level of penalties that has been imposed on other Parties and noting that increases for deterrence may be appropriate for companies for whom the penalty calculated at the end of Step 2 represented an inappropriately and disproportionately low proportion of turnover in accordance with paragraph 737, the OFT considers that an increase of £520,000.00 is appropriate to act as an effective deterrent to Makers and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £526,500.00.

124. The figure arrived at by Step 3 was therefore about 80 times as great as the starting figure. No adjustments were made at Steps 4 or 5 and there was no reduction for leniency.

(e) Summary of grounds of appeal

125. Makers' grounds of appeal against the amount of the penalty were first that the OFT had failed to give adequate reasons for how it applied its Guidance. In particular the OFT does not give any reason for why it applied an uplift of £520,000 at Step 3. This appeared to be an arbitrary figure unrelated to Makers' turnover in any market and was not explained.

126. Secondly, Makers argued that the penalty was manifestly out of all proportion to the alleged infringement, having regard to the value of the contract alleged to have been affected by Makers' conduct and the overall value of Makers' business in the relevant market.

127. Thirdly, Makers argued that the penalty imposed infringed the principle of non-discrimination because it was considerably greater than the penalty imposed on the other addressee whose position was most comparable, namely Coverite Ltd ("Coverite").

(f) The calculation of the uplift at Step 3: the Minimum Deterrence Threshold

128. The Decision did not provide any explanation as to how the figure of £520,000 was arrived at for the uplift at Step 3. Makers' solicitors contacted the OFT to ask for the penalty calculation to be disclosed. The OFT at that time refused to disclose the actual calculations but it did disclose the underlying rationale for the uplift at Step 3.

129. At the case management conference held on 22nd May 2006, Makers sought disclosure from the OFT of the figures used in its calculations of the penalties of the other addressees of the Decision. The OFT accepted that it was appropriate for Makers to be provided with this information but argued that since it was information

confidential to the third party addressees, an Order of the Tribunal was needed before the information could be disclosed. The Order made at that hearing required the OFT to write to the other addressees of the Decision requesting their consent to the disclosure of the relevant information. Coverite responded to this letter indicating that it had no objection to its financial details being published.

130. At the second case management conference on 21st June 2006, the Tribunal ordered the OFT to prepare two schedules setting out for each of the addressees the calculation by which it reached the final penalty figure: see [2006] CAT 13. Schedule A set out the calculations of penalties showing the total turnover and final penalty figures already disclosed in the published version of the Decision. It would also include the other figures relating to those addressees who had not sought to retain the confidentiality of the information. Schedule B would set out the calculations in full including the confidential information relating to all but two of the other addressees. Information included in Schedule B but not in Schedule A would be disclosed only to the named external advisers of Makers. Those Schedules were provided by the OFT on 28th June 2006.

131. In its Defence dated 6th June 2006, the OFT attached an Annex setting out how it had calculated the penalties. The explanation of how it arrived at the uplift at Step 3 was based on the assessment of a "minimum deterrence threshold" (MDT) applied to all the parties to the Decision in order to determine whether there should be an uplift at Step 3.

132. The MDT depended on comparing the undertaking's turnover in the relevant market (used in the calculation of the starting figure at Step 1) with the undertaking's total turnover. The OFT considers that if the undertaking's turnover in the relevant market is less than 15 per cent of its total turnover, then the figure arrived at by Step 1 will not act as a sufficient deterrent. In such a case therefore the OFT calculates what the figure arrived at by Steps 1 and 2 would have been, if the undertaking concerned had derived 15 per cent of its total turnover on the relevant market. An

amount is then added at Step 3 to bring the overall figure up, broadly speaking, to that threshold figure.

133. The OFT calculated that Makers was in a position where its Step 1 figure was insufficient to act as a deterrent in that its relevant turnover was much less than one per cent of its total turnover. If 15 per cent of Makers' total turnover of £69,678,000 had been derived from the relevant market then the figure resulting from the application of Steps 1 and 2 would have been £522,585. This figure is 0.75 per cent of the total turnover, which is the same as 5 per cent (which was the starting percentage used by the OFT at Step 1 for Makers) of 15 per cent of the total turnover (on that basis £520,000 was added to the actual Step 1 figure of £6,500 in order to bring the total penalty at Step 3 up to the MDT).

134. We therefore reject Makers' assertion that the uplift of £520,000 imposed at Step 3 of the calculation of its penalty was arbitrary or unjustified. The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance. However, there is justification in Makers' complaint that the reasoning disclosed in the Decision was inadequate since the existence of the calculation of the MDT did not become apparent until the matter was pursued by Makers' solicitors. This is particularly unfortunate in a case where the uplift at Step 3 is a very large multiple of the starting figure arrived at by Steps 1 and 2. In providing reasons for any decision which includes the amount of the penalty it is incumbent on the OFT to set out its methodology.

(g) The overall proportionality of the penalty

135. Makers asserts that the penalty imposed on it is manifestly out of all proportion to the alleged infringement. Makers points to the fact that the amount of the penalty exceeds the value of the contract to which the alleged infringement relates as well as exceeding by a large margin Makers' annual turnover in the relevant market.

136. As we have set out earlier, the Tribunal does have an overall discretion to fix the penalty based on its own assessment of the infringement in the light of the facts and matters before the Tribunal.

137. Although the value of the contract may have been relatively small, the OFT was right to regard this kind of infringement of the Chapter I prohibition as being serious. The form of tender signed by Mr Bowman on behalf of Makers in the contractual documents distributed by AKS brought to the attention of every potential bidder the importance that clients attach to bids being tendered independently. We do not regard the overall level of the penalty as disproportionate in this case.

(h) Infringement of the principle of non-discrimination and equal treatment

138. It was common ground between the parties that the OFT is bound to observe the principle of equal treatment established by the case law of the Community Courts which have stated, for example in Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, paragraph 406, that:

> "According to settled case-law, the principle of equal treatment is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified".

139. Makers compared its penalty of £526,500 with that imposed on Coverite. Coverite, like Makers, had been found to have committed only one infringement and had not received any reduction in penalty either at Step 5 of the calculation or as a result of the leniency programme. Yet the penalty imposed on Coverite was £104,498. Makers asserts that there was no explanation for the difference in treatment and it was not objectively justified.

140. From the calculations disclosed by the OFT in Schedule B, it was apparent that Coverite was also in the position where an adjustment needed to be made at Step 3 in order to bring the overall amount of the penalty up to the Minimum Deterrent Threshold. As far as Coverite was concerned, the Schedule B figures showed that its

relevant turnover was only 4 per cent of its total turnover, given in the table as £18,271,831. Again, if 15 per cent of its total turnover had come from the relevant market, the figure resulting from the application of Steps 1 and 2 would have been £137,038, which is 0.75 per cent of the total turnover because the starting percentage used at Step 1 for Coverite was 5 per cent. Therefore at Step 3 the OFT added £100,000 to the actual Step 1 starting figure of £39,330 in order to bring the penalty up to the MDT.

141. From the figures in Schedule B it is apparent that the OFT has sought to apply the same methodology to all the addressees and that the reason why Coverite's penalty is substantially lower than that of Makers was two fold: it has a much smaller total turnover figure and hence a lower MDT and it received a substantial reduction in the penalty as a result of mitigating circumstances at Step 4 whereas Makers had no mitigation deduction.

142. But what also became apparent from the OFT's explanation was the importance to the penalty calculation of the undertaking's total turnover figure. Whereas the Guidance on Penalty refers to the total turnover figure only in relation to the application of Step 5, in fact the OFT uses that figure to arrive at the MDT to determine any uplift at Step 3.

143. The figure that the OFT used for Coverite's total turnover was £18,271,831. This is also the figure referred to in paragraph 816 of the Decision as the total turnover figure used by the OFT when applying Step 5 to ensure that the penalty does not exceed the statutory maximum. However, in its earlier description of Coverite in the Decision, at paragraph 18, the OFT gives the figure for Coverite's total turnover for the financial year 2003/04 as £33,072,000.

144. If that higher figure for total turnover is used in the calculation at Step 3, then Coverite's MDT would have been £248,040 (that is 0.75 per cent of £33,072,000). This would have required a figure of the order of £208,700, rather than £100,000 to

be added at Step 3 in order to bring the actual Step 1 starting figure of £39,330 up to the MDT.

145. As Makers pointed out, an uplift figure of £100,000 corresponds to only 0.3023 per cent of the total turnover figure rather than 0.75 per cent. In order to treat Makers and Coverite equally, Makers contends that the OFT should apply this 0.3023 per cent figure to arrive at the MDT rather than the 0.75 per cent figure. If this 0.3023 per cent figure is applied to Makers' total turnover figure (£69,678,000), the MDT threshold figure would have been £210,637 not £522,585. Therefore the uplift at Step 3 would have been about £204,000 to bring the actual starting figure of £6,500 up to the MDT rather than £520,000. On this basis, Makers submitted it is entitled to a reduction in penalty.

146. No definite explanation has been provided by the OFT as to why Coverite's total turnover figure for the financial year 2003/04 was given as £33,072,000 in paragraph 18 of the Decision and as £18,271,831 in paragraph 816 of the Decision and in the Schedules showing the penalty calculations. A footnote to the figure in Schedule B states:

> "In the case of Coverite Limited the penalty was based on figures supplied by Coverite Limited's solicitors (Denton Wilde Sapte) on 23 May 2005 which showed a turnover of £18.3 million. Para 18 of the Decision refers to a figure of £33.1 million derived from the Financial Analysis Made Easy Report. Coverite Limited's Annual Report for the Year ended 30 June 2004 indicate that the £33.1 million figure derives from the consolidated financial statement for Coverite Limited."

147. This footnote does not explain, however, why the fact that the £33.1 million figure derived from the consolidated financial statement for Coverite meant that it was not the correct figure to use in either Step 3 or Step 5 of the calculation of the penalty.

148. At the hearing of this appeal, Mr Ward for the OFT stated that it was not possible to resolve which was in fact the correct figure but that it was also not necessary to do so. He stated:

> "… As the Tribunal will, of course, be aware … there are issues about when, and in what circumstances a head company can be grouped together with other companies which it has whole or partial ownership of. There is a presumption that if it is whole ownership, then it is a single undertaking. But, it is a rebuttable presumption. It is a murky issue. Denton Wilde Sapte produced a figure and some draft accounts which the OFT relied upon for its decision. It is no part of my submissions today to seek to persuade you one way or the other which of those is correct. We can in fact proceed on the assumption – although I would not accept it – that the OFT may have made a mistake here. Let us assume for a minute that it is just a mistake and that Denton Wilde Sapte gave the wrong figures to the OFT, and the OFT were wrong to allow them".[6]

149. Following the hearing, the OFT provided the Tribunal and Makers with the exchange of correspondence between Denton Wilde Sapte and the OFT. The letter of 23 May 2005 referred to in the footnote to Schedule B was simply a covering letter enclosing draft financial accounts for the year ended 30 June 2004. We do not know whether those draft accounts were provided to the OFT in response to a particular request or were unsolicited. The front page of those draft financial accounts gives the name of the company as Coverite Limited with a company registration number of 454440. On the page headed "Coverite Limited, Profit and Loss Account for the year ended 30 June 2004", the figure given for turnover is £18,271,831. Included in the Notes to the Accounts is a list of the subsidiaries in which Coverite Limited has 100 per cent holding and others in which it has a 50 per cent holding.

150. The draft accounts appear to have been provided separately from the response by Coverite to the OFT's request, included in the covering letter under which it served the Statement of Objections, for Coverite's turnover figures in the relevant market. An email dated 3 June in which Denton Wilde Sapte provided the OFT with Coverite's relevant turnover figures states as follows:

> "Coverite's accounting procedures before October 2003 were very unsophisticated. Steve Adkins, Coverite's Finance Manager and Company Secretary only joined the company in October 2003. Since he is the first qualified

[6] We should make clear that there has been no suggestion that either Coverite or Denton Wilde Sapte was in any way at fault in providing these figures to the OFT.

chartered management accountant to join the company, no detailed accounting information was kept regarding product lines before this time."

151. Attached to the Notice of Appeal was the final version of the annual report for Coverite Limited for the year 2003/2004 as submitted to Companies House on 26 July 2005. This gives the same company registration number 454440 but the figures are very different. The profit and loss account is expressly stated to be a consolidated profit and loss account and the turnover figure is £33,072,356. The figure of £18,271,831 does not appear anywhere in the final set of accounts.

152. We have not been provided with any evidence to support Mr Ward's suggestion in his submissions that the difference in figures derives from a decision – good or bad -- by the OFT not to use the consolidated group figures for Coverite. There is no reference in the correspondence we have seen to any discussion between Coverite and the OFT as to whether it is appropriate to use the consolidated group's turnover in the penalty calculation or as to whether the subsidiaries in which Coverite has only a 50 per cent share are properly to be treated as part of the same undertaking. Both the draft set of accounts provided to the OFT in May 2005 and the final set of accounts included in the trial bundles purport to relate to the same holding company. It is not possible to ascertain from the material before us whether the draft accounts in fact record the results of only part of the business and if so which part, or why otherwise the turnover figure in the finalised set of accounts is so much greater than the figure in the draft set.

153. We conclude from this that the OFT simply failed to update the figures that it had been given in May 2005 with the final consolidated figures. It did not deliberately use figures from only part of the group and it did not, so far as we have seen, request from Coverite any turnover figures other than the figures for total turnover and turnover in the relevant market.

154. The issue for our determination is, therefore, whether since this mistake on the part of the OFT led to it imposing a lower penalty on Coverite than it would have done if

it had used the correct total turnover figure, the Tribunal should reduce the penalty imposed on Makers by a corresponding amount.

155. Mr Ward referred us to two cases from the Community Courts concerning the effect of a mistake in the calculation of the penalty of one addressee of a decision on the penalties imposed on other addressees. The first case was Case T-304/02 *Hoek Loos v Commission* [2006] CMLR 590 ("*Hoek Loos*"). There the Appellant complained of unequal treatment in that another undertaking, AGA Gas, which the Commission had treated as comparable in terms of responsibility for the infringement, had received a substantially smaller fine. The Court found that this was justified by the fact that AGA Gas's fine had been reduced in order to bring it within the upper limit of 10 per cent of total turnover which the Commission was legally bound to apply and because AGA Gas had been entitled to a greater reduction for leniency. The Court found that the Commission had not erred in the way it applied the 10 per cent upper limit on the fine but went on to state at paragraph 113:

> "In so far as the applicant alleges that AGA Gas obtained an unlawful reduction in its fine and even if the Commission wrongly granted that undertaking a reduction by incorrectly applying the 10% upper limit, compliance with the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely in support of his claim, on an unlawful act committed in favour of a third party. (Case 134/84 *Williams v Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 160, confirmed on appeal in Case C-297/98 P *SCA Holding v Commission* [2000] ECR I-10101; and *LR AF 1998 v Commission*, cited in paragraph 40 above, paragraph 367)".

156. The second authority cited by Mr Ward was the earlier case of Joined Cases T67/00 etc *JFE Engineering Corp & ors v Commission* [2004] ECR II – 2501 ("*JFE Engineering*"). That case concerned an appeal by one of the addressees of the decision in the seamless steel tubes cartel. The operative part of the Commission's decision in that case had found two infringements. Article 1 stated that the eight addressees of the decision, four of which were Japanese producers and four of which were European producers, had taken part in an agreement to respect their domestic markets. Article 2 of the decision found that the European producers had committed

a separate infringement in relation to supplies of tubes to Corus. The decision also stated that the Commission had decided not to take account of the second infringement when setting the fines because it regarded the second infringement by the European producers as merely a means whereby the cartel condemned in the first Article of the decision had been implemented.

157. The Court of First Instance found that this assessment of the significance of the second infringement was vitiated by errors and that the Commission's failure to take account of the second infringement when setting the fines for the European producers was thereby "deprived of its logical basis". By omitting to impose an additional fine on the European producers for the second infringement, the Commission had acted contrary to the principle of equal treatment *vis a vis* the Japanese producers.

158. The Court considered that the logical way of dealing with this was to increase the fines on the European producers. Although those producers had brought their own appeals against the Commission's decision so that the Court was seized with jurisdiction to vary the penalties imposed on them, the Commission had not made submissions in support of an increase in fines for the European producers. Those appellants had therefore not had an opportunity to give their views on the appropriateness of increasing the fine. The Court concluded (at paragraph 579) that the most suitable way of remedying the unequal treatment was to reduce the fines imposed on the Japanese producers even though there was nothing wrong with the way their fines, taken alone, had been calculated.

159. We have also been referred to the Court of Appeal's decision in *Argos & Littlewoods*. In that case the appellants submitted that on the proper application of the principles of the leniency programme set out in the OFT Guidelines, the other cartel member Hasbro should only have been granted a 50 per cent reduction in its penalty rather than the 100 per cent it was in fact granted. The Court of Appeal did not accept this submission. However, it remarked at paragraph 180 as follows:

> "Thus, Community law requires that comparable situations are to be treated the same way, and that different situations are to be treated differently, unless a departure from this is objectively justified. The question in the present cases is whether the situations which have been treated differently are in fact comparable, and if so, whether there is an objective justification for the difference of treatment. In addition … there are separate procedural points arising in relation to the discrimination argument, but we will not anticipate those at this stage."

160. Although the Court of Appeal held on the facts that the OFT was entitled to grant full remission of penalty to Hasbro, it indicated that if it had found otherwise, a reduction would have been given to the less favoured undertaking to eliminate the inequality of treatment as was done in the *JFE Engineering* case. Such reliance was not precluded by the fact that Hasbro had not brought an appeal against the OFT's decision, as the Court said at paragraph 257:

> "… In that case, the other parties could rely on unequal treatment, as the Japanese parties did in *JFE Engineering*. The favoured undertaking would, on the other hand, have to weigh up (as well as all other relevant factors) the risk that, by bringing such an appeal, it would expose itself to the jurisdiction of the Tribunal to increase the penalty imposed on it. It might therefore decide that, discretion being the better part of valour, it would not challenge the finding of breach of the penalty for fear of ending up with the same finding of breach and a heavier penalty. We do not see why the ability of the other parties to rely on unequal treatment as a ground of appeal at all should depend on the decision of the favoured undertaking whether or not to appeal. If there has been unequal treatment in the imposition of penalty, the OFT has acted in breach of relevant principles of Community law, and therefore of the Act. That breach ought in principle to be available to the other undertakings as a ground of appeal."

161. Having thus decided that the absence of Hasbro as an appellant was no bar to Argos and Littlewoods seeking to compare their treatment with Hasbro's, the Court concluded at paragraph 280:

> " … it seems to us that the principle of equal treatment requires that, if two undertakings in comparable circumstances have been dealt with in unlike ways, the difference of treatment is wrong in law unless, and except to the extent that, it is objectively justified. If it is wrong in law, then the less favoured undertaking is entitled to appeal and to have its penalty reduced to the extent necessary to eliminate the inequality of treatment…"

162. The *JFE Engineering* judgment does not appear to have been cited to the Court in the *Hoek Loos* appeal and the Court in *JFE Engineering* does not appear to have considered whether and, if so, what account should be taken of the principle of legality when applying the principle of equal treatment. We have considered carefully what principles can be derived from these two strands of case law – *Hoek Loos* and the cases cited in paragraph 113 of the *Hoek Loos* judgment on the one hand and *JFE Engineering* and the *Argos & Littlewoods* judgments on the other. All of the cases cited were instances where it was either alleged by the appellant or found by the Court that the decision under challenge was flawed because of a failure to apply the guidelines properly in assessing the penalty to be imposed on another addressee of the decision. In each case the Court had to consider whether it would be appropriate to correct the perceived unfairness arising from that failure by reducing the appellant's fine even though the appellant's fine had been arrived at by an entirely correct application of the relevant guidelines. In the *Hoek Loos* line of cases the Court of First Instance has indicated that the principle of equal treatment must be reconciled with the principle of legality so that a person may not rely in support of his claim on an unlawful act committed in favour of another party. However, in the *JFE Engineering* case (which was followed by the Court of Appeal in *Argos & Littlewoods*) the Court of First Instance was prepared to use its unlimited jurisdiction in respect of penalties to adjust the fine so that it better reflected the correct relationship between the penalties which should have been imposed on the parties to the cartels.

163. The majority of the Tribunal (Marion Simmons QC and Vivien Rose) consider that none of the cases cited to us is precisely in point because the nature of the mistake in those cases is different from the nature of the mistake in the Makers case. The mistake made by the OFT was not a mistake of methodology or a departure from the Guidance but simply the insertion of an incorrect figure at a point in the OFT's arithmetic. The mistake here is therefore different from that considered in the European authorities or in *Argos & Littlewoods* where the unfairness arose, or was

alleged to arise, from a deliberate decision by the Commission or the OFT to adopt an approach which would have been vitiated by errors of assessment.

164. We regard it as very unfortunate that such a mistake should be made by the OFT if, as we have concluded, it arises simply from using the turnover figure from the draft Coverite accounts even though the correct figure in the finalised accounts was available. The mistake made a significant difference to the penalty imposed on Coverite. It is particularly unfortunate that the mistake was not picked up given that the correct turnover figure was used in the earlier paragraphs from the Decision. If the OFT is determined, rightly in our view, to ensure that substantial penalties are imposed for infringements of the Chapter I prohibition then it is incumbent upon it to take care to use the appropriate figures in its calculations.

165. Although Makers, in order to calculate the reduction to which it claims to be entitled, has expressed the mistake in terms of the application of a lower percentage to arrive at the Minimum Deterrence Threshold (that is, 0.3023 per cent rather than 0.75 per cent), that is not in fact the calculation that the OFT used. Rather the mistake led to the MDT for Coverite being an entirely arbitrary percentage of its actual total turnover. Further the mistake only had an effect on Coverite's penalty because the level of turnover of Coverite's business outside the relevant market meant that an adjustment of the penalty at Stage 3 was called for. Several of the other addressees had no such adjustment made and it is therefore a matter of chance that the mistake made actually affected the level of penalty.

166. The question we have to decide is whether Makers is entitled to rely on the OFT's arithmetical mistake in relation to the penalty it imposed on Coverite or whether the Tribunal should only adjust the penalty imposed on Makers if there had been a mistake of methodology or a departure from the Guidance by the OFT in arriving at the penalty for Coverite. The latter is not the position in this case. In none of the authorities cited above has the Court considered whether the difference in character between these two types of mistake is material and whether an adjustment should be

made in circumstances where the Regulator had made an arithmetical error in calculating the fine of another party. Is the difference in character between these two types of mistake material? Although in both situations the party in the position of Makers can point to unfairness between the amount of the penalty imposed on it and the amount of the penalty imposed on another, on balance, the majority of the Tribunal has come to the conclusion that the Tribunal should only adjust the penalty imposed on a party such as Makers, where it is disproportionate to a penalty imposed on another party which had been calculated by the OFT having relied on an error of law. The majority of the Tribunal does not consider that the Tribunal should reduce a penalty imposed on one party which has been properly calculated by the OFT because the OFT made an arithmetical error in calculating another party's penalty. The majority of the Tribunal does not consider that it would be appropriate for the Tribunal to give credence to the arithmetical mistake of the OFT in arriving at the penalty it imposed on Coverite, by reducing the penalty imposed on Makers.

167. The majority of the Tribunal does not see that fairness requires the Tribunal to apply a lower percentage to Makers' total turnover in order to arrive at its MDT or to attempt in some other way to transpose the mistake from the Coverite calculation to the Makers calculation. The majority of the Tribunal considers that in the circumstances of the present case where the mistake is an arithmetical error made by the Regulator in calculating another party's penalty the application of the principle of equal treatment does not require a reduction in Makers' penalty in this case.

X CONCLUSION

168. It follows from the above that Makers' appeal against the OFT's finding of infringement is unanimously dismissed. The appeal against the level of penalty is also dismissed.

169. In the light of our findings of fact, we do not find it necessary to consider whether, if we had accepted Makers' account of events but upheld the OFT's finding of liability on the second ground, we would have reduced the level of the penalty.

170. There will be interest on the penalty to run, subject to any further submissions the parties wish to make, at 1 per cent above the Bank of England base rate from the date set for the payment of the penalty in the Decision, namely 24 April 2006 until payment or judgment under section 37(1) of the Act.

Michael Blair QC: Reasons for dissent on level of penalty

171. I fully agree with the judgment except at paragraphs 163, 166 and 167 inclusive.

172. My reasons for departing from the view of the majority in that limited area are:

a. The difference in character of the two mistakes is not in my view material;

b. From the point of view of Makers, this mistake is just as unfair in its effect as if there had been an error of law or a misapprehension of the true meaning and intent of the OFT's guidance;

c. Makers have sought to persuade us that, as in *JFE Engineering*, the most suitable, and indeed the only, way of remedying the (comparative) unequal treatment, is by an adjustment downwards in their penalty even though there was nothing wrong with the penalty imposed on them, viewed on its own; and that submission seems to me to be more attractive than the alternative of admitting an error and seeking to show that it is immaterial;

d. While there is no authority directly on the point, and this decision has therefore to make new law one way or the other, I have found no trace in the jurisprudence of any requirement that the mistake has to have a legally vitiating character. It simply has to be wrong. We do not need to look for any unlawfulness that produces the unfairness. It is the unfairness in itself that produces the unlawfulness that enables or requires the Court to rectify matters;

e. The only way of escaping from that power or duty, once it arises, is by reason of objective justification, but it was not suggested in argument that there was any such justification and I have found none of my own;

f. Further, the remarks of the Court of Appeal in *Argos & Littlewoods*, so far as they can be extended beyond the facts in those appeals, suggest that the approach at (d) above is the right one; see in particular the quotations contained at paragraphs 159 and 161 above. The approach of the Court there was to identify a difference of treatment, which is, unless objectively justified, "wrong in law"; and

g. It is in any event undesirable to create what I would see as an unnecessary new distinction into the jurisprudence. There is no bright line between arithmetical mistakes and mistakes of methodology. These two cases (*JFE Engineering* and *Makers)* may have sea room between them, but it is easy to imagine cases where the line becomes blurred.

173. I therefore would have awarded to Makers a proportionate reduction in penalty, by applying at the appropriate point what seems to me to be the relevant fraction (that is 1.8271 divided by 3.3072).

Marion Simmons Michael Blair Vivien Rose

Charles Dhanowa 22 February 2007
Registrar