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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1120/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 July 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

- and -

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

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

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

1 THE CHAIRMAN: Good morning. Mr. Clough.

2 MR. CLOUGH: Good morning, Mr. Chairman and members of the Tribunal. Mr. Adam Aldred
3 on my right here and I appear for the appellants this morning, Quarmby Construction
4 Company Limited (who we call QCC for short and for a reason that I hope you will
5 understand shortly) and the second appellant, St. James Security Holdings Limited, SJS,
6 who are the parent company. This is their appeal under section 46 Competition Act against
7 the OFT's decision dated 21st September 2009 with which I know you are all already
8 familiar from last week. Miss Kelyn Bacon and Mr. Tony Singla represent the respondent,
9 the Office of Fair Trading.

10 THE CHAIRMAN: We have seen them before as well! (Laughter)

11 MR. CLOUGH: That is right, sir. Miss Bacon wants to address you on a couple of documents. I
12 will sit down for a moment.

13 THE CHAIRMAN: Miss Bacon.

14 MISS BACON: Sir, whilst I was preparing for this hearing it came to my attention that there
15 were a couple of documents in the bundle that were either unredacted or redacted and
16 illegible. So I have arranged for unredacted and legible versions of both of them.

17 THE CHAIRMAN: A good combination!

18 MISS BACON: Also, Mr. Singla was in the hearing last week in Crest where the Tribunal
19 indicated that the navigation tables were very helpful, and he has diligently prepared a
20 navigation table for this case.

21 THE CHAIRMAN: I think I blamed you for the concept, Miss Bacon, wrongly!

22 MISS BACON: Sir, you rightly blamed me for the concept. I invented it at the end of the
23 defence.

24 THE CHAIRMAN: In that case you are to be congratulated on the concept!

25 MISS BACON: I am very grateful. Can I just tell you where I think these documents ought to be
26 inserted. The first document in the clip is the navigation table. The second document is a
27 blown up and unredacted version of document A1595. This should go behind p.92 in QAB
28 4. That is QAB 4 tab 12. You will see on the second page of that tab is 91. That is the
29 illegible and redacted version. QAB 4 is the core chronological bundle. If you turn two
30 pages in that is the old version. I suggest you put A1595 behind that.

31 THE CHAIRMAN: QAB 4 has the disadvantage of having 5 on the spine. Tab 12, two pages in,
32 yes.

1 MISS BACON: So the single page should go behind p.91. Then you will see there is a rather
2 longer clip and that is the original version of the next document that is in QAB 4 that starts
3 at p.92 and goes through to p.110.

4 THE CHAIRMAN: It looks like that, and it runs to how many pages?

5 MISS BACON: It runs through to p.110 in the bundle that you have. I suggest that you keep that
6 there and simply insert the new version that I have given you with the red lines and boxes
7 on it behind it.

8 THE CHAIRMAN: So it is the entirety of this clip?

9 MISS BACON: Yes, the entirety of the clip. The same change has been made to the witness
10 bundle. Can I just check, when I am referring to QAB 4, the witness bundle is also marked
11 with a 5 on spine.

12 THE CHAIRMAN: QAB 4 is core chronological bundle, and it has a number of interview
13 transcripts, inquiry records?

14 MISS BACON: Yes, that is the same as my QAB 4, so I am just anxious not to confuse the
15 witness when I take them to the bundle. I will ask the witness to go to bundle 5.

16 THE CHAIRMAN: It is the Tribunal's bundle numbered 5. The bundle that we have numbered 4
17 contains the appellants' skeleton, the reply and various other documents that are connected
18 therewith.

19 MISS BACON: Yes, I have that as numbered QAB 3.

20 THE CHAIRMAN: We will just add 1 to each QAB. Mr. Clough?

21 MR. CLOUGH: Thank you, Mr. Chairman. I apologise for the file numbers, because we have
22 also done some homework which slightly overlaps with Miss Bacon's, going through all
23 these seven suspect tenders. I am afraid we have put the references to our own bundle
24 numbers.

25 THE CHAIRMAN: We will muddle through somehow. We will get used to it. Use your
26 numbers. It will only take one or two documents for us to be able to find exactly where we
27 are.

28 MR. CLOUGH: I think your plus 1 should work.

29 Sir, subject to the Tribunal's approval, the proposed timetable which has been agreed with
30 Miss Bacon is as follows: first, we will make a short opening, hopefully not beyond
31 11 o'clock, and then Miss Bacon is going to deal with her cross-examination of the three
32 QCC witnesses, Mr. Nelson, Mr. Harrison and Mr. Buckler, who are all in good time and
33 sitting here at the back of the court. She has indicated that she may need between two and
34 three hours to cover the witnesses. We would then propose that I make submissions after

1 that, either finishing by the end of this afternoon or relatively early tomorrow morning, and
2 then she will make her submissions, allowing me a short time to reply before the short
3 adjournment tomorrow, and then as proposed by the Tribunal, we would stick to the plan of
4 dealing with the penalties submissions tomorrow afternoon at 2 o'clock with the idea of
5 being roughly 50 minutes each and a short time for replies.

6 THE CHAIRMAN: Let us see how we go.

7 MR. CLOUGH: Certainly. Just by way of a few words of introduction, we would like to stress,
8 especially as this is the second week (like the second week of Wimbledon, I suppose, and
9 things may be hotting up a bit) this is not just another of the cover pricing appeals. It may
10 have already struck you that we have one very serious starting point with our preliminary
11 issue. The company, QCC, has (and it is clear from the evidence) a clear policy of not
12 involving itself in cover pricing. Indeed, there is clear evidence from the correspondence
13 that is attached to the exhibit, Roger Nelson 1 to be found at Quarmby's appeal bundle 1 tab
14 6 pp.115-160 where there is a host of 40-odd letters sent out informing potential employers
15 when QCC is unable to bid. We put quite significant reliance on that in support of the
16 company's policy, which may very well be different from a lot of the other companies in
17 the construction industry at the relevant time.

18 As a preliminary issue, we say that the appellants should not be here at all since the
19 Decision, and indeed the Statement of Objections, should never have been addressed to
20 them, because they do not satisfy the evidential tests that the OFT chose to apply itself to
21 select at least five suspect tenders. That is, as you will hear, the crucial procedural step
22 where they selected 112 out of 1,000 potential companies to, if you like, proceed against in
23 the case that we are now dealing with in their voluminous Decision.

24 We say that ultimately the defects in that methodology of selecting the non leniency parties
25 demonstrates the dangers that applying a one size fits all approach to what are in effect
26 discrete and unrelated tenders which should not have been combined together in one
27 gigantic decision. There were more proportionate methods of deterrence available to the
28 Office of Fair Trading if deterrence was really necessary by the time of the Decision in the
29 light of the Europe Economics report, which, as I am sure you know sir, is in the joint
30 authorities bundle.

31 That report confirmed that until 2005, and indeed our own press analysis in QAB 2 tab 26
32 also demonstrates this, no-one knew that cover pricing was unlawful. Now, according to
33 the Europe Economics report, 82% of the construction industry has understood that what we

1 call simple cover pricing (that is what Quarmby has been accused of – no compensation
2 payments) is considered a competition law infringement.

3 THE CHAIRMAN: It may help you to know, Mr. Clough, that one of our number, Mr. Summers,
4 sat on the *Apex* case.

5 MR. CLOUGH: Thank you, yes. Indeed, I think it was in that case that the late chairlady actually
6 commented that that was the very first case where cover pricing and bid rigging was being
7 dealt with in this Tribunal. I noticed that in the transcript that she said, and I think I am
8 quoting: “This is a new area”. That brings back memories!

9 The position of QCC is that it is not in a position to put a positive case before the Tribunal.
10 So the appeal before this Tribunal, sir, is to invite you to find that QCC has no case to
11 answer effectively. We say that in the light of the OFT’s skeleton at para.41(a) – this is
12 because of the passing of time – it has not got any documentary evidence. Indeed, the
13 recollections of the witnesses, as we will no doubt hear this morning, are not sufficient to
14 put forward a case that might prove a negative. If you bear in mind, sir, that the first
15 infringement found in the Decision was more than ten years ago, this perhaps is not
16 surprising. The date was 3rd March 2000, literally three days after the Competition Act
17 came into force.

18 (QAB paragraphs 15 & 16) That there is little dispute between the parties as to the burden
19 and standard of proof in this case. Indeed, the Decision itself at section 3 paras.198 and 199
20 refers the well cited paragraphs from *Napp* (in particular para.109).

21 However, we do have to take issue with the OFT on one important matter. That is this.
22 When the OFT says at para.41(d) p.16 OFT skeleton “It was entitled to consider the
23 surrounding behaviour of other companies”, the OFT clearly means that it is entitled to
24 disregard the presumption of innocence in the light of its policy concern that cover pricing
25 was endemic in the construction industry.

26 There is a strong flavour, in our case, of guilt by association. We say this not lightly, but
27 because the only evidence relied upon for guilt is what we would say are self serving,
28 prompted documents produced, and statements made, by leniency applicants, some of
29 whom seem to have used cover pricing as a marketing tool to get their names into the
30 market. They were prolific. The three companies on whose evidence the OFT relies in our
31 three infringement cases confessed respectively: Strata to 214 instances of cover pricing;
32 York House 34 instances; Admiral 70 instances. They knew that they did it all the time. I
33 quote from the chief estimator Strata, the liability defence tab 7 p.4: “I would say we were
34 covering 90 per cent of the traditional tenders that came in.” We are tempted to say, sir,

1 that “in for a penny, in for a pound” seems to have been their approach. It is perhaps
2 important to remember that the leniency tainted evidence relied upon against QCC is far
3 removed from this Tribunal’s and the European Court’s endorsement of a very important
4 evidential test, and that is (and I quote now again from the liability defence para.59 which
5 sets this out) “a single item of evidence or wholly circumstantial evidence may be sufficient
6 proof of a prohibited agreement; and it may be necessary to draw inferences from
7 fragmentary and sparse evidence of unlawful conduct.”

8 But that, we say, is not this case. Indeed, the OFT itself accepted in the Decision that a
9 single document was insufficient evidence in the present case. There were 38 examples of
10 cases dropped by the Office of Fair Trading between the Statement of Objections and the
11 Decision on this basis. In Annex 2 to the QCC skeleton we set out some examples and
12 actually list the types of evidence that the OFT had. They are remarkably almost identical to
13 the sorts of evidence that they relied upon in our seven suspect tenders, and that they found
14 insufficient in those 38 cases.

15 So we say, if it is necessary to say it, put a big warning sign over evidence from leniency
16 applicants, not because they are dishonest but because they obviously had other things on
17 their minds at the time when they are making leniency applications. We submit very
18 strongly that it is for the Tribunal now, on the evidence that the OFT had before it, to be
19 satisfied to the required standard of proof at the time of its Decision, and (and we say this is
20 very important, albeit unusual) that at the other relevant stage of the procedure when it
21 selected the minimum five suspect tenders for the purposes of continuing the procedure
22 against the selected non leniency companies, which was the basis for the fast track offer
23 letter on 22nd March 2007, to look again at the evidence and to take a fresh approach to the
24 issues, as we submit the Tribunal is well able to do.

25 In particular, we submit the Tribunal will be asking, what other plausible and innocent
26 explanation for the sparse evidence that the OFT relies upon is offered or available? The
27 authority for that test, with which the Tribunal is familiar, is the joint cases 204/00P
28 *Aalborg Portland v. The Commission* at para.57, which is at QAB 5, bundle 6, tab 5, p.29.
29 The explanation that QCC offers is that there is no evidence linking QCC to any of the three
30 infringements found in the decision other than this weak evidence: late remembered, OFT
31 prompted, unclear answers to OFT interview questions of leniency applicant employees
32 long after the event.

1 The leniency applicant employees often express doubt and uncertainty as to the meaning of
2 documents and had no or little recollection of the tender in question. The evidence relied
3 upon by the OFT is second or third hearsay evidence at best.

4 QCC says it is likely, indeed more likely, that there is an innocent explanation as to how the
5 OFT came to connect QCC with these infringements, including mistaken identity or
6 presumptions and assumptions on the part of the leniency applicants.

7 It is perhaps worth drawing to the Tribunal's attention that the OFT has not contradicted
8 and not put forward evidence to contradict the evidence put forward by QCC nor QCC's
9 criticisms of the OFT's evidence. The OFT has not produced any interview witness before
10 the Tribunal, no doubt because doing so would lay bare the fact that there is no direct
11 evidence being relied upon at all in many instances, and likely that the OFT believes the
12 hazy recollections of its interviewees could only become weaker.

13 Let me take one example, the estimator, Mr. Richardson: in his interviews at QAB 4, tab
14 12, p.123, which may be bundle 5, tab 12, p.123. QAB 4 is our core chronological bundle
15 of key documents that we rely on, which we have taken out of our own documents, but a lot
16 of them out of the OFT's very helpful bundle of evidence attached to their liability defence.
17 Our core chronological bundle, which I will come back to later after the witnesses, we hope
18 will help the Tribunal to see the different documents that we say are important under each
19 of the seven suspect tenders. That is p.123.

20 THE CHAIRMAN: Can we just have the reference to that, because it might be worth testing the
21 bundle system on this document.

22 MR. CLOUGH: Our reference is QAB 4, tab 12, p.123. That is Mr. Richardson's interview.

23 THE CHAIRMAN: Yes, I have some pages helpfully upside down, but I can turn the file over.
24 Yes, I see.

25 MR. CLOUGH: Does that work?

26 THE CHAIRMAN: Yes, we have found the document.

27 MR. CLOUGH: It is an extract from his interview. We can test it further because Mr.

28 Richardson was not actually the estimator on this job, but he had a book with 28 pages of
29 telephone numbers and that should be QAB 4, tab 12, pp.119 and 120. Just to stress, these
30 are extracts from the complete documents. The complete documents are still in their homes.
31 Page 119 lists the pages which are omitted from the full document.

32 I will give you a document which actually links all these things together when we come
33 back to the meat of this, if I can put it like that.

34 Does that work?

1 THE CHAIRMAN: Yes, thank you.

2 MR. CLOUGH: In this 28 pages of telephone numbers, Mr. Harrison, who is one of the
3 witnesses you are going to hear from shortly, who was employed as an estimator manager
4 by QCC, is listed, and his number, or rather the QCC number, is to be found in Mr.
5 Richardson's book, along with 250 other names. We say there is a host of different and
6 entirely innocent reasons why at some point in his career Mr. Richardson may have noted
7 Mr. Harrison's telephone number. For example, it is clear from the OFT's own evidence
8 that it was normal practice for the estimators of many construction companies to contact
9 each other after a tender had been awarded to find out how they had fared. Beyond that
10 superficial link, we say there is no unambiguous contemporaneous link of any cover pricing
11 activity by QCC in respect of that project at all.

12 Turning very briefly to the decision, Mr. Chairman, as I am sure the Tribunal is aware, there
13 are three alleged infringements. They are infringement numbers 6, 214 and 233. The first
14 and last concern private housing, and the second education. Education forms part of the
15 commercial category of QCC's business, which in the year chosen by the OFT to determine
16 the relevant turnover for the purposes of penalties accounted for less than 5 per cent of its
17 overall turnover. In contrast, the relevant turnover in private housing was seven times
18 greater at just under 35 per cent of its total turnover. However, QCC's total penalty of
19 £881,749 was almost all imposed for the two infringements in the private housing sector
20 because of the artificial way the OFT defined the relevant markets and calculated relevant
21 turnover. By taking private housing, as you will hear later, as a complete market, rather
22 than sub-dividing it in the way it is sub-divided on the commercial side, Quarmby's
23 turnover of course was much higher in that particular wide housing market, although its
24 market share may have been very low. When you are looking at turnover fines we say it
25 actually artificially inflated the turnover that was taken into account.

26 I am just making these brief comments on fines before turning back to the liability case.
27 The average fines as a percentage of total turnover was about 1 per cent in this case. QCC's
28 fine was 3.62 per cent of its turnover, making it one of the highest fines imposed in terms of
29 percentages.

30 As I have indicated, sir, there are two parts to the appeal. The liability appeal, including the
31 preliminary issue: here we say there is no case to answer on the evidence available to and
32 relied upon by the OFT, either at the fast track stage where it selected these five suspect
33 tenders, or at the decision stage. There are also certain legal grounds of challenge, in
34 particular in relation to the first infringement, infringement number 6. We say that the

1 finding of an infringement of the chapter 1 prohibition is statute-barred; or alternatively
2 that the agreement or concerted practice found by the decision predates the Competition Act
3 1998. If you remember, sir, the alleged infringement is 3rd March 2000. As to
4 infringement 233, there is also a factual and legal issue as to whether there was any effect of
5 the infringement found by the decision in the light of the evidence of Mr Colin France,
6 which is accepted by the OFT. He says that he was not deceived by any cover pricing, he
7 was acting on behalf of the employer, which may or may not have taken place, and
8 therefore there was no effect on the employer letting this contract.

9 But, more importantly perhaps, Mr France's evidence is crucial for another reason. The
10 Tribunal needs to assess the evidence on the balance of probabilities, and the OFT did not
11 have the benefit of Mr France's evidence when it made its decision that the Tribunal does.
12 Mr France's evidence supports the appellant's proposition that there is an entirely innocent
13 explanation for the way York House came to put in its tender price. He does not believe,
14 and says in no uncertain terms, that it did put in a tender price, and there was a lot of doubt
15 in his evidence which we will look at in a moment. Sorry. He says that he does not believe
16 York House put in a cover price. They certainly did not need to, and they certainly did not
17 have any effect on him.

18 Then, secondly, we will come to the penalty appeal. Here we submit that the fine of
19 £818,749 imposed jointly and severally on SJS as the parent company as well as QCC is
20 disproportionate and excessive in the light of the OFT's guidelines and the facts – even
21 taking the facts as found by the OFT.

22 THE CHAIRMAN: And you contest the step 1 starting point in any event, do you not?

23 MR. CLOUGH: We do contest the step 1 starting point, but our – the primary emphasis of our
24 challenge there is on the relevant turnover and the year of turnover that has been used in the
25 light of the seriousness, which I understand has been rehearsed, indeed I saw it being
26 rehearsed in front of you at one of the hearings last week.

27 Very briefly, and then I shall let Miss Bacon get on with her witnesses, we have what we
28 call a "QCC OFT procedure chronology" which I will hand up to you now, which just sets
29 out the main procedural events and the pleadings in chronology order, which may I hope be
30 of some assistance.

31 THE CHAIRMAN: Thank you.

32 MR. CLOUGH: So, it is relevant to show the dates, for example, when the OFT first took action
33 in the case, indeed in the three infringements, and then deals with some of the later stages of

1 the leniency applicants which are relevant, and then right through to the witness statements
2 and the pleadings.

3 As our main submission on the liability side is that the OFT's evidence is of too poor a
4 quality when it was relied upon in the decision, we have also prepared a chronology
5 checklist of the seven suspect infringements which includes, of course, the three
6 infringements in the decision, listing the evidence relied upon by the OFT in its decision
7 and liability defence, as well as the dramatis personae involved in each of the suspect
8 tenders. And we have actually attached at the back of that the original navigation table
9 from the decision, which has the paragraphs in the decision referred to it.

10 Just very briefly to explain this document, although I am going to come back to it when we
11 make our submissions – first of all it refers to the various paragraph numbers in the decision
12 where the evidence tests are set out at the very top of page 1. It then goes through the
13 suspect tenders one by one, setting out the chronology of the evidence and the references, as
14 I said, I apologise, to QAB 4, which are the extracts, and indeed the liability defence for the
15 full documents that those extracts are made from. There is then a list of the pleadings which
16 I am afraid duplicates the helpful navigation table. The client's name is put there. The
17 tenderers, the companies that tendered and the amounts of money they tendered. Then there
18 are the interviewees that the OFT interviewed and there are the appellant's witnesses that
19 are relevant to each of the suspect tenders. And we hope that that may assist the Tribunal in
20 its deliberations at a later date if not now.

21 So, that brings me to where I will pause before we start our submissions later, after the
22 evidence, and now prior to the cross-examination by Miss Bacon, with the Tribunal's
23 permission I will call the first of the three QCC witnesses. The first one is Mr Roger
24 Nelson, and the witnesses are in QAB -----

25 MISS BACON: It is bundle 1, tab.6.

26 MR. CLOUGH: Mr Roger Nelson's first statement is at QAB bundle 1, tab.6, p.107. The second
27 statement of Mr Nelson is at QAB 1, tab.14, p.262. The third statement ----- I should have
28 said that the first statement is dated June 2008. That was attached to the response to the
29 statement of objections. The second statement is dated 18th August 2009. That was in
30 connection with the fast track offer. That is QAB 1, tab.14, p.262. The third statement of
31 Mr Nelson, dated 19th November 2009 is at QAB 2, tab.41, p.551. And, finally, his fourth
32 statement, dated 30th April 2010, is at QAB 2, tab.45, p.601.

33 Mr ROGER NELSON, Sworn
34 Examined by Mr. CLOUGH

1 Q Good morning, Mr Nelson. Could you tell the Tribunal your full name, please?
2 A Roger Nelson.
3 Q Thank you. And can you confirm that your address is the address given in your witness
4 statements?
5 A Yes, it is.
6 Q What is your role at Quarmby Construction?
7 A I am Commercial Director.
8 Q And you are aware that there are some bundles of documents there which contain your four
9 statements.
10 A Yes.
11 Q And indeed there are a number of exhibits to your statement. Is that correct?
12 A Yes.
13 Q And, can you confirm that those are the statements that you made, for want of me going
14 through them, the dates I read out, that is 26th June 2008, 18th August 2009 -----
15 THE CHAIRMAN: I think we can take all that as read, Mr Clough.
16 MR. CLOUGH: Thank you very much. (To the witness) So, can you just confirm that those four
17 statements stand as your evidence today?
18 A They do indeed.
19 Q Thank you very much. (To the Chairman) Mr Chairman, I am not proposing to ask him
20 any questions now, but I will hand over to let Miss Bacon ask questions. (To the witness)
21 So, if you would like to answer the questions from Miss Bacon.
22 A Surely.
23 Cross-examined by Miss BACON
24 Q Mr Nelson, you said in your first witness statement that you have been employed by
25 Quarmby since 1998.
26 A Yes.
27 Q What were you doing before you went to Quarmby?
28 A I worked for Wimpey Construction for almost 20 years.
29
30 Q So, on my calculation, you have been working in the construction industry since about
31 1970, is that right??
32 A Before then, I think, 1960. Certainly over 40 years.
33 Q And you started off at Quarmby as the Commercial Manager, but I understand that in 2002
34 you were promoted to your current post of Commercial Director.

1 A That's right, yes.

2 Q And, who reported to you when you were Commercial Manager?

3 A When I was Commercial -----

4 Q Among the estimators?

5 A Estimating team report to me. Quantity surveying team report to me. Design and build
6 team report to me.

7 Q And who were the estimators, at that point?

8 A When I joined David Harrison and a gentleman from the north-east, whose name I cannot
9 recall. I think he left about '99, I think. David Harrison and Andrew Bell, and over the
10 years I've probably had a staff of nine or ten estimators over those years.

11 THE CHAIRMAN: We are going to find it easier to hear you if you answer your questions in this
12 general direction.

13 A I do apologise. Right. Okay.

14 MISS BACON (To the witness): When you were promoted to Commercial Director in 2002, who
15 was your estimating team then, can you remember?

16 A I can. David Harrison and Andrew Bell.

17 Q And as Mr Harrison's immediate supervisor, how would you describe your role?

18 A How would I describe my role? My role is to ensure that the tenders, when a tender enquiry
19 comes in, that it's processed through the department and gets to a situation where the
20 estimating team can sit down with the Managing Director, who then makes the decisions on
21 the tenders.

22 Q So, you said in your witness statement that you are a Chartered Quantity Surveyor yourself.

23 A I am, yes.

24 Q Was it one of your duties, as the Commercial Manager, to ensure that people reporting to
25 you, such as Mr Harrison and Mr Bell adhered to good business practices in their estimating
26 practices?

27 A Yes.

28 Q And, how would you do that? Would you have discussions with them about policies, or
29 would you send emails?

30 A No. I have to say I'm not an email person, and I'm not a memo person. It tends to be, it
31 tends to be face to face discussions.

32 Q Now, you have just said that in 2002 your estimating team comprised of Mr Harrison and
33 Mr Bell.

34 A Yes.

1 Q And presumably they would have been there in 2000 as well.
2 A Yes.
3 Q And I understand that Mr Bell left in the middle of 2004, is that right??
4 A I can't remember when he left, but probably about those – that's about the right time,
5 I would say.
6 Q Right. And he was succeeded immediately by Mr Butler, who is in court today. Is that
7 right?
8 A He was, that's right, yes.
9 Q Now, I want to ask a few general questions about cover pricing in the industry. Could I ask
10 you to take up your first witness statement, which is at bundle 1, tab.6. If you turn to the
11 second page of that, you will see there that you give a number of reasons why you say cover
12 pricing took place within the industry.
13 A Yes.
14 Q At para.9 you say that employers become agitated if a contractor declines to tender. At
15 paras.11-12 you say that there was limited estimating resource so that, if documents are
16 received late or someone is unacceptably absent, it is difficult to price up a job. Can you
17 see that?
18 A In paragraph – sorry?
19 Q Eleven and twelve.
20 A Eleven and twelve. Yes.
21 Q So, can I take it from that, that a construction company might initially decide to tender, start
22 to prepare for the tender, and at the last minute they might not be able to put in the time to
23 do the estimating, so they could take a cover price then. Is that your evidence?
24 A That, that is how I understand it happened. Yes.
25 Q And in para.15 you say that one aim is to enable contractors to stay on tender lists for the
26 future. (That is over the page, Mr Nelson).
27 A At 15. Yes.
28 Q And you say in the last sentence, the:
29 “... general aim was widely understood throughout the industry, including by
30 commercial clients and members of the employer's design team”.
31 A That was my experience, talking to people. Yes.
32 Q So, something that went on a lot.
33 A It, it happened in the industry. Yes. I accept that.

1 Q I just want to read out one more paragraph of the decision. You do not have to turn up the
2 decision. I just want to see if you agree with this. It is the Decision at IV.33 says:
3 "Irwins listed the various factors which led to cover prices being taken as: [then
4 there are a number of reasons] (g) The realisation that after initial work,
5 inspection of the site and documentation, that the company would not be in a
6 position to offer a competitive price. --
7 THE CHAIRMAN: May we have that reference again, please?
8 MISS BACON: Yes, it is IV.33. I just wanted to read one further reason, which is similar to
9 what you have just told the court. At para.(g) it says:
10 "The realisation that after initial work, inspection of the site and documentation,
11 that the company would not be in a position to offer a competitive price."
12 Mr. Singla has given you the paragraph so you can look at it.
13 A This is a statement made by who, sir?
14 Q It is a statement made by one of the leniency applicants, and I just wanted to see if you
15 agreed with that. It is (g).
16 THE CHAIRMAN: Irwins set out a list of reasons and the OFT seems to have adopted them
17 basically. That is what it amounts to. Just have a look at (g)
18 A I suppose there could be a situation where you had agreed to accept a tender inquiry and
19 then at some stage, looking at the site in more detail, maybe there were some geo-technical
20 difficulties that may be you thought at that time : it's not our cup of tea and therefore didn't
21 proceed. That could happen, yes.
22 MISS BACON: Thank you, that is very helpful. Do you agree, Mr. Nelson, that companies took
23 cover prices particularly where they were invited to tender by an established client who they
24 hoped might continue to give them work in the future?
25 A I would think that's probably the case, yes.
26 Q Do you agree that another case where cover pricing might particularly occur was where the
27 tender was broadly in a contractor's field of work but the contractor just did not have the
28 capacity to price that job up, but it hoped to get similar kind of work in the future?
29 A Yes, if you didn't have capacity and was going through the tender period and then, for some
30 reason, he didn't have capacity, he would struggle at that point, I would suspect.
31 Q My point was directed at this being something in your field, because if it was something
32 that was in your field you would want to make sure that you stayed on the tender list for that
33 kind of work in the future. Is that right?
34 A Sorry?

1 THE CHAIRMAN: This is a matter of common sense, really, is it not? If you do a certain kind
2 of work and it is the sort of work that, for example, a County Council asks for from time to
3 time, you would want to remain on that County Council's tender list?

4 A You would.

5 Q Even if you did not want to do all their jobs?

6 A Yes, you would, and if you were doing Sainsburys, you would want to remain on a
7 Sainsburys list or a Tesco's list.

8 Q Absolutely, the key is to be on the tender list?

9 A The key is to try to get work for the future.

10 MISS BACON: So can I put the opposite situation. If you were invited to tender for something
11 that was completely outside your field, in that case I would suggest there would not really
12 be a need to put in a cover price because you would simply decline it politely and say: that
13 is not our kind of work.

14 A Yes, you would decline it, and you would decline for maybe a lot of other reasons.

15 Q So those could be the situations where you did decline, but you would put in a cover price –
16 I am not saying you, but companies generally would put in a cover price more in situations
17 where it was an established client or their area of work?

18 A I would think it would be to protect the future position, yes.

19 Q Thank you. Could I ask you to turn up the exhibit to that witness statement. If you look in
20 the bottom right hand corner, it is p.116. These are your letters rejecting tender invitations.
21 I would say for the benefit of the Tribunal that they are more or less in chronological order,
22 but as you go through, particularly to the years 2005, 2006, 2007 onwards, sometimes
23 within a year they are not in chronological order. I am going to take Mr. Nelson through
24 these in the order in which they are in the bundle. Look at the first letter on p.116. That
25 was a letter dated 13th November 2000. This was obviously a tender for a residential
26 development and you declined because it was not the kind of work you did, did you not?

27 A That's right, yes.

28 Q If you go over the page, the next letter is at p.117 12th July 2001. If you look at this letter,
29 my interpretation of this is that it seemed to be a project where there was confusion over
30 which Quarmby had been invited to tender?

31 A Yes, it looks like it.

32 Q So that is a specific situation. Over the page at 118 -

33 MR. CLOUGH: Sir, it might be helpful if he just reads out that paragraph of that letter on p.117
34 since he is being referred to it.

1 MISS BACON: I am not sure which paragraph Mr. Clough means.

2 THE CHAIRMAN: We can read that for ourselves. What do you particularly want us to read? I
3 had underlined the last paragraph.

4 MR. CLOUGH: The middle long paragraph was what I had in mind, sir.

5 THE CHAIRMAN: Yes, we have read that. Thank you.

6 MISS BACON: Would you turn over to p.118 21st November 2001. This was another case, my
7 understanding is, where the invitation was for a type of work that you did not carry out,
8 because you say you do not carry out this kind of project, is that right?

9 A That's right, yes. We must have had an inquiry and declined it.

10 Q Over the page, 119, the reason for this was that the value of the project was too small?

11 A Yes.

12 Q Over the page, 120. Sir, the Tribunal will be pleased to know that I am not going to go
13 through the whole of this; I am going to stop at around 2005. 120, this seems to have been a
14 swimming pool in someone's back garden, again the reason that you give is that it is not the
15 kind of work that you do, because you do not involve yourselves in domestic projects?

16 A That is right, yes.

17 Q Over the page, we are at 2003, Mr. Patel's domestic building works, and the reason given
18 was that you do not carry out domestic building works.

19 A Yes.

20 Q Over the page, 122, you will recall the last letter was April 2003 and we are now at 7th
21 October 2004. This is the only letter in the bundle from 2004. You will see the reason that
22 you give, which is that your estimating capacity is insufficient. This is the first letter in the
23 bundle, is it not, where you decline a tender on the basis of your insufficient estimating
24 capacity, as opposed to declining it because it is just not the kind of work you do?

25 A Yes.

26 Q Now I want to take you to p.130, which is a couple of years later. 26th September 2006.
27 You say: "unfortunately, due to current tender commitments we are unable to allocate the
28 necessary resources to prepare a tender". So again, this is a rejection on the basis of
29 insufficient resources?

30 A Yes.

31 Q If you go to p.135, the last one I want to show you, 9th August 2006 you say you were
32 unable to price the project due to current tendering workload and the size and nature of the
33 scheme?

34 A Yes.

1 Q So, thinking about those letters, do you accept that the first letter in the entire clip of letters
2 showing that you declined the tender on the basis of insufficient estimating resources was
3 the letter from October 2004 which I showed you?

4 A Certainly so far as this bundle goes. That's not to say there's not lots of other letters that
5 have been destroyed a long time ago. I certainly accept in this bundle that appears to be the
6 case.

7 Q You have letters here going back to 2000, we have got them in 2000, 2001, 2002, 2003. I
8 am presuming you put the best examples in your exhibit. The point that I am putting to you
9 is that none of the earlier letters, until 2004, were letters where you say: we are just
10 declining it due to insufficient resources. The earlier letters are cases where you say it is not
11 the kind of work you do, or the project is too small.

12 A Of course, the other thing is they didn't always go back with a letter. Occasionally we just
13 declined, maybe over the phone.

14 Q Yes, Mr. Nelson, I am just asking you what the letters show?

15 A Yes, that appears to be the case.

16 Q So the first letter was in October 2004 which was, as I understand it from your witness
17 statement, a few months after you had become aware that cover pricing was unlawful?

18 A Certainly a few months after I'd read in an article that it was likely to be, yes.

19 Q Can I take you back to your first witness statement which is in the same tab. Can you turn
20 up para.20 p.111. You say in that paragraph that it has been the practice of Quarmby for a
21 number of years not to give or take cover prices.

22 A Yes.

23 Q You say at para.21 what you would do is instead to decline the tender with a letter of
24 apology?

25 A Yes.

26 Q You say that the letters annexed to your witness statement show that from 2000 onwards,
27 you say that from 13th November 2000 to the present day Quarmby consistently declined
28 tenders when it was unable to price the job?

29 A Yes.

30 Q Having now looked at those letters, do you agree that it was actually only since 2004 that
31 those letters show that Quarmby sent letters declining to tender on the grounds of
32 insufficient resources?

33 A No, I don't, because the documentation for these tenders, and the files for these tenders,
34 goes back many, many years. We could have destroyed those letters, sending them back,

1 were perhaps part of the file that had been destroyed. All these are is a selection of those
2 that have survived over the years.

3 Q Mr. Nelson, I am not asking you about what else you might have had on your files that has
4 been destroyed. I am asking about the inferences that you draw from the letters and your
5 witness statement. You say that these letters illustrate QCC's consistent practice from 13
6 November 2000 to the present day on tenders. I am just asking you, having looked at those
7 letters, do you accept that that is not a fair inference and actually what the letters show is
8 that you did decline to tender on the grounds of insufficient resources from 2004 onwards,
9 but none of the letters shows that you did that before 2004?

10 A None of the letters, that you appear to be correct, then yes.

11 Q So it follows, doesn't it Mr. Nelson, that none of those letters show that Quarmby had any
12 policy regarding cover pricing and declining rather than submitting a cover price, before the
13 summer of 2004? I am asking what the letters show, not --

14 A That's maybe what the letters show, but I can assure you that's not the case.

15 THE CHAIRMAN: What were the criteria by which the company determined whether to keep
16 letters or not, given that we have letters that you have selected going back to 13th November
17 2000?

18 A Well, these letters, I think in the main, come from David Jones our managing director. So I
19 think there's the odd one of mine, but David had his own file of letters. But the estimators at
20 the time, when the documents come in, they'd have their own file. So if the estimator sent
21 it back with a letter, probably those files have been destroyed a long time ago. He would
22 open an estimating file, and once we've looked through the tender, he would send it back.
23 It may have gone out in the estimator's name. So I don't accept that there was some sort of
24 magic moment in 2004 where things changed. That was our policy.

25 MISS BACON: What is odd, Mr. Nelson, is that we have got Mr. Patel's domestic works and we
26 have got a swimming pool in someone's back garden, but we just do not have in this file
27 any other letters showing that Quarmby, prior to 2004, declined on grounds of insufficient
28 resources.

29 A Or other reason that we didn't want to take the tender. It may be other reasons.

30 Q But I am asking about insufficient resources, which was one of the main reasons why a
31 company might take a cover price.

32 A That's one of the main reasons, but there are other reasons.

33

1 Q Mr. Nelson, you say, nevertheless, despite the fact that there are no letters evidencing this
2 policy, there was a policy prior to 2004 – is that your evidence?
3 A Yes.
4 Q How did you know about the policy?
5 A Sorry?
6 Q How did you know about the policy?
7 A How did I know about it?
8 Q How did you know that it was Quarmby’s policy not to give or take cover prices?
9 A Because that had been our practice. That’s good practice.
10 Q Was the policy ever written down?
11 A No, it wasn’t.
12 Q Were there any meetings at which you discussed the policy before the summer of 2004?
13 A Before 2004, not that I recall.
14 Q Did you ever discuss this policy with Mr. Jones before then?
15 A Yes.
16 Q When?
17 A Over a period of years, I would say. It was something that – our practice was to get an
18 inquiry document in, and if we didn’t feel that we could cope with that then not to tender.
19 Q Did you ever discuss this cover pricing policy with Mr. Harrison before the summer of
20 2004, because it is not recorded in your witness statement that you ever had that discussion
21 with him?
22 A No, I can’t remember.
23 Q So, to summarise, on the OFT’s position, the letters do not show that there was any policy
24 before 2004, and I think you have agreed that. You have agreed that there is no written
25 document showing any such policy. You cannot recall conversations with Mr. Harrison
26 regarding the policy, and you have just said to the Tribunal there were no meetings to
27 discuss the policy. Is it a fair inference from that that actually there was not any policy set
28 in stone at that point?
29 A There was definitely no written policy, I’ll accept that. It’s a cultural thing through the
30 company.
31 Q So, at the very least, even if there was this kind of cultural policy that was not written and
32 was not discussed in formal meetings, is it quite possible that it was not known to either
33 Mr. Harrison or Mr. Bell or the other person who you said preceded Mr. Bell?
34 A They would understand that they were not to give or take cover prices?

1 Q Yes, because there was not ----
2 A I would say they understood that, yes.
3 THE CHAIRMAN: How would they understand it? Supposing the culture of the industry
4 included cover pricing. If somebody joins your company from elsewhere in the industry,
5 how would they acquire your different anti-cover pricing culture?
6 A By discussion with the other estimators.
7 MISS BACON: You have just told the court that certainly you did not discuss it with
8 Mr. Harrison, or you do not recall discussing it with Mr. Harrison. How would he know?
9 You are his immediate supervisor, and you have told the court it was your responsibility and
10 your role to ensure that Mr. Harrison and other estimators adhered to good business
11 practices. If you did not make that clear, and it certainly was the culture in the industry and
12 it was not ever written down, how was he supposed to know?
13 A Well, from my point of view, I believe – I understood that the staff knew that that was how
14 we operated.
15 Q But you are not sure that he knew, because you did not ever tell him that before 2004?
16 A We may have discussed it. After all these years I just don't remember.
17 Q Do you accept that it is at least possible that Mr. Harrison and Mr. Bell were not aware that
18 there was this so-called policy of not giving or taking cover prices until 2004?
19 A There is a possibility of that, yes.
20 Q Do you also accept that it is quite possible that Mr. Harrison or Mr. Bell might, therefore,
21 have given cover prices, at least before the summer of 2004?
22 A I think that I accept that any estimator may have given cover prices without my knowledge,
23 yes, indeed.
24 Q Can I come on to the conversation that you had with Mr. Harrison. You record this in your
25 witness statement at para.22. You say in that paragraph that you only became aware of the
26 law governing cover pricing in spring or summer of 2004, and it seems from what you say
27 that you realised this following reading articles in the **Building** magazine around that time?
28 A Yes.
29 Q So until that time I think it is your evidence that you considered cover pricing to be entirely
30 lawful?
31 A Entirely lawful, no, I've never said that.
32 Q You did not realise that it had serious legal consequences?
33 A I didn't realise it. I certainly did not realise until that point in time that there could be
34 consequences, yes, indeed. I don't know whether the rest of the industry did, to be honest.

1 Q What you say is that when you realised that there were serious legal consequences, you had
2 a discussion with your managing director, Mr. Jones ----

3 A Yes.

4 Q -- who unfortunately cannot be here today, and that both of you then agreed that you needed
5 to take measures to ensure that Quarmby was not engaging in cover pricing?

6 A Yes.

7 Q Was that the first time that you can recall specifically having a discussion with Mr. Jones
8 about this?

9 A Specifically, yes.

10 Q The reason for that, I would suggest to you, is that there was not really any reason to talk
11 about it before because, like you, everyone assumed that this was going on and there were
12 no serious consequences to be drawn from it?

13 A No, I don't think so.

14 Q You say that after your discussion with Mr. Jones you went on to discuss the matter with
15 Mr. Harrison?

16 A Yes.

17 Q That would have been in July or August 2004?

18 A About that time, yes.

19 Q You say at para.25 that you had that discussion very shortly after reading the articles that
20 you have referred to?

21 A Yes.

22 Q You have said at 22 that you think the article was in issue 30 in July 2004. Would it have
23 been probably a few weeks after that that you spoke to Mr. Harrison?

24 A Within a couple of weeks, I would say.

25 Q So quite quickly?

26 A I would say so, yes.

27 Q Why were you concerned to have that discussion so quickly with him?

28 A Because I read the article and at that point probably the mist was clearing a little bit on this
29 cover pricing, but I have to admit it, at that point there had been no information from the
30 legal profession, or anything like that. That was the first time I understood – I didn't know
31 anything about the Competition Act, to be honest with you. At that point I thought there
32 was more to cover pricing than maybe we thought in the whole industry.

33 Q Is it right to say that, because of reading the article and becoming aware that there were
34 serious legal consequences, what you were concerned about was that Mr. Harrison and

1 maybe someone else in the estimating team might have given cover prices in the past, and
2 that you wanted to make sure that it did not happen again, because you now knew that there
3 were serious legal consequences?

4 A No, I think it was just to reinforce the company's procedure, the way we went about things.

5 Q Did you ask Mr. Harrison at that point if he or Mr. Bell had ever given a cover price?

6 A Sorry?

7 Q Did you ask Mr. Harrison at that point (when you had the discussion with him to reinforce
8 what you say was the company policy), did you ask him if he or Mr. Bell had ever given a
9 cover price?

10 A No.

11 Q Why not?

12 A Why ask that question?

13 Q You have just become aware that something that you know is widespread in the industry is
14 seriously unlawful and has serious consequences, you have a discussion with your
15 estimating manager to reinforce what you say is Quarmby's policy. Why would you not ask
16 him if he had given cover prices?

17 A Well, I would assume that he hadn't.

18 Q Can I suggest that you did not ask him because you actually knew that Mr. Harrison might
19 at least have given cover prices and that the others in the estimating team might also have
20 given cover prices?

21 A Not at all.

22 Q The OFT's position will be that you needed to have that conversation with him because you
23 were quite aware that this was going on in the industry and you needed to ensure that it did
24 not carry on in Quarmby – is that right?

25 A Not that it didn't carry on, that we carried on in a way that we always did, which was to
26 send inquiries back if we could not price them.

27 THE CHAIRMAN: What did Mr. Harrison say when you told him you had read this article and
28 that cover pricing was apparently unlawful?

29 A He understood what I was saying. I didn't ... I have to say, with the benefit of hindsight, I
30 should have maybe drafted a procedure out.

31 Q Did he say, "That's all right then, because we've never done it"?

32 A No, he just said, "Right, I'll take on board what you say", as far as I recall.

1 MISS BACON: That is a bit odd, is it not, Mr. Nelson, because if it had been a policy within
2 Quarmby Mr. Harrison would have said, “That’s good because we’re in the clear, no one at
3 Quarmby has ever done that, so we can’t be ever at risk of being fined”?

4 A Well, all I can say is that I cannot definitely say that it never happened.

5 Q Can I take you to that part of your witness statement where you say at para.29 that you have
6 never been aware of an individual employed by QCC giving a cover price to a contractor or
7 any other individual or organisation. From what you have just said, you could not be sure
8 that it never had happened. When you spoke to Mr. Harrison, at the very least you knew
9 that this was something that might have happened at Quarmby in the past?

10 A Yes, it might have happened in the past.

11 Q And one of the reasons it might have happened was that it had not been explicitly prohibited
12 in a written policy or any other formal discussion?

13 A There was no written procedure, I accept that.

14 THE CHAIRMAN: We will probably have a ten minute break at some point, Miss Bacon, you
15 choose your moment.

16 MISS BACON: I think about four more questions and then I was going to look at the specific
17 tender, sir, so I am happy to break then. (To the witness) Can I ask you to look at your last
18 sentence of para.27. You say that, having spoken to Mr. Harrison there was no need to
19 confirm the discussion in writing or take further action. Does that mean that you did not
20 raise the matter with him again after that?

21 A I don’t think I did.

22 Q I understand that Mr. Harrison retired in the spring of 2006?

23 A He did, yes.

24 Q So would that conversation in 2004 have been the last time you spoke to Mr. Harrison about
25 cover pricing?

26 A I think so.

27 Q You also say in the same paragraph that you relied on Mr. Harrison to communicate the
28 message to the two others in his estimating department. Does that mean that you did not
29 speak to either of them about cover pricing?

30 A I didn’t, that’s right. I left it to David, yes.

31 Q That would have been, at the time, Mr. Buckler and a clerical assistant – is that right?

32 A Yes, it would.

33 Q Can you accept it, at least as a possibility, that Mr. Harrison or one of the others in the
34 department, might have gone on to give cover prices after your conversation?

1 A Sorry, could you repeat that?

2 Q Do you accept that it is a possibility that after your conversation, which you say you did not
3 repeat or reinforce, he might still have, on occasion, given cover prices, or somebody else --
4 --

5 A Who?

6 Q Mr. Harrison or one of the others ----

7 THE CHAIRMAN: It is a bit of an inference rather than a question for him, is it not?

8 MISS BACON: I am happy to move on, sir. I am happy to break at that point.

9 THE CHAIRMAN: Just make yourself comfortable. It is probably better not to talk to anyone in
10 the next ten minutes or so.

11 (Short break)

12 THE CHAIRMAN: Just before you continue, Mr. Summers has a couple of questions arising
13 from the earlier evidence that he would like to ask.

14 MR. SUMMERS: Good morning, Mr. Nelson.

15 A Good morning.

16 Q Like you, I have got a business background, so I do understand aspects of this case from a
17 different point of view. You joined Quarmby from Wimpey where you had worked for, I
18 think you told us, about 20 years.

19 A Going on for 20, yes.

20 Q I am not going to enquire about practices in Wimpey or anything like that, but we all get
21 into routines, a certain way in which we do things, and then we go to a new company and
22 we are interviewed by somebody and then we are appointed and we settled into the new
23 company, and very often we discover, or we want to know, how to do things in this
24 company. Is the way we did it in the old company the way you do it here? How do you do
25 it here? Am I on the right lines? What I would like you to perhaps explain to us is how you
26 became aware of whether you were on the right lines, as it were, when it came to cover
27 pricing when you joined Quarmby. You have told us that there was a sort of cultural
28 attitude towards it, but how did you discover that cultural attitude?

29 A The cultural attitude that I came into was the same as I came from, to be honest. When I
30 worked for Wimpey that was very much their approach to business, that they did not cover
31 price. I'm not saying it didn't go on on the odd occasion, it would be silly to say that, but
32 that was the culture that went through. So when I joined Quarmbys, we dealt with things in
33 the same way.

34 Q Are you saying that you therefore just assumed that the policy was the same?

1 A Indeed, I just assumed that it was done properly, yes.

2 Q Was one of your responsibilities to ensure that the strategy for tenders was executed
3 effectively?

4 A Yes, it's part of my role to ensure that the tender process is completed from beginning to
5 end.

6 Q Would you say that cover pricing was part of that strategy, it was a tactic if you like, in that
7 strategy?

8 A From Quarmby's point of view?

9 Q Yes.

10 A Not really, no. We didn't see it as a strategy, no.

11 Q That was not part of your strategy to ensure that your bids were effective?

12 A We were invited to tender and we sent it back.

13 Q Can I then just move to a second question, please. We have been taken to a number of
14 letters that the company wrote during this period. What I cannot see in here is any evidence
15 (maybe because it was not intentional) that during that period, or during your time in
16 charge, Quarmby got into a tender, they accepted a tender, and then for some reason (and
17 the Office of Fair Trading took you to para.(g) about things that can happen after you have
18 decided you are going to go for a tender which stop you from completing the tender) there
19 is no evidence here that Quarmby ever got into the process and then decided whoops, we do
20 not want to go on with this; we had better write and let them know. Did you ever have a
21 situation where, having accepted a tender, you were not able to complete the
22 documentation?

23 A Not that I can recall. Our system is that when the tender enquiry arrives the estimator does
24 a preface of that particular contract. So he identifies within the contract what the job's all
25 about. The paperwork then goes to the managing director. The managing director decides
26 the process, and once we decide to embark on a tender, we will finish the tender.

27 Q Right, that was a given, that you never at any point had a tender during this time that you
28 did not complete as it were, you did not submit?

29 A I can't recall one. I have to say sometimes we had to complete them in the most difficult of
30 ways and maybe did not give our client the most competitive price, because maybe we got a
31 difficulty in tendering, maybe we didn't get an extension of time. I can give you a perfect
32 example of that, something that's happened this week where we just know, because the
33 employer will not give us more time to do the tender, we are not going to be able to do that
34 tender.

1 Q You err on the side of caution, obviously.

2 A What happened was we've ended up in difficulties with this tender because of the client
3 who has given us late information. We've asked for an extension of time for the tender,
4 which goes in on Friday. He's only given us till Monday and that does not help us at all.
5 But I will sit down with Andrew Buckler on Friday and we will do that tender. If I have to
6 take a view, a flyer or whatever word it is, I will do that to get that tender in. I will not send
7 it back. I will not get them the most competitive price, but if I send it back to them now, I
8 will be vetoed from that client.

9 THE CHAIRMAN: Mr. Nelson, thank you for assisting the Tribunal.

10 A My pleasure.

11 MISS BACON: Mr. Nelson, I would like to go on now to ask you some questions about the three
12 infringements that were found by the OFT in the Decision. Taking them in chronological
13 order the first was the 2 Water Lane, Leeds infringement which was infringement 6 in
14 March 2000. You deal with this at paras.36-38 of your first witness statement. At para.37
15 you say that this project was, according to QCC's tender book, a design and build job, and
16 that would have required a detailed tender submission, you say, including contractor's
17 proposals.

18 A Yes.

19 Q For that reason you say it would be difficult for a contractor to submit a cover price?

20 A I am totally perplexed as to how any contractor can cover price a design and build job, but
21 yes, it would be.

22 Q Can I ask you just to turn up the tender return for the project. That is the file that is marked
23 5 at the bottom. That could say QAB 4 on the inside, tab 1 and it is the document right at
24 the start of tab 1. Just so you know, this was the tender return for the project from the
25 leniency applicant that was then called Weaver but is now called Strata.

26 A Yes, I think they are now called Strata, yes.

27 Q That contains, you will see Mr. Nelson, the total tender price. I will wait for the Tribunal.
28 That contains the total tender price, and it is a tender price of £848,512?

29 A Yes.

30 Q Then it has got various further details: the cost of removing a lift, the contract period, the
31 earlier start date and so on.

32 A Yes.

33 Q So this was actually a copy of the tender form submitted by Strata?

34 A Yes.

1 Q So this does not have any contractors' proposals in it?

2 A Yes.

3 Q So do you accept that even if this was a design and build job, at the time of submitting the
4 tender it was possible for Strata to put this in without putting in detailed contractors'
5 proposals?

6 A I can't speak for what Strata did and did not put in. This looks like their tender form. I
7 can't say what else they did put in. It is conceivable that all they did was put in a tender
8 form. I would be staggered if any contractor who did a design and build contract would
9 only submit, and could only submit, a tender form – because it does not identify to that
10 client what he is getting for his money. But it is possible.

11 Q Is it possible they could have put this in and then later on they could have told the client
12 what they were proposing to do in more detail, at the second stage for example?

13 A Yes, this is possible. But, as I say, at some time you have to submit the detail, it is all part
14 of your submission package.

15 Q Can I ask you about the Humanities Research Institute? You have not got a heading in your
16 first witness statement about that. What you say is back at para.34.

17 THE CHAIRMAN: Can I just ask you the source of the document we have just been looking at?

18 MISS BACON: This is from the leniency applicant Strata.

19 THE CHAIRMAN: It came from Strata.

20 MISS BACON: It came from Strata. I can find out whether this was obtained as part of the dawn
21 raid, or whether they provided it.

22 THE CHAIRMAN: I only ask because of the words that appear in the top right hand corner of the
23 page.

24 MISS BACON: From Quarmby Construction. When I am making my submissions, I will take
25 you to the transcript of Mr. Ironmonger where he explains that. If it would be helpful, I can
26 take you to it now.

27 THE CHAIRMAN: Do it in your own way, just bank the question.

28 MISS BACON: Yes. Just so that you have got the point, what he said and also what Mr.
29 Throssell said is what they did when they submitted a cover price is that they would take a
30 photocopy of the form that they put in, and they would write in the top corner who they
31 were taking the cover price from, they would put that form in a file which was marked
32 "Covers", and I believe it is that file where the OFT found this particular tender.

33 THE CHAIRMAN: I noticed, from my reading, that Strata kept a number of files headed
34 "Covers".

1 MISS BACON: This was certainly one of the documents that was in one of those files.

2 THE CHAIRMAN: Thank you. That is the explanation I needed. What are we looking at next?

3 MISS BACON: Humanities Research Institute. This is in Mr. Nelsons' statement at para.34. All
4 you say about this was a short comment that there were a couple of other companies that
5 submitted bids higher than Quarmbys. I take it from the fact that you do not have a specific
6 heading and you do not say anything more about that, that it was not a project, as far as you
7 recall, where there were any particular difficulties with submitting a cover price?

8 A The Humanities job, I didn't recall a great deal about that, to be honest, as you don't about
9 most of the tenders that go in, because --

10 Q You have got so many in a year?

11 A We've got so many in a year, and when you don't win the job, you destroy the files and
12 that's the end of it. I think it was a design and build job, from memory I believe it was
13 design and build.

14 Q Then the third infringement chronologically is Eastbrook?

15 A Yes, I do remember Eastbrook.

16 Q You have got a separate heading for that in your witness statement. That is at the bottom,
17 para.29. You say there that you recall that it was a design and build project but your files
18 say that it was only a two stage tender process. So your files do not give any indication one
19 way or the other.

20 A The only file I keep, after such a length of time, is our tender book and our tender book,
21 where we record all the tenders as they come in, says it is a two stage tender. But I
22 remember afterwards it was a design and build job and Andrew Buckler, I think, will
23 confirm it was a design and build job. I didn't remember what type of scheme it was when I
24 did this statement, but it was D&B, very complicated D&B.

25 Q So if it is a two stage tender, does that mean that there is a first round of tenders and then
26 the client chooses one or two tenderers to negotiate with further?

27 A There's lot of different ways to do it really. Sometimes a two stage tender will be simply a
28 contractor is asked to price his prelims, his overheads and profit, and the mark up that he
29 needs for the job. If he's got the lowest mark up and other elements, then that client will go
30 into the second stage with that contractor. That's one way. Sometimes you submit all your
31 proposals, all your submissions, and they will take two into the next stage, because with
32 design and build you're offering a package rather than just a tender. This is what I don't
33 understand about these design and builds, you're offering a product for a sum of money.

1 You're not comparing a straight job for a straight price; you're saying that is what I am
2 giving you for that amount of money.

3 Q If it had been one of the first type of tenders where you have just described, the two stage
4 tender where you put in some preliminary specifications or some preliminary prices and
5 then you go through to a more detailed second stage, do you accept that in that case a cover
6 price might have been given at the first stage, and that might also explain the more limited
7 information in the Strata document that we have just looked at?

8 A No, I don't accept that, because if it was a single stage like that, then there would be no
9 point in a lump sum cover price because all you're asked to price is the prelims and the
10 overheads and profit.

11 Q Can I ask you now to turn up your third witness statement. That is in the bundle that is
12 marked on the spine with number 2, and it is at tab 41. At para.9 you say that York House
13 (and this was the company that submitted the leniency information about this tender) gave
14 every appearance that it had in fact costed the project legitimately and it had attended site
15 meetings etc.

16 A Yes.

17 Q Is this a reference to the one site meeting that is referred to by the construction director Mr.
18 Hicks in his statement?

19 A Yes, from what I recall, the tenderers are all invited to a meeting for a fuller explanation of
20 the project, yes.

21 Q Just for the Tribunal's note, Mr. Hicks' statement is at bundle 1 tab 9. Mr. Hicks confirmed
22 that he went to a site meeting and that Mr. Kofler from York House was at that meeting,
23 that is what he said. So when you refer here to York House giving the appearance of
24 costing the project legitimately and attending site meetings, plural, am I right in saying that
25 what you are really referring to is that single meeting that York House attended?

26 A Yes, that's the only meeting they had with us present, as I understand it, yes.

27 Q The date for this tender was 8th August. I can just show you the document that shows that.
28 That is at your bundle 5 tab 13. That is the client's form provided to the OFT.

29 THE CHAIRMAN: Where am I now?

30 MISS BACON: Bundle 5 tab 13. So the date of the tender submission was 8th August 2005 at
31 noon, and the meeting with York House was on 7th July.

32 A Yes.

33 Q And you agreed earlier that companies sometimes took the cover at the last minute after
34 starting work to price a project, and sometimes even after attending a site meeting.

1 A Yes. That would be a decision for them but, yes, that could happen.

2 Q Yes. So, in the month after attending the site meeting, York House might have found itself
3 unable to tender, for whatever reason.

4 A They might have done. Yes.

5 Q And they might have just realised, for example, for the reasons you give, that there are
6 problems with the site, or whatever. They could not have submitted a competitive bid. So,
7 it is possible, is it not, that York House might have pulled the plug right at the end of the
8 process, and taken a cover price from somebody?

9 A Yes. They might have done – except to say again on that one, this was a lump sum design
10 and build price. I mean, I don't, I can't speak for what York House did or did not do; but,
11 again, I would be astonished that you could submit a £9 million job on the design and build
12 basis without having contractors' proposals and all the documentation that that requires.
13 But, yes.

14 Q It's possible. Can I, you have got tab.13 open. Can I ask you just to turn back now to
15 tab.12. Now, if you start at the front of tab.12 you will see that there are two pages, the
16 second of which has got a fairly tiny and illegible document, and then a third has got a
17 blown up version of the same document. Then, on p.92 at the bottom, you will see that this
18 is the estimating programme from York House. And I think you have seen this document
19 before, have you not?

20 THE CHAIRMAN: Sorry, which page?

21 MISS BACON: Page 92. This is the redacted version, and I was just going to take Mr Nelson
22 through to the unredacted version, which should now be behind that.

23 THE CHAIRMAN: I see. I have got p.92 at the bottom but it is a pretty meaningless document,
24 as it stands.

25 MISS BACON: I hope that we are going to shed some light on that.

26 THE CHAIRMAN: Yes.

27 MISS BACON (To the witness): Mr Nelson, you commented on this document in your third
28 witness statement, that this document in your view (the paragraph number is 11) is not a
29 contemporaneous document and the reason that you give is that the page on which the
30 relevant markings referring to Quarmby appear is the only page of the document which
31 contains manuscript markings. Now, I think you may have made this comment because you
32 only have access to this redacted version, the version with lots of blanks on it, and you
33 cannot see very well where the manuscript markings are. If I can just get you to turn
34 through, past p.110 and we have got the full document now. And it should have some red

1 boxes drawn around various office entries on the left hand side. Have you got the
2 document?

3 A Sorry, 110?

4 Q Past 110, to the next page.

5 A To the next page – yes.

6 Q And the page after 110 should look like this. It should have a “1” in the corner. Is that
7 right?

8 A Yes, A490 with a “1” underneath.

9 Q A490 with a “1” underneath it. Right.

10 A Yes.

11 Q So, this is the original of the document. And I think you might not have seen this before. If
12 you just turn through, and you can then go to p.3 at the bottom. You will see that there are a
13 number of manuscript markings on this. There is, right down the left there is “AJR” which
14 is presumably Mr Richardson. “ED”, not sure who that is. You can see that alongside
15 row 9 there are the initials “JWL”, and you can see that there are a number of initials down
16 in typescript in the second column, “ART”, “JWL”, “JAG”, and these look like the names
17 of the, the initials of the estimators who assigned the project.

18 A Yes.

19 Q If you then go on to p.4 you can see a number of manuscript markings there, both down the
20 left hand side there are some scribblings out, then there are some that are marked “Enq”, E-
21 N-Q, which I surmise means “enquiry”, something like that. You have got “ART”, “JAG”
22 (this is the page which says “4” at the bottom). And in row 17 you will see that there is also
23 a manuscript amendment to the bar graph.

24 A Yes.

25 Q If you then turn to p.5 there are some more amendments. There is a manuscript amendment
26 saying “Cov”, there are a few “R”s written in, there is an “AJR” over in the middle, floating
27 around in the middle of the graph. And, p.6, if you look at row 6 which says “JAG, Resi,
28 Morley, Lofts, Leeds”, you will see that there has been a manual extension to the date,
29 which is specified on the bar graph. The only reason I wanted you to see this was that
30 I think that you did not see this version of it when you made your statement. Having seen
31 the complete version of the document, do you accept that there are lots of manual markings
32 on other pages?

33 A There are lots of manual markings on the pages -----

1 Q There are lots of handwritten annotations on many of the pages in this document. I can
2 show you all of the rest if you want, but that has taken you to the main ones.

3 A I accept, for example, on p.4 that somebody has scribbled initials down the left-hand side.

4 Q Yes.

5 A And there's, there's letters on the right-hand side. I don't know what it means, but I accept
6 that they're there.

7 Q So, do you accept also that this indicates that this document would have been a
8 contemporaneous document because you would not have had, would you, annotations
9 giving initials of estimators on a document that was prepared for a leniency application?

10 A I don't see how I can say whether this a contemporaneous document or not, to be frank.
11 It's -----

12 Q Well, I am very happy with that answer, but, it's just that you commented in your witness
13 statement that you think that was not a contemporaneous document, so you are retracting
14 that.

15 A No, the one I saw, which I think is document p.37, is it – p.92, is the only one that I've seen,
16 I think, where it says “cover, residential, Morley” -----

17 THE CHAIRMAN: It all speaks for itself, does it not? The one you saw had a lot of information
18 removed. Now we look at the original version it has got lots of manuscript on it, lots of
19 handwriting on it.

20 MISS BACON: I thought it fair to put that to Mr Nelson -----

21 THE CHAIRMAN: Absolutely.

22 MISS BACON: -- because he obviously had not seen that when he made his statement.

23 THE CHAIRMAN: Well, it is a “yes”, Miss Bacon.

24 MISS BACON (To the witness): Now, you say in your third witness statement at para.17 -----

25 THE CHAIRMAN: If you feel in any way confused by any questions, just say so. Sometimes
26 barristers, to establish a point, bounce questions off a witness and you may have no idea
27 why you are being asked, but sometimes we have no idea why you are being asked, either.

28 A It confused me, I've got to say. Yes.

29 THE CHAIRMAN: Carry on.

30 MISS BACON: I will bear that in mind, sir.

31 THE CHAIRMAN: What are we looking at now?

32 MISS BACON: Going back to his witness statement, there is one other point I just wanted to
33 check. (To the witness) In your witness statement at para.17 -----

34 A Seventeen. Yes.

1 Q -- the third one. And you refer to the allocation of "1/8 Quarmby" which is a reference to,
2 you say, a date. And the only point that I want to make is that you have said that the tender
3 due date was extended in that case several times. It was originally -----
4 THE CHAIRMAN: I am sorry, we are in bundle 2 -----
5 MISS BACON: We are in bundle -----
6 THE CHAIRMAN: Tab.41, p.554, para.17. (Sorry, Miss Bacon)
7 MISS BACON (To the witness): And you say in the same paragraph that the original tender date
8 was 25th July.
9 A Yes.
10 Q And that it was extended at least once.
11 A Yes.
12 Q So, do you accept that the annotation "1/8" could have been the first time that it was
13 extended which was a week later than 25th July, rather than a reference to the date that
14 Quarmby was contacted by York House?
15 A Sorry, could you repeat that? I didn't, I didn't get that.
16 Q You are commenting in your witness statement on the annotation "1/8 Quarmby".
17 A Yes. Yes, which is a hand annotation.
18 Q The hand, yes, the hand annotation.
19 A Yes.
20 Q And you say that:
21 "No-one at QCC could have given a cover price on 1 August". So, what I am asking,
22 Mr Nelson, is that could the 1/8 have simply been the fact that it was, that the tender date
23 was extended from the 25th to the 1st, which was a week later?
24 A Well, I can't say why the annotation's there. It wasn't me that put it there. It's
25 "1/8 Quarmby". It could be the first of August -----
26 Q I am only asking -----
27 A Could be. I can't speak for an annotation that somebody else has put on to it, to be honest.
28 Q Fine. I do not have any more questions.
29 THE CHAIRMAN: Thank you very much. Mr Clough?
30 **Re-examined by Mr CLOUGH**
31 Q Thank you, sir. I had better start, I think with tab.12, and I am going to ask
32 Mr Nelson -----
33 THE CHAIRMAN: So, back to volume 5 in our bundles.

1 MR. CLOUGH: Volume 5, yes. I am not totally clear what the page numbers are. The version
2 I have got starts at p.1 and goes to p.27 or 28. I want to start at the beginning, please. Is it
3 marked “p.1, document A0490”? It is in tab.12. Do you have a page number “1” written at
4 the – if you hold it like that is there a page number under the number A0490?

5 A What file number am I on, please? (Sorry).

6 Q File number 5.

7 A I’m on file 5, yes.

8 Q Tab.12.

9 A Twelve?

10 Q You have got the right-looking document.

11 A Okay, yes, I’m on tab.12.

12 Q If you go to the very beginning of it.

13 A Yes, very beginning.

14 Q Sorry, no, it is marked “Page 1”.

15 A Right. Okay.

16 Q Does it say “Page 1” there?

17 A I’m with it. Yes.

18 Q And, just to make sure we have got the right bunch of pages, if you go through those, all the
19 pages with the black bits on the black columns, does it end with number 27? At the top
20 right-hand side do you see -----

21 A Oh, right, yes. Yes.

22 THE CHAIRMAN: What are these? A sort of progress report produced every month?

23 MR. CLOUGH: Sir, I just want to clarify with this witness what these are and what they have got
24 on them, because I think Miss Bacon has slightly exaggerated the amount of handwriting on
25 them, and I would like him just to go through each page one by one and tell me whether
26 there is any handwriting on it. (To the witness) So, let us start with the first page, shall we?
27 Is there any handwriting on the first page?

28 A No.

29 Q On the second page?

30 A No.

31 Q On the third page?

32 A There appears to be three initials down the left-hand side.

33 Q Yes.

34 THE CHAIRMAN: The “JWL”

1 MR. CLOUGH: On the fourth page?

2 A Again, initials down the left, and “TOR” and other annotations to the right of the
3 description.

4 Q The fifth page?

5 THE CHAIRMAN: Do we really need the witness to tell us what we can see for ourselves,
6 Mr Clough?

7 MR. CLOUGH: Well, sir, I want to bring out the fact that he has been, it has been suggested to
8 him that there is lots of writing such as the writing on p.27

9 THE CHAIRMAN: There is some writing.

10 MR. CLOUGH: There is a lot of initials, sir. Perhaps I can make it short. (To the witness) Is it
11 the case, Mr Nelson, that on pp.1-26 there is nothing really but initials that you can see on
12 the documents, if they have anything written on them at all – and 90 per cent of them have
13 nothing written on them?

14 A Some appear to have annotations, hand drafts. Others have got nothing on them.

15 Q Well, I have got to p.27 and I have not seen any more since the last comment you made
16 about the initials. So, may we have a look at p.27?

17 A Yes.

18 Q And do you see some initials there?

19 A Yes. There are initials to the right-hand side of the bar lines for the programme.

20 Q And, do you see the “?? Quarmby”?

21 A Yes.

22 Q And do you see the words, “Stainforth” “Stainf” “Stainf”?

23 A Yes.

24 Q And then “1/8 Quarmby”?

25 A Yes.

26 Q And there are a few words down the bottom on the left hand side, including “Fountain
27 House”, “Irwins”.

28 A Yes.

29 Q Apart from those words, is it correct to say in those 27 pages there are not any other words?

30 A Yes. I think that’s right.

31 Q And the suggestion has been made that this document is, sorry, the handwriting on this
32 document is contemporaneous. Now we have established that there is only one document
33 with significant handwriting on it, can you form a view from the document in front of you,

1 really, as to whether or not it is contemporaneous, and is there anything on this document,
2 p.27, that will show you why it was contemporaneous, or not contemporaneous?

3 A It just seems to me initials after the event.

4 Q And what about the words, like the “Quarmby”, with two question marks before it? Does
5 that look contemporaneous?

6 A No, I would say that’s ----

7 THE CHAIRMAN: We really are entering into the realm of comment, Mr Clough.

8 MR. CLOUGH: Well, he has already given evidence on it, sir, and he has been – there has been
9 suggestion that he has changed his evidence.

10 MISS BACON: I am not suggesting he has changed his evidence. I took him to the document
11 because he obviously had not seen that, and I wanted him to make sure he had seen the right
12 document.

13 THE CHAIRMAN: Whatever inferences are to be drawn are a matter for the Tribunal, not for the
14 witness.

15 MR. CLOUGH: Sir, I am totally happy with that. I would just like to make one comment, if
16 I may. That is that this document, in terms of what is relevant on it, has not changed from
17 the version that has been given this p.27. The relevant writing was on the other – it is the
18 left-hand columns that have been revealed in the confidential version. I think, to be fair to
19 Miss Bacon, it is the earlier pages that she wanted to be shown, which have initials written
20 on. Anyway, let me leave it like that. The question marks in front of Quarmby are
21 significant, in our view. (To the witness) Mr. Nelson, let me just go back a few steps.
22 Were you aware of the nature of Quarmby’s business before you arrived at Quarmby in
23 1998, and I am thinking in particular of the relationship with its parent company SJS?

24 A When I joined them?

25 Q Yes.

26 A No, I don’t think I was.

27 Q You said in answer to the Tribunal, Mr. Summers, that when you were at Wimpey the
28 culture was the same as when you arrived at Quarmby. Could you perhaps describe that
29 culture that you say existed when you arrived at Quarmby?

30 A In relation to?

31 Q The business practices of Quarmby?

32 A Well, the business practices – I worked for Wimpey, as I say, for many years, and Wimpey
33 had a reputation for being professional in all their business dealings. Cover pricing was not

1 something that was carried out at Wimpey. There were reasons for that. That was the
2 culture that I stepped into at Quarmby Construction.

3 Q Can you look at para.21 of your first witness statement. It is at Quarmby appeal bundle 1,
4 which may be volume 2, tab 6, p.107, at p.111.

5 A Is that my first statement?

6 Q Your first witness statement, yes, para.21. Can you just read that paragraph:

7 A “When QCC was unable to tender for work for whatever reason the documents
8 were returned to the employer with a letter of apology. Examples of the letters that
9 were sent to the employer in this situation appear at exhibit RN1 (pages 1 to 45).”

10 Q Just pause there, RN1 contains examples – is that correct?

11 A Yes.

12 Q Can you please go on:

13 A “These letters have been extracted from QCC’s tender files. These letters illustrate
14 that QCC’s consistent practice from 13 November 2000 to the present day has been
15 to reply to tenders without providing a price for those tenders where QCC has
16 decided that it has either been unable to provide a priced tender or did not want the
17 work in question for another legitimate or good faith reason (for example,
18 sometimes QCC would not have the estimating resources to price the tender by the
19 required date or the nature of the project might have changed significantly).”

20 Q Thank you. Could you turn up your exhibit to that statement at p.117, the letter dated 12th
21 July 2001.

22 A Yes, “Shipley Swimming Pool”.

23 Q Yes, and this is a letter to Bradford Metropolitan District Council.

24 A Yes.

25 Q Would you have done a significant amount of work for Bradford Metropolitan District
26 Council?

27 A I wouldn’t have said significant, no.

28 Q Would you have done any work for them?

29 Q I cannot recall over the years.

30 Q They were not a main client of yours?

31 A I would say not. We were on their tender list, as I recall, but I can’t recall lots of inquiries
32 from Bradford Council.

1 Q Is this is a common reason for your returning the information, the letter that they sent you
2 on 10th July 2001, where you refer to the letter having been wrongly directed to your
3 company? Would that have happened?

4 A Yes, it's happened on a number of occasions where Bradford Council have confused us
5 with QSP Limited.

6 Q What is the full name of QSP?

7 A Quarmby Construction (Special Projects) Limited.

8 Q So their name starts with the same two words as yours, does it?

9 A Yes.

10 Q You say here you have had instances in the past whereby:
11 " ... they have purported to be our company and have changed our address for
12 theirs to obtain tender documentation from others ..."
13 etc, etc.

14 A Yes.

15 Q That refers to Quarmby Construction (Special Projects) Limited, does it?

16 A It does, yes.

17 Q Can you just go back to the witness statement text on p.110, para.16. If I may summarise
18 what you say in paras.16, 17 and 18, you are saying that after the Labour Government came
19 into power in 1997 they introduced "best value" as a new way of tendering, and indeed
20 elsewhere there is evidence of what is called the "most economic advantageous tender
21 criteria" as opposed a single price criteria. You say that changed the approach to tendering.
22 What changes did it make?

23 A Well, the change it means from then, and really to this present day, is that when you're now
24 submitting your tender you are not submitting a tender based on purely giving the lowest
25 price. That is not the object of the exercise. The objective of the exercise now is to give
26 what we now call "best value", so we are offering a package. What will happen is the
27 employer will tell us how you are going to assess submission, so he may say to us that he
28 will consider a 60 : 40 ratio – in other words, he means that 60 per cent of his marking will
29 be the price, 40 per cent of the marking will be something else. Then he will set out how he
30 is going to mark. What it will actually mean is that you can win the job even though you
31 were not the lowest price. The employer is actually saying to you, "Lowest price is no
32 longer what we are looking for, what we are looking for is the best contractor to do that
33 scheme who offers us the best value for money". He'll assess the other 40 per cent based
34 on health and safety records, quality records, your experience on how you've done the job,

1 the CV of your staff that you are putting forward, and so on, and then his panel of advisers
2 will mark the project. You will get so many marks for your price, so many marks for your
3 health and safety, and whoever gets most marks gets the job. It does not mean that, because
4 you have submitted the lowest price, you will get the job. So the tactic of a tender is now
5 completely different. We don't think in terms now of giving the client the lowest price any
6 more.

7 THE CHAIRMAN: So it is a mixture of price and value, rather than price alone?

8 A It is, yes.

9 Q In a sense?

10 A It's a mixture of experience. You're selling not only the price, you're selling your staff ----

11 Q We have got the point.

12 A Yes.

13 MR. CLOUGH: Thank you. Could you perhaps read out para.17 on p.110?

14 THE CHAIRMAN: We have read it, Mr. Clough, I am not sure of the point of reading out
15 paragraphs in full in front of the Tribunal like this.

16 MR. CLOUGH: Sir, I would like just to ----

17 THE CHAIRMAN: By all means emphasise any part of you would like to, but I do not think one
18 should really ask the witness to read it.

19 MR. CLOUGH: I am sorry, sir, when I say the paragraph, actually the first four lines is what I
20 need of it. The first four lines of para.17.

21 A Yes:

22 "As a result of this change from 'lowest price' to 'best value', the fact that more
23 contracts are awarded on a 'design and build' basis and the growing awareness in
24 the industry of the OFT's view on the practice of 'cover pricing', the practice of
25 'cover pricing' has reduced very significantly and is gradually dying out."

26 Q Could you read the two lines of para.19?

27 A "I therefore find it surprising that cover pricing was still widespread in the industry
28 in the lead up to and around the time of the allegations made by the OFT against
29 QCC."

30 Q When was the first allegation made against QCC – what was the date of it?

31 A When we received the first letter from ----

32 Q No, the alleged infringement?

33 A Oh, sorry, the alleged infringement was ----

34 THE CHAIRMAN: The 3rd March 2000.

1 A -- March 2000.

2 MR. CLOUGH: Thank you. May I then take you to the Quarmby chronological core bundle, tab
3 13, which is bundle 5 for the Tribunal, I think. You may remember Miss Bacon showed
4 you this document. It is document 7023. This is ----

5 THE CHAIRMAN: This is infringement 233, this document, the third of the infringements.

6 MR. CLOUGH: Let me just find my note. I am sorry, it is tab 1. This is the Weaver
7 Construction, now known as Strata, tender form. So this is the tender return form, it is tab
8 1, p.1. We have looked at this already. What I would like to ask you is this: is this
9 document the only document that would be submitted in a design and build tender by the
10 time of the deadline for submitting tenders?

11 A On a design and build job it is – I can't speak for Weaver, but on a design and build job I
12 would say you must have more documentation than one piece of paper.

13 Q Is there not an invitation to tender document?

14 A Oh yes.

15 Q Would that normally have to be completed before the tender is submitted?

16 A Invitation to tender?

17 Q Would a tenderer submit a response to an invitation to tender, to answer the questions in it?

18 A Well, he may go through a pre-qualification process, yes.

19 Q I am talking about at the tender stage. Let me go back. Is this the only piece of paper that a
20 tenderer would submit by the final date when a tender must be submitted?

21 A You may very well submit one piece of paper, but I would say in most cases on design and
22 build jobs you would have to submit proposals, price.

23 THE CHAIRMAN: Let us see if the Tribunal understands this, Mr. Nelson. The purpose of a
24 tender is to submit a price basically?

25 A Yes, indeed.

26 Q By a certain date, a deadline, you have to submit a price.

27 A Yes.

28 Q On a piece of paper signed by someone on behalf of the tendering company?

29 A Yes.

30 Q This document is that submission?

31 A This document is that submission. Weavers are offering to do this job for that sum of
32 money.

33 Q So if there is, for example, time pressure and you have got to get your price in by 3rd March
34 2000 this, at the very least, is what you have to give them?

1 A Oh yes, at the very least.

2 Q At the very least. Now, there might be all kinds of other documents that you would give
3 them, either then or subsequently?

4 A Yes.

5 Q But the bottom line literally is this document?

6 A The bottom line is that document and, in some instances, it may be a simple one page
7 document. On design and build jobs it's --

8 Q I think we understand. Thank you very much.

9 MR. CLOUGH: I am sorry to pick this up, but I was asking about design and build, and you just
10 said on a simple job it would be this page. On a design and build job, may I just ask you
11 finally, what would you expect to be submitted, just this page or some other documents?

12 A On a design and build contract you would normally submit – because the quantity surveyors
13 will insist on it, you will submit a contracts analysis, you will submit a programme, you will
14 probably have to submit a method statement, your health and safety proposals, if you've got
15 any other matters, any technical issues, you would submit that as a full, bound document.

16 Q Thank you very much.

17 THE CHAIRMAN: Miss Bacon cannot resist rising for some reason.

18 MISS BACON: I am sorry to interrupt. I am concerned about time. I did say that I would need
19 between two and three hours to cross-examine the witnesses. I had exactly an hour with
20 Mr. Nelson and it looks like I am not even going to start with Mr. Harrison until after lunch.
21 I am slightly worried about the overall timetable.

22 THE CHAIRMAN: We have got Thursday if we have to.

23 MISS BACON: I am grateful.

24 THE CHAIRMAN: It is not convenient, but it is possible.

25 MR. CLOUGH: I apologise for my contribution to that.

26 THE CHAIRMAN: Do not worry. The early stages are always the slowest in my experience.

27 MR. CLOUGH: Mr. Nelson, did the OFT decision have any effect on your business practices and
28 indeed your business?

29 A The effect it's had on the business is pretty disastrous is probably the phrase that I would
30 use. Probably up to a couple of years ago we were turning over between £30-35 million, as
31 at last year we turned over £16 million. I entirely accept that the market has tightened up,
32 and life in general contracting is a bit tougher for us all, but our business has dropped from
33 £31 million to £16 million. That is not all as a result of the market, because in fact I've got
34 more estimators pricing work now and work is harder to come by. I think it has affected us,

1 yes. That is my personal view. When I read articles in the Building Magazine and others
2 where certain contractors are coming out with results they are down 10 per cent or 15 per
3 cent of turnover and we are down 50. I think it has just been catastrophic for us frankly.

4 Q Have you received questions relating to the OFT's investigation and the Decision from
5 potential employers or clients?

6 A Yes, we do. I've had letters saying; have you got the financial wherewithal if you're fined
7 £800,000 to carry on, should we be putting you on this tender list, where are you up to with
8 the OFT investigations? It is clear that people are sat in meetings and putting a line through
9 our name. We're absolutely confident that's what's going on, because these days there's so
10 many of us chasing so little work that what's happening is you're getting about 30
11 contractors applying for one job, and five or six of you will get on the tender list. So any
12 reason not to put you on the tender list, to mark you down, is what's happening. So it's
13 hard going at the moment.

14 Q Finally, Mr. Nelson, do you have any reason to believe that your colleagues during the
15 relevant times since 2000 either gave or took cover prices as suggested in the OFT's
16 Decision?

17 A No, I have no reason to believe they would. Certainly to my knowledge, cover pricing is a
18 risky thing to do.

19 Q Do you have any reason to believe that the policy that you inherited at QCC after leaving
20 the same climate at Wimpey ever changed during that period?

21 A No.

22 Q Thank you very much.

23 THE CHAIRMAN: Thank you very much, Mr. Nelson, your evidence is finished. You are free
24 to stay or go as you wish.

25 (The Witness withdrew)

26 THE CHAIRMAN: It is probably sensible to adjourn now, is it not?

27 MR. CLOUGH: I am in your hands, sir.

28 THE CHAIRMAN: I think it makes sense. We will adjourn now until 2 o'clock.

29 (Adjourned for a short time)

1 THE CHAIRMAN: Yes.

2 MR. CLOUGH: Good afternoon, sir, I think the ball is in my court to call our second witness,
3 who is Mr. Harrison. Mr. Harrison is in bundle 1, tab 7, p.161.

4 Mr. DAVID ROGER HARRISON, Sworn

5 Examined by Mr. CLOUGH

6 Q Good afternoon, Mr. Harrison, can you please tell the Tribunal your full name?

7 A David Roger Harrison.

8 Q Thank you, and can you confirm that your address is the address given in your statement?

9 A It is.

10 Q You have your statement I think in a bundle in front of you, it is volume 1, and could you
11 go to p.161, tab 7, and there is an exhibit to it, I believe, as well?

12 A There is.

13 Q Does that statement stand as your evidence today.

14 A It does.

15 Q I will not ask you any further questions now, but Miss Bacon will have some questions for
16 you.

17 Cross-examined by Miss BACON

18 Q Mr. Harrison, could you just keep out that witness statement and can I ask you to turn to the
19 second page of it, and at para.9 you say effectively that you were aware of cover pricing
20 taking place in the industry during the period when you were at Quarmby?

21 A I was aware of that, yes.

22 Q You go on to say at para.11, that if you had provided a cover price for a tender that would
23 not have influenced you in your price estimate?

24 A It would not have done.

25 Q One thing, Mr. Harrison, that you do not say in this witness statement is that you did not
26 ever give a cover price?

27 A I never did give a cover price.

28 Q Are you changing your evidence?

29 A I said I did not give a cover price.

30 Q That is a bit odd, because if you had never given a cover price you would not made the
31 statement at para.11, would you?

32 A In what respect, sorry.

33 Q In para.11 you say:

1 “I can also state categorically that had I at any stage been asked for and provided a
2 cover price, this would not have influenced me in any way in my estimate of the
3 price at which Quarmby could carry out the specification.”

4 A. Yes.

5 Q It is strange because this statement does not appear in anyone else’s witness statement. You
6 are implying in that statement that you may have given cover prices, but if you had done so
7 it would not have influenced you in your price?

8 A I don’t read that implication into that statement.

9 Q At para.7 of the statement, slightly above the paragraph I have just taken you to, you say
10 that you dealt with 40 to 50 tenders every year?

11 A Yes.

12 Q How often among those 40 or 50 would one of the other tenderers ring you up and ask for a
13 cover price?

14 A I don’t recall that.

15 THE CHAIRMAN: I am sorry, I did not hear?

16 A I’m sorry, I don’t recall.

17 MISS BACON: Can you turn over the page, please, and look at para.13.

18 THE CHAIRMAN: Just before you move on, just bear with me for a moment, when you say you
19 do not recall, does that mean that people did ring you up and ask you for a cover price or
20 that you do not remember anyone ever ringing you up and asking you for a cover price?

21 A I don’t recall the number of occasions that someone may have rung me.

22 Q That, if I may say so, is not answering my question.

23 A Sorry.

24 Q Either people did ring you and ask you for a cover price from time to time or they never did
25 or you cannot remember?

26 A There were occasions when we were asked to provide a cover price. On the number of
27 occasions, I can’t recall.

28 MISS BACON: At para.13 you make reference to Mr. Bell, who left Quarmby around five years
29 ago, and we have established this morning that he probably left around the summer of 2004
30 and then Mr. Buckler came along in around July 2004?

31 A I think, from memory, there was a period of two or three months between them.

32 Q You say in the last sentence of that paragraph:

33 “If Andrew had discussed a cover price with someone I would have expected him
34 to discuss it with me. I don’t recall any such conversation.”

1 A Yes.

2 Q Are you saying here that if Mr. Bell had given a cover price for this particular project you
3 would have expected him to tell you about it – is that what you are saying?

4 A I think our relationship was such that I would, yes.

5 Q Is it that you would have expected that because on other occasions when Mr. Bell had given
6 cover prices he told you?

7 A I don't recall Mr. Bell ever having given a cover price.

8 Q Can you go back to para.10. You say in para.10 that during the period of your employment
9 with Quarmby you did not understand it to be the company policy to give or receive cover
10 prices?

11 A Correct.

12 Q This morning Mr. Nelson has said that he never had a discussion with you before 2004?

13 A Not a formal discussion with regard to the company policy, no.

14 Q So is it fair to say that you were aware of the company policy particularly from 2004 when
15 you had that conversation with Mr. Nelson?

16 A It may be fair to say that I think when I joined the company in 1989 as chief surveyor, the
17 surveying function and the estimating function were my responsibility. My policy was not
18 to engage in cover pricing.

19 Q As I understand it, you did not have any discussion with Mr. Nelson and there was not any
20 written policy saying that estimators should not specifically give cover prices?

21 A There was certainly no written policy, no.

22 Q Did you ever tell any of your estimating team that cover pricing was unlawful and that they
23 should not give cover price?

24 A I don't recall saying it was unlawful, but it was policy that we never entered into.

25 Q Did you actually have a discussion with any of your estimators in which you said
26 specifically that they were not to engage in cover pricing, whether taking cover prices or
27 giving cover prices?

28 A I don't recall.

29 Q Can I ask you about the specific tenders, and I am aware that some of them are quite a long
30 time ago. Can I start with the 2 Water Lane project in Leeds, which is infringement 6, and
31 the date for the submission of the tender was 3rd March. Can I ask you to look at the Strata
32 tender return, which is in your bundle 5, the first document in the bundle. You will see the
33 words "Conversion of offices to flats, 2 Water Lane, Leeds", and you will see in the right
34 hand corner the words "From Quarmby Construction". This was a long time ago, it was in

1 2000, and you have said, not surprisingly, that you do not recall the project. Is that still
2 your evidence?

3 A It is.

4 Q But you do say that you did have contacts at Strata?

5 A Yes.

6 Q Did anyone from Strata ever ask you for a cover price for any project?

7 A At the time that it was called Weaver Construction ----

8 THE CHAIRMAN: You are going to have to speak up, I am afraid. You were asked whether you
9 recalled whether anyone at Strata had ever asked you for a cover price?

10 A And I don't recall. Strata changed their name from Weaver Construction some time after –
11 certainly after the date of this tender, and I believe that the personnel at Weaver changed
12 when they became Strata.

13 MISS BACON: Could you just take a look at this document and you will see that there is a total
14 tender price and a number of other details?

15 A Yes.

16 Q Do you accept that if somebody had given a cover price for this, whether it was you or Mr.
17 Bell or somebody else at Quarmby, you could have also suggested the other details that are
18 included in the tender form?

19 A That could be possible because there was very little on the form.

20 Q The next project that I am going to ask you about is the Humanities Research Institute in
21 Sheffield, and that was dated 23rd December 2004, and it is infringement 214. Can I ask
22 you to turn in the same bundle to tab 9, p.72. You will see the bottom row on that is “45/04,
23 23.12, UofS”, which presumably means University of Sheffield, “Humanities Research”,
24 and on the right hand side it says “Quarmby Const”. That is one of the documents that
25 establishes the tender date as being 23rd December. If you then turn back a few pages to the
26 page which is marked 69 in the bottom right hand corner – have you seen this document
27 before – you will see towards the top in a circle, just under “Bt Phone Disc Standard
28 Version”, there is the name David Harrison, and then Quarmby Construction Company,
29 Ilkley. That is Quarmby's address there?

30 A It is.

31 Q It appears from this that someone from Admiral – this is an Admiral document – contacted
32 you, or somebody at Quarmby in relation to this tender contacted you. Can I give you a
33 calendar from 2004 that the ever diligent Mr. Singla has produced just to highlight when
34 this was. (Same handed) You will see from this that 23rd December fell on a Thursday.

1 When it says around the middle of the page, “Ring 4.30 Wednesday”, is it not the most
2 probable explanation that whoever was going to ring Quarmby rang on the Wednesday,
3 which was the day before the tender submission, to get the cover price?
4 A I don’t honestly know what that reference means.
5 Q If you look down the page you can see, “Suggested contingency excluded by 60k”, and then
6 you can see in a box at the bottom the figure £1,487,250, and then above that, “Plus 40k
7 ACL”, which presumably means that a figure of £1.487 million was given and then they
8 added 40 on to it, ACL, Admiral Construction Limited, and then got to the figure
9 £1,527,272. You will see that whoever made this note is also referring to “provisional sums
10 employers”. Do you have any idea what that could have been?
11 A Provisional sums are usually stated in tender documents ----
12 THE CHAIRMAN: Sorry?
13 A Provisional sums were usually a sum stated in the tender documents given to the
14 contractors, and would be a sum available to all tenderers.
15 MISS BACON: The words “not silly distance away”, might that have meant that the cover price
16 that was given was not a silly distance away from the price that was being submitted by the
17 company giving the cover?
18 A ... [inaudible] ...
19 Q If you look towards the right hand side you will see the words “not lowest”?
20 A Yes.
21 Q That would normally suggest that whoever was writing this was aware that they were not
22 the lowest tender – is that right?
23 A Well, I don’t know what it would mean. I mean, it could well have been written after the
24 tenders had been submitted and the results found by various contractors.
25 Q Would another quite possible explanation have been that they were aware that they were not
26 the lowest company receiving a cover price, that somebody else had received a cover price
27 and then they were the next in line, so to speak?
28 A Well, you could say that, yes.
29 Q You talk about this tender at para.15 of your witness statement and you say there that it may
30 have been that Admiral spoke to you after the tenders had gone in to find out whether they
31 had under or over priced the bid. Can you remember that conversation specifically taking
32 place, or is that just a surmise?
33 A That’s just a surmise. I don’t recall the conversation. One assumes it would be after
34 Christmas.

1 Q That was my next question, Mr. Harrison, because it certainly would not have taken place
2 the next day, would it?

3 A Presumably not.

4 Q There is nothing in this document that would suggest that the words “ring 4.30 Wednesday”
5 were referring to a post tender conversation?

6 A There is nothing on that form, no.

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

12 A I would tend to disagree with that. There’s nothing on there to suggest to me that that is pre
13 tender.

14 Q May I move on to the final tender, that is the Eastbrook Hall tender, infringement 233. You
15 say in your witness statement at para.16 that you remember this project because it was a
16 façade retention scheme, and you say that it was priced by Mr. Buckler. If he had priced it
17 you would have presumably known the price that he was specifying one way or another?

18 A Eventually, yes.

19 Q So York House could have asked you for a cover price for this tender, because you would
20 have known the price?

21 A That is possible, yes.

22 Q Or they might have spoken to Mr. Buckler directly?

23 A Again, that is possible.

24 Q Do you accept that either you or Mr. Buckler might have given a cover price for this
25 project?

26 A No, I don’t. Sorry, I don’t accept that. It was not our policy to give cover prices.

27 Q Do you accept that you or one of the other estimators might have given a cover price for any
28 of the other two projects that we have just referred to?

29 A Whether Water Lane or Humanities, I doubt it very much, knowing Mr. Bell and certainly
30 not with the Sheffield contract.

31 Q I do not have any more questions for Mr. Harrison.

32 THE CHAIRMAN: Thank you. Mr. Clough, any re-examination? I am so sorry, Mr. Summers.

33 MR. SUMMERS: Mr. Harrison, may I just ask, in one of your answers there when you were
34 asked whether you would have known what the price was, what the tender price was you

1 used the word eventually, you said “I would have known what price was being submitted
2 eventually.” Can you just explain the word “eventually”?

3 A After the event.

4 Q Presumably he reported to you, and therefore you would have had to, what, given your
5 permission for his price to go forward to your boss?

6 A No, the system ...[inaudible] ... if Mr. Buckler was working on one or two active tenders I
7 would be working on one or two tenders, and Mr. Buckler would produce a price for a
8 particular project and submit that to the managing director and the commercial director for
9 analysis.

10 Q Mr. Buckler reported to you, but you were not responsible for the prices that he was
11 proposing to put forward to management?

12 A I was responsible for his actions, yes.

13 Q But not for the prices that were submitted?

14 A The price of the various contracts was put before the directors to make a decision as to what
15 price was. Mr. Buckler would prepare it and submit that price to the directors. So I would
16 be only on the periphery at that stage.

17 Q Right, so there was no onus on you to, as it were, approve the quality of the work that he
18 was putting forward?

19 A No.

20 Q OK, thank you very much.

21 MR. CLOUGH: Mr. Chairman, we have no further questions.

22 THE CHAIRMAN: Thank you very much. Thank you, sir. Thank you for attending. You are
23 free to go if you wish to.

24 MR. CLOUGH: May Mr. Harrison be released?

25 THE CHAIRMAN: Yes, I just said so.

26 (The Witness withdrew)

27 MR. CLOUGH: Mr. Chairman, may I also ask that Mr. Buckler be released because he is no
28 longer required, I gather?

29 THE CHAIRMAN: Yes, Mr. Buckler can be released as well. Thank you, Mr. Buckler, for
30 coming. I think that is Mr. Buckler at the back.

31 MR. CLOUGH: I think we have moved on quite quickly.

32 THE CHAIRMAN: Yes, we have exhausted the witnesses, I gather! We may not have exhausted
33 the witnesses, but we do not require any more!

1 MR. CLOUGH: I am grateful to Miss Bacon for keeping her cross-examination short. May I
2 now turn to the submissions on behalf of QCC in relation to the liability issues. I am going
3 to deal, if I may, with the issues I mentioned when I outlined this morning, the seven
4 suspect tenders, then add some final submissions on the three of those which became the
5 three infringements.

6 Our proposition, which is set out both in our Notice of Appeal at para.2.6 and in the
7 skeleton argument, is that the appellant should have been excluded from the scope of the
8 investigation and should not have been addressees of the Decision for the same reasons that
9 each other company which had less than five suspect tenders has been excluded from the
10 investigation and was not an addressee of the Decision.

11 Before I take that further I should perhaps emphasise that this is not a normal case where a
12 procedural infringement is alleged but the outcome of the Decision may very well not be
13 any different as a result of that procedural irregularity. In the present case, there would
14 have been no decision for QCC, just as that is true for the 900 companies for whom the
15 OFT did not have sufficient evidence of five suspect tenders by the date of the fast track
16 offer letter of 22nd March 2007.

17 It is our submission that at the time when the OFT sent QCC the fast track letter (22nd
18 March 2007) the evidence available to it and relied upon in that fast track letter set out in
19 the schedules was not sufficient to justify the OFT's decision to select QCC as one of those
20 112 construction companies out of the thousand potential companies to continue to include
21 in its investigation. In particular, the OFT did not have evidence available and did not rely
22 upon sufficient evidence to meet its own selection test set out in the Decision, to which I
23 will turn in a moment, that would allow them to say that there were at least five suspect
24 tenders out of the seven suspect tenders identified in the OFT's fast track offer. QCC says
25 there was only one suspect tender where there was some reasonable grounds for suspicion.
26 The legal principles have been set out shortly and although contested they are not
27 complicated. They are in para.4.4 Notice of Appeal p.14, and the breach of those principles
28 is set out at para.4.10 and 11 on pp.15-16 of the Notice of Appeal.

29 THE CHAIRMAN: I will just find that. You referred to para.4.4.

30 MR. CLOUGH: 4.4 p.14 and then 4.10 and 4.11 on pp.15-16.

31 THE CHAIRMAN: You are going to take us to authorities for the proposition in the second
32 sentence of 4.4?

33 MR. CLOUGH: I was going to refer, sir, to *Crest Nicholson* at para.50 where we submit it is
34 clearly established that the OFT is required to act fairly, and in particular is not permitted to

1 treat differently parties that are in the same situation in the course of the competition
2 procedure. It is for that reason we say that by failing to exclude the appellants from the
3 investigation the OFT breached the principle of equal treatment in that it treated the
4 appellants differently from other undertakings in respect of which it had concluded that it
5 did not have evidence of at least five suspect tenders. It was common ground in *Crest*
6 *Nicholson* (so it says at para.50) that the OFT must comply with the principle of equal
7 treatment in all steps leading up to the imposition of a penalty. Sir, I think that the OFT
8 does dispute that the principle of equal treatment applies to this process, but they have not
9 elaborated their grounds for that.

10 What I would like to turn to now, if I may sir, is the Decision and the OFT test which is set
11 out in the Decision at para.II.1483 p.261. That is the same test that is set out in the fast
12 track offer letter, which is perhaps most easily found in the defence bundle tab 3, which is
13 bundle 3. It is volume 3 tab 1, the first tab of the evidence.

14 THE CHAIRMAN: Yes, we have got that.

15 MR. CLOUGH: It is on p.3 at the top under the heading “Your company is implicated in this
16 investigation”.

17 THE CHAIRMAN: Sorry, not everybody has got it. We are looking at our bundle 3 tab 1 p.3.

18 MR. CLOUGH: It is the defence so maybe it is tab 2.

19 THE CHAIRMAN: I am sorry, let us just have a look at this. It is just, we have two tab.1s in this
20 bundle. That is the problem. (After a pause) I am sorry, there is a bit of confusion because
21 there are two tabs numbered 1. (After a pause) Fine. Thank you very much ...

22 MR. CLOUGH: Right. So you will see on p.3 of the letter at the top, under “**Your company is**
23 **implicated in this investigation**”, that it reads:

24 “I am writing to your company today because as a result of its investigation the
25 OFT has obtained evidence indicating that your company has been involved in bid
26 rigging activities in a number of tenders since 1st March 2000 (‘suspect tenders’),
27 as detailed in the table attached as an Annex to this letter”.

28 The annex has the seven suspect tenders. And it is the next part which is the same as in the
29 decision.

30 “The OFT suspicion that your company has participated in bid rigging activities in relation
31 to suspect tenders ... the table is based in most cases emphasised by the OFT on at least one
32 contemporaneous incriminatory document such as an annotated tender register of one of the
33 implicated parties, and an express written admission of participation in bid rigging activities

1 by one of the many leniency applicants in this case which directly implicates your company
2 in relation to that suspect tender”.

3 And the same text can be found on p.261 at roman II.1483, the decision, where it says:

4 “The OFT wrote to 85 non-lenieny Parties on 22 March 2007. The letter sent to
5 each company informed them that the opportunity for leniency applications in the
6 investigation had now ended, as discussed above ... It stated that the relevant
7 company was implicated in the OFT’s investigation and included a schedule of
8 Suspect Tenders in respect of which the OFT suspected the company had engaged
9 in bid rigging activities. The OFT’s evidence that gave rise to these suspicions
10 comprised, in most cases”,

11 and then it sets out the two categories of documents.

12 So that is the test for the fast track offer and indeed the selection of those tenders. What is
13 interesting, sir, is that was the same test as is used for the substantive infringement which is
14 set out in the decision at para.IV.127 on p.419. Here we see, at IV.127:

15 “The OFT has therefore had to proceed on the basis of limited contemporaneous
16 documentary evidence for this investigation. [I will come back to that] Notwithstanding
17 this, for most tenders included in this Decision, there is at least one contemporaneous
18 document evidencing bid rigging activities, often comprising one of the colluding
19 companies’ tender registers or forms of tender in which they recorded the giving and/or
20 taking of cover prices, and in addition this is supported by a transcript of an interview with
21 an employee or ex-employee of one of the leniency Parties. The OFT is therefore satisfied
22 that the evidence set out in this Decision is sufficient to meet the required standard of proof
23 described in the Legal section above”.

24 I appreciate we cannot keep all these pages open at the same time in the Decision, but I am
25 going to refer, if I may, just to a few more of these paragraphs, just to try and assist the
26 Tribunal to understand what these tests were, and then we can look to see how they were
27 applied. Sir, as I have already read out at para.IV.127 at p.419, the OFT concedes in the
28 opening sentence there that:

29 “The OFT has uncovered [and I am quoting] very little evidence of written
30 communications between competitors in the construction industry in order to
31 facilitate cover pricing. In this investigation the evidence has been that contact
32 between competitors took place by telephone”.

1 That is actually para.122 which is on the same page, p.419. So, they are saying they have
2 very little written evidence. The evidence is that contact was made by telephone. And then:
3 the OFT confirms, at para.123, that:

4 “Many companies would not make any record of the contact or of the fact that a
5 cover price was submitted and, in many cases, the relevant tender file would be
6 destroyed since it no longer needed to be kept, either during the tendering process
7 because the company knew it would not win the contract, or after the tendering
8 process once the company had received confirmation that it had lost the contract”.

9 That is para.IV.123. Unsurprisingly, in 127 the OFT complains that the OFT has therefore
10 had to proceed on the basis of limited contemporaneous documentary evidence for this
11 investigation.

12 Now, we flag that up to show that, in general terms the OFT is accepting that there is very
13 limited contemporaneous documentary evidence as a general principle.

14 But it is rather curious that the OFT has applied the same evidence test that it appears to
15 apply for the five suspect tender selection stage, or consolidation step, for the substantive
16 infringements found in the Decision. It has relied on the same two categories of evidence
17 referred to in the fast track offer letter and the third consolidation step for limiting its further
18 investigation to those companies for which there was what they call “Category 1, 2 or 3
19 evidence”.

20 Now, this is described in para.II.1464, p.255, 1464 and 1465 are highly relevant, but 1464
21 has this table where we are told what the three categories of evidence are. So, we see that
22 the first category is:

23 “Two stand-alone pieces of evidence of collusion on a specific tender from two
24 different Parties”,

25 and there are examples given. And then, the second category:

26 “Two stand-alone pieces of evidence of collusion on a specific tender from one Party
27 corroborating each other”.

28 Now, those are very similar to the tests set out in the FTO letter and indeed at the paragraph
29 on p.261 1483. But then the third category seems to be quite, almost open-ended:

30 “One uncorroborated piece of evidence which falls within one of the below
31 scenarios:

- 32 • From a leniency Party:

1 A witness statement or summary table produced for the purposes of leniency
2 which has been corroborated generally by other evidence but where there is no
3 specific corroboration of the individual tender in question;”

4 It seems quite extraordinary, to be perfectly frank, that if there is no specific corroboration
5 of the individual tender in question, it is considered to be reliable evidence. And then:

6 “• From a non-lenieny Party [which is perhaps less relevant in the present case]:
7 A contemporaneous tender log book which has been corroborated generally by
8 other evidence but where there is no specific corroboration of the individual
9 tender in question; or any other piece of unambiguous and strong
10 contemporaneous documentary evidence (eg a fax, email or contemporaneous
11 note)”.

12 This evidence appears in category 1 and 2 appears, as I say, to coincide with the way the
13 evidence is described in para.II.1483 and IV.127. Assuming that the sort of evidence
14 referred to incriminates the suspect tenders, for example, a contemporaneous tender log by
15 Party A and a witness statement, presumably meant to refer to the OFT interview of a
16 leniency applicant employees, by Party A or by Party B. However, the third category of
17 evidence appears to stray from the evidence test set out in paras.14.1483 and 14.127 since
18 the different categories of evidence envisaged would permit a witness statement or
19 summary table produced for the purposes of leniency where there is no specific
20 corroboration of the specific individual tender in question; or a contemporaneous tender log
21 from a non-lenieny Party where again there is no specific cooperation of the individual
22 tender in question. So we say, and the Tribunal should take this into account, it cannot be
23 ruled out therefore that the OFT has considered itself entitled to rely on evidence which
24 does not incriminate a specific tender or specific alleged infringer, certainly at the five
25 suspect tender stage, which is what our preliminary issue is all about.

26 The OFT then refers to the evidence “then available to the OFT as enabling the OFT’s
27 investigation to focus on those companies that appear to have engaged in bid rigging
28 activities on the most occasions since they had a minimum of five suspect tenders”. This is
29 what the consolidation exercise and the selection of the minimum of five suspect tenders is
30 all about.

31 I would just like to go one step further, although I readily accept that what I am about to say
32 is not totally clear, but I would just like to draw it to the Tribunal’s attention, because
33 I think it is only fair that the Tribunal understands that the point is, to the extent that I can
34 make it on the text of the Decision, and here it is the relationship between the statement of

1 objections and the five suspect tenders; because para.II.1471 which is going to be on p.256
2 describes the relationship between the statement of objections and the five suspect tenders
3 in the following way:

4 “The OFT’s decision to investigate at this stage five Suspect Tenders for each of the
5 non-leniency Parties, discussed in paras II.1467 to II.1469 above, was intended to
6 ensure that in most cases there would be sufficient evidence to include in the
7 Statement at least three tenders for each Party, allowing for the possibility that, at the
8 conclusion of the investigation and prior to the issue of the Statement, there might
9 prove to be insufficient evidence in respect of one or more of the five Suspect Tenders
10 selected. The OFT did not consider it necessary or appropriate to investigate more
11 than five Suspect Tenders for each of the non-leniency Parties, given the additional
12 resources and time that would be required and also the initial assessment of the quality
13 of the evidence in the OFT’s possession”.

14 That suggests to us that the OFT is aware that the five suspect tender evidence might not be
15 sufficient to justify issuing the statement of objections in respect of all five suspect tenders,
16 which one might say is fair enough. However, this approach appears to be inconsistent with
17 the reference to the statement of objections being prepared in the fast track offer letter of
18 22nd March 2007. And, if you combine that with the parallel Decision reflected in the press
19 releases and in the fast track offer letter, to exclude further leniency applications after that
20 date, after the date of the fast track offer. So, if we could turn to para.II.1480 which is on
21 p.260 under the heading, “**Closure of availability of leniency in the investigation**”.

22 That paragraph states that the OFT decided to exclude further leniency applications.

23 I quote:

24 “At the same time as making the selection of tenders for investigation”.

25 This decision was announced by the two press releases referred to there on 22nd March.
26 Para.II.1481, the next paragraph, under the head, “**The Fast Track Offer to non-leniency**
27 **Parties**” deals with the fast track offer. And the FTO letter, second paragraph, p.3, perhaps
28 we should turn that up. We discovered that was in tab.2 in your bundles.

29 THE CHAIRMAN: We have got it. Yes.

30 MR. CLOUGH: That second paragraph certainly suggests that the statement of objections is
31 being prepared on the basis of the evidence used to select the five suspect tenders. It says:

32 “The OFT is now in the latter stages of the investigation phase of this case and intends to
33 issue a Statement of Objections (‘the SO’) to a number of implicated companies,
34 including your company, in due course. The SO will set out, in full, the OFT’s

1 provisional view that certain companies, including your company, have engaged in
2 bid rigging activities in breach of the Chapter I prohibition, and the evidence on
3 which the OFT relies. You – as well as all the other implicated companies – will
4 then be given the opportunity to make written and oral representations on the
5 matter set out in the SO, before the OFT adopts a final decision in this case.”

6 In our submission, in stating the SO will set out in full the OFT’s provisional view that
7 certain companies, including your company, have engaged in bid rigging activities in the
8 Chapter I prohibition, the OFT is effectively saying that it has sufficient evidence to send of
9 statement of objections to QCC, at least in respect of some of the suspect tenders, to be
10 totally literal about it.

11 It follows that the evidence that the OFT says it has obtained, which indicates that QCC has
12 been involved in bid rigging and detailed in the table of suspect tenders in the annex to the
13 fast track offer is the same evidence it proposes to rely upon in the statement of objections.
14 Pausing there, I am not going to try and mislead the Tribunal because of course the decision
15 goes on to the next stage, and in para.1482 it actually says that the OFT has not yet selected
16 the tenders for the statement of objections. That does not fit comfortably with what has just
17 been said about the statement of objections in that para.2 of the fast track offer where the
18 implication is, “We have chosen at least five suspect tenders, we are at the latter stages of
19 our investigation, we are going to send you a statement of objections in the decision we
20 have, it may not be on all those cases”. Our submission is that that is a very strong
21 indication that the evidence that was used by the OFT, according to the OFT, for the
22 identification of the five suspect tenders was sufficient and of a quality to justify issuing the
23 statement of objections. Even if it was not in all five of them, it must have been in some of
24 them to have made these observations, if I can put it like that, in the decision, but more
25 importantly this para.2 in the FTO letter itself.

26 If you tie that together with para.IV-127 where they say they have effectively used the same
27 evidence to find the substantive infringements, then it all seems to make sense, and it seems
28 to add up to the OFT saying, “At the time of the fast track offer we actually have sufficient
29 evidence in which to prosecute you”, effectively.

30 I should also, for the interests of completeness say, para.II-1479, p.258, refers to further
31 interviews and evidence obtained after 22nd March 2007. For example, in QCC’s case there
32 are two sets of leniency interviews that took place after the FTO letter. I do not think that
33 they add very much to the evidence that is ultimately relied upon but they, of course, took

1 place. That again, if you like, is an argument against [myself] that clearly the OFT was
2 going to look at further evidence.

3 At the same time, if one is trying to identify what the standard was that they were using for
4 this test to establish what were the five suspect tenders, there does not really seem to be
5 very much difference, is what it boils down to, between the standard of evidence that they
6 claim to have had at that stage for the five suspect tenders and the standard they would have
7 applied to prosecute at the SO stage and indeed the standard they actually relied upon for
8 the final substantive findings in the decision.

9 THE CHAIRMAN: Can we just go back to p.3 of the FTO, or for that matter to one of the
10 paragraphs of the decision.

11 MR. CLOUGH: Certainly, the equivalent paragraph was 1483.

12 THE CHAIRMAN: I just have in the back of my mind that the document we find at file 5, flag 1,
13 which was the tender offer, the tender document ----

14 MR. CLOUGH: Weaver Construction.

15 THE CHAIRMAN: Weaver Construction, I think that is the first infringement, which has got
16 written in the top right hand corner "From Quarmby Construction". This I understand to be
17 Weaver or Strata's document.

18 MR. CLOUGH: Yes.

19 THE CHAIRMAN: And the document which we were given today, and let us take as the best
20 example, the same file, flag 12, in manuscript, p.27 ----

21 MR. CLOUGH: "Question mark Quarmby".

22 THE CHAIRMAN: -- I cannot read what line it is because it has got a cross through it, but the
23 word "Quarmby" written in the first column, and then "?? Quarmby" across the page, and
24 then in line 16, "Eastbrook Hall, 1/8", which presumably means 1st August, "Quarmby".
25 Those are two documents, are you saying those documents do not fall within the category of
26 the first bullet point in the FTO on p.3?

27 MR. CLOUGH: We do. There is one simple reason which I will be coming on to at the
28 beginning of my next section of submissions, and that is there are two companies. One of
29 the reasons I asked the witness this morning to look at the letter about QSP, Quarmby
30 Construction (Special Projects) Limited, is that there are two Quarmby's. If we look at the
31 fast track letter schedule you will actually see ----

32 THE CHAIRMAN: Is Eastbrook Hall not one of those potential contracts in respect of which
33 there is a letter – I am now going completely from memory – a letter exhibited to
34 Mr. Nelson's first statement?

1 MR. CLOUGH: I do not think so, no.

2 THE CHAIRMAN: Mr. Singla says no, so that is bound to be correct.

3 MR. CLOUGH: May I answer your perfectly understandable question, and that is that one of our
4 primary submissions is that on five, if not six, tenders the short answer is that the OFT did
5 not know on 22nd March what the words “Quarmby Construction” or “Quarmby” referred
6 to, because there are two companies with the same starting names, “Quarmby
7 Construction”. Our name is Quarmby Construction Company Limited, and the other is
8 Quarmby Construction (Special Projects) Limited. Both, unfortunately, are based in Ilkley
9 (for reasons of confusion, I may say). That is, if you like, one of the key nubs of our case,
10 that the OFT should have taken at this stage a further step to examine. They actually sent
11 one of the seven suspect tenders in our fast track offer letter to Quarmby Construction
12 (Special Projects) at exactly the same time it was sent to us. In other words, as I am going
13 to submit in a moment, they seem to be inviting an admission of guilt from two companies
14 to whom they were not showing any evidence at all. I do not know whether it has come up
15 so far, but there is no evidence given out at all behind the FTO letter. It is, “You go away
16 and see what you have in your files and come and confess to us if you want a 25 per cent
17 discount”.

18 So at that time they sent the FTO to both Quarmby companies in respect of one and the
19 same infringement, and I will come back to that.

20 This is of very little relevance, and I have finished what I was going to say about the
21 decision, but simply to explain why, to the extent that it may be relevant, QCC did not know
22 about the evidence being used until para.6 of the *Crest Nicholson* High Court judgment
23 explained the process that had been put before them in evidence as to how the five suspect
24 tender selection process took place. There is no dispute about that, that is now explained in
25 the decision.

26 The second witness statement of Mr. Nelson was sent to the OFT in order to seek to put
27 forward arguments, and it contains the comments on all seven suspect tenders having seen
28 what was said in the *Crest Nicholson* case, in an attempt to invite the Office of Fair Trading
29 to drop the case at that stage, which was pre-decision but post-statement of objections,
30 because of course the *Crest Nicholson* case was not decided until August 2009. So the
31 witness statement of Roger Nelson, which is your first bundle, tab 14, was 18th August
32 2009, and there in para.5 it sets out why QCC was not aware of the five suspect tender
33 process until the *Crest Nicholson* case, and paras.7 to 14 give the reasons why QCC was not

1 involved in five or more suspect tenders. As I say, it was asking the OFT to release them at
2 that stage.

3 This is not in dispute, the OFT effectively said, “It is too late to do so now, you cannot
4 challenge the statement of objections”, is what they said, “but we recognise that you can
5 appeal this point”, and that is why it is before you today, sir.

6 Did I answer your questions about the two documents?

7 THE CHAIRMAN: I think you have, yes.

8 MR. CLOUGH: We also do not accept that the handwriting is contemporaneous.

9 THE CHAIRMAN: I understand that.

10 MR. CLOUGH: Could I move on now to what I might call our submissions, the OFT has not
11 satisfied its own evidential test, because (a) it did not have a contemporaneous incriminating
12 document, such as the documents we were looking at; or (b), if it did, it did not have an
13 express written admission of participation in bid rigging activities by one of the many
14 leniency applicants which directly implicated QCC’s tender, the second category of
15 evidence required for that test. It was not just one, it was both of them.

16 An analysis of each of each of the seven suspect tenders and the evidence relied upon by the
17 Office of Fair Trading which is set out in what we have called our core chronological
18 bundle, which is your bundle 5, where we have the two documents from Quarmby. That
19 reveals that the OFT’s contentions in the liability defence and its skeleton argument are
20 flawed for the following reasons. I am going to deal with two main submissions at this
21 point, and then come on to go through the evidence to the extent that we can all bear that.
22 The two primary submissions are these: the OFT makes two main submissions with regard
23 to the seven suspect tenders in its skeleton. First, in relation to all six suspect tenders that
24 they address, the OFT claims to be entitled to rely on the word “Quarmby” as sufficient to
25 justify incriminating Quarmby Construction Company Limited in at least five suspect
26 tenders. Second, even where they have doubts as to whether a document is
27 contemporaneous they claim to be entitled to have a reasonable suspicion that a document is
28 contemporaneous for the purposes of justifying their suspicion that QCC is implicated in at
29 least five suspect tenders.

30 I will say that again: even where they have doubts as to whether a document is
31 contemporaneous, they claim to be entitled to have a reasonable suspicion, despite those
32 doubts, that a document is contemporaneous for the purposes of justifying their suspicion
33 that QCC is implicated in at least five suspect tenders.

1 In the OFT's skeleton argument at para.17(b), 18(b), 19, 20, 21(a) and 22(a), the OFT
2 claims to be entitled to rely on the word "Quarmby" in either contemporaneous documents
3 or leniency applications for "reasonable suspicion that QCC infringed Chapter I", even
4 when the OFT knew that there was a second company whose name started with the same
5 words "Quarmby Construction", because the OFT says that it was entitled to suspect both
6 companies at that stage of the procedure.

7 That stage was the issue of the fast track offer letter following the selection of the
8 companies that at least five suspect tenders in respect of which the OFT had evidence
9 within those three categories in para.II-1464 of the decision.

10 QCC's submission is that the OFT has infringed the principle of equal treatment and was
11 required to take additional steps to ensure that the two parties are not confused. First, if the
12 OFT is correct, that means they would have accepted positive requests for 25 per cent
13 penalty reductions from both Quarmby Construction companies in respect of the same
14 infringement. I say that because there is no dispute that the fast track offer letter sent to
15 Quarmby Construction (Special Projects) had one of the seven suspect tenders also sent to
16 us. This would infringe the principle of proportionality if not the Chapter One prohibition
17 itself since the OFT would have to accept a guilty plea when it knew there could not be
18 evidence of an infringement by both companies, whether or not there could be by one.

19 Second, if the OFT's contentions are upheld, they will create a new exception to the
20 presumption of innocence. A decision to select 100-odd companies out of over a thousand
21 for the purposes of continuing a competition investigation on the basis of evidence that
22 could only raise a suspicion that one of two companies could be implicated in a Chapter
23 One infringement when, if that evidence was not considered to support such a suspicion, the
24 company (or two companies for that matter) would have been excluded from the OFT's
25 further investigation. That must constitute an infringement of the principle of equal
26 treatment and the principle of procedural fairness referred to in *Crest Nicholson*.

27 Third, and I do not want to exaggerate this, we believe in these circumstances and would
28 submit that the OFT would be guilty of abuse of power contrary to section 2 Competition
29 Act because it does not have the power effectively to accept a guilty plea for one
30 infringement from two parties when one of them cannot have done it.

31 The combination of the selection of companies alleged to have at least five suspect tenders
32 with the fast track offer letter amounts to an infringement of the principle of legitimate
33 expectations or legal certainty (this is for a different reason), because the addressees of the
34 fast track offer letter are effectively deprived of an opportunity to submit an application for

1 immunity or leniency in respect of those suspect tenders. The clear acceptance by the OFT
2 that they would have accepted an admission of guilt in respect of any of the suspect tenders
3 in the FTO letter schedule, regardless of whether the company concerned was guilty, is
4 contrary to the OFT's own leniency guidelines which require a genuine belief that a
5 leniency applicant has committed an infringement before a leniency application can be
6 accepted.

7 That, before it becomes a great bone of contention and to clarify, is what the current "new"
8 leniency rules say. To be fair, that wording and that requirement was not totally obvious in
9 the past, but there have been a number of drafts over the period of two or three years which
10 resulted in the leniency guidelines being published in December 2009, something like that.
11 This principle that you cannot plead guilty unless you have a genuine belief that you have
12 committed an infringement does seem a logical one, and indeed one which is necessary to
13 allow a competition authority to enforce the provision against the party that wishes to plead
14 guilty. Otherwise, one is effectively saying: "if you want to save yourself time and effort,
15 do not worry about reading the schedule, just come along and tell us you did it and we will
16 give you a much lower fine than if you want to go away and spend all the time and effort to
17 look at the evidence and try to work out whether you did or did not do it." It is especially
18 difficult where there was no indication of what the evidence that was behind this fast track
19 offer letter was. Of course, that applied to everybody, but it was particularly bewildering
20 for QCC, who could not understand it. That is why the correspondence took place in
21 August 2009, and indeed where the first steps of the defence, if you like, to the seven
22 suspect tenders was actually put forward, and it is still consistent with the original position
23 that was taken then.

24 We would also submit that this raises a question mark over whether the OFT had any
25 genuine suspicion in respect of the suspect tenders listed in the schedule to the FTO letter, a
26 reverse lowering of standards.

27 Our next submission is that there are two stages in the OFT's investigation procedure which
28 are relevant to the fast track offer letter. First, there is the second and third consolidation
29 step that we saw in II.1464 and 1465 of the Decision, the table being 1464, where the OFT
30 identified the three categories of evidence upon the basis of which it considered it could
31 entertain a reasonable suspicion that a company was implicated in five or more of the
32 suspect tenders. Those are the OFT's words: "reasonable suspicion".

33 Second, following completion of the consolidation steps, the fast track offer letter was
34 issued offering to grant a 25 per cent discount on any penalties that the OFT might impose

1 regarding infringements listed in the schedule to the letter which the companies concerned
2 were prepared to admit were infringements of Chapter One.

3 At that separate, but later, FTO stage, but using the same evidence, reinforced by the OFT's
4 decision to exclude any further immunity or leniency applications, the OFT must have
5 considered that it had sufficient evidence to prosecute the suspect infringement listed in the
6 schedules to each letter. If the OFT did not have sufficient evidence to prosecute or, to put
7 it in competition procedure language, to rely on to issue a Statement of Objections, the OFT
8 letters should not have withdrawn leniency which would otherwise only happen once the
9 Statement of Objections is issued. That is practice rather than law, I think I have to say, but
10 it is practice set out in guidelines, so one would have thought legitimate expectations
11 applied.

12 The standard of evidence required to issue a Statement of Objections is stated in *Claymore*
13 *Dairies* at para.11, as the OFT has pointed out in its skeleton. That is that evidence, if
14 uncontested, would prove an infringement that would be sufficient to support a Statement of
15 Objections. We say that that is the sort of evidence that the OFT should have had at this
16 late stage of its investigation when it issued the fast track offer letter telling QCC and others
17 that it had at least five suspect tenders. Therefore the evidence has to be looked at from that
18 point of view to check that its quality is sufficient.

19 Indeed, by implication from para.13(a) of the OFT's skeleton, it appears that they admit that
20 they did not have sufficient evidence to prosecute and therefore insufficient evidence to
21 justify its inclusion of QCC in the fast track offer letter and the Statement of Objections,
22 and the Schedule of seven suspect tenders which the OFT selected for further investigation.
23 That is because they do not accept the test of uncontested evidence being the test for
24 reasonable suspicion that form the Statement of Objections.

25 If the quality of the evidence considered sufficient to meet the evidential tests for the five
26 suspect tenders was not sufficient to justify the issuing of a Statement of Objections, the fact
27 that the same evidential tests are said by the OFT to be applied in its findings of substantive
28 infringements in the Decision (para.4127) render the findings of infringement themselves
29 unsubstantiated and unable to meet the required standard of proof, because they are
30 effectively applying the same standard.

31 Finally, it has to be noted that the OFT did not provide any evidence, or even identify the
32 evidence, on which it claims to have based its reasonable suspicion of infringement until the
33 liability defence, when it has done so. By the time of the Statement of Objections and the
34 Decision the OFT had other evidence which it was not permitted to use retrospectively to

1 justify its selection of the 100-odd companies out of the thousand potential infringers.
2 However, again in para.4127 the OFT applied the same evidential test for the finding of
3 substantive infringements as it did for the five suspect tenders in paras.1464 and 1465.
4 Those tests were applied for the purposes of the FTO letters.
5 So it is not surprising that the OFT has never sought to claim that the quality of the evidence
6 it had at the date of the FTO following the selection of five suspect tenders was any greater
7 at the time of the Decision. After certain further interviews of the leniency applicant
8 employees, there were two in the case of two of the infringements of Quarmby, I think.
9 That is our submission on the words Quarmby or Quarmby Construction.
10 Let me turn to the other main point made in the OFT skeleton. It is the contemporaneous
11 document. The OFT says where it did not have a contemporaneous document, and it did
12 not even claim to do so "in every case" in paras.18(c), 21(b) and 22(b) of the skeleton it
13 says that:

14 "in any event the OFT was entitled to form the reasonable suspicion that the
15 document was a contemporaneous record of cover pricing on the part of
16 Quarmby".

17 QCC contends that not to apply the same approach to the evidence in every case itself
18 infringes the principle of equal treatment and the principle of procedural fairness. We also
19 contend that the OFT may not entertain a "reasonable suspicion" (their wording) regarding
20 the nature of a document as to its contemporaneous status when it is relying on that
21 contemporaneity for its "reasonable suspicion" for a substantive infringement. In particular,
22 it has given no reason for the reasonable suspicion regarding contemporaneity.

23 So if we take p.1 of bundle 5 from Quarmby there is actually no evidence that conclusively
24 would show that that document was contemporaneous. We will have a look at that in a
25 moment. We say the OFT takes a different view of what the witnesses say in interviews.

26 THE CHAIRMAN: Do original documents exist?

27 MR. CLOUGH: That is a very good question. We have asked for original documents in certain
28 cases (Mr. Aldred can tell me which ones) and I know the OFT has tried to find them but I
29 think they have been unable to.

30 THE CHAIRMAN: I imagine they have a warehouse full of original documents, or of
31 documents.

32 MR. CLOUGH: I think they cannot take the originals, they have to copy them. I think that is the
33 problem.

34 THE CHAIRMAN: I see, they copy them.

1 MR. CLOUGH: It is a very good point, sir, because of course it would be much easier if one
2 could see the original. Indeed, some of these documents have got more than one author
3 writing on them, but of course it is not very clear.

4 THE CHAIRMAN: Page 1 – I do not want to put myself up as a handwriting expert – looks as
5 though the writing at the top and the writing at the bottom from D H Ironmonger
6 downwards is the same hand.

7 MR. CLOUGH: Yes. There are two questions. One is who has written it, and secondly, when
8 have they written it?

9 THE CHAIRMAN: Yes, that is another question.

10 MR. CLOUGH: It could well be the same person.

11 THE CHAIRMAN: Looking at the word “construction”, it is perfectly obvious that it was written
12 by the same person. It does not need an expert to say that.

13 MR. CLOUGH: I think I would agree with you. The other famous case, the 27 that we have
14 already looked at, that is another of our *causes celebre*, and there does seem to be different
15 writing on that one.

16 THE CHAIRMAN: What does contemporaneous mean?

17 MR. CLOUGH: The first one is the tender submission, or one of the pages of the tender
18 submission, and 27 is a tender record kept by the company concerned. We would say it is
19 contemporaneous if the evidence of this, for example, Residential Morley and the word
20 Quarmby and then ?? Quarmby, if that was to be strong evidence to do with the cover
21 referred to there, we say it should have been written at the time or around the time.

22 THE CHAIRMAN: The same period?

23 MR. CLOUGH: Yes. Our strong contention is that it was written at the time the leniency
24 applications were prepared.

25 THE CHAIRMAN: Yes, I understand.

26 MR. CLOUGH: It is very understandable, and there is nothing dishonest about it. It is rather
27 tricky at the moment to say.

28 THE CHAIRMAN: Rather like my accountant asking me to annotate my bank statements months
29 after I have received them!

30 MR. CLOUGH: Yes, I am afraid it is rather similar.

31 THE CHAIRMAN: We have all had that experience.

32 MR. CLOUGH: That is, in a nutshell, it. No-one is to blame at all. It is slightly difficult to jump
33 on one side of the fence or the other. Obviously, the OFT has jumped but that is not the
34 way we think they should have jumped.

1 I think that brings me to the evidence, unfortunately. I will now try to demonstrate from the
2 evidence that we have in this bundle which we hopefully helpfully have put together. These
3 are the documents that we want to focus on – not every one but most of them – briefly and
4 they are in that bundle 5 that you have, what we call QAB4.

5 THE CHAIRMAN: Right, bundle 5 alone is on my desk.

6 MR. CLOUGH: I think there are two files that we are going to need, two bundles. One is bundle
7 5 and the other is your bundle 4, because that has a table. It has our skeleton argument and
8 at the beginning of Annex 1 it has a table which is simply an aide memoire to show you
9 what conclusions are about the seven suspect tenders. Page 3, thank you. It is Quarmby's
10 analysis of suspect tenders and infringements, Annex 1.

11 THE CHAIRMAN: Yes.

12 MR. CLOUGH: The other bundle which may assist us is the core chronology and dramatis
13 personae which I handed in this morning. I am sorry I should remind you, that actually has
14 the notes of the evidence test paragraph numbers at the top of it.

15 THE CHAIRMAN: Yes, thank you Mr. Clough.

16 MR. CLOUGH: The chronology you will find matches, to a very large extent, the contents page
17 of bundle 5 in terms of looking at the documentation. It also has references to the pleadings
18 and, as I said, the companies who tendered and the values of their tenders where we know
19 what they are. Again, it identifies the leniency applicant into the UEs and the witness
20 statements of the appellants, which I am not going to go to very much; I am going to
21 concentrate on the documents in the file. That is the same for all seven suspect tenders.
22 May we start with the table on p.3 of Annex 1 to the skeleton. You will see suspect tender
23 1. We have the first two columns of our legal arguments which I will come to at the very
24 end. They apply, in terms of the suspect tenders, to certainly the first four suspect tenders
25 which we say are statute barred in any event. The first suspect tender, which became
26 infringement 6, is not only statute barred, but we say it pre-dates the Act, the 3rd March
27 issue versus 1st March. I will come back to those submissions at the end.

28 We are really looking at whether Quarmby Construction Company Limited was identified,
29 that is the Quarmby issue as I have mentioned, or whether there is some other reliable
30 evidence that incriminates Quarmby sufficiently as to suspect tender level, and then
31 substantively at the Decision level.

32 Sir, the submissions I am going to set out are really section 3 of the QCC skeleton p.9 and
33 following. I am going to start therefore with suspect tender 1/infringement 6 as it is, 2
34 Water Lane, Leeds. That is dealt with in tab 1 and tab 2 of our core chronological bundle.

1 Here, at least until the date of the fast track offer, our submission is that the OFT's
2 information was merely Quarmby Construction (Ilkley), and here we need to look at the
3 first two documents in tab 1, the OFT documents 3504 and 4054.

4 THE CHAIRMAN: Yes, got them.

5 MR. CLOUGH: Obviously, one we are familiar with, the first one with the words "from
6 Quarmby Construction". We would simply say, forget about contemporaneity for a
7 moment and assume this was a smoking gun, but it was a smoking gun for whom? For
8 Quarmby Construction? It could be us or it could be QSP. Our strong submission is that
9 the OFT was clearly aware of that because they were dealing with both of us, and they
10 should have taken it a stage further before sending the FTO, and including that as a suspect
11 tender.

12 Then the second document which was changed because we got the wrong one, this was the
13 schedule of covers for 2000/2001 provided in the Strata Construction Limited's leniency
14 application. It is p.2 and it may have the words "new 2" at the top of it. Do you have that?

15 THE CHAIRMAN: Yes.

16 MR. CLOUGH: You can see the fourth line from the bottom: "03/03/2000 Conversion of offices
17 to flats, 2 Water Lane, Leeds for CPL Furb Ltd". I do not know what the middle column,
18 "OFT: BXM/107" is. It must be from some OFT document. Then it says "Quarmby
19 Construction, Ilkley". This is not claimed to be contemporaneous. This is an OFT
20 document putting together a schedule to Strata's cover pricing activities. It has the words
21 "Quarmby Construction", no doubt taken from the first page from Quarmby Construction.
22 That is the position at the time of the FTO; that is the evidence which was used to form a
23 reasonable suspicion that we were suspect at least and should be sent an SO, or at least be
24 allowed to put our hands up to and get a 25 per cent discount on that tender. Sir, more
25 documentation comes later.

26 Suspect tender 2, which was 154-155 High Street, Lincoln, is at tab 3 of volume 5. Here
27 again we say at least until the date of the fast track offer the OFT's information was merely
28 "Quarmby". Here we have document B3587 tab 3 p.27. Here again, the word "Quarmby"
29 appears under "Wrights", "Linden", I think it is, at the top of the page you have got 154-155
30 High Street and on the left hand side four names with some prices and the word
31 "Quarmby". Then there is the document B3586, p.26.

32 THE CHAIRMAN: If somebody from, let us say, Strata provides an admission that cover pricing
33 was being carried out to their knowledge and involved Quarmby in relation to a specific
34 contract, and then a document which is ambiguous as to which Quarmby is involved is in

1 existence which is apparently contemporaneous with that cover pricing, is the OFT in those
2 circumstances entitled to treat that document as both contemporaneous and relating to the
3 correct Quarmby?

4 MR. CLOUGH: It may be entitled to treat it as contemporaneous, but not related to the correct
5 Quarmby?

6 THE CHAIRMAN: Why not?

7 MR. CLOUGH: Sir, I have to sidestep your question in one way. We know from looking at the
8 interview transcripts that the OFT never asked any of the interviewees which Quarmby it
9 was. Half the time they said: "was it Quarmby" and the answer was "yes, it was Quarmby",
10 rarely it is "Quarmby Construction" (that is unusual); it is normally "Quarmby". The OFT
11 never asked which Quarmby. Indeed, the example we are looking at is the example where
12 they sent the FTO to the two different Quarmby's. It is a big case, we all know that, and
13 they would have had a lot of paper flying around. But you would have thought they could
14 have asked in the interviews and you may have then got an answer and I would not be
15 standing here saying this now. If an interviewee had said yes, it is Quarmby Construction
16 Company from Ilkley, then fair enough. Indeed, to be fair to the OFT, some of their
17 evidence is linked to, say, Mr. Harrison. They say: we have got the name Quarmby and we
18 have got the name Mr. Harrison. A telephone call was made to Mr. Harrison. We say we
19 have got other explanations. It is largely that there is clear evidence that there was post
20 tender discussions with people whose names appeared in telephone books or whose names
21 appeared on bits of paper. That is something the Tribunal will have to decide. I am not
22 going to say that that is an open and closed book; it requires careful consideration. That is
23 about the best evidence that they have got because they never asked the right questions. We
24 say they should have asked the right question.

25 The reason that we are making a meal of this is that 900 of our fellows walked down the
26 street. We received letters from our employers and public authorities saying: we see you on
27 the list; you have been fined by the Office of Fair Trading. It makes our life extremely
28 difficult and it is that seriousness that the OFT should have applied at the suspect tender
29 stage, let alone at the decision making stage.

30 THE CHAIRMAN: Context may be everything, may it not? If the context justifies the
31 conclusion that it is plain that the OFT were asking Strata about a Quarmby which involves
32 a named person who we know was in your Quarmby, and there appears to be a
33 contemporaneous document, then you cannot really say, can you, that the OFT were not
34 entitled to act on that document, all other things being equal?

1 MR. CLOUGH: I am afraid it is very much all other things being equal, because the interview
2 evidence is pretty hairy scary stuff. The interviewees say yes and no several times. To be
3 fair to the OFT, they do sometimes agree with them, but they say a lot of things which are
4 very inconsistent with the OFT's ----

5 THE CHAIRMAN: No doubt Miss Bacon will take us to the relevant material, if there is any!

6 MR. CLOUGH: We may take you there as well. I am afraid the only evidence we have to go on
7 is what is before the Tribunal really and is largely in this file. Obviously, if Miss Bacon has
8 got some others we are happy to look at it.

9 Just to deal with this page, 26, you will see again appendix 5.2, this will be the appendix to
10 the leniency application, and you will see in the second paragraph:

11 "At the top of the document there is a list of names of three other contractors who
12 SCL believes were Wright's competitors for this tender. These contractors are
13 Lindums, Quarmby and Mansell."

14 So it is basically explaining that handwritten document.

15 My colleague points out that the OFT never spoke to the estimator in this particular project,
16 so there were lines of inquiry they could have pursued but they have not.

17 There are two more documents here, 12816, which is p.28, and 12817, which is 35. These
18 are the interviews of Mr. Colin Sargeant. These interviews pre-date the fast track offer
19 letter. They are 15th March and the letter was sent on 22nd March. On p.29 ----

20 THE CHAIRMAN: I have been asked by my colleague if you could just explain in a little bit
21 more detail – we had this earlier in evidence – the essential differences between the two
22 Quarmby's.

23 MR. CLOUGH: There is not a lot of difference, as I understand it, in what they do, but their
24 names are Quarmby Construction Company Limited, that is us, and Quarmby Construction
25 (Special Projects) Limited. This may assist to answer your question. If you could turn to
26 p.38, this is obviously the sort of work that the other Quarmby did, because this is their fast
27 track schedule of their suspect tenders. You can see on p.38 their name is set out at the top,
28 "OFT investigation, Acceptance of the OFT's Reduction, *Quarmby Construction (Special*
29 *Projects) Limited*". Then on pp.39 and 40 you have the suspect tenders that they were
30 accused of, and I think they were found to have committed two infringements in the
31 decision ultimately. Here you have 154/155 High Street, Lincoln, as one of their suspect
32 tenders, which of course is also our second suspect tender.

33 THE CHAIRMAN: Then we see on pp.41 and 42 Quarmby Construction Company.

34 MR. CLOUGH: Exactly. It may be that these are ----

1 THE CHAIRMAN: These are unrelated, completely unrelated, even though they are in the same
2 area.

3 MR. CLOUGH: It is extraordinary. There is an old family connection through the name, but it is
4 very historic.

5 THE CHAIRMAN: So it is a distant connect, there just happen to be a lot of Quarmby's around
6 the area.

7 MR. CLOUGH: Exactly, and it is confusing because they are both in Ilkley, so that does not help.

8 THE CHAIRMAN: The only place I know in Ilkley is Betty's Tea Room.

9 MR. CLOUGH: Yes, it is a nice part of the world, but there are two Quarmby construction
10 companies there, so no doubt we will remember that.

11 I was going to take you to the fast track document anyway ----

12 THE CHAIRMAN: And the Box Tree, a very good restaurant, I have to be honest!

13 MR. CLOUGH: You have obviously done some local study.

14 THE CHAIRMAN: I am from up north.

15 MR. CLOUGH: That is a good part to come from. Mr. Aldred also comes from ----

16 THE CHAIRMAN: From the better side of the Pennines than Ilkley, but there we are, let's move
17 on.

18 MR. CLOUGH: That is document 12816 and 12817, I was just going to show you on p.29.
19 Perhaps I should take you to the bottom of p.28. This is the interview of Mr. Colin
20 Sergeant:

21 "Well I joined the Simons Group in September 1999, and I was recruited
22 specifically into the Managing Director's role at Wright's, which is an operating
23 company within the Simons Group that had been purchased some 18 months, two
24 years previously."

25 We have played this game of putting the minimum stuff in here, and p.28 of course is not
26 consecutive to p.29. It is unclear. Let us forget about it. Page 29:

27 "I came across this, which is fairly, you know, from my perspective, you know,
28 and I recognise it is, it's Arthur's handwriting, and I look at something like this,
29 and, you know, immediately come to the conclusion this is, this is the workings of,
30 um, of preparing for a cover price conversation with somebody.

31 Okay. And you found that document within the tender file for that contract?
32 I found it within the actual contract file.

33 Yeah.

34 Because this is actually a project we...we, secured.

1 So that was just a loose page within the file?

2 Correct.

3 On the version that we had, there's handwriting on the top, which says, 154 to 155
4 High Street. Is that something that you added?

5 Yeah, that's my writing.

6 So that's your writing at the top. But all the calculations are in Mr. Fox's
7 handwriting?

8 Yeah. That's right. That's right, yeah.

9 Okay.

10 I wrote that just to identify it."

11 THE CHAIRMAN: Can we just look at the document again. Which page is the document on?

12 MR. CLOUGH: He seems to be saying on p.27 that he wrote the words "154/155 High Street".

13 THE CHAIRMAN: Yes, so it is p.27.

14 MR. CLOUGH: This is Mr. Fox's handwriting. This is why it is very confusing to actually work
15 out who wrote what and when. Anyway, "I wrote that just to identify it", so he must have
16 put on Mr. Fox's document the 154/155 High Street.

17 "Well, certainly this piece of paper was, was, um, was a mechanism to sort of get
18 my memory going ... I recall the contract itself. It was a very difficult contract for
19 us, and, um, we didn't, ah, we did secure it, um. It came to us actually ... it's
20 original opportunity came to us through Simons, funnily enough, because it was a
21 project that was offered to Simons to price. It was one of their established
22 customers, but it was too small for Simons, so it was, it was given to us as an
23 opportunity. Um, and it was going on at the time as one or two other pieces of
24 work, which, which we'll no doubt touch on in a moment, but we didn't make any
25 money on the job. I must admit I wasn't aware until, until I picked up this piece of
26 paper, or I didn't recall, that we appeared to have given a cover price to all of the
27 other bidders. That's the way this piece of papers reads, to me."

28 I think, just pausing there, there is a very salutary reminder that the paper is "reminding"
29 him of what happened. It must be terribly difficult for a person in his situation to actually
30 recall really what is in that, and, as my learned friend points out to me, it is hearsay. That is
31 something for the Tribunal to take into account.

32 He is asked:

1 “What’s your understanding of, of what those figures? Because there’s two sets of
2 figures for each company? Lindum, Quarmby and I can’t read the bottom one on
3 my piece of paper.

4 It’s, ah, Mansell’s.

5 Mansell’s.

6 Well, the way I interpret this is the figures on the left are the first set of figures.

7 Because, because very often when you’ll be doing an estimate, there’s, you know,
8 there’s kind of prices coming in from supply chain, from subcontractors all the
9 time, so the way I interpret this is, is that the figures on the left were the first kind
10 of pass of what, what it was going to be, so it’s a little difficult to read, and I think
11 my copy’s probably a bit clearer than yours, because I’ve got the original here, but
12 there’s a figure here, of, um, of, ah, 3687,930, which was [sighs] the first figure
13 that going to be given to Lindums, but clearly something happened, to lift the price
14 up a little bit, which means, you know, it’s gone up by some £10,000. Now,
15 underneath that there’s the workings for what looks like a couple of late quotes,
16 which you can see adds £7,443 to the tender.

17 Right.

18 So my interpretation of that is that 7,000 has been taken up to there, then ...

19 Then to there as ten ...

20 Taken across, you know, so what’s happened there is late quote’s come in,
21 Arthur’s said, oh, if we’re not careful here, we’re going to be £7,000 low. We’ll
22 increase our bid by £7,000 or, whatever, and we need to do the same with the cover
23 price that we’re going to give to Lindum, Quarmby’s and Mansell’s.

24 Yeah.

25 That’s, that’s the way I interpret that.

26 Is there anything within the files that would suggest that those cover prices were
27 actually provided to those other companies?

28 Not ... not any more than this evidence.”

29 It goes on like this. If you go over to p.31 in the middle – I can read it all if you like, sir,
30 but I do not want to ----

31 THE CHAIRMAN: Please do not.

32 MR. CLOUGH: In the middle of p.31:

1 “Um. Well, I can only ... I can only recall the Lindum part of it. I mean I can’t
2 recall, you know, I have to confess when I, when I found this piece of paper, I
3 didn’t specifically recall that Quarmby or Mansell was, um, involved.”

4 That is the quality of this evidence. He is saying, “Until I saw that piece of paper”, so how
5 can he actually recall why their names are on that piece of paper is what one is tempted to
6 ask. It is some time later, it is in March 2007, and we are talking about the second suspect
7 tender. The handwritten date is “Date unknown”.

8 The next reply:

9 “The Lindum thing would have probably come at me from two ways. It would
10 have come at me from Arthur telling me that he’d come to an arrangement with
11 Lindum’s, and also ... whilst I can’t recall, you know, a specific conversation, it’s,
12 it’s highly...it’s highly possible that, Herman Koch would have made it very clear
13 to me that they were very keen on the ... Pelham House Bridge.”

14 Then he says:

15 “... I need to emphasise that ... this, I’m, I’m kind of in, in the world perception,
16 you know, what I think might happened rather than what actually happened, and
17 I’m not trying to be defensive there, because I can’t, I can’t say I recall a specific
18 phone call, say, from Herman, saying, or what, but it wouldn’t have surprised me if
19 he did ring me. You know.”

20 It reminds me a bit of the cross-examination, I think it was in the *Apex* case, where the
21 witness was accused of relying on what it would have been like because he really did not
22 remember what actually was happening. This was very similar and understandable for these
23 interviewees.

24 THE CHAIRMAN: This is more like a conversation than an interview really, which is part of the
25 problem.

26 MR. CLOUGH: Our submission is that it does not really take you anywhere one way or the
27 other, largely through lack of ability to remember, and there is one document which is used
28 as a memory product, and that is that one. Our main submission is that there is nothing
29 there to clarify which Quarmby company it is. We are still at the suspect tender stage. We
30 submit it is actually crucial that they should have clarified that, or at least attempted to
31 clarify it.

32 Our next point is that the OFT sent an FTO to both QSP and QCC in respect of this suspect
33 tender, and those are documents 10746 and 1070, which we were looking at before I do not
34 know if you want me to give you the page reference?

1 THE CHAIRMAN: So, you are saying this is really a bit like a criminal case in which one of two
2 people might have assaulted the victim and you really cannot say which one, so -----

3 MR. CLOUGH: Yes.

4 THE CHAIRMAN: -- subject to special statutory provisions, that is the end of it.

5 MR. CLOUGH: Yes. Yes. It is in effect an identity issue. Quarmby Construction Company
6 Limited has not been identified. Indeed, our next submission is that at the date the FTO was
7 issued the OFT had made no attempt to determine which of QCC or QSP was meant by
8 Quarmby. Further, the OFT did not have an express written admission of participation
9 implicating QCC, and the evidence is as follows, in the leniency application (B3580) which
10 is the first document in the three, numbered p.21, behind tab.3 of bundle.5. Simons
11 Construction Ltd (SCL) states:

12 "The contracts on which we have been able to confirm that cover prices were
13 sought or given by rights a member of the SCL Group elicited in appendix 2 of the
14 notice of the application".

15 Appendix 2 should be next, p.25. This lists 154-155 High Street with a cover given to
16 Lindums. It does not name Quarmby Construction, Quarmby or QCC, nor does it name
17 QSB. All it names is Lindums.

18 And then we have appendix 5.1 which is B3587. So that is the handwritten document.

19 THE CHAIRMAN: Yes.

20 MR. CLOUGH: The handwritten document was supplied ----- I am sorry, it is a question which
21 has been ricocheting around my head about "What is a contemporaneous document?"
22 I believe the OFT uses that term as being a document that they found on their dawn raids, as
23 opposed to documents which were produced at the leniency application. I think those are
24 probably the two possibilities, whether that precludes a contemporaneous document being
25 found on a leniency application, I think that is the normal use of the word "the
26 contemporaneous document".

27 THE CHAIRMAN: I was just concerned to know whether a narrow meaning was being applied
28 to contemporaneous, as in "I noted the car's registration number as it drove away".

29 MR. CLOUGH: Yes.

30 THE CHAIRMAN: That is contemporaneous.

31 MR. CLOUGH: Yes.

32 THE CHAIRMAN: Or as in "Within a time frame which is much broader than that, I made some
33 contemporaneous notes to clarify the rest of the document".

1 MR. CLOUGH: Yes. I think, in our submission we are using it as “Shortly after the event this
2 was, this document” -----

3 THE CHAIRMAN: So it has got to be the middle rank, has it not?

4 MR. CLOUGH: Yes. But there is a slight overtone that a leniency application document which
5 was produced for the leniency application clearly is not a contemporaneous document. So,
6 I am slightly confused now as to whether this document on p.27 which it appears was
7 actually, I think it must have been submitted with the previous document on p.26, which
8 explains it. It may be that Mr Colin Sergeant wrote his 154-155 High Street for the
9 preparation of the leniency application. Not that I think that really matters in the present
10 context. And then that enables whoever put together the leniency application to identify
11 what this document was. But it is, even that in itself is fairly questionable. So, we have the
12 appendix 5.1, appendix 5.2. Appendix 5.1 includes the names then of Quarmby and
13 Mansell and some figures next to each name. The document did not say what they related
14 to, although subsequently the witness evidence makes clear that the words “154-155 High
15 Street” were added when SCL was preparing its leniency application, dated 15th January
16 2007. So, that is when that document had its title written on it. And the leniency applicant,
17 SCL, explains, SCL suspects that the calculations represent the cover prices which were
18 provided by names confidential to Quarmby. This is not an express written admission of
19 participation in bid rigging implicating QCC, in other words SCL suspects the calculations;
20 they are not exactly giving strong evidence. And it is clear that SCL’s admission was that it
21 engaged in cover pricing in respect of those tenders and parties listed in Appendix 2, and
22 that it suspected it had engaged in cover pricing in respect of those tenders referred to in
23 Appendix 5.2. Appendix 2 is p.25 which we already looked at.

24 THE CHAIRMAN: Five point two is p.26.

25 MR. CLOUGH: Exactly.

26 THE CHAIRMAN: Which refers to Quarmby and others?

27 MR. CLOUGH: Yes, it has Lindums, Quarmby and Mansell, and it is obviously taken from the
28 handwritten – p.27 is the source of it. So, we say these conclusions are entirely consistent
29 with the witness evidence that the OFT obtained from Mr Colin Sergeant before it sent the
30 FTO documents, and he makes it clear that he is not aware or did not recollect the giving of
31 a cover price to Quarmby QCC, and that he had a suspicion but also uncertainty as to what
32 Appendix 5.1 meant, that being the handwritten document. I have already read to you what
33 he said about “I was not aware until I picked this piece of paper”. That is for the record,
34 document 12-816 at p.14. “I do not specifically recall Quarmby’s involvement”. He even

1 says "Quarmby, I think, are based in Skipton". He does not actually know very much about
2 Quarmby. That is in his interview at p.3. And although the appellants accept that this may
3 not have been evident without further investigation, it should be noted the figures in
4 Appendix 5.1 do not in fact correspond with any of the tender figures subsequently
5 submitted, details of which are set out in document 10-573. That is in tab.4. This is the
6 client's tender record sheet. This was obtained after the fast track offer letter, it is on p.44
7 and tab.4. This, I understand, is a schedule that the OFT would have sent to the employers
8 or clients, which they then filled in as part of a section 26 request for information.
9 But that is after the FTO. And I think, again, going back to those two documents, 5.1 and
10 5.2, at 3, pp.26-27, I think I need to say for the record that we strongly submit that on p.27
11 there is absolutely no evidence of what that relates to, especially after Mr Colin Sergeant
12 has stated in his interview that he wrote 154-155 High Street on it in January 2007. And so
13 it is then – that document, if you like, informs the previous one, p.26, so it is not as if they
14 are two separate documents saying "Lindums, Quarmby and Mansells". And the only
15 document that is clearly produced by Wrights Construction (that is p.25, Appendix 2) only
16 lists Lindums as having given the cover in respect of 154-155 High Street.

17 THE CHAIRMAN: So, you say there is no contemporaneous document at all in relation to that
18 transaction.

19 MR. CLOUGH: Yes. Exactly. I am going to move on to suspect tender 3, City Learning Centre,
20 Leeds.

21 THE CHAIRMAN: I have been reminded by the Referendaire that we are really looking at vol.4,
22 flag 1, and we are now on p.12, following through the written analysis.

23 MR. CLOUGH: Yes, yes. I am sorry, I thought I had made that -----

24 THE CHAIRMAN: You did, to be fair, but I had been looking at the documents and I had lost
25 track of quite where we were in the analysis. Volume 4, flag.1 and we are now on p.12.

26 MR. CLOUGH: Yes.

27 THE CHAIRMAN: And hopefully we can take – as we have got it in the argument in front of us,
28 we can take it quite quickly, can we not?

29 MR. CLOUGH: Yes, yes.

30 THE CHAIRMAN: Do not feel hurried.

31 MR. CLOUGH: I just wanted to demonstrate, as I said earlier, as much as you would like how
32 this evidence works, because in our submission it is all very similar, that there is not a
33 contemporaneous document incriminating Quarmby Construction Company Limited at the
34 fast track offer stage at all anyway, and that the rest of the evidence, the interview evidence

1 often takes back, undermines the OFT's case rather than improves it. Actually, again,
2 suspect tender 3, the OFT's information at the FTO stage again was merely Quarmby, and
3 A3093 is in tab.5 of your bundle 5. Tab.5, p.45 is the first of the documents that has the
4 word "Quarmby" but, again, the OFT did not know whether it was – which Quarmby it was.
5 And if we look at the interview of Graham Pearce on the same tab.

6 THE CHAIRMAN: Which bit?

7 MR. CLOUGH: Tab.6, sorry. This is actually after the fast track offer. He says -----

8 THE CHAIRMAN: Mr Harrison, correct me if I am wrong, but I think during his evidence today
9 Mr Harrison accepted that QCC was certainly involved in suspect tender 5, the Humanities
10 Institute.

11 MR. CLOUGH: Yes.

12 THE CHAIRMAN: And suspect tender 7, East Brook Hall, a York House matter.

13 MR. CLOUGH: Yes, indeed. But with great respect, sir, I am trying to keep the distinction
14 between what the OFT's evidence was at the time of the suspect tender -----

15 THE CHAIRMAN: I understand that.

16 MR. CLOUGH: – from afterwards.

17 THE CHAIRMAN: This is the purpose of the question.

18 MR. CLOUGH: Yes.

19 THE CHAIRMAN: If Mr Harrison gives evidence that QCC were involved in two of the
20 questioned tenders, and there is a striking similarity across some, at least, of these tenders in
21 addition to those two, to what extent are we allowed to use Mr. Harrison's oral evidence and
22 that similarity as evidence in support of the assertion of contemporaneity?

23 MR. CLOUGH: I think two things. First of all, in our submission, Mr. Harrison's evidence in
24 relation to participating in tenders - I appreciate that with the benefit of hindsight it is
25 possible to say: here you are, you can see it is Quarmby Construction Company Limited
26 who put in the tender, therefore that suggests that Quarmby was the Quarmby that was
27 written in the document whether it is contemporaneous or not. I think that that is, to a
28 certain extent, highly arguable. There are, of course, other defences that we have when we
29 come to the two infringements, such as the limitation period --

30 THE CHAIRMAN: Forget that for a moment.

31 MR. CLOUGH: And we have evidence on 233 that goes to Eastbrook that whilst Quarmby
32 tendered for Eastbrook we say the evidence that there was any cover price is very, very thin,
33 in particular because the employer or the employer's professional agent took the view that
34 he was very dubious about it in two witness statements which have not been challenged and

1 which say: I have very strong doubts as to whether they did give a cover price. He not only
2 says it had no effect on him because he went for the three cheaper tenders anyway and
3 everyone knew what the budget was, and if they just told him they could not meet the
4 budget he was not going to bite their heads off. So why they bothered, if they did, to put in
5 a cover price he did not know and he does not believe they did. He uses words even
6 stronger than that. So there are other pieces of evidence that suggest although Quarmby
7 Construction Company, yes, did tender, it does not mean necessarily there was a cover
8 price, or certainly one involving them, which is a separate issue.

9 I am not sure whether we would wish to challenge Mr. Harrison's evidence at all in the
10 sense that there are other ways that we believe we can explain what the correct situation
11 was. I would not proceed to walk away from that.

12 THE CHAIRMAN: I have just used the term "identification issue", and I was just thinking
13 around that term in another context. Certainly in a criminal context, if you had an
14 identification issue, the judge would be directing the jury to be extremely careful and to
15 look for other evidence which supported the identification. That other evidence might
16 include similar behaviour or documentary evidence to connect the suspect, the accused,
17 with the series of behaviours complained of.

18 MR. CLOUGH: Yes.

19 THE CHAIRMAN: I am always wary of criminal analogies in this particular jurisdiction, but
20 sometimes they are irresistible.

21 MR. CLOUGH: I entirely understand where you are coming from, sir. I just say two things
22 quickly. One is that we submit very strongly (only you have not heard it from me fully yet)
23 that the OFT is quite wrong to use the endemic nature of cover pricing in the marketplace as
24 justifying saying in a particular tender situation that means if there is any doubt we rule it
25 out; Quarmby must have been involved with a cover price because that is what was going
26 on in the market.

27 Of course, normally one would agree that circumstantial evidence is relevant for the
28 Tribunal and the OFT. We would not deny that. But I think one needs to be careful to
29 separate that, because of the way this Decision has been put together. It is not a cartel case.
30 Although there is this evidence that there are thousands of people doing cover pricing and it
31 was a regular activity, each individual tender has to be approached and assessed on its own
32 evidence, in our submission. It is dangerous to say: just because all the other companies are
33 doing it so was this one. That is part of our case, to make that distinction and why it is
34 important that our evidence is that Quarmby Construction Company's policy was not to do

1 cover pricing. As I submit it came out from the evidence this morning, the need for cover
2 pricing (if I can put it like that) with all the justifications that the industry put forward, must
3 have dropped away from the early 2000s in a large way, because of the way tendering is
4 done. I unfortunately for my sins do public procurement law in my spare time. I know
5 letting a tender for anything other than buying or selling rubber bands involves loads of
6 paperwork and indeed has to be submitted at the time of the tender. I do not want to give
7 evidence on the subject.

8 That, I think, is a strong message: the effectiveness of cover pricing stopped working
9 because no-one was able to use it once the price stopped being the be all and end all of the
10 choice of the tenderers. But let me move on to this third one, City Learning Centre, Leeds.
11 Here, in the Graham Pearce interview, which starts on p.50 behind tab 6, he said:

12 “It looks like it [we gave a cover to Quarmby] but I mean we have got 690,000
13 less 2,000 cover, I mean, it might be that we found out after the event what ...
14 what their tender figures were, because if we found out we would write them at
15 the side as well so just seeing figures doesn’t necessarily mean we have given a
16 cover but we have wrote cover but I don’t quite understand why I have put less
17 2,000 and less 5,000, I don’t know [on page 16 (p.52)].”

18 Then at the bottom of p.52:

19 “I haven’t noticed that [C with the circle around it] to be honest. It has been
20 put there for a reason but I generally can’t what’s surprising is that I don’t
21 know why I’ve got less 2,000 less 5,000 on one of them. I don’t know. I
22 haven’t got a calculator but they look very close to give covers they are very
23 close, 690 ... 700,000 I would have thought there would have been a bigger gap
24 between them just off the top of my head but I could be wrong so but I have
25 wrote cover at the side I honestly can’t remember what it’s there for.”

26 That is again a classic piece of the evidence that is in these witness interviews.

27 I move on to suspect tender 4, Newcastle & Fairfax and Bradford. This was supposedly on
28 4th July 2001. I should have said that the suspect tender 3 was 4th April 2001. Again, we
29 say the OFT’s information was merely “Quarmby”. They did not know whether it was QSP
30 or QCC. The evidence pre-dating the FTO was insufficient to give rise to a reasonable
31 suspicion of bid rigging.

32 Sir, here we start on p.55 which we were going to look at before, tab 7.

33 THE CHAIRMAN: Mr. Clough, we will rise in about a quarter of an hour.

34 MR. CLOUGH: Certainly.

1 THE CHAIRMAN: So bear that in mind.

2 MR. CLOUGH: I will, sir. I think the message for most of these pieces of evidence is the same.

3 I just wanted to try to assist the Tribunal because I appreciate looking at it on your own is

4 not always easy.

5 THE CHAIRMAN: What I think we might usefully do is all read this part of the analysis

6 overnight.

7 MR. CLOUGH: If you were prepared to do that, sir, that would save me boring you rigid.

8 THE CHAIRMAN: It is not boring and it is important.

9 MR. CLOUGH: There is no point in reinventing our skeleton.

10 THE CHAIRMAN: It is our intellectual digestive system. Tell me where we are on the timetable

11 now.

12 MR. CLOUGH: I think I am going to need about another hour in total, I will say 50 minutes.

13 THE CHAIRMAN: That will leave us with tomorrow morning's timetable.

14 MR. CLOUGH: I would hope to finish by 11 tomorrow.

15 THE CHAIRMAN: If we start at 10?

16 MR. CLOUGH: Yes, I think that we can finish tomorrow in any event.

17 THE CHAIRMAN: Why do we not start at 10 tomorrow morning.

18 MR. CLOUGH: That is very kind of you.

19 THE CHAIRMAN: I am not sure it is kind but it is helpful.

20 MR. CLOUGH: The conclusions which, if you like, draw together the points here, apart from the

21 ones I have already made, are actually set out at para.10(g) p.6 of our skeleton argument, (g)

22 and (h) to a certain extent.

23 THE CHAIRMAN: Yes, 10(g) and Annex 1.

24 MR. CLOUGH: Basically our case is set out in Annex 1 of the skeleton. I could turn to the main

25 infringements. If you prefer, if we are going to start at 10 o'clock tomorrow we could

26 perhaps stop now. I am confident I can finish in an hour and I do not know how much more

27 of this you can take!

28 THE CHAIRMAN: I think that is quite a sensible idea. Mr. Summers just has a question.

29 MR. SUMMERS: Sorry, can I just come back to the differences, as it were, between QCC and

30 QSP. This is from the point of view of somebody who does not know Ilkley, my bad luck.

31 If you were putting these two companies up in an identification parade, what are the

32 essential differences between them? Is it going to be obvious to somebody in the industry

33 that it must be one rather than the other? Do they have different interests in the market?

34 They have got the same name but they are really sort of totally different sorts of companies?

1 MR. CLOUGH: Sir, I need to take instructions on that. (Pause)
2 THE CHAIRMAN: Mr. Clough, I have a suggestion. Do sit down. I have a suggestion which is
3 that – it sounds like a job for Mr. Aldred to me – in the morning perhaps we could have a
4 little family tree on a piece of paper showing a potted history. I imagine it will be simple,
5 not that Mr. Aldred could not deal with a very complicated genealogy, a little family tree
6 that sets out for the Tribunal the history of these companies and perhaps adding what they
7 do. It may be that they do broadly the same thing. I suspect that might be the answer.
8 Would you mind doing that for us, Mr. Aldred?
9 MR. ALDRED: Yes.
10 MR. CLOUGH: That is a very sensible idea. We were getting some feedback there that it is
11 about half the size in terms of business turnover, QSP to QCC. Some of the projects,
12 although the same, in the educational field, but probably tends to do smaller projects. That
13 summarises what I was just instructed.
14 THE CHAIRMAN: Sounds like a recipe for Clan Harmony, does it not, in the Ilkley area. OK, if
15 that can be done, are we content to adjourn now? Miss Bacon?
16 MISS BACON: I anticipate I will finish my submissions on liability by lunchtime, if Mr. Clough
17 is going to be another 50 minutes.
18 THE CHAIRMAN: Let us allow ourselves the extra half hour. 10 o'clock tomorrow morning
19 and we will take our homework with us.

20 (Adjourned until 10.00 a.m. on Wednesday 7th July 2010)
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