This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1120/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 July 2010

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

\- and -

OFFICE OF FAIR TRADING Respondent

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

HEARING

APPEARANCES

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

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

---

1 THE CHAIRMAN: Good morning. Yes, Mr. Clough?
2 MR. CLOUGH: Mr. Chairman, members of the Tribunal, it falls to me to continue and complete
3 my submissions from yesterday. I was proposing to turn now to the evidence on the three
4 infringements, if that is convenient after you have so kindly agreed to look at the
5 submissions in the skeleton argument and the evidence.
6 THE CHAIRMAN: We have.
7 MR. CLOUGH: Our specific submissions regarding the substantive infringements numbers 6,
8 214 and 233 are set out in annex 1 to our skeleton at paras.5.1 to 5.25, pp.22 to 28. I
9 believe that is bundle 4. The OFT responds in its skeleton at paras.40 to 48, pp.15 to 18.
10 If I can deal, first, with the burden and standard of proof, briefly, paras.19 to 21 of our
11 skeleton, again pp.14 to 16, respond to the liability defence, paras.56 to 79, pp.16 to 31,
12 with regard to the burden and standard of proof. Section 2.10 on p.7 and sections 7.1 to 7.8,
13 pp.23 to 24 of the notice of appeal also address the insufficiency of evidence and the burden
14 and standard of proof. Correspondingly, the OFT's skeleton deals with the standard of
15 proof issues at paras.40 to 48, pp.15 to 18.
16 I put all those references down because our primary submission is that there is no dispute
17 between the parties as to the relevant case law governing the burden and standard of proof
18 in competition cases. However, the nature of the evidence and the weight to be given to it
19 in the context of the balance of probabilities test has thrown up at least two areas of
20 disagreement. Very briefly, the first one, Quarmby submits that the company policy of not
21 engaging in cover pricing should require evidence stronger than that provided by leniency
22 applicants if the OFT is to prove a serious offence such as the three it alleges. We say the
23 OFT is wrong in saying that it is just another factor for the OFT to take into account. Our
24 evidence of the QCC company policy against cover pricing must increase the improbability
25 of its infringing Chapter 1.
26 THE CHAIRMAN: First you have to establish that there was a policy.
27 MR. CLOUGH: We do, sir, and we say that the evidence of Mr. Roger Nelson, despite the cross-
28 examination yesterday, has still clearly put before this Tribunal the evidence that Quarmby
29 had this policy. Miss Bacon of course challenged that, but Mr. Nelson equally confirmed in
30 his responses that that policy existed.
31 THE CHAIRMAN: That is a question of fact, is it not?
32 MR. CLOUGH: It is a question of fact for you, sir, yes I must accept that. But it is a consistent
33 factual issue that has been presented from the outset. When I say the outset, I mean from
34 the correspondence dealing with the fast track offer back in August 2009, after the

1 Statement of Objections, and of course in the response to the Statement of Objections itself.
2 It has been the consistent position that Quarmby's corporate policy was not to have
3 anything to do with cover pricing.
4 It is perhaps understandable, because the evidence makes it clear, that historically QCC did
5 most of its work for the parent company, SJS. So it was not actually going out into the
6 market, so there was no question of cover pricing. As I believe it is put, the corporate
7 image of Quarmby Construction Company was one that the company wished to maintain as
8 having nothing to do with that sort of practice, albeit it knew the practice was going on.
9 In fact, I should just say that I have not forgotten Mr. Summers, and indeed Mr. Chairman,
10 your request for us to put together the story for the history of the company. Perhaps while I
11 am just talking about it is a good moment for me to do that. I have got copies. (Pause)
12 THE CHAIRMAN: Do you want to leave that for the time being and hand them up later?
13 MR. CLOUGH: They seem to be here, sir. (Handed)
14 THE CHAIRMAN: Thank you.
15 MR. CLOUGH: This is a Google search, sir, that members of our team have carried out, so you
16 can see what you get in response to the two different companies.
17 THE CHAIRMAN: Yes, thank you, OK. I have read it quickly, but we will read it later.
18 MR. CLOUGH: Thank you very much.
19 THE CHAIRMAN: Special Projects is about a third the size of QCC in terms of turnover.
20 MR. CLOUGH: It is, yes. You see the history of how they work, under one parentage so to
21 speak.
22 THE CHAIRMAN: I have read it.
23 MR. CLOUGH: Effectively sold off.
24 THE CHAIRMAN: Yes, carry on.
25 MR. CLOUGH: Sir, I was just saying that the OFT, we submit is wrong to say it is just another
26 factor to take into account, i.e. the policy of no cover pricing and the evidence, assuming
27 that it is accepted, that the company's policy against cover pricing must increase the
28 improbability of its infringing the Chapter I prohibition and therefore increase the weight of
29 the evidence required to prove that it has nonetheless been guilty of an infringement of
30 Chapter I.
31 The second area of disagreement is that the OFT is wrong to have fallen into the trap of
32 treating the "endemic nature of cover pricing in the construction industry" (as it calls it) as
33 repeatedly alleged in the decision as evidence against QCC on the three individual findings
34 of infringement. We say they should be assessed discretely on the evidence available

1 against the parties involved in those individual alleged infringements. It follows that the
2 OFT is misguided at para. 41(d) of its skeleton, p.16:
3 "In assessing whether particular behaviour was probable or improbable, the OFT
4 was entitled to consider the surrounding behaviour of other companies in the same
5 way that one would be entitled to consider (to invoke Lord Hoffmann's example,
6 cited in *Re D (Northern Ireland)*) the prevalence of lions in England when
7 considering whether a lioness had been seen in Regent's Park …"
8 – unless of course the lions are involved in a specific tender with which Quarmby is
9 concerned.
10 I submit that this is quite an important point because so much of the OFT's case is what we
11 call, perhaps too tritely, "guilt by association", but it comes again and again as a theme that
12 cover pricing was endemic therefore there must be a presumption against you being
13 innocent in a specific case and we will start off on that basis, and indeed were entitled to
14 take that into account as being evidence of a specific infringement.
15 We accept that that is part of the general background but it is not evidence in a specific
16 infringement, especially in the context of where our evidence is that we had a policy of not
17 committing these sorts of infringements. That is why we say we are perhaps in a rather
18 different position to some of the other appellants, because we do have a different story to
19 tell, and I very much hope that we are explaining that yesterday and today to the Tribunal.
20 If I may now turn to infringement 6, the first of the three infringements alleged to be on
21 3rd March 2000. QCC's case is set out in the response to the statement of objections at
22 para. 2.11, that is your bundle 1, tab 3, p.57. I do not propose to take you there in the sense
23 that we have consistently said the same thing, that is largely our case until we comment on
24 the further evidence. That is repeated at para. 7.6(b) in the notice of appeal, and then para.
25 7.7 at p.24 of the notice of appeal refers to the further deficiencies in the evidence of one of
26 the leniency applicants which was identified by Mr. Roger Nelson in his witness statement
27 which is at bundle 2, p.41.
28 Let me move on to see how the OFT sets out its position ----
29 THE CHAIRMAN: We are now on to the limitation point?
30 MR. CLOUGH: I am not doing the limitation point until the end, Sir, I am dealing with the
31 evidence still – the evidence to infringement 6.
32 The OFT sets out its position as taken in the decision at paras. 64 to 68 of liability defence
33 which is your vol.3, pp. 19 to 23.
34 THE CHAIRMAN: Yes.

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

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

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

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

In other words, that is a leading question.

> "So, you, you'd keep all, all the forms of tenders for the jobs that you've taken cover on in that file …"

Another leading question –

> "… and then somewhere on those documents somebody …
>
> Top right-hand corner there possibly be a name of who we got it from."

Then it goes on:

> "… and this is how the estimating department kept a track of the covers that Strata had taken on jobs?
>
> Yeah, don't know why we kept them, to tell you the truth."

And he says it was either he or other estimators who put these documents in there. Coming back to the OFT's chosen extracts, the next one is that he, Mr. Ironmonger, said that that indicated to him that he took a cover from Quarmby Construction. He also said that this was his handwriting in answer to a leading question from the OFT, "That indicates you mean cover from?" To this he replied, "Yeah". He also said that the form of tender with the annotation at the top that says, "From Quarmby Construction", was found in the covers file in which he put the form of tender for a contract when he had taken a cover. I would like us to go to p.7 of the interview. This is to show that his memory is not very good, and there is perhaps very good reason, in the middle of the page he says:

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

Four lines down he says:

> "… which didn't go down very well with me personally."

He is asked:

> "Is it still quite fresh in your mind, can you recall…?
>
> I've gone through this list and individual … I find it very difficult to remember individual jobs."

He is then told:

> "I've got some documents that I can show you …"

Then he is told:

> "Might not be that you're going to be remembering, it might be that, if I show you a document, you can tell me exactly what it means.
>
> "So, hopefully, um, it won't rely on your memory too much."

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

1 THE CHAIRMAN: Should we not look at p.17 of the bundle if we are going to go through this
2 exercise?
3 MR. CLOUGH: I think we have done so yesterday, but I apologise for that.
4 MISS BACON: If you are looking at this transcript, so that I do not have to take you back to it,
5 perhaps you could start at p.16, or even in the middle of p.15, which is where Mr.
6 Ironmonger starts talking about this particular tender. I will avoid bringing you back to it in
7 my submissions.
8 THE CHAIRMAN: I have done that exercise, and one comes to the dénouement at p.17 of this
9 series of questions, and we have to form our own conclusions on the facts as to what he was
10 saying.
11 MR. CLOUGH: Sir, that is exactly what we invite you to do. In our submissions that I made
12 yesterday I said that these interviews are very unsatisfactory for a number of reasons. First,
13 it is clear that the witnesses, if that is what they can be called, for very understandable
14 reasons do not really remember what happened. They are then shown documents, which of
15 course is perfectly reasonable to jog their memories, and they then are surmising and often
16 we will see they use the words "surmise", "suspect", "may", and it is not helped by the
17 leading questions. It is quite complicated because, I think to be fair to the OFT, in the
18 written lawyer's leniency application documents they may say, "We accept a cover was
19 given to X company", but they are still relying on the documentary evidence for saying that
20 rather than on the witness being able to say, "Yes", I remember that that specific cover was
21 given. I am not suggesting that the OFT's trying to mislead anybody, but we very strongly
22 submit that there is just not enough evidence here to meet the standard of proof.
23 THE CHAIRMAN: We really have got that point, Mr. Clough.
24 MR. CLOUGH: Thank you, sir, I do appreciate that. What I am just trying to do now is to show
25 you the bits that the OFT have picked out in their defence as being the key bits of evidence,
26 and our comments on them.
27 I will turn now to para.(d) of para.65. This is the general point that elsewhere in the same
28 interview as Miss Bacon was indicating, Mr. Ironmonger says that on certain of the tender
29 records he would write on the top right hand corner who he had got a cover from. Indeed,
30 at p.6 of the bundle we can see that.
31 A general explanation then by Strata of its participation in cover pricing is given in the
32 decision, para.IV-763, cross-referring to the leniency evidence section at IV-617 to 634.
33 Then, finally, the fact that Quarmby's tender figure was the only figure below Strata's
34 tender figure on which the OFT inferred that Strata could only have received a cover price

1 from Quarmby (decision IV-784) is relied upon. Our comment on that is that it can go
2 either way. If your covers are being given by somebody to another then they may have
3 been given by somebody totally different, and indeed there may have been several covers
4 from what appears to have taken place in other incidents in the decision.
5 Quarmby has already set out its objections to the finding of infringement 6 in the SO
6 responses I mentioned. We simply maintain our contentions that the OFT has failed to
7 consider other reasonable explanations for the annotation on the form of tender document
8 from Quarmby Construction, such as post-tender discussion, and that the post-tender
9 discussion provides a plausible alternative explanation in QCC's submission.
10 It should be pointed out, as I have perhaps said a number of times, the OFT has not
11 contradicted our approach and it has not sought to produce any evidence to contradict what
12 we are saying. It is sticking in its heels and simply relying on the documentary evidence
13 before the Tribunal.
14 If I may, I will turn now to the infringement, 214. QCC's submissions are set out in annex
15 1 to the skeleton, paras.5.6 to 5.21, pp.22 to 26. In case this is helpful for your further
16 reading, I should just point out that this is summarised in the chronological document, the
17 paragraph numbers for the pleadings are given, in this case under suspect tender 5,
18 infringement 214. These submissions are in addition to the original arguments made in the
19 response to the statement of objections at para.212, which was in your bundle 1, tab 3, p.60,
20 repeated in the notice of appeal at para.7.6(b), and the OFT position is set out at the liability
21 defence, paras.69 to 73, pp.23 to 26, and in their skeleton argument they have also made
22 some small observations.
23 The infringement concerns Humanities Research Institute, the University of Sheffield, and
24 our submissions are that the OFT relies upon the following five categories of document.
25 The first one, and this is bundle 5, tab 9, p.68, is a handwritten note which the OFT says is
26 contemporaneous. If you see that, sir, it has Humanities Building at the top and you see
27 Quarmby (Ilkley), so the name Quarmby is written there.
28 The second document is the Admiral memo. That is the BT standard version. The next
29 page of that bundle, p.69, which the OFT again says is contemporaneous. This, you may
30 remember, was put to Mr. Nelson in cross-examination. I beg your pardon, I am corrected.
31 It was put to Mr. Harrison in cross-examination. It concerns the allegations about the
32 telephone conversation with him. You will see his name on the page and Quarmby
33 Construction Company Limited, their phone number and address, and the various
34 indications that a call of some sort took place at 4.30 Wednesday.

1 Then we have all the other pieces of evidence which we have commented on already as
2 actually adding up to supporting more of a finding that there was a post-tender telephone
3 conversation rather than there was a pre-tender one. In our submission, there is clearly
4 different handwriting which must therefore have been made at different times. For
5 example, the left hand list of design etc looks different from the 1.487250 million pricing
6 figures, then "not silly distance away" looks like "ring 4.30 Wednesday" handwriting.
7 Again, sir, we have asked the OFT for the original of this document and, as we understand,
8 the OFT does not take original documents so it may be that it is not very easy for them to
9 find it. They have not found it so we are unable to see the original handwriting, which is a
10 problem for the OFT, we would say, rather than for us because they have the burden of
11 proof.
12 Then the third piece of evidence relied on for this infringement is the leniency application,
13 or Appendix 1 of it, which is at p.70 (the next page). That is accepted as not being
14 contemporaneous. At 5189, that is said to list Quarmby and D Harrison. I beg your pardon,
15 sir, I think it is actually p.73.
16 THE CHAIRMAN: Mr. Harrison's name is at p.73 alongside Quarmby.
17 MR. CLOUGH: Yes, p.73. Yes, it must be p.73 which I thought was the next document.
18 THE CHAIRMAN: Are pp.72 and 73 the same document or different documents? Can someone
19 help us?
20 MR. CLOUGH: They are different. Yes, I think there must be some misunderstanding in the
21 mind of the writer of this paragraph (c). Page 70 does not name Quarmby and D Harrison,
22 but p.73 obviously does. The next piece of evidence is a leniency application listing D
23 Harrison and Quarmby as someone who contacted the leniency applicant about tenders.
24 THE CHAIRMAN: I presume pp.72 and 73 are part of Appendix 2, is it?
25 MR. CLOUGH: Page 73 is headed Appendix 2, so it is separate. I think Appendix 1 is Schedule
26 of Projects and Appendix 2 is Schedule of companies and, where known, individuals who
27 were either in contact or contacted.
28 THE CHAIRMAN: I understand.
29 MISS BACON: Sorry, the confusion might arise because this is a core bundle which contains
30 only extracts. The full copy of Appendix 1 is at tab 12 of the Liability Defence bundle. Sir,
31 that contains considerably more pages than is extracted at 72. So that was Appendix 1 and
32 Appendix 2 is just a list of contact names, of which your copy in that bundle is heavily
33 redacted, but in tab 13 of the Liability Defence bundle you should see an unredacted
34 version.

1 THE CHAIRMAN: Basically what it amounts to is this, is it not, that Appendix 1 contains a list
2 of allegedly offending contracts with the name of the company, and then Appendix 2 is a
3 separate appendix in which they were asked to put names to companies, contacts to
4 companies? So if one sees a name, for example the first name on p.72, somewhere in
5 Appendix 2 one might find a name of an individual relating to that named company?
6 MR. CLOUGH: Yes, sir, and indeed on p.72 (which is part of Appendix 1) you see the name of
7 the company, Quarmby Construction, at the bottom of the list. I am sorry, it is my fault, I
8 had not explained that properly to you. Appendix 1 is the first two pages, and then
9 Appendix 2 has the name Harrison and Quarmby as a separate document. That is why we
10 did not put in all the intervening pages because you do not really need to see them, I do not
11 think, for the point the OFT wishes to make.
12 That brings us to the interview with Mr. Andrew Clarkson which was on 30th March, so
13 again that is after the fast track offer. That is bundle 5 tab 10 p.74. I am going to deal with
14 that in a moment. First, the OFT accepts that the leniency application documents would
15 have been drawn up with the assistance of documents 5205 and 5206. That is the first two
16 documents, the handwritten note at p.68 of tab 9 bundle 5, and the Admiral BT memo
17 document at tab 9 p.69. As such, we submit that those documents do not add anything to
18 the probative value of the underlying documents, because the leniency applications do not
19 add anything; they are just recording in a different form what those original documents
20 indicate.
21 Second, the OFT asserts at its liability defence para.71 that there is no plausible
22 interpretation of the contemporaneous documents other than being a minute of a
23 conversation discussing cover pricing, when taken together with the interview of Mr.
24 Clarkson and his explanation of the contemporaneous documents.
25 In our submission, that conclusion is wrong for the following reasons. Mr. Andrew
26 Clarkson has no specific recollection of the project. We should be able to see this in his
27 interview.
28 THE CHAIRMAN: Yes, we have read his interview.
29 MR. CLOUGH: You have, thank you that is very helpful. He says there, the OFT asked him:
30 "Have you got any recollection of that job?" and he says "Not specifically." He then
31 expresses a suspicion that Admiral took a cover from Quarmby when he says:
32 "Not specifically other than I suspect, again because it's from the university,
33 [cough] a regular client that we'd a lot of work with, we got the enquiry from
34 them and didn't have the capacity to give them a, a proper tender. And instead

1 of sending the information back, I suspect we took a cover on it, and that
2 Quarmby are the contractor that we took the cover from."
3 This is after the fast track offer, and this evidence is still evidence of suspecting. This is
4 also consistent with the fact that Mr. Clarkson repeatedly expresses doubt or suspicion when
5 being interviewed about infringement 214. For example:
6 "I suspect, again I must have rung up a subcontractor. Yes, I suspect that
7 that Rawe with the question mark and crossed out was actually Hare and Ransom,
8 but it may well be that, um, [rustling] somebody gave me a name that sounded like
9 Raw when they spoke to me on the phone so I wrote it down there.
10 I suspect, and I may be wrong, but they just asked for one set of price bills on that.
11 I don't know why that's on there, I genuinely don't.
12 I don't know I'd be surmising if I say anything …"
13 And that is about the annotation "not lowest" on that handwritten BT document.
14 "I don't know what, unless it means they asked for one price bill", and that is answer to the
15 question: "What 'asked for one' means?" "I don't know. Well I presume for whatever
16 reason he just said 'I've given you a figure'." That is p.45 of the interview, which is p.79
17 of tab 10 – it is in the second big passage with "AC" against it.
18 "Ah, I suspect that the 1487250 [£1,487,250] was a figure that he gave me as our figure, as
19 our cover figure …(pause)."
20 THE CHAIRMAN: Mr. Clough, what is happening here – I have read this interview more than
21 once.
22 MR. CLOUGH: Yes, Sir.
23 THE CHAIRMAN: What is happening here is that Mr. Clarkson is giving an explanation of what
24 he says is a contemporaneous document.
25 MR. CLOUGH: Yes.
26 THE CHAIRMAN: He does not say: "I suspect it might be a contemporaneous document", he
27 says "It is a contemporaneous document with various annotations made on it at various
28 contemporaneous times" – yes?
29 MR. CLOUGH: Yes.
30 THE CHAIRMAN: And what he says in the interview really speaks for itself, does it not? It is a
31 question of what interpretation we put on it. I am not sure that going through the interview
32 in detail is going to add anything to the sum of our knowledge; we already have that sum of
33 knowledge.
34 MR. CLOUGH: I am obliged, Sir. Our case is exactly as you understand it. We say this

1 is not ----
2 THE CHAIRMAN: Well we have read it and we understand it.
3 MR. CLOUGH: I am very grateful. We say this interview is particularly bad in the sense that it
4 has explanations even given in the interview that totally support a post tender telephone
5 conversation conclusion and that is our main point. My learned friend just reminds me that
6 in the cross-examination yesterday Miss Bacon very properly put this question to Mr.
7 Harrison:
8 "So the OFT's case on this, and I need to put it to you is that it is just not plausible
9 that this document was written as a result of post tender discussion. There is
10 nothing on it at all that would indicate that it was a post tender discussion and
11 everything would indicate that it was a pre-tender discussion designed to establish
12 not only the price but the various other elements in the specification?"
13 Mr. Harrison answered:
14 "I would tend to disagree with that, there is nothing on there to suggest to me that
15 this is a pre-tender …"
16 That is obviously his view looking at that document. I think we accept what you kindly say,
17 Sir, and it is a matter for the Tribunal looking at that interview – all of it – to see what
18 conclusions you can come to and whether the OFT was justified in finding that there was an
19 infringement, bearing in mind all the hesitation and, indeed, contradictions that are in that
20 witness statement.
21 I will not take you through the rest of our comments on that interview after your helpful
22 indication. I think if I can conclude on infringement 214 Quarmby's main submission is
23 that the interview with Andrew Clarkson is consistent with the BT telephone memo – the
24 Admiral memo – and its annotations with the inference that the document related to a post-
25 bid note and, in particular, Quarmby relies on p.44 where Mr. Andrew Clarkson said regard
26 the words 'the lowest tender': "That's something I would normally ring up about after the
27 tenders had gone in. I don't know what that means."
28 Finally, at para. 44 of the OFT's skeleton, the OFT admits that Mr. Andrew Clarkson
29 qualified his answers when interpreting the contemporaneous documents relating to
30 Admiral's evidence. The OFT has also confirmed that the OFT has never denied that Mr.
31 Clarkson had no specific recollection of the projects in question.
32 I turn now to infringement 233, which is the final infringement. Here QCC sets out its case
33 on infringement 233, which is Eastbrook Hall in Bradford, again back in the response to the
34 statement of objections at paras. 2.8 to 2.9 and, in particular, 2.13 (bundle 1, tab 3, p.62)

1 and I would just refer you to para. 2.13. It is repeated at para. 7 by reference in the notice of
2 appeal.
3 The OFT's response is set out at paras. 74 to 79 of the liability defence, pp. 27 to 31 in your
4 bundle 3 and further elaborated at para. 45, p.17 of the OFT's skeleton – I am sorry, not
5 "further elaborated" save that it contends that the new evidence of Mr. France, in which he
6 expresses doubt that York House submitted a cover price for this tender is pure speculation
7 which cannot outweigh the totality of the evidence on which the OFT based its conclusion
8 that an infringement had occurred.
9 In this instance I would like very quickly to look at the paragraphs in the decision which
10 lists the evidence relied upon for the finding of infringement, that is IV.6499 to 6508. Here
11 again, we have just four main pieces of evidence, and again you are going to be quite
12 familiar with these from yesterday and no doubt from your reading, so I will take this as
13 quickly as I can.
14 The first one is an estimating programme document provided by York House as part of its
15 leniency application which consists of a print out of an electronic document with some
16 manuscript annotations indicating that a cover was obtained for Eastbrook Hall tender, and
17 stating '1/8 Quarmby' beside the entry for the tender.
18 This, Sir, is the tab 12 of bundle 5, and it is 92.1, the page which Miss Bacon has very
19 kindly had blown up so we can all read it. At 15 it says: "15 COV. 0580 Eastbrook Hall,
20 Bradford." That is the computerised programme.
21 THE CHAIRMAN: So this is on manuscript p.2?
22 MR. CLOUGH: It is the third page in your tab. This is simply saying "COV" but the key
23 document is p.27, which we have looked at before of the next group of documents, which is
24 on p.97. This is where we see the "1/8 Quarmby" down against "Eastbrook Hall,
25 Bradford."
26 We looked again yesterday just above that at the other tender "COV Residential Morley"
27 which has the word "Quarmby" on the left hand column, and then the "?? Quarmby" on the
28 right hand side.
29 The other document is a handwritten list of covers provided by York House, that is a list of
30 their covers, stating that a cover had been taken from Quarmby from Eastbrook Hall. The
31 OFT accepts that this is probably not a contemporaneous document that was created for the
32 purposes of York House leniency application. That again simply, on p.112, has the number
33 "5080 Eastbrook Hall, Bradford" and "Quarmby" against it. That is a leniency period
34 created document.

1 Finally, there is an interview with Arthur Richardson, the estimator for York House who
2 confirmed that the two contemporaneous print-outs are to be interpreted as indicating that a
3 cover was taken from Quarmby for the tender.
4 So, the OFT says its case is based on two consistent contemporaneous documents, together
5 with leniency evidence corroborating the interpretation placed by the OFT on those
6 documents (para. 78, p.28 of the liability defence). The OFT responds to our objections
7 raised in response to the Statement of Objections at para. 77A to E on pp.28 to 29 of the
8 liability defence. At para. 78A to C it responds with three further arguments which you see
9 made in this Notice of Appeal. In particular, QCC contends that the OFT was not -- Sorry.
10 Document A0490 is the collection in which p.27 is included. It is our contention that that
11 document was not contemporaneous because the manuscript annotation "1/8 Quarmby"
12 appeared only on one page of the document. There is also a reference to "Quarmby" with
13 two question marks alongside the Morley Project, which cast doubt on the contemporaneity
14 of the document. The fact that there were twenty-odd other pages also casts doubt on the
15 timing of the handwriting of this particular page. As we saw yesterday, there is only one
16 other page which has handwriting on it which has initials ----
17 THE CHAIRMAN: Can we just look at p.27 again, please, Mr. Clough, because I think we might
18 like your assistance on this? The black bars indicate what?
19 MR. CLOUGH: My understanding, sir, is that they indicate the time period. If you look at the
20 top above the bars you will see it is an estimating programme. You see 27th June, 2005, July
21 2004 ----
22 THE CHAIRMAN: That means you have got until ----
23 MR. CLOUGH: Those are the weeks.
24 THE CHAIRMAN: You have got until, for Eastbrook Hall, it would appear, Monday, 25th July to
25 prepare the tender. Is that what it means? Is that your contention?
26 MR. CLOUGH: Yes.
27 THE CHAIRMAN: If we look up the page at line 10, which relates to an ambulance station,
28 which has nothing direct to do with this case, we have a blocked black section which leads
29 to, probably, Friday, 1st July for that ambulance station. Yes? Then we have a manuscript
30 hatched-in version which appears to extend that black block to Monday, 18th July. Now,
31 what are we to take that to mean? What is your submission? (After a pause): Let us just
32 go through that again. You are making a submission that this is not contemporaneous. So, I
33 think we have to look at the document in perhaps a little bit more detail than we have.
34 MR. CLOUGH: Certainly.

1 THE CHAIRMAN: Line 10. The ambulance station at Tenyas Brough. The estimation period,
2 programme period in the printed black, the computerised black block is Friday, 1st July,
3 2005 when it finishes.
4 MR. CLOUGH: Yes.
5 THE CHAIRMAN: But, then there is a manuscript extension and it looks as though originally it
6 was extended to the Friday of the week commencing 11th July, and then re-extended to
7 Monday, 18th July. Now, what are we to take from that in terms of contemporaneity?
8 MR. CLOUGH: Sir, there are a number of comments one can make about that. First of all, as I
9 am sure you have seen, there are different pages where the same projects have proper black
10 lines extended beyond different dates. I think there is probably one which goes beyond ----
11 THE CHAIRMAN: Presumably that is because this document is produced on more than one
12 occasion and circumstances alter.
13 MR. CLOUGH: Absolutely. So, it could well be that the black that you have pointed out - and,
14 indeed, maybe the squiggly black line below that which looks like another date ----
15 THE CHAIRMAN: Yes. The squiggly black line below that suggests that whatever was
16 happening in Mushroom Street, Leeds, the estimation period was extended into the middle
17 grass, the middle distance.
18 MR. CLOUGH: Indeed in all the entries like that one finds initials - the initials of the estimators
19 presumably.
20 THE CHAIRMAN: Yes. So, what is it if it is not contemporaneous?
21 MR. CLOUGH: Some of it may be. What we say finally, sir, is that the words that now relate to
22 actual or alleged infringements of cover pricing – Quarmby, Stainforth, Stainforth, 1/8
23 Quarmby - those have got no initials against them at all. They are nothing to do, if you like,
24 with the management of the tender processes which the other changes have, and no doubt
25 where the initials go down, that is indicating who is dealing with that.
26 THE CHAIRMAN: Except you cannot take it a column at a time, Mr. Clough. What we see if
27 we look at that line - I know these lines are not consecutively numbered - the Eastbrook
28 Hall line is that the manuscript contains "COV", a squiggle, and then a date and the name
29 Quarmby. Now, if we take all those together, what inference do you suggest we draw or do
30 not draw from that?
31 MR. CLOUGH: Sir, I think one has to put this in context. These documents came to light at the
32 time of the leniency application. In our submission there is no reason to jump one way or
33 the other in terms of when these -- We cannot say, of course, when the handwriting was put
34 there. Our submission is that the OFT cannot say either. This is a very important

1 document . Quite frankly, we have again asked for a copy of the original and if the OFT
2 seeks to rely upon it - and, indeed, they do - and to draw the sort of inferences that
3 understandably you are considering, we submit that they really ought to get the original of
4 this document. It must exist - otherwise, they could not have got a copy of it. (After a
5 pause): Mr. Aldred has put it in a slightly different way from what I was submitting: our
6 submission - and we do not see any evidence against it - is that anything to do with the
7 cover prices on this document (or alleged cover prices) would be more likely to have been
8 put there at the time of the leniency application than at the time of the tenders themselves.
9 That is regardless of the fact that no doubt you are right, sir, that it is more likely that the
10 changes of dates could have been put down on the original document.
11 THE CHAIRMAN: Thank you. I understand.
12 MR. CLOUGH: When I say 'the leniency application' I mean that people are trying to remember
13 what was happening, and so they wrote these things down - hence the "??". The "??" would
14 be very surprising if it really was contemporary. Why would it have to be a question mark.
15 It is very interesting because, of course, Residential Morley is one of the suspect tenders
16 which was dropped by the OFT. That does again tend to support our approach that this is
17 more likely to have been written there in the context of the leniency application. However,
18 I do understand where you are coming from, sir. It is ultimately for the Tribunal to decide,
19 but we say this evidence is not sufficient to draw the conclusions of infringement.
20 Sir, the argument is set out at paras. 3.30 to 3.46 of annex 1 to our skeleton, which we
21 referred to yesterday, where we have explained why the evidence available to the OFT prior
22 to the fast track offer was insufficient to found a reasonable suspicion that QCC have
23 engaged in cover pricing on this Eastbrook Hall, Bradford project. It follows, we say,
24 inevitably that the evidence cannot be sufficient to satisfy the higher evidence burden for
25 finding an infringement. The evidence is simply not strong and compelling.
26 We set out, finally, our response to the liability defence, paras.5.24 at pp.27 to 28 in annex 1
27 to our skeleton. Here, if I may just briefly summarise, we say that since the fast track offer
28 more evidence has become available, and this is set out at tab 13. This the OFT's schedule
29 returned by the employer or client listing the tenderers, and you see Quarmby and the
30 amount tendered by the company and the fact that Ham is the winning tender. We say that
31 adds nothing to the evidence already there.
32 We have said perhaps too many times that it is QCC's corporate policy neither to give nor
33 take cover prices, and the OFT is not entitled to draw a conclusion that because other
34 companies are engaged in cover pricing that increased the likelihood that QCC was as well.

1 The OFT concludes at para.77(b) of the liability defence that a cover price may have been
2 given whilst the QCC estimators were genuinely unaware that a colleague supplied a cover
3 price to York House. We say that is fallacious. All those at QCC who were involved in the
4 estimating process and may have had access to sufficient information to give a cover price
5 have given witness statements to the effect that they did not give York House a cover. The
6 only people who had access to that information were the commercial director, the managing
7 director and the two estimators. We can see that in the fourth witness statement of Roger
8 Nelson, which is in bundle 2, tab 45, pp.601 and following.
9 The OFT has already accepted that QCC's directors were not involved in cover pricing and
10 accordingly it has not sought to increase any of QCC's fines for such an aggravating factor.
11 Finally, I want to turn to Mr. France's evidence.
12 Mr. Aldred has kindly found the word "he", and I think, in the light of our debate on the
13 interview of Mr. Richardson, p.123, it is the fifth box from the bottom where it says "AR".
14 This is in terms of the contemporaneousness of the handwriting.
15 THE CHAIRMAN: This is volume 5, tab 12, p.123, which helpfully is upside down, but I have
16 read the whole of that interview.
17 MR. CLOUGH: It is the fifth box from the bottom. That is the same as that, and according to
18 that, "he's put we have taken a cover from Quarmby". So that is, if you like, something
19 else.
20 THE CHAIRMAN: Yes, got that.
21 MR. CLOUGH: Then we come to Mr. France. He was the client's surveyor, and his evidence is
22 in bundle 2, tab 34. The first witness statement of Mr. France says that he would be
23 surprised if York House took a cover price and certainly there was no need for it to do so. It
24 could simply have returned the tender without penalty or submitted a bid that was
25 comfortably above the client's budget, safe in the knowledge that it would not be awarded
26 the contract.
27 The evidence of Mr. France in his second witness statement again confirms that he saw no
28 reason why York House should deceive him on this project and that he "doubts" York
29 House gave him a cover price and he remains "suspicious" of the suggestion that York
30 House gave one.
31 We submit that on the totality of the evidence there is insufficient evidence to find an
32 infringement in respect of alleged infringement 233, especially given that it is possible to
33 interpret the known facts in a way that is entirely innocent, and indeed the innocent
34 explanation is the most plausible explanation.

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

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

> "There was, therefore, simply no need for any contractor to take a cover price. Any contractor worth his salt would know that if he submitted a tender above the budget, it would be very unlikely that he would be awarded the contract. In the context of Eastbrook Hall, I made this very clear to York House and the other contractors."

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

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

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

> "Whereas those Rules make no provision for any limitation period …"

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

> "Whereas it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down; whereas for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions …"

and so on. Then it says:

> "Whereas such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period …"

At the very end of the last recital it says:

> "… whereas it must also apply to the relevant provisions of future regulations in the fields of European Economic Community law relating to transport and competition …"

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

> "Whereas it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down …"

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

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

> "The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

1 (b) five years in the case of all other infringements.
2 2 Time shall begin to run on the day on which the infringement is committed.
3 However, in the case of continuing or repeated infringements, time shall begin to
4 run on the day on which the infringement ceases"
5 In our case, we think there is going to be no dispute, to the extent that this provision would
6 apply, that the dates of the alleged infringements are the dates that they were committed,
7 and certainly, not that it is relevant, they were the dates when the infringement ceased as
8 well.
9 Then para.3 sets out when interrupting activity can take place and what it can be.
10 Sir, in our submission, the application of those Rules is the most appropriate and logical
11 conclusion. I am not aware that this issue has come up before either the Tribunal or the
12 courts in this country before. No-one, I think, has come up with an authority for that
13 context. So I do offer my sympathy in that this Tribunal is being put upon perhaps to
14 decide this point. I do not think it is necessarily appropriate. It may be that you can
15 consider the possibility of making a reference to the European Court if you were to find it
16 difficult, but in my submission it is a straightforward application of s.60 Competition Act.
17 In the absence of silence, as we accept, of the Competition Act to deal with the question of
18 limitation in competition cases, then these rules should be applied. They are very clear and
19 easy to apply. In our case, they would lead to the result that infringement 6 would be statute
20 barred. So, turning the clock back, we say the first four suspect tenders would have been
21 statute barred as well.
22 THE CHAIRMAN: To what extent does the requirement of consistency in s.60 require exactitude
23 in the Member State, or is there a margin of appreciation, for example to enable a member
24 state, if it regards it as appropriate policy, to pursue an infringement within a reasonable
25 time of discovery thereof? Forgive me for interrupting you. If you take the analogy of a
26 prosecution of a criminal case (and there have been a lot of criminal analogies in this run of
27 cases) there is no limitation period for a criminal case because it is regarded as in the public
28 interest and sound public policy to start the case when you discover about it and then be
29 subject to abuse of process applications if appropriate.
30 MR. CLOUGH: Yes, sir. May I answer your question in two ways. First of all, we think that
31 consistency is most usefully implemented by this Tribunal in following what is done in the
32 European level, allowing obviously for any local or national idiosyncrasies if there is no
33 need to trample on them. To say that there is a margin of appreciation, I would not go to
34 that extent. I would say that the practice, and indeed in this case the very clearly set out

1 principle and implementing provisions after the 25 Regulation 1 2003 offer is a perfectly
2 rational and applicable system.
3 The second answer to your question – and I do not want to be accused of opening an issue
4 that we have not addressed before, but just in the context of the Decision - the Tribunal may
5 recall that the Decision holds that Article 81 does not apply in the present circumstances.
6 There may well be some parties who would dispute that, bearing in mind that the building
7 industry is an international industry – certainly a European wide industry. There is, to my
8 knowledge, one European company that was appealing this Decision. Leaving that on one
9 side, there are clearly in general going to be many cases where the OFT has to apply Article
10 81 alongside Chapter 1. If we are going to start talking about different limitation periods in
11 the context of each provision when those provisions are identical (apart from the geographic
12 jurisdictional scope) in my submission that would be very unhelpful and inappropriate.
13 Sir, in one sense it sounds a straightforward point. It has not arisen before, so there is not
14 any guidance that I can offer you, apart from stressing (as I perhaps have already) an
15 original regulation from 1974 that it is a direct consequence of the principles of legal
16 certainty and legitimate expectations that one should have a limitation period in competition
17 law proceedings.
18 In this case, it does go to strengthen the – not criticism but fact – that our first infringement
19 and this infringement 6 is over ten years ago, and whether it is appropriate to allow that sort
20 of infringement to be dealt with in this way. There may have been other ways that the
21 European Economics report canvassed that the OFT could have dealt with some of those
22 perhaps historic allegations.
23 Let me equally briefly deal with the submission that infringement 6 pre-dates the 1998 Act.
24 Here again our arguments were set out in our skeleton at paras.15 to 17, pp.11 to 14, and at
25 paras.6.1 to 6.21 of the Notice of Appeal, the OFT's Liability Defence paras.33 to 55 and
26 their skeleton paras.32 to 39. I am going to make two very short submissions, sir. That is
27 that if the agreement to provide a cover price was made and implemented before 1st March
28 2000, it clearly pre-dated the Competition Act 1998, whether or not it should have been
29 registered under the Restricted Trade Practices Act 1976. Second, if the agreement to
30 provide a cover price was made before 1st March 2000 but for the future to provide the
31 cover price after 1st March 2000 we say the agreement was still made before 1st March and
32 therefore not subject to the Competition Act 1998, and that there were not two registerable
33 restrictions accepted by two parties to a registerable agreement prior to the commencement
34 of the Competition Act because the restrictions were future restrictions, if any, within the

1 meaning of the RTPA 1976. So in that situation the transition provisions apply to the effect
2 that the Competition Act 1998 does not apply until 1st March 2001. That is our case.
3 My learned friend tells me that the *Tobacco* case decision was published yesterday and that
4 apparently also addresses this issue of the transitional period and the application of the
5 transitional period. We will give you a copy of that later in the day, I think.
6 Mr. Chairman, unless I can assist the Tribunal any further, those are our main submissions.
7 I apologise to Miss Bacon for going on a bit longer than I should.
8 THE CHAIRMAN: There is no need to apologise; you have been most helpful. Do you want a
9 ten minute break? I think we will probably have one anyway.
10 MISS BACON: I do not need ten minutes. I would be grateful for a few minutes.
11 THE CHAIRMAN: We will have a ten minute break. Can I put you on warning for your
12 domestic arrangements that we may have a shorter lunch break today. We need to rise for
13 reasons of my own not later than twenty to 4, absolutely not a minute later than twenty to 4
14 and if necessary we will have to go into another day. I suspect we probably can complete
15 the case by then. We will see. Twenty five to.
16 (Short break)
17 THE CHAIRMAN: Yes, Miss Bacon.
18 MISS BACON: Sir, I will make my submissions in the order set out in our skeleton argument, so
19 I will deal first with the preliminary issue concerning whether Quarmby was rightly
20 included as an addressee of the SO and the decision. I will then move on to the limitation
21 and timing arguments. I will then deal with the substantive evidence in relation to the three
22 infringements, and finally very briefly I will address the Tribunal on this short point about
23 whether the client was deceived in relation to infringement 233.
24 Starting with the preliminary issue. This is a point that has not been taken by any of the
25 other appellants in the 25 appeals before the Tribunal. The reason for this, we say, is that it
26 is a hopelessly bad argument both as a matter of principle and as a matter of the specific
27 facts of Quarmby's case. The first point to make is that by now the Tribunal will have well
28 on board the fact that the OFT had to conduct this investigation so as to make the best use
29 of its limited resources, and one of the ways it did this was to take the policy decision at a
30 certain point in its investigation to draw a line, look at the evidence that it had gathered up
31 to that point and decide which of the hundreds of the companies implicated by the evidence,
32 and the thousands of potential infringements it was going to investigate further.
33 The way it did that is set out in the decision, and I will just give you the paragraph numbers
34 for your note: II.1459 to 1507. Those paragraphs of the decision describe in particular the

1 steps that the OFT took between autumn 2006, when it started its process of consolidation
2 and 16th April 2008 when it issued its statement of objections.
3 Quarmby's case is that when the OFT carried out that process of consolidation it did not
4 have sufficient evidence in Quarmby's case of at least five suspect tenders. So Mr. Clough
5 says Quarmby should not have been brought within the door at all, the OFT should have
6 excluded it from its investigation at that point and it was therefore not entitled to take an
7 infringement decision against it.
8 Putting it quite starkly, Mr. Clough's case is that even if Mr. Nelson and Mr. Harrison had
9 come to the Tribunal yesterday and had admitted that Quarmby had given cover prices to
10 Strata, Admiral and York House on the three occasions alleged, the OFT was not entitled to
11 include it in its infringement decision, because of the way it had consolidated its decision at
12 an early stage. One can immediately see that if that were correct as a matter of principle
13 that there would be very serious concerns, but even leaving the principle concerns aside, the
14 real difficulty with Mr. Clough's case on this is that he is conflating two quite different
15 evidential standards. The first is the standard of reasonable suspicion at the FTO stage, and
16 the second is the quite different standard of evidence satisfying the balance of probabilities
17 so as to reach a conclusive decision against an undertaking.
18 The way that Mr. Clough tries to reconcile that problem is very ingenious but it just does
19 not work. He says that when you look at the FTO letter sent to Quarmby, you see a
20 statement there saying that in most cases the OFT's suspicions are based on the following
21 types of evidence, and then it is set out.
22 Then if you go back to the decision IV.127 it says the same thing. I have underlined the
23 word "most" deliberately because the OFT is not saying in either case that this is its test, or
24 that in all cases that it had that of evidence. What it is saying simply is that in most cases
25 this is the kind of evidence on which it based its decision.
26 Mr. Chairman, the best place to find this is behind tab 1 of the liability defence bundle.
27 That, I think, is in the latter half of the bundle – there was some confusion yesterday. I just
28 want to emphasise the word "most" there, really that is all that needs to be underlined.
29 THE CHAIRMAN: Yes.
30 MISS BACON: That is the first problem with Mr. Clough's argument. He ignores that, assumes
31 that the word "most" does not exist , assumes that this is setting out a test for the standard of
32 evidence that the OFT is applying and he says that since you have the same language used
33 in the FTO decision that means that the FTO must be adopting the same test for the quality
34 of evidence as in the decision, and that is what he said yesterday. He supports that by

1 saying that if you also look in the FTO letter, the OFT said it was intending to issue an SO.
2 So, he says, the OFT must have already had the evidence by that stage so as to issue the SO
3 and, by parity of reasoning, the evidence in the decision is of the same quality as the
4 evidence that it had at the time of the FTO letter. He claimed yesterday – I am sorry I do
5 not have the transcript note – that the OFT had never said that its evidence in the decision
6 was better than its evidence at the FTO stage.
7 With the greatest respect to Mr. Clough, this is complete and utter nonsense. If the OFT had
8 had enough information when it issued FTO to adopt an SO it would have done so. It
9 would not have spent another couple of years investigating the case. The reason why it
10 issued the FTO was that the OFT knew that there would be an enormous amount of work
11 still to do to get to the point at which it could issue an SO, and what it wanted to do was to
12 see if it could limit that in some way, and that is why it adopted this FTO process to see if
13 the parties would make admissions, and then it would rely on reduced evidence in the FTO
14 and it could shortcut the whole route for those parties who were willing to make the
15 admissions. So it was absolutely not the case that by the time of the FTO there was enough
16 evidence for the SO, let alone a decision.
17 What the OFT did after the FTO, as you have seen from looking through bundle 4 – the
18 core bundle of documents – was to collect substantial further information particularly
19 through interviews with leniency applicants, but also through seeking information from
20 clients of suspect projects. That further information was relied upon extensively in the
21 decision and just to give you one example relating to the first infringement of the three,
22 infringement 6, at the paragraphs of the decision that deal with infringement 6 (paras.
23 IV.763 to 765) the OFT sets out in detail the evidence that it had obtained from its interview
24 with Mr. Ironmonger, which took place after the FTO had been issued.
25 In my submission, a clear distinction needs to be drawn between two very quite different
26 questions here. The first question, which is the relevant one at the stage of the FTO: Did the
27 OFT have sufficient evidence to form a reasonable suspicion that Quarmby had been
28 involved in five or more suspect tenders? The second question is the one relevant to the
29 substantive infringements, which is at the stage of the decision did the OFT have sufficient
30 evidence to form the conclusion that, on the balance of probability, Quarmby had
31 committed the three infringements alleged? They are two quite different questions, two
32 different evidential standards.
33 Sir, if I can then go to the specific arguments why Quarmby says that in the case of the
34 suspect tenders on the OFT's list for Quarmby, these should not have been included in the

1 FTO. Those arguments have evolved over time in letters to the OFT, in the pleadings and
2 in the skeleton argument. There was at some point a debate about whether or not Quarmby
3 had actually tendered for various of the suspect projects. Just for your note it is common
4 ground that Quarmby did, in fact, tender for five out of the seven, and that is 1, 2, 3, 5 and
5 7. The express acceptance of that is set out in the second witness statement of Mr. Nelson,
6 at paras. 8, 10 and 12.
7 A second argument that was made in the pleadings and the skeleton argument, that seems to
8 have disappeared and certainly was not pressed to a great extent by Mr. Clough was the
9 argument that various tenders were statute barred, or time limited, and the Tribunal will
10 have seen the OFT's answer to that, that this is a legal and factual question which fell to be
11 decided at the time of the decision; it was not something that had to be resolved at the
12 necessarily early stage of the FTO when simply it was a question of reasonable suspicion –
13 as I said, Mr. Clough has not particularly pressed that point today.
14 The two other arguments are ones that he has pressed today, and the first of those is the
15 contemporaneity point. Just to clear some bats out of the belfry, the OFT's definition of
16 "contemporaneous" is exactly the same as the Tribunal's i.e. that the document was created
17 around the time of the infringement, even if not necessarily at the precise moment of the
18 infringement. It is not, as Mr. Clough suggested, that the document was found on a dawn
19 raid, because there are, of course, some documents that were contemporaneous that were
20 provided voluntarily by leniency applicants and not during a dawn raid – the dawn raid has
21 nothing to do with it – so it was a question of when it was created.
22 I fully accept that when the OFT is weighing the substantive evidence for an infringement,
23 the question of whether or not a document is contemporaneous is relevant to the weight to
24 be given to it. However, as I said, one has to draw a distinction between the factors taken
25 into account in assessing the quality of evidence for the decision and the factors taken into
26 account in assessing whether there was a reasonable suspicion at the FTO stage. When we
27 are looking at the FTO stage there are two points to be made about contemporaneity, and
28 the first is that the OFT never set a standard of having contemporaneous documentation at
29 the stage of the FTO. All that it said was in most cases that is what it had, but that was not
30 any kind of evidential threshold.
31 The second point is that that the FTO stage the OFT certainly did not set itself the test of
32 establishing whether, on the balance of probabilities, a particular document was or was not
33 contemporaneous, it was simply applying the 'reasonable suspicion' threshold. So even if
34 there had been some test of contemporaneity it would have been simply a suspicion, or

1 reasonable suspicion, that the document was contemporaneous, so in our submission this
2 contemporaneity point is a complete red herring.
3 The other point on which Mr. Clough focused, and to which he dedicated substantial time,
4 was this distinction between QCC and QSP. He says that for all except suspect tender 5,
5 when there was a contemporaneous document which specifically implicated his company,
6 and that is the famous "Admiral Memo", the "BT Phone Disc" memo, he says all except
7 those, the evidence at the FTO stage did not establish conclusively that the Quarmby
8 referred to in the documents was QCC rather than QSP.
9 The OFT's response to that is to confess and avoid. It is quite true that the evidence at the
10 FTO stage did not establish conclusively in relation to the six out of the seven suspect
11 tenders that it was QCC and not QSP, but that is irrelevant for the point I have just made
12 that the quality of evidence required at the FTO stage was reasonable suspicion standard,
13 not a balance of probabilities standard that would be required for the decision. So simply
14 the OFT did not need to establish that.
15 It is quite clear that when we got to the decision we did have to establish that the party
16 involved in the alleged infringement was QCC and QSP, and we have done that. As I have
17 said, Quarmby accepts certainly it tendered for all three of the projects involved in the
18 alleged infringement, in fact it goes further and accepts that in relation to five out of the
19 seven suspect tenders it did participate in the tender.
20 But, at the FTO stage, since the OFT standard was reasonable suspicion, the question is
21 whether the evidence allowed the OFT to suspect QCC and whether that suspicion was
22 reasonable.
23 So in response to Mr. Clough's mistaken identity point, we say we did not have to identify
24 anyone, we simply had to suspect, and a criminal analogy can be made at this point. Let us
25 suppose Mr. Clough is walking down the street in Ilkley when he is hit on the head by
26 someone who he describes as "a seven foot man with bright orange hair and a wooden leg".
27 Now, it so happens that in the town of Ilkley there are only two people fitting that very
28 unusual description as far as the police. The police therefore suspect both. Of course, at the
29 point at which the police suspect both and before they have interviewed either of them to
30 see whether they have an alibi for the moment at which Mr. Clough was clonked on the
31 head, it is not proven that either of them did it. But, they are both suspects and in each case,
32 due to the very unusual description and the fact that only two people correspond to that very
33 unusual description, I would say the suspicion would be reasonable. So, that analogy
34 applies precisely here. There are two Quarmbys in Ilkley. It is an unusual name. The OFT

1 therefore had reasonable grounds that when it saw the word "Quarmby" on a
2 contemporaneous note, it could suspect QCC. It had reasonable grounds to do so, whether
3 or not it also suspected QSP.
4 The other point that I should make - and I should say this is only something that I have
5 really realised overnight, is that the OFT did have grounds to distinguish between the two.
6 It did have grounds to suspect that the references to Quarmby meant Quarmby Construction
7 Company, Mr. Clough's client, rather than QSP. The reason for that is that it did, of course,
8 have a number of documents implicating QSP because QSP is among the other companies
9 listed and subject to the infringement decision. In the cases where companies were
10 referring to Quarmby Special Projects, they did so habitually by saying "QSP" and not
11 "Quarmby". You can pick this up in the Decision if you look at the infringements that are
12 listed in relation to QSP. If you look at paras. IV.4444 (which is one of the infringements)
13 and at IV.6745 you will see that in the contemporaneous document recorded there the
14 reference is to "QSP" and not "Quarmby".
15 THE CHAIRMAN: Shall we just have a look at one of those.
16 MISS BACON: I am very happy to do that. The first one is IV.4444.
17 THE CHAIRMAN: QSP Construction.
18 MISS BACON: It is a short point. As I said, I do not need to make that point because my primary
19 point is that it is just a case of reasonable suspicion. Quarmby gave rise to a reasonable
20 suspicion that it was QCC. That is the other reason. That is the reason why, in relation to
21 all of the suspect tenders listed in Quarmby's FTO letter, those suspect tenders were not
22 replicated in relation to QSP. In fact, I am told that for all but one of the suspect tenders
23 attached to QSP's FTO letter, the evidence that the OFT had referred to QSP specifically
24 rather than Quarmby. The one exception is the suspect tender that was addressed to both.
25 That is our suspect tender 2, the High Street, Lincoln project, which was included in the
26 FTO letters for both QCC and QSP. On that case, and in that case alone, the note said,
27 "Quarmby". What I understand to be the case is that this came in quite late in the stage and
28 the OFT was not quite sure and so it simply put it in both. For all the others there was a
29 distinction. Quarmby was addressed to Quarmby Construction Company and QSP
30 references went in suspect tenders for QSP. That is the reason why there was not complete
31 replication across the two and why the OFT, at that stage, thought on balance that if there
32 was something saying Quarmby it was QCC rather than QSP.
33 On those grounds, sir, members of the Tribunal, we say that this preliminary point is a
34 complete non-starter. There was plainly sufficient evidence implicating Quarmby in relation

1 to all of the suspect tenders. I am not going to take the Tribunal through all of the evidence
2 in relation to each. I am very well aware that you have read the contents of Bundle 4, and
3 you can go back to it. But, you will see there that there is absolutely sufficient evidence in
4 relation to each that the OFT could form a reasonable suspicion.
5 Sir, I am afraid I am taking this at brake-neck speed. Please do tell me if you would like me
6 to slow down.
7 THE CHAIRMAN: We will. Carry on at brake-neck speed - if only because it is very clear and
8 we have read all the papers.
9 MISS BACON: I am very grateful.
10 THE CHAIRMAN: Of course, it is much easier -- I understand why Mr. Clough took us through
11 things in some detail. You are responding, which one can do more quickly.
12 MISS BACON: Limitation arguments. The second of my list of four headings. Now,
13 Quarmby's limitation and timing arguments apply to infringement 6 only, which, as you
14 will all recall, involved a tender that was submitted on 3rd March, 2000. There is one other
15 case which raises a limitation point among the twenty-five. That is Galliford Try, which was
16 heard last Friday in Court 1. Galliford Try's argument was put on the basis of the five year
17 limitation period in Regulation 1, 2003. Its argument in that basis was put on two grounds:
18 the first was the legal certainty point; the second was the s.60 point. Quarmby raises both
19 of those arguments, although in Galliford Try's case it put this in the context of penalty and
20 Quarmby puts this in the context of its appeal against liability. It does not make much
21 difference. But, in addition, Quarmby raises a third argument which is that even if the
22 Commission limitation period (if we can call it that) does not apply, by some process of
23 analogy or consistency, it can still rely on the six year limitation period set out in the
24 Limitation Act as a matter of domestic law.
25 Cantering through the Commission limitation arguments, the first is the legal certainty and
26 fairness points. We say that these just do not get off the ground for the reasons set out in
27 the penalty defence at paras. 311 to 315 which, by the by, address the point which Mr.
28 Clough made this morning in relation to Regulation 2988 of 74. The headline point, just to
29 summarise, is that nothing in the EU law principles of legal certainty and fairness requires a
30 limitation period to be imposed for domestic law infringements of the competition rules.
31 Mr. Clough might say, "Oh, well, we think that there was an Article 101 point". Article 101
32 is what used to be Article 81. That does not get off the ground. He has not said that this
33 should have been an Article 81 case. He cannot take that point now. We are squarely in the

1 territory of domestic law. On that, looking at European law principles of fairness and legal
2 certainty tells us nothing.
3 The second, and more substantial, point - and this is the second of the Galliford Try points -
4 is the s.60 point of consistency. Can I just make one observation right at the start in
5 response to the Chairman's question about, "Well, does this mean that there should be some
6 degree of consistency across the Member States?" Just to remind you, the consistency
7 point is in the domestic statute - it is not in Regulation 1 of 2003. So, this is not about
8 trying to achieve consistency across the Member States. It is simply that when the domestic
9 Competition Act was enacted there was a provision which said that in certain contexts it is
10 desirable to preserve consistency with the approach taken in Europe. But that is all.
11 The real point on s.60 is whether there is a relevant difference or whether there is silence
12 which allows the courts to imply the European limitation points. Now, Mr. Clough says -
13 and Quarmby says in its pleadings and skeleton argument - that its big case here is *Pernod*,
14 where the domestic provisions did not provide for a right of third party complainants to be
15 heard. In the pleadings and skeleton argument it said that the absence of any limitation
16 period is analytically the same as that. I appreciate that Mr. Clough did not develop the
17 point this morning because of limitation of time, but I think I need to respond to that.
18 *Pernod* is not the right analogy at all. The reason is that in *Pernod* the effect of the
19 legislation was that the Director General could perfectly well have allowed a complainant to
20 participate. There was nothing unlawful about that. But, in the present case, if the OFT
21 were to fetter itself by saying that it could not make a finding of infringement against a
22 company because of a limitation period that exists in the Competition Act, that would be
23 wrong in law because there is no limitation period in the Competition Act. I tried to think
24 of a suitable analogy. Because I like bicycles and do not like cars, this is the analogy that I
25 came up with: Let us say that both domestic and EU law gives the regulator - in the
26 domestic case, the OFT; in the EU case, the Commission - the power to confiscate the
27 company cars owned by an undertaking that has entered into an anti-competitive agreement.
28 Now, let us suppose that English law says that the OFT can confiscate any company car
29 belonging to an undertaking that has breached the Chapter I prohibition. By contrast, EU
30 law says that the Commission can confiscate company cars belonging to undertakings that
31 have infringed comparable Article 101, but only the petrol cars. It cannot confiscate diesel
32 or hybrid cars. Now, is there silence or is there a relevant difference? We would say there
33 is a relevant difference. We would say that s.60, if you applied it to that, would not have
34 the effect that the OFT, contrary to the legislation, could only confiscate petrol cars as

1 opposed to diesel and hybrids because the OFT's statutory power is expressly and
2 relevantly different to the statutory power conferred by the Commission. Putting it another
3 way, it is inherent in the fact that the OFT's power is unlimited and extends to any car that it
4 is not taking anything away. It has an express power to attach and to expropriate all cars,
5 whereas the Commission's power is a limited one. That, we say, is not silence, but a
6 relevant difference. In our submission that analogy applies in the present case and it is a
7 complete answer to the s.60 point.
8 I have dealt with the first two of the three ways that Quarmby puts the limitation case. The
9 third limitation argument is a Quarmby-specific argument not adopted by Galliford Try.
10 That is, as I have said, the fall-back argument - that in any event the Limitation Act applies
11 and prescribes a limitation period of six years. The insuperable obstacle, we say, to this
12 argument is that both s.2 of the Limitation Act and s.9 of the Act impose a limitation period
13 in respect of an action: in the case of s.2 an action founded on tort; in the case of s.9 an
14 action to recover any sum recoverable by virtue of any enactment.
15 As set out in our liability defence in this appeal, all of the authorities - and there are a
16 number of them on - the meaning of the word 'action' in this context conclude that it means
17 litigation in a court or Tribunal. There is absolutely no authority at all to suggest that
18 action can be extended to mean the imposition by the OFT of a fine in circumstances where
19 it does not have to come to any court or Tribunal to impose that fine. The only authority
20 that Quarmby has been able to cite in its pleadings and skeleton argument is the 2009
21 version of Mr. Whish's eminent textbook on competition law where Mr. Whish offers the
22 opinion - again himself without citing any authority - that the imposition of a penalty under
23 the Competition Act is subject to a six year period of limitation under the Limitation Act.
24 I have the greatest respect for Mr. Whish, but in this case he is simply wrong. He does not
25 give any view in his textbook as to which specific provision of the Limitation Act he is
26 thinking of. It may be that as a result of that he just has not given any thought to the point
27 that the only sections of the Act that could conceivably be relevant apply to an action and
28 not simply an administrative penalty. Whatever the reason, we say that this is not authority
29 on the point, and Mr. Whish's opinion, no doubt helpfully offered, is wrong.
30 There is actually a good reason, we say, why the Limitation Act is confined in this respect
31 to judicial proceedings - that is, that public powers are generally not constrained by time
32 limits unless it is otherwise expressly stated. There are examples of this in the Competition
33 Act. I will not ask you to turn to them, but if you look, for example, at s.3(2) of the
34 Competition Act,

1 “The Secretary of State may at any time by order amend Schedule 1, not limited
2 by time”
3 and at s.6(1),
4 “If agreements which fall within a particular category of agreement are, in the
5 opinion of the OFT, likely to be [exempt agreements], the OFT may recommend
6 that the Secretary of State make an order specifying that category for the purpose
7 of this"
8 Various things that can be done under the Competition Act. No time limit specified. No
9 suggestion that there would be a time limit for that.
10 There are cases in a public policy context where policy considerations, such as legal
11 certainty, may mean that a public body’s powers have to be curtailed by some time limit. In
12 those cases the relevant statute makes express time limit provision for that. An example is
13 the time limit set out expressly in the Enterprise Act for the OFT’s intervention in relation
14 to a merger. There are time limits there and we say they are there for a purpose and they are
15 expressly stated. You find the same in other areas of law, such as tax where the Taxes Act
16 set out limited periods of time within which the Revenue can commence an inquiry into
17 matters such as an individual’s self-assessment return.
18 In our submission, if there had been a limitation period it would have had to have been
19 stated, and it would have been stated, in the specific provisions of the Competition Act. In
20 this case, the relevant power to impose a penalty is s.36(1) of the Act which enables the
21 OFT to impose a penalty. I will not ask you to turn it up, but if you do you will see that the
22 power is hedged about by express limitations. There are a number of them and they are set
23 out in all of the sub-paragraphs of s.36. By contrast there is no limitation as to time, so we
24 say, as a matter of statutory interpretation, the power must be read as being not constrained
25 by a time limit. In other words, the legislature could have specified a time limit. It did
26 specify various other limitations on the power to impose a penalty. It did not specify a time
27 limit, so that means, and that is to be interpreted as meaning, that there is no time limit
28 imposed on the OFT in relation to penalties.
29 Can I just add one point purely for completeness, because we say that everything that I have
30 said so far completely answers the point, but even supposing that Mr. Clough could get over
31 these problems with the definition of the word “action” and the policy reasons why, in my
32 submission, there should be an express limitation, if there is one, in relation to constraining
33 public powers, even if he could get over that, he still failed to explain how a penalty
34 imposed by the OFT could conceivably be regarded as an action “founded on tort” within

1 the meaning of s.2, or an action to recover a sum recoverable by virtue of any enactment
2 within the meaning of s.9. That is not explained in the notice of appeal, it is not explained
3 in his skeleton argument, and the reason why Quarmby is so coy on this point, I would
4 suggest, is that it is quite plain that the OFT's administrative procedure is not something
5 based on a tortious claim, and nor is it a procedure to recover a sum recoverable by virtue of
6 any enactment. What it is is a procedure allowing the OFT in its discretion to impose a
7 penalty on the basis of powers conferred by the Competition Act.
8 So the penalty imposed is not a tortious one, it is not a penalty recoverable by virtue of an
9 enactment, but is one imposed by virtue of the exercise of a statutory discretion and that is a
10 completely different thing.
11 THE CHAIRMAN: If that is so, and if the OFT acts in a way that is plainly unfair, perhaps
12 because of the passage of time, what is the remedy? Is there a remedy?
13 MISS BACON: In my submission, one would have to identify the substantive unfairness, and it
14 follows from what I have said that the unfairness cannot lie in the taking action beyond the
15 expiry of a particular passage of time, because there is not a particular passage of time
16 within which the OFT has to act. So one would have to identify a different substantive
17 unfairness.
18 THE CHAIRMAN: Is there something like a general right to allege that there has been an abuse
19 of process?
20 MISS BACON: That is a good question.
21 THE CHAIRMAN: Thank you!
22 MISS BACON: It is conceivable that a party might make that kind of argument. Certainly that is
23 not a point that has been taken in this case. I am also being reminded that there could be a
24 sort of general proportionality point.
25 THE CHAIRMAN: That is what I had in mind.
26 MISS BACON: If it were, say, 20 years down the line and nobody had any evidence of anything,
27 or maybe the OFT starts proceeding against someone for something that happened in, I do
28 not know, in 1970, then you get into problems that the Competition Act only entered into
29 force in 2000 anyway. That is perhaps why this really has not arisen.
30 THE CHAIRMAN: One could say it was arbitrary and disproportionate?
31 MISS BACON: If, say, in 2050 the OFT were to act in relation to something that happened in the
32 year 2000 and stopped in that year 2000 an argument could possibly be made. That is not
33 the way the case is put by any of the appellants in this case. At the very highest what they

1 do is rely on an EU argument of fairness and legal certainty, which we say, okay, maybe in
2 relation to the Commission, but there is no read-across in relation to domestic powers.
3 THE CHAIRMAN: Thank you.
4 MISS BACON: The other way in which we put our case, and we have yet one more argument,
5 and I think that is the last of the arguments on s.2 and s.9, which is that, even if they do
6 apply for some reason, this is one of the cases where they are trumped by s.32(1)(b) of the
7 Limitation Act, which is, as you will recall, the deliberate concealment provision. We say,
8 just as in any case where, for example, a civil claim is brought on competition law in
9 relation to a cartel and the claim is made, "This is a long time ago", and the claimant
10 responds, "It is a long time ago, but I only just found out about the cartel". We rely on this
11 point because it is a point continuously pleaded in civil claims brought on the basis of the
12 competition provisions, and it is obviously right that the OFT did not find out about it until
13 a long way down the line.
14 Quarmby's only answer to this is to say that it did not conceal the fact that it had engaged in
15 cover pricing. Our response is that is completely untenable, not only was it concealed, but
16 Quarmby is still today and yesterday coming to the court and saying that it did not do it. So
17 there is no argument there that Quarmby did not deliberately conceal the point. Quarmby
18 never told the OFT that it had engaged in cover pricing, supposing it did. It did not come to
19 the OFT as a leniency applicant. It has continually denied engaging in cover pricing. It is
20 simply not open to it to say that there was no deliberate concealment. That is the last
21 argument that we make in relation to limitation.
22 That brings me on to the timing of infringement 6. This has occupied a vast amount of
23 space in the pleadings and skeleton arguments, but I think we can cut through all of that
24 because there is actually a very short answer is, and that is that whichever approach the
25 Tribunal adopts as the start date of the agreement, the infringement falls within the
26 provisions of the Competition Act. The starting point in this analysis is that the OFT has
27 found in the decision on the balance of probabilities that the cover price in relation to
28 infringement 6 was likely to have been provided after 1st March 2000. Just for pedantry, I
29 note that it should have said "on or after 1st March 2000", because the Competition Act
30 entered into force on 1st March, not on 2nd March. The reason for the finding in the decision
31 that the cover price was probably provided either on or after 1st March 2000 was that
32 Strata's evidence was that while the timing of the initial contact between the parties varied
33 from case to case depending on whether they knew at the start they were going to cover or
34 whether they got a long way down the line and took a cover at the last minute, the cover

1 price was taken in general the day before the tender was due in. For your note, that is set
2 out in the transcript of the interview with Mr. Throssell from Strata at your bundle 5, tab 2,
3 pp.4 and 5. That is the bundle numbering. If you want it, the full transcript of the interview
4 is at tab 6 of the liability defence bundle.
5 You will also have seen this by the by with infringement 214, the famous Admiral memo,
6 which had the words "Ring 4.30 Wednesday". As I put to Mr. Harrison yesterday, that was
7 most likely the day before the tender was due in, which was a Thursday.
8 In this case, the tender due date was 3rd March 2000. So by taking that and the evidence
9 given by the particular leniency applicant, we say that, on the balance of probabilities, the
10 cover was provided on or after 1st March 2000. I do not understand that part of the analysis
11 to be disputed by Quarmby.
12 On that basis we know that the agreement certainly continued after the entry into force of
13 the Competition Act. The question is then when it started. The decision does not make any
14 findings as to when that particular infringement did start for the reason that it does not
15 matter. If the agreement started on or after 1st March – in other words, if the first telephone
16 contact was made on or after 1st March – then it falls squarely within the Competition Act,
17 and there is no issue about any transitional provisions. We do not get into transitional
18 provision territory at all. It is an agreement that has been commenced and ended after the
19 entry into force of the Competition Act.
20 The only case in which we even start looking at the transitional provisions is if there were
21 evidence that on the balance of probabilities the agreement started before 1st March. In that
22 case there would be a question as to whether the transitional provisions were engaged. Our
23 answer to that is that they are not, since the agreement would have been void under the
24 RTPA. That we say is just a complete answer to the point. It would have been void under
25 the RTPA. The relevant provisions are paras.19 and 20 of the Schedule 13 to the
26 Competition Act. Paragraph 19(1):
27 "Except where this Chapter or Chapter IV provides otherwise, there is a
28 transitional period …"
29 Then 20(1):
30 "There is no transitional period for an agreement to the extent to which,
31 immediately before the starting date, it is –
32 (a) void under section 2(1) or 35(1)(a) of the RTPA."
33 The relevant provisions of the RTPA are in the first authorities bundle at tab 2, starting at
34 s.1:

1 "Every agreement to which this Act applies by virtue of –
2 (a) section 6 below (restrictive agreements as to goods) …
3 is subject to registration under this Act."
4 Then if you turn over a couple of pages, s.6(1):
5 "This Act applies to agreements (whenever made) between two or more persons
6 carrying on business within the United Kingdom …"
7 THE CHAIRMAN: Section 6(1)?
8 MISS BACON: Yes, that was the one referred to in s.1:
9 "… in the production or supply of goods, or in the application to goods of any
10 process of manufacture, whether with or without other parties, being agreements
11 under which restrictions are accepted by two or more parties in respect of any of
12 the following matters –
13 (a) the prices to be charged, quoted or paid for goods supplied, offered or
14 acquired, of for the application of any process of manufacture to goods …"
15 That is the bit that we rely on.
16 THE CHAIRMAN: I am sorry, I am sure there is an easy answer to this, but why are we dealing
17 with goods and not services?
18 MISS BACON: That is good question.
19 THE CHAIRMAN: Thank you again. Section 11 deals with services.
20 MISS BACON: The OFT has relied on goods. Section 11, as you have just said, deals with
21 services. There is an almost identical provision in relation to s.11. I imagine it is because
22 one could classify this as either goods or services. Mr. Singla is giving me a helpful answer
23 here. At III-223 of the decision the OFT says that it:
24 "… considers that all of the infringements involving cover pricing which are being
25 pursued would (if they were concluded before 1st March 2000) have been void
26 under the RTPA as:
27 (a) the construction or carrying out of buildings, structures and other works by
28 contractors is a supply of goods for the purposes of RTPA."
29 I think the point is a fair one. In some respects there may have also been the provision of ---
30 -
31 THE CHAIRMAN: It is s.43(3), is it not, which equates to goods and services. I think Mr.
32 Singla will probably give you a nod to that.
33 MISS BACON: In which case it is correct.
34 THE CHAIRMAN: There is a definition of goods in s.43.

1 MISS BACON: It includes ships and aircraft.
2 THE CHAIRMAN: Then s.43(3) --
3 MISS BACON: Yes, that is right: "This Act applies to the construction", yes. It was put there
4 before me. I am very grateful.
5 THE CHAIRMAN: I am sorry about that. It seemed an obvious question. Thank you.
6 MISS BACON: So there we have it. Section 6 is the one that we have relied on. Then if you go
7 forward a few pages to s.35(1), that is the provision that says:
8 "If particulars of an agreement which is subject to registration under this Act are
9 not duly furnished within the time required by section 24 above, or within such
10 further time as the director may … the agreement is void in respect of all
11 restrictions accepted or information provisions made thereunder."
12 So we say s.1 agreements to which this Act applied are registerable; s.6 this is the kind of
13 agreement that is registerable; s.7(5) if it is not registered it is void. None of these
14 agreements was ever registered.
15 I must say I was surprised, because so far there has been no answer to this point, and right at
16 the end of his submissions today for the very first time, Mr. Clough offered up the point:
17 this is all about future restrictions. We say that is just not the case. If he is saying that there
18 was an agreement made before the entry into force of the Competition Act his case is that
19 there was a restrictive agreement made, otherwise, he would not be saying that there was an
20 agreement made at that point. So the premise of this argument is that there is an unlawful
21 restrictive infringing agreement that was entered into at that point, and then he turns round
22 and says; oh, but it is not within the RTPA because it is not restrictive; it is only a future
23 restriction. We say that just does not get off the ground. Either it was a restriction before
24 1st March in which case it was void, or it was made after 1st March, in which case it is
25 subject to the transitional provisional.
26 I would like to draw the Tribunal's attention to one further at footnote 2181 of the Decision
27 p.392. Please do not turn it up. There is a reference to a case where the Registrar of the
28 Restrictive Trading Agreements listed as a restriction cover prices, but that is just for
29 completeness.
30 The only other answer that has been offered up in relation to the RTPA, and it has been
31 made in the pleadings and the skeleton argument, is the *Tobacco* decision. Mr. Clough is
32 right to say that that is now out. There was an issue about this because at the time that the
33 argument was made the *Tobacco* decision was not published; it was only available in
34 confidential and embargoed form. It has now been published in non confidential form.

1 This is another red herring. The *Tobacco* decision concerned a different type of case on
2 very different facts concerning a different type of agreement: retail price maintenance. The
3 conclusions that the OFT reached in that case, such as they are, concerning the application
4 of the transitional provisions, are conclusions reached in a different factual and legal context
5 and whatever was decided there has absolutely no bearing on the legal and factual question
6 of whether the transitional arrangements are applicable in this case on different case and to
7 a different kind of agreement.
8 I think I am getting there and with a fair wind I should be finished by lunchtime. I am now
9 on to the evidence for the three infringements. I just want to make two preliminary points.
10 First, about the burden and standard of proof, and then the alleged policy regarding cover
11 pricing. Then I am going to turn to the evidence on the specific infringements, bearing in
12 mind I am aware that the Tribunal has read most of this for itself already.
13 Starting with the burden and standard of proof, as Mr. Clough fairly said yesterday and
14 today, there is a great deal of common ground between us on this question. Where we
15 differ is on a very small point and that is the way in which the Tribunal should take into
16 account the inherent probability or improbability of what is alleged.
17 Quarmby has continually been very exercised about the OFT's comments about the
18 endemic nature of cover pricing which it characterises (and Mr. Clough made the point
19 yesterday and today) as the OFT relying on guilt by association. Or, he says, it is a
20 presumption against Quarmby being innocent. My answer is that that is not at all what we
21 are doing here. Our position is merely that in circumstances where cover pricing was
22 endemic in the industry (which is acknowledged by Quarmby's own witnesses) Quarmby
23 cannot pray in aid a submission that this was a kind of inherently improbable infringement.
24 There may be cases on different facts where the OFT is alleging something that is
25 inherently improbable; it is novel, it is unusual, and it is inherently improbable that the party
26 would have done what the OFT is saying it did. I am not saying that the OFT has done that;
27 I am just saying that is the kind of situation in which a party might come along and say: no,
28 what you are alleging is simply improbable, and that should be taken into account in
29 looking at the evidence. But that is not this case. Cover pricing was very common, and it is
30 not in the mouth of any party to come along and say: a factor to take into account in
31 weighing the evidence is that this is simply improbable. That is a general argument on
32 probability.
33 The other way at which Quarmby puts this is its point on its own probability of engaging in
34 this, that is the Quarmby alleged policy not to engage in cover pricing. It puts enormous

1 weight on its claims that it had a specific practice or policy not to do this. In fact, it says at
2 para.7.5 of its Notice of Appeal that its directors:
3 "can say with utter conviction that the estimators were not allowed to give cover
4 prices and were specifically told not to".
5 Unfortunately, in our submission, that simply was not borne out by Mr. Nelson's evidence
6 yesterday. What Mr. Nelson actually said was that:
7 "At the time of the three infringements in issue Quarmby had no written policy
8 that its employees should not engage in cover pricing." (see p.22 line 13 of the
9 transcript).
10 He also said at p.18 line 13 that he could not recall any meetings to discuss the policy
11 before the summer of 2004. He also said that he could not remember discussing the cover
12 pricing with Mr. Harrison before the summer of 2004 (p.18 line 22). He also said that after
13 his summer 2004 discussion he did not remember any subsequent discussions with Mr.
14 Harrison about cover pricing (p.21 lines 9 to 19 and p.22 lines 24 to 26). He also said he
15 did not follow up his discussion with Mr. Harrison with any discussions with the other
16 estimators.
17 THE CHAIRMAN: He said it was cultural, like saying that we Welsh like singing!
18 MISS BACON: Yes. That was the sum total of it: a culture of not doing this, which was not in
19 any written document, any email, any formal discussion except a single discussion that he
20 recalls having in the summer of 2004 with Mr. Jones, followed up by a single discussion
21 with Mr. Harrison. Mr. Singla is pointing out that he also accepted that any estimator may
22 have given cover prices without his knowledge (p.19 lines 22 to 23).
23 The other evidence put forward by Mr. Clough to show that there was a policy of cover
24 pricing, and relied on continually by Quarmby, is the collection of letters annexed to Mr.
25 Nelson's first witness statement. You will know what I am going to say about this, because
26 I put it to Mr. Nelson yesterday. What I am going to say is that those letters do not provide
27 any evidence that before 2004 there was any kind of policy at all. Even after that date, all
28 they show is that Quarmby declined some tenders on the basis that it had insufficient
29 resources. So I accept that tenuously those letters could be relied upon to draw some kind
30 of inferences about taking cover prices after 2004. They do not say anything about giving
31 prices at all, and they certainly say nothing at all about any policy before 2004.
32 In our submission, the argument that there was some kind of policy at Quarmby, and
33 specifically the argument that it was so engraved in stone that the directors can say with
34 utter convictions that the estimators were not allowed to do this and were specifically told

not to, is simply not borne out by the evidence. That is a question of fact that the Tribunal will have to decide. Those were the two preliminary remarks I wanted to make.

May I now turn to the evidence in relation to the three infringements. The first is infringement 6. This was the cover given to Strata regarding 2 Water Lane, Leeds, 3rd March 2000. You have seen the pre FTO document; you know that the main document relied on is the Strata tender form with the words "from Quarmby Construction" in the corner. After the FTO the OFT interviewed a number of employees at Strata, including Mr. Throssell and Mr. Ironmonger. Mr. Throssell explained in his interview (your bundle 5 tab 2 p.5) that he recorded a case where cover was taken by him, the company giving cover, in the top corner of his copy of the tender form. That was the point I made yesterday. He then put the copy tender form with his annotation in a file marked "Covers". His evidence there was that that was the only way that he recorded the covers that he had taken.

Mr. Ironmonger said exactly the same thing. I will not take you back to his interview; you have seen it. The relevant pages are 15 to 18 (using the bundle numbering at the bottom) and that is again at bundle 5 tab 2. He gives evidence that his system was the same as Mr. Throssell's. He would record the name of the company on the copy tender form and put it in the file of Covers. Most importantly, his evidence was that exactly that occurred in the case of this tender, and that this indicated that the cover price was supplied by Quarmby to Strata.

That, in our view, provides contemporaneous evidence incriminating Quarmby, followed by interview evidence with two employees of the leniency applicant that explain what inferences are to be drawn from where this document was found in the file marked Covers, and the annotation in the corner, which was exactly the way they always marked up cases where they had taken the cover from someone.

One last point to note about this tender, before I get on to Mr. Clough's arguments about it, was that Quarmby's price was actually the only price below Strata's. So that if Strata had taken a cover, as it said it did, it could only have come from Quarmby. You will see that from the table in the Decision at the start of its findings on infringement 6. You know what they look like. They set out the prices and all the tenderers for a particular project.

Can I get on to Mr. Clough's arguments now? His first argument was that the evidence is insufficient because this was simply a process of reconstruction. Again, our answer is: confess and avoid. We accept that the witnesses often had no direct and unprompted recollection of specific projects. It was a long time ago, all of these tenders. But they could give evidence of what their system was. In other words: this is the way I recorded a cover

1 price – I put the name of the party giving the cover in the top right hand corner, I put the
2 tender document in a special file, and I notice that you found that tender in that file and lo
3 and behold it has got Quarmby Construction in the corner, and the only interpretation of
4 that, based on my consistent system, is that we took a cover from Quarmby.
5 We submit that is absolutely sufficient: contemporaneous document witnessing, in fact in
6 this case two witness statements, identifying what that meant. So it is neither here nor there
7 that they were reconstructing rather than giving evidence on the basis of direct recollection
8 of the tender which actually would have been very improbable for the number of tenders
9 that they were doing, and the passage of time.
10 Mr. Clough's second argument is that there could be other reasonable explanations for this.
11 What reasonable explanations? We have the evidence of the leniency applicants. There is
12 no reasonable alternative explanation that could explain finding this tender record in a file
13 marked "Covers" with Quarmby's name written in the top right hand corner. Mr. Clough
14 has not put forward any plausible alternative explanation.
15 A subsidiary argument that has been taken at various points by Quarmby relating to this
16 tender was that it was a design and build tender, and that was in the evidence of some of its
17 witnesses. But I pressed Mr. Nelson about this yesterday, as did the Chairman, and Mr.
18 Nelson was driven to accept that it would have been possible for Strata to put in this tender
19 form without including detailed further proposals, and that is p.26 of the transcript, line 10.
20 As for Mr. Harrison, he accepted that if someone at Quarmby had given a cover price
21 relating to this tender they would have been able to provide the other details included on the
22 tender form. The reference for that is p.45 of the transcript, line 19, and in his words "…
23 that could be possible because there was very little on the form".
24 The remaining question that might be asked is: "Who gave the cover price?" It might be
25 asked but we do not need to answer it because we do not need to establish who gave a cover
26 price and it is no part of our case to do so.
27 Just in case the Tribunal wonders about that point there are at least two possibilities. The
28 first possibility is Mr. Bell, who was the estimator working under Mr. Harrison at the time.
29 Mr. Bell has not come to the court to give any evidence, he has not put in a witness
30 statement, so there is no basis on which he could be ruled out, he quite plausibly could have
31 given a cover price and actually, right at the end of my questioning of Mr. Harrison
32 yesterday, he more or less accepted that at least in relation to that it was possible that Mr.
33 Bell had given a cover price.

1 The other possibility is Mr. Harrison himself. He said in evidence yesterday that he had
2 never given cover prices. I am afraid to say that the OFT simply does not believe that. The
3 very important point is that his evidence yesterday on this point was the first time that he
4 had ever said he did not give cover prices, and it is very noticeable that if you look at the
5 statements of Mr. Nelson, Mr. Jones and Mr. Buckler, they all contain, in almost identical
6 words, the same categoric denial that they have ever given cover prices. But if you look at
7 Mr. Harrison's witness statement, and I took him to it yesterday, Mr. Harrison does not
8 make any statement in his witness statement that he did not engage in cover pricing, and
9 that is very surprising because it is there in all the others, and it is not there in his.
10 What he does say at para. 13 of his evidence is "If I had ever given a cover price it would
11 not have influenced me." We say the only inference to be drawn from that is that he is not
12 ruling out that he has given cover prices, in fact, at the time he signed the witness statement
13 he knew that he had given cover prices, that is why he made the statement. If he had never
14 given cover prices he would have said so in his witness statement, everyone else did and it
15 is not plausible that at the time he knew that he had never ever given a cover price but he
16 just did not think to mention that in his witness statement.
17 I put that to him yesterday and he denied that was the inference to be drawn from what he
18 said, but we submit that that is the plain and obvious inference. So Mr. Harrison is another
19 suspect for who gave the cover price in that case but, as I said, you do not actually need to
20 establish that – we do not need to establish that – we simply need to establish that a cover
21 price was given by somebody at Quarmby, it does not matter who.
22 Unless the Tribunal has further questions, that is all I wanted to say about the first of the
23 three infringements.
24 The next one is infringement 214 and that was the cover given to Admiral in relation to the
25 Humanities Research Institute, Sheffield University, 23rd December 2004. You will recall
26 the pre-FTO documents and, in particular, the famous BT Phone Disc memo: "Ring 4.30
27 Wednesday". You will recall from the calendar that I handed up that Wednesday was, in
28 fact, the day before the tender was due to be submitted. That was the evidence, again with
29 another handwritten memo that had a list of various companies, including Quarmby – that
30 was the pre-FTO evidence that the OFT had.
31 The post-FTO evidence included interviews with a number of the employees of Admiral –
32 the leniency applicant – including Mr. Clarkson, who was Admiral's estimating director,
33 and he was the author of both of the handwritten memos. I will not take you to it ----
34 THE CHAIRMAN: We looked at it earlier this morning.

1 MISS BACON: You know where it is. Finally, I would like to take you to one document which I
2 do not think you have seen, which is the client information, which confirms the net prices.
3 THE CHAIRMAN: I am aware of this document, I was mindful of it this morning after my
4 homework last night.
5 MISS BACON: I am very grateful.
6 THE CHAIRMAN: But you will have to remind me where it is.
7 MISS BACON: It is at tab 10, and in the bottom right hand corner it is p.83.
8 THE CHAIRMAN: Yes, in fact I had highlighted that document, it is vol. 5.
9 MISS BACON: Tab 10, p.83, it is the last document in tab 10. Can I ask the Tribunal to have
10 this open and also to have their finger in the Phone Disc memo, which is the second
11 document in tab 9, and if you compare the two you will see that the figure submitted by
12 Admiral Construction £1,527,272 is the figure that has been worked out for BT Phone Disc
13 memo, and it is exactly that figure. The first point that I make on that is that the
14 correspondence of the two figures, the fact that this figure was worked out in the course of
15 this document is entirely consistent with a pre-tender discussion, it is completely
16 inconsistent with this document recording a post tender discussion. There would have been
17 no reason to work it out. Why would he have written down how he worked out his own
18 price as a record of a conversation with someone after the tender. What we would have
19 done is possibly write down the price that the other person had given him.
20 THE CHAIRMAN: Just to be clear what this document is. This is the university's document
21 recording the size of the amounts tendered by each of the company tendered on 12th May?
22 MISS BACON: Yes ----
23 THE CHAIRMAN: I do not think it is 12th May, it is 23rd December. 12.05 is probably the time,
24 they probably had to tender by noon, at a guess.
25 MISS BACON: That is right.
26 THE CHAIRMAN: Thank you.
27 MISS BACON: I am just being told that what we did was to send the client's pro-forma
28 schedules and just asked them to complete them, so they completed it in this way.
29 THE CHAIRMAN: So this is derived from the client's computation?
30 MISS BACON: No, the client completed it but they completed it on a pro-forma.
31 THE CHAIRMAN: They derived it from other documents, filled in the pro-forma and sent it to
32 the OFT.
33 MISS BACON: Absolutely. So the point I just made is that if you see that the amounts are the
34 same this memo could not have recorded a post-tender discussion.

1 THE CHAIRMAN: Yes, we understand that.

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

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

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

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

32 THE CHAIRMAN: Flag 12.

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

1 to make one more point. I am afraid I have to ask you to look at this document because
2 there is some confusion as to why this document contains so much of the same thing, and as
3 the Chairman pointed out this morning this is probably because it was created at different
4 times. It was printed off at different stages of work in progress, and our submission is that is
5 exactly what occurred, and you can actually see the progression between the different
6 pages, how the situation developed in relation to particular tenders, and how it was amended
7 and then that amendment was carried through to subsequent documents. So can I ask you to
8 turn up the unredacted version that I gave you, which has the manuscript numbers in the
9 bottom right hand corner. I will just ask you to look at four pages of that to make good this
10 point. The first page is p.12 in the bottom, and you will see that there are various red boxes
11 drawn around. Underneath the first red box there is "*** 0567 junction 37 M1 Dodsworth".
12 Then if you go down to line 16 "*** 0580 Eastbrook Hall, Bradford." If you could just
13 highlight those two and then turnover the page half way down we have the same "junction
14 37 M1 Dodsworth" it is starred still. "Eastbrook Court, Bradford" it is still starred. Over
15 the page in a different place again those are still starred. There are a number of subsequent
16 pages I will not take you to which have the same stars.
17 Just pausing there, what the stars mean at this stage, in our submission the most plausible
18 explanation is that no estimator had been allocated, so it had neither allocation estimator nor
19 had decided to take a cover price, because where they had allocated an estimator, the
20 estimator's initials appeared in the left hand side, so it is "ART", "JWL", or "GAJ". When
21 they decided to take a cover that was also allocated in the left hand side "COV" and you
22 will see that from p.14.
23 Can I ask you to turn to the last page, which is the page that everyone is arguing about, and
24 that is p.27. At that point you can see that overwritten, over the stars in relation to both of
25 these projects "Junction 37", which appears half way down, and "Eastbrook Hall" someone
26 has added in manuscript the letters "COV". So on this document, at the time this was
27 created the person that decided in relation to those two projects a cover price was going to
28 be taken. The last piece of the jigsaw that is then the blown up document, if you then turn
29 back in tab 12, to the blown up A1595, which should be the third piece of paper in the
30 bundle and it does not have a number in the corner. Low and behold, four lines down,
31 "Junction 37, M1 Dodsworth COV" in typescript, and "Eastbrook Hall, Bradford COV" in
32 typescript. So what happened is – and this is also explained in the leniency evidence – the
33 bar chart was the old computer programme, various manual amendments were made to it.
34 When the leniency applicant, York House, went over to a new computer programme of

1 which this document is a print out, it entered in a lot of the information from the old
2 programme and its manuscript amendments into the new programme and then carried on
3 from there, and that is precisely borne out by this sequence. You see the stars meaning that
4 a project has been unallocated; the manuscript amendment showing that a cover price was
5 taken; and, finally, you have this document which my learned friend accepts is
6 contemporaneous - and Quarmby accepts expressly that this is contemporaneous - recording
7 that a cover price has been taken. The only place they could have got that is from the
8 manual annotations. So, if there were any doubt as to whether this was a contemporaneous
9 document, I would say that explains how those annotations came into being and where they
10 then followed through to.
11 Mr. Clough's case on this is that some of the annotations may have been contemporaneous,
12 but the leniency applicant, when it submitted its leniency application, went back and
13 decided that it was just going to add some names where it had not done so before. So, it was
14 going to add Quarmby, or it was going to add the letters 'Cover'. In the light of what I have
15 just shown you, showing how the document progressed, and the fact that there were lots of
16 manual annotations on this document - there were some manual annotations showing
17 extension of dates; there were some specifying the estimator-allocated; there were some
18 giving a manuscript date -- It is simply not plausible that a couple of years down the line,
19 yes, someone went back and thought "Oh! I do not want to be helpful to the OFT. I am just
20 going to write 'Quarmby' there so that it looks like Quarmby gave me the cover price. I do
21 not remember it, but I am just going to put them down. Then I am going to put
22 'Quarmby??'". It is just not plausible that someone went back and did that for the purpose
23 of making their leniency application.
24 Mr. Singla is pointing out to me that at para. IV.746 of the Decision the OFT extracts a
25 passage of the interview with Mr. Richardson who says that the programme is updated, on
26 average, on a weekly basis which could explain that if he printed it out every time he
27 updated it, it could explain why we have got loads of the same documents -- or loads of
28 very similar documents.
29 THE CHAIRMAN: Really para. IV.705 explains what he claimed to be the process.
30 MISS BACON: Yes. In any event, it is set out in detail in his leniency transcript.
31 I would ask the Tribunal please to perhaps read the full transcript of that interview at Tab 15
32 of the liability defence bundle because a number of the extracts on which I would have liked
33 to take you had I more time are in that, and not extracted in the core bundle. If I can just
34 give you some specific pages - pp.6, 10, 12 to 14, 23, and 25 to 27 --

1 The evidence amounts to two contemporaneous documents. They admit that there is one.
2 We say that there are two. The first establishes that York House took a cover. The second
3 establishes that it took a cover and it took it from Quarmby. We have detailed evidence
4 from the estimating director at York House confirming our interpretation - namely, that
5 those documents were to be interpreted as indicating that a cover price had been taken from
6 Quarmby.
7 Apart from the contemporaneity point, Quarmby have put forward a number of arguments
8 to suggest that a cover either was not taken at all or it was not taken from them. One of
9 those arguments is that York House appeared to have cost the project legitimately because it
10 attended site meetings. In fact, when I put it to him, Mr. Nelson admitted that it was just a
11 single site meeting and he accepted that York House might have pulled the plug at the end
12 of the process.
13 There was also some debate about the "annotation 1/8 Quarmby" and whether or not York
14 House could have spoken to Quarmby on that date. Our answer is that we are not saying
15 the "1/8" means that York House spoke to Quarmby on that date. The most probable
16 explanation, which I put to Mr. Nelson, was that this represented simply the first extension
17 of deadline. It was a week after the original deadline. We note actually the deadline was a
18 week later. So, it was extended twice and each time by one week.
19 As for Mr. Harrison's evidence, I make the same point as before: in the light of all the
20 evidence, his oral statements denying that he could have given a cover price on this project
21 are not credible.
22 There is one further witness - two witness statements - which deals with this project, and
23 that is Mr. France. You may wonder why I did not call Mr. France. That is because we say
24 that his evidence is completely irrelevant on this question of whether there was an
25 infringement. All he says is that he does not believe that York House took a cover. Our
26 response was to say, "Well, you did not believe it, but we have got lots of evidence showing
27 that they did, and York House said they did".
28 On infringement 233 - whether the client was deceived - this is again a point that they make
29 based upon the evidence of Mr. France. They say, "Well, even if Quarmby did provide a
30 cover price, the client was not deceived". They rely on both the statements of Mr. France,
31 who was the quantity surveyor appointed by the client. The short answer is, as we have set
32 out in our pleadings, that actually Mr. France's evidence shows exactly the opposite and
33 positively supports our case because he says, "I do not believe that York House took a

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

"I would not have thought about cover pricing in this case".

In his second witness statement at para. 10,

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Different schools.

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

1 writing on one of these so-called contemporaneous documents, and, indeed, it comes out, if
2 we go back to p.52 ----
3 THE CHAIRMAN: The witness, Mr. Pearce, is saying that the figures "£690,000 less £2,000"
4 are his writing.
5 MR. CLOUGH: Yes. I was going to come on to that if I may. He just says, earlier than that, in
6 the first big box, fourth down,
7 "Right yes again I'm guessing that the fill in general stuff is Chris ... 'cos he did
8 most of them anyway by the looks of it. It looks like I have wrote figures at the
9 side of Quarmby and GMI. It's not mine. Quarmby, GMI and Holroyd
10 Manchester is not my writing but the figures at the side of Quarmby and the
11 figures at the side of GMI looks like my writing, but I don't know what I mean by
12 less 2,000 less 5,000 but I put the cover at each side of them. So I'm not sure as I
13 say we tended to just put them in just to jog our memory but it was more or less
14 short-term if we needed it that was all".
15 But there appear to be three people who have written on this document at p.46. I suppose if
16 one looks at it, it is not totally a surmise to say that the words "Quarmby" and "GMI" look
17 as though they are different to the numbers. But, I would not like to put that too strongly.
18 My point is that here we have at least two, and probably three, different people writing on a
19 contemporaneous document at different times.
20 The second point on this p.52 is where you were taking us to, sir, yourself. There is this
21 paragraph which says,
22 "It looks like it but I mean we have got 690,000 less 2,000 cover I mean it might
23 be that we found out after the event what ... what their tender figures were because
24 if we found out we would write them at the side as well so just seeing figures
25 doesn't necessarily mean we have given a cover ----"
26 I say that to contradict Miss Bacon's point that on the contemporaneous document you will
27 not find things that are written which are post-tender as opposed to pre. or at the time of the
28 tender. That is evidence relied upon by the OFT.
29 My second main point was about the QSP and the Decision. I have tried to see whether
30 there are any other references to it in the Decision. Clearly we do not have any
31 documentation in relation to the QSP infringements, let alone their suspect tenders. But, the
32 only point I can make, which is a minor one, is that at least throughout the Decision,
33 consistently, the OFT in every other paragraph has set out the full name - Quarmby
34 Construction (Special Projects) Ltd. I do not think one can really say more.

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

THE CHAIRMAN: Yes. We saw this letter yesterday.

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

THE CHAIRMAN: This is in 2009.

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

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

I think perhaps one last thing about Mr. Nelson. Mr. Nelson made it clear that he came from Wimpey, where he had been for 20 years, with the same cultural policy of not getting involved with cover pricing and therefore he understood and accepted on arrival at Quarmby Construction Company that that was the culture and the practice, and he did not therefore need to discuss it with anybody. I think that is rather important that from day one that he was there that he was used to that policy, and indeed, as Miss Bacon emphasises we do constantly repeat that that was the company policy of Quarmby Construction Company.

Sir, unless I can assist you any further, or those behind me want me to say anything, I think that is all I want to say.

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

MR. CLOUGH: Thank you very much, sir.

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

1 negotiated contracts; the next point is the assertion that intra-group turnover as between
2 Quarmby and SJS should have been excluded; next the failure to adjust the fine
3 appropriately for other factors; and finally, an asserted failure to adjust the fine
4 appropriately for aggravating and mitigating factors. Those are broad headlines, and I
5 thought it might be helpful if I indicated on behalf of the Tribunal that we are aware that
6 those are the main issues and that we have read the papers.
7 Counsel can take as long as they like because we have got plenty of time, albeit not
8 necessarily this afternoon, but were counsel to take this largely on the basis that it is
9 additional points which are going to help us, rather than points covered in what I have
10 summarised and what has led to those summaries, then it might assist in the expedition of
11 the proceedings.
12 MISS BACON: Could I ask what provisional timetable the Tribunal had in mind in terms of
13 allocation of time that would enable us to finish by 3.40. I am presuming in that case the
14 50/10, 50/20 current allocation is not going to work.
15 THE CHAIRMAN: It rarely is the 20. I would have thought that – it is a matter for counsel, you
16 can have as long as you like so long as it is understood that we might spill over into another
17 day.
18 MISS BACON: I think it is in everyone's interests, both Mr. Clough's and mine, that we finish
19 today, so it would be helpful ----
20 THE CHAIRMAN: If we come back at about 1.45 – I apologise to the distant staff, who can hear
21 what I am saying, but they are working in shifts anyway, quite short shifts – if we come
22 back at about 1.45 then I would have thought that if each side takes about half an hour in
23 opening that will leave some slack, given that we have actually read everything.
24 MISS BACON: Yes, that would give about half an hour slack at the end. I am grateful.
25 THE CHAIRMAN: Thank you very much.
26 (Adjourned for a short time)
27 THE CHAIRMAN: Yes, Mr. Clough.
28 MR. CLOUGH: Sir, I have some good news for you. My learned friend and colleague Mr. Adam
29 Aldred is going to deal with our submissions on penalties, so that will give you a different
30 and more musical voice to listen to this afternoon.
31 THE CHAIRMAN: It is always a pleasure to hear from you, Mr. Clough. Mr. Aldred.
32 MR. ALDRED: If it pleases the Tribunal, on penalty the heart of the appellant's case is that the
33 OFT erred in fact and law and exceeded its margin of appreciation when applying its 2004
34 penalty guidance in that the penalty it imposed on the appellants was inappropriate having

1 regard to deterrence, equal treatment, proportionality, and the justice of the overall penalty.
2 You will have heard that often, and read it often.
3 The OFT's one-size-fits-all approach has meant that the guidance just simply has not been
4 followed as it should have been. The rigidity of the fining mechanism has resulted in fines
5 which, in the case of the appellants, have been disproportionate and are unjust. What I am
6 about to say, of course, only has bearing if the Tribunal finds against the appellants in
7 respect of the preliminary issue and finds that there has been one, two or three
8 infringements.
9 I have prepared a mini bundle which I would like to hand up so that we do not have to chop
10 and change between different bundles. (Handed)
11 THE CHAIRMAN: Thank you.
12 MR. ALDRED: Since our written submissions there have been two substantive developments.
13 First is, of course, that the *Tobacco* decision was published yesterday. The relevant extracts
14 appear in the mini bundle at pp.2 to 10. Those are the extracts that relate to penalty. The
15 extracts which relate to liability (which Mr. Clough referred to) we will have to provide to
16 the Tribunal subsequently.
17 The other substantive development is you have started hearing many cases like this. I have
18 read some of the transcripts of those and where it is appropriate I hope to be able to add
19 some comments, but we will have regard to the arguments that you have already heard, and
20 try to foreshorten those which I will give you.
21 With regard to *Tobacco* it is sufficient to say that in its decision under appeal that OFT has
22 imposed fines in respect of each infringement, it rejected submissions that it should not
23 impose separate penalties. This, of course, is in marked contrast with the recent *Tobacco*
24 decision where each retailer was found to have entered into two separate infringing
25 agreement and the manufacturers up to ten infringing agreements. Yet in that case, the OFT
26 imposed only one penalty on the parties. The OFT's reason for imposing only one penalty
27 and not two or ten appears at para.8.13 of that Decision on p.3 of your bundle:
28 "In order to reflect: (i) the underlying commercial rationale and common aim of
29 the Infringing Agreements, namely to enable the Manufacturers to specify the
30 relativities between the retail prices of competing linked brands; and (ii) the
31 restrictive nature of the Infringing Agreements, the OFT considers it appropriate
32 in this case to impose a single penalty on each Party for all of the Infringing
33 Agreements to which it was party."

1 THE CHAIRMAN: Presumably all the infringing agreements were contemporaneous in this
2 case?
3 MR. ALDRED: The infringing agreements in that case ranged over a period of two or three
4 years, from 2000 to about 2003.
5 There is, the appellants submit, an underlying commercial rationale and common aim to
6 single cover pricing which, we think, warrants and justifies a similar approach. There is no
7 compelling policy or other reason why the overall proportionality or justice of the
8 appellants' case requires that they be penalised separately in respect of each infringement.
9 In our skeleton, we make submissions with regard to a number of points which have now
10 been well rehearsed before you and we shall not add to your burden by adding more
11 comments on those. I am thinking, in particular, with regard to: the profit margins within
12 the industry being low; the OFT's fining policy being far too severe when compared with
13 penalties imposed on corporate crime for example, corporate manslaughter; project
14 selection; and negotiated turnover. All those points have been well rehearsed before you.
15 The remainder of my comments can be followed in the skeleton and I am just going to be
16 drawing comments from that. Our skeleton appears at QAB 3 paras.25 to 71. Of course,
17 we rely on our written submissions.
18 THE CHAIRMAN: Sorry, give the reference again, please, Mr. Aldred.
19 MR. ALDRED: Your bundle 4, the skeleton should appear in the front of that, paras.25 to 71. I
20 am now at para.28 which deals with step one, the starting point. As the Tribunal
21 appreciates, the appellants submit that the OFT has failed to calculate properly the starting
22 point for the following reasons, and we set out a number of reasons there, and the first of
23 those is the decision uses the incorrect year to determine the relevant turnover.
24 As you will appreciate the OFT has calculated its fine on the basis of turnover in the
25 relevant market in the year preceding the decision and we say it should have done so in the
26 year preceding infringement.
27 There are lengthy submissions set out there, and we would ask you to read those at your
28 leisure, but I would like to highlight five points if I may. The first is that the OFT's
29 approach before the 2004 order was consistent with the underlying intention of Step 1,
30 which, of course, was to determine the size of the market affected by the infringement, and
31 to ensure that, as a starting point, there is a direct correlation between the harm, the affected
32 market, and the fine.
33 The second point I would like to highlight is the turnover at Step 1 is used as part of the
34 assessment of the seriousness of the infringement, and the culpability of the undertaking.

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

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

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

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

Mr. Chairman, I think you responded by saying: "I am not sure how binding this is in law" and, of course, there is a discussion around that, but I make two points: our complaint with the application of the year of turnover in the year preceding the decision and the OFT's later attempts to justify is that it has become an *ex post facto* justification. When, in this investigation, it was pointed out to the OFT that it had changed its approach to turnover at Step 1 for apparently no good reasons the OFT's response was to ask all 112 defendants of the SO to provide turnover figures on both bases, the year before the end of the infringement and the year prior to the expected date of the decision. That hardly demonstrates a pre-existing, pre-determined underlying policy reason justifying the change.

If I may return to *Degussa*, and Mr. Beard bringing in the concept of deterrence at Step 1. Deterrence – as I am sure you are now quite aware (it would have been submitted often) – is for Step 3, it has no application at Step 1 which is concerned with the seriousness of the infringement and the relevant turnover of the undertaking concerned.

I would also like to say with regard to the year of relevant turnover that it is notable that the relevant provisions of the EC Guidelines, which specifically acknowledge that the combination of the value of sales to which the infringement relates (that is the relevant turnover, of course) and the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement and the relative weight of each undertaking in the infringement – that is at para. 6 of the EC Guidelines.

Likewise, the General Court considered that the reference to the turnover in the last full year of the infringement allowed the Commission to assess the size and economic power of each undertaking in the relevant sector. That certainly supports the proposition that, for good policy reasons, you actually start with the seriousness of the infringement and the turnover in the relevant market. Finally, we would also say in this particular case a good reason why we should be having regard to the turnover at that time is simply because of the effluxion of

1 time. It is 10 years since the first infringement. I could put the figures before you but had
2 the OFT relied on those figures of 10 years ago the fine would be significantly smaller than
3 that which was subsequently imposed and, similarly, we are now dealing with very different
4 businesses because of that effluxion of time. So the proper approach would have been to
5 look as a starting point at the business as it was and the infringing behaviour at that time.
6 I would now like to deal, and it is in the skeleton, at para. 32 et seq, with the starting point
7 for fines being 5 per cent in Step 1, which we say is too high.
8 We, of course, rely on our written submissions, and we only have a couple of additional
9 comments. I would have regard to Mr. Beard's submissions in Hobson & Porter criticising
10 Mr. Robertson's clients who accepted that 5 per cent was an appropriate starting point but
11 nonetheless were challenging the basis of the application of that figure.
12 We say that you must look at Step 1 against the backdrop of what it is intended to do,
13 which is namely to assess the seriousness of the infringement, and the relevant turnover.
14 Step 1 concerns seriousness. Mr. Beard quoted from *Apex* in his submission and it was
15 pp.19 and 20, line 1 to 27 of the transcript. I know one of the members of the Tribunal was
16 in *Apex* so you have a much clearer understanding than I do of what happened, but when I
17 read it I am certainly left with the clear and distinct impression that what was happening
18 was something a little bit more sinister than the simple cover pricing that you have been
19 hearing about over the last couple of weeks. If 5 per cent was right in that case then perhaps
20 less than 5 per cent would be appropriate now, all else being equal. But that is not the only
21 reason we challenge the blanket application of the 5 per cent starting point.
22 At Step 1 the OFT is required to calculate penalties on a party by party, infringement by
23 infringement basis. Paragraph 2.9 of the penalty guidance says:
24 "Where an infringement involves several undertakings, an assessment of the
25 appropriate starting point will be carried out for each of the undertakings
26 concerned, in order to take account of the real impact of the infringing activity of
27 each undertaking on competition."
28 The OFT has not done that. The appellants submit that for each defendant, and each of the
29 defendants' agreement infringements the guidance requires the OFT, when making its
30 assessment of the seriousness the OFT will consider a number of factors, including the
31 market shares of the undertakings involved, and the effect on competitors and third parties.
32 I know there has been a lot of discussion in other Tribunals and before yourselves with
33 regard to that on other appeals, but we say, with regard to our appeal, the OFT has not
34 considered the seriousness on a case by case basis, but generically for all parties, and of

1 course with regard to the appellants in this case the OFT has not considered its tiny market
2 share, it has not taken account of the lack of anti-competitive effect. We know, for
3 example, with regard to Eastbrook Hall Mr. France says: "If the OFT is right that York
4 House took a cover price from Quarmby then that made no difference to my project.".
5 (QAB 2, tab 34, para. 31).
6 THE CHAIRMAN: That last observation about lack of anti-competitive effect is general as well
7 as particular - so we have been told in other cases.
8 MR. ALDRED: Yes, and I also come on to some specific evidence that you have available to
9 you. Mr France's evidence specifically affects alleged infringement 233, but, of course,
10 with regard to all the infringements, the appellants also rely on the expert evidence of Mr.
11 Bamford. That expert evidence is uncontested. It might help the Tribunal to know that Mr.
12 Bamford was at the OFT for thirteen years, and of those he was the chief economist for five
13 years. He was Head of Merger Economics for three years. He was also the economic
14 advisor to what was then the MMC and is now the Competition Commission. He is an
15 economist. His first report appears in your Bundle QAB1, Tab 4, p.93, para. 31. It might be
16 just helpful to read a couple of those paragraphs. I could read them to you if you do not
17 want to turn them up now. (Pause whilst read):
18 "In my opinion simple cover pricing should not be regarded as the same as the
19 hard core cartel offence of bid rigging. It cannot be presumed on the basis of the
20 form of the conduct - simple cover pricing - that it has the object of leading to a
21 harmful effect on competition or detriment to consumers, or that it is likely to
22 have such an effect. A competitive counterfactual needs to be established as a
23 basis for a competition assessment of cover pricing and evidence is required in
24 each case to show that it is harmful to competition and detrimental to the
25 consumer".
26 The next paragraph:
27 "QCC is alleged to have given cover prices in three different tenders. If the
28 allegation is correct, there is no evidence presented in the SO [and this was
29 prepared in response to the SO] that this conduct was harmful to competition or
30 detrimental to the consumer. QCC, as the alleged giver of a cover, should be
31 better placed to win the tender. The fact that it failed to win any of the three
32 tenders suggest that QCC did not benefit from the conduct and in my view
33 competition for the contracts was not reduced".

1 As I say, that evidence of Mr. Bamford is put before this Tribunal. Mr. Bamford was
2 tendered for cross-examination and the OFT declined to take up the opportunity.
3 I wish now, if it pleases the Tribunal, to deal with the lack of segmentation in the private
4 housing market, which penalises the appellants. That is at para. 35. We note that for
5 commercial projects the OFT has sub-divided the relevant markets narrowly with the
6 consequence that firms fined for cover pricing in respect of commercial projects have
7 tended to receive smaller fines as they have less turnover in each relevant market.
8 However, a relevant contractor, such as QCC, with alleged infringements in private
9 housing, will have received higher fines because the market has, we say, not been similarly
10 sub-divided. No allowance has been made for this and the OFT has erred, we say, in failing
11 to split the markets more narrowly - for example, into new-build, repair, maintenance,
12 conversions or in any other way.
13 With regard to relevant turnover, Mr. Beard has said - and, I apologise, I do not seem to
14 have the reference with me now, but you might recall it - that, "the relevant market
15 definition is not something that is arbitrary. It is not a random selection of turnover". He
16 also said that in a market where the conditions of competition are sufficiently homogenous,
17 in those circumstances we can look at the impact sensibly from an economic point of view."
18 However, the appellants submit that the OFT has not defined the relevant market as an
19 economist would have done. Again, the appellants rely on the expert report of Mr.
20 Bamford. This time it is the second expert report of Mr. Bamford which appears in Volume
21 2, at Tab 25. Mr. Bamford says that the OFT has not undertaken a proper economic
22 assessment to define the relevant market. Again, his evidence is unchallenged. The gist of
23 his report is that the OFT began with the BERR classification and ended with it. It made no
24 attempt to define the market focusing on individual cases. It did not exercise the caution
25 which the OFT tells us that it did. It just did not do what was expected of it. Having not
26 done so, it is incumbent on the OFT, we say, to ensure the fines were reasonable. But, it did
27 not do that either. We would invite the Tribunal to read Mr. Bamford's second expert
28 report at your leisure, and at paras. 6 to 13 and 15 in particular. In summary, Mr. Bamford
29 says,
30 "In terms of the matters that I was asked to consider in this report my opinions as
31 an expert economist are summarised as follows:
32 * The market definition exercise set out in the Decision fails to follow the
33 established process even on the basis of a less formal approach.

1 * It begins with an aggregated statistical classification designed for another
2 purpose by BERR [Business, Enterprise & Regulatory Reform] and GOR
3 [Government Office Regions] rather than from the Focal Product relevant to each
4 infringement.
5 * The result is a blunt framework that is uneven and arbitrary.
6 * If the framework is to be used the assessment of fines for individual
7 infringements particular care must be taken to ensure that results are fair and
8 proportionate. The OFT has not exercised such care".
9 I am now turning swiftly to p.33. At para. 48 we do not take issue with duration. With
10 regard to Step 3 at para. 49 - Adjustment for Other Factors - the appellants submit (and we
11 have quite a few written submissions here, but I will not be taking you to all of them) that
12 the OFT has failed to impose a fair and proportionate fine on them because it has failed to
13 properly apply its Guidance at Step 3 in some key respects. We say the maximum fine
14 threshold was set too high. Of course, the OFT has applied a maximum fine threshold in
15 very limited scenarios purportedly to ensure that the fines on parties were not excessive
16 compared with the fines of other parties who are involved in similar infringements. That
17 appears in the Decision at VI.273. However, the appellants submit that the figure is
18 arbitrary and set too high. The method of application is too limited, and, as a result, the
19 appellants' fines, as a proportion of total turnover, is 386 per cent higher than the lowest
20 fine. We just say that in the overall context that is disproportionate. You will see at 52(b)
21 that the decision is in stark contrast to the approach adopted by the OFT in the Construction
22 Recruitment Forum decision which was decided within days.
23 It might be an appropriate time to take you to the mini bundle. These are non-confidential
24 copies of the decision. The CRF decision appears on p.11 and I would like to invite you to
25 have regard to the paragraphs that, in fact, I have highlighted, I hope that is all right.
26 THE CHAIRMAN: I am sorry, which paragraph?
27 MR. ALDRED: We are looking on p.14 at 5.254, 5.257, 5.258 and 5.259. I would perhaps
28 particularly draw your attention to the discounts. What was happening here was essentially
29 the OFT acknowledged that because relevant turnover in the markets affected very
30 markedly between the parties who were involved in the same infringement, that led to very
31 different levels of fine as a result of step 1 and step 2. Stepping back at step 3, they were
32 minded to impose a minimum deterrence threshold on those who seemed to be, in the
33 OFT's view, fined lightly. They brought them up to a minimum deterrence threshold. Once
34 they had decided, what is the appropriate level for deterrence in that case, then they looked

1 at all those people who were above that and then brought them down. So the MDT became
2 a focal point, if you like.
3 I would particularly draw your attention to the levels of discount. Henry Recruitment
4 received a reduction of 75 to 85 per cent in para.5.257. Fusion People received a reduction
5 of 55 to 65 per cent; and on the next page, a reduction of 35 to 45 per cent. These are not
6 insubstantial reductions. Of course, it places that case and the rationale for the approach
7 there at odds with the rationale and the approach that had been adopted in the construction
8 decision.
9 I might also on this point take you, if I may, to the mini bundle, p.8. This is the *Tobacco*
10 decision, paras.8.89 and 8.90. Again, the fines were reduced.
11 There is also, again with regard to focal points, at p.7 of the bundle the figures that
12 otherwise would let you know what the different turnovers were and why it was that they
13 were coming to the approach that they have, but of course those are marked "Confidential".
14 We say there is simply no good reason why (given other comparable Chapter I cases which
15 are being decided at pretty much the same time) the OFT has not, in this case, sought to
16 again moderate between the lowest and the highest fines. They should have done so, we
17 submit, and we would invite the Tribunal to rectify that.
18 With regard to para.53 of my skeleton, the fine is disproportionate given current economic
19 conditions. Others have spoken generally about what is happening in the market. It is not
20 just the construction industry. But we would say that as a result, of the conditions, and you
21 heard Mr. Nelson yesterday, QCC's profit, turnover and net assets have fallen substantially.
22 If the fine had been recalculated on the basis of figures even for the 12 months to September
23 2009, which was only shortly after the decision was made, the fine would have been just 35
24 per cent of the fine that was actually imposed.
25 If I may, I will pause just to help you with regard to the current financial position of the
26 parent company, which is set out in the statement of Mr. John Batty, which is unchallenged.
27 It is in the bundles but I have reproduced it ----
28 THE CHAIRMAN: I have looked at it.
29 MR. ALDRED: Thank you, sir. With regard to fines being disproportionate given the current
30 economic conditions, I would just like to emphasise three points. The Tribunal is entitled to
31 reduce the fine to take account of the financial situation prevailing at the date of its
32 judgment. That is contested, but we have set out in footnote 56 the basis for that contention.
33 Secondly, we submit that the OFT was wrong not to reduce penalties across the board due
34 to the economic circumstances that prevailed. Finally, we submit that the Tribunal should

1 take into account the profit of the appellants when determining the appropriate level of
2 penalty if that becomes necessary.
3 In *Umbro,* the Tribunal considers Umbro's penalty and the anomalies that are likely to be
4 produced by any turnover based calculation. Umbro's high penalty was, the Tribunal
5 observed, exacerbated by the fact that the penalty was in excess of its operating profits for
6 the years in question. Then perhaps you can read the balance of that paragraph, at p.36 at
7 (e).
8 You also heard the evidence of Mr. Nelson yesterday.
9 That brings me on to chilling effect. The investigation and the decision have undoubtedly
10 had a chilling effect on the appellants' business, and it has affected their ability to win work.
11 We say the decision should have taken this foreseeable effect into greater account when
12 determining the amount of fines and applying step 3. They should have reduced the fine
13 markedly at that time to take that into consideration. Simply writing letters to people and
14 suggesting to them that they should be dealt with in a way which acknowledges the fact that
15 this was endemic in the market was not enough. It has actually had a real effect on the
16 companies whose names appear; at first there was over a thousand of them, and now it has
17 been whittled down to 103.
18 May I just simply, because I have finished, run through this bundle, if I may, and let you
19 know what else is in it. At p.16 it says at the top "Project selection", but please ignore that.
20 There is just simply a large "X" for QCC, and this is just a tabulation of all the fines that
21 have been imposed and you will see that the appellants sit very significantly at the top of the
22 scale.
23 At p.18 – and this is one of the points that, Mr. Chairman, you indicated earlier, which was
24 the number of suspect tenders – there is a chart, and what we have done is, at the bottom,
25 calculated the different fines, and then plotted above, it has got 5, 10, 15, 20, 25, and it has
26 got a per cent sign. Please ignore the per cent sign, that is just a numerical number. If you
27 had five suspect tenders, you have dots on that line. If you had ten you had dots on the next
28 line, and you will see many had 20 or more. We gave up after more than 20. What it
29 demonstrates is actually there is an interesting cluster with those companies that were fined
30 the most heavily. There is a coincidence, there is a clusteral coincidence, that actually they
31 had the least suspect tenders. The OFT has made no allowance for that. It is as a matter of
32 fact that that is the case, and we then have a situation where people with few suspect tenders
33 are getting disproportionately high fines, and we think a mechanism must be devised to deal
34 with that.

1 The next graph which appears at p.19 again appears in the notice of appeal, and the
2 reference is given. It simply plots director involvement per infringement. This cross-
3 correlates the director involvement with those people who applied for the fast track offer or
4 leniency. I think the point to emphasise is when you get to the flat bar line from 81 onwards
5 each company that had directors involved in each of the infringements at that point applied
6 for leniency or got a fast track offer. If you had less than three directors, which is the next
7 space, less likely to do so, and those who did not have any director involvement were least
8 likely to take advantage of getting fast track offers or leniency because they simply did not
9 know whether or not it had happened. Of course, the directors, who were the decision
10 makers, and making the decision as to whether or not to make an application for leniency, if
11 they had been involved then they jolly well knew that there was an issue and they had to do
12 something about it. Actually, if you were in a business where the directors were doing it in
13 the context of this investigation, you would be making an application, or you certainly
14 would be being advised perhaps to make an application to take the FTO or to apply for
15 leniency, which has the perverse outcome where these people have been given a 5 per cent
16 increase for aggravation because there is director involvement, but they actually have 25 per
17 cent or more per cent discount for leniency because they are able to take advantage of the
18 offers that were made available.
19 On the next page is an email, and I think this is an important point, we spotted in the
20 footnote of the decision, and we refer to it there, in footnote 1742 of the decision,
21 para.II.1619, p.295, it says:
22 "In those instances where the construction work falls into more than one sector the
23 contract is attributed to the sector that represents the highest proportion of work."
24 Then we went on to say, and asked the OFT, that our interpretation of this is that where a
25 project is for mixed use, say 60 per cent private residential and 40 per cent retail, the entire
26 turnover for the project was treated as private residential for the purposes of calculating
27 relevant turnover. Is that correct?
28 The response from the OFT comes above:
29 "Further to your email, [the relevant paragraph] set out how we placed
30 infringements into particular relevant markets. For example, if an infringement
31 related to building for mixed use, we allocated it to the relevant market relating
32 to the main use for which the building was being constructed. [So this was the
33 main use.] By contrast, in relation to the provision of figures for relevant
34 turnover, the OFT relied on the parties to assess their projects and decide which

1 ones (including any mixed use projects) fell into a particular relevant market,
2 and therefore what the relevant turnover was. The parties had to get these
3 figures audited and certified by a qualified accountant or equivalent."
4 At pp.21 and 22 appear the certified figures that we put to the OFT and on which the fine
5 was calculated. At the bottom of p.22 the Tribunal will see in the "Notes" section that, for
6 example, the first project there, the Round Foundry, Leeds, they decided it was 94 per cent
7 commercial and 6 per cent residential. What was then done in the figures was a split was
8 undertaken. But then we also have situations where, at York Place, Leeds, for example, 54
9 per cent was commercial and 46 was residential. We still, at that point in time, applied 46
10 per cent of that turnover to residential where actually, adopting the approach that the OFT
11 had adopted, we should have ascribed none of it.
12 So we went back and re-did the figures which now appear at pages immediately behind an
13 email again to the OFT. I think that is a duplication there. The fresh information now
14 appears at pp.39, 40 and 41. That is simply adopting the approach that the OFT had
15 adopted, which is simply if you are going to decide where the infringement lies on that
16 basis, and using relevant turnover for that purpose, there has to be a suitable cross
17 correlation between the two approaches.
18 We put the OFT's approach to the accountant and they have certified that they are
19 comfortable and happy with that. So we would like to submit those revised figures to the
20 Tribunal. We have had correspondence with the OFT in this regard. I wrote to them (p.42)
21 asking if it would it help them if I sent them through my workings to show the changes
22 made consequential on the re-certified figures, asking them when they propose to respond.
23 The OFT said they do not agree with the new figures and they will deal with this in oral
24 submissions. We have not had any warning as to what that might be, but it might help the
25 Tribunal on p.43 that those are the re-submitted figures that we had provided to the OFT
26 showing the final figures for each of the infringements on that recalibrated and re-certified
27 figures basis. It is not as though the OFT has not seen its way fit to change the figures post-
28 decision. There are three instances where they have accepted different fine calculations
29 from companies. We would say that it is simply appropriate to mirror the approach that the
30 OFT has when they are working out what the relevant turnover is with our calculation of
31 relevant turnover.
32 Unless I can assist you further, sir, those are my submissions.
33 THE CHAIRMAN: We are most grateful, and thank you for the small bundle; it helps us greatly.
34 Miss Bacon.

1 MISS BACON: Sir, members of the Tribunal, many of the general themes in Quarmby's penalty
2 appeal have been traversed extensively last week. So I am going to try to avoid repetition,
3 as I am aware from Mr. Aldred's submissions that he has read the transcripts of the relevant
4 appeals. I am going to try to focus on the specific points that Quarmby makes that are not
5 picked up in the other appeals.
6 Mr. Aldred starts off with the submission that the OFT has applied a one size fits all
7 solution, and this is a theme that occurs throughout his pleadings and skeleton argument. In
8 fact, many of his submissions are not that we applied a one size fits all solution but that we
9 should have done. To a great extent he objects that we took account of differences such as
10 different markets on which the infringements were committed, or the undertakings'
11 different turnovers in the various defined markets. Actually, just now he said that the OFT
12 should have applied more of a corrective mechanism to balance out the outliers, if you like,
13 the lowest and highest fines. So at the end of the day, this is not really a complaint about
14 mechanistic application of our rules, but simply an overall complaint that when we applied
15 our methodology his fine came out too high. Obviously one sees why appellants come to
16 the Tribunal and say that, but saying that it was a result of a mechanistic application does
17 not really hit the point as far as his particular complaints are concerned.
18 THE CHAIRMAN: Just hold on. I think it is a little hot in here, is it not? Can we turn it down a
19 bit, thank you very much. Carry on, Miss Bacon, sorry.
20 MISS BACON: Sir, I was just summarising what his complaint was not about. Even if he did
21 advance an overall complaint about proportionality, this was a point that we discussed last
22 week, particularly in the GAJ and Francis appeals, as to where that goes as a matter of law.
23 The OFT's central point is that it is not a proper ground of appeal to say: we applied all the
24 guidance and the figure that came out was, on balance, disproportionately high. What the
25 Tribunal has to do is identify what the OFT has actually done wrong.
26 I turn to what Mr. Aldred says the OFT did wrong. I start with the step one starting point.
27 He addressed the Tribunal on the last business year contention. I think in that respect this is
28 almost done to death in the submissions made last week, and I do not want to repeat them. I
29 do want to pick up on one particular point that he made that is different from the points
30 made in the appeals last week, which is that he says that if the OFT did have a policy
31 relating to last business year why was it that they asked for all the turnover figures going
32 way back when? Does that not show that they did not have this policy and they were just
33 sitting on the fence at that point?

1 The response is no, that is not the case. There are several reasons why we ask for the last
2 business year figures. Firstly, there is this *Uttley* point about whether the total fine
3 exceeded what could have been imposed under the old rules, so taking the 10 per cent pre-
4 infringement. Then there is the point that we did want to look at a series of figures rather
5 than just basing the penalty calculation on the most recent accounts. So we did ask for
6 some years of accounts as a cross check, if you like.
7 The third reason is that the OFT did bear in mind the various submissions that had been
8 made by the parties concerning the relevant last business year to adopt, and what it wanted
9 to do was to determine whether there was a compelling reason to depart from its policy of
10 consistency between the cap, the 10 per cent worldwide turnover, and the relevant year
11 taken for that, and the relevant year for step one purposes. So whether it should depart from
12 that in this case. It decided, as you as a Tribunal will be aware, that there was not a
13 compelling reason. So the fact that it asks for those figures does not say anything about
14 what the OFT's policy was or was not. That is the only additional point that I wanted to
15 make on the last business year argument.
16 Mr. Aldred's next argument concerned the 5 per cent starting point level. He made two
17 points on this. The first was that you need to look at step one against the backdrop of what
18 it is intended to do, he says. In *Apex* which has a similar starting point of 5 per cent, he said
19 there was something more sinister going on than what he calls simple cover pricing. Just so
20 that the Tribunal knows, "simple cover pricing" is not a term of art adopted by the OFT; is
21 it a phrase coined by Mr. Aldred. We do not accept that the cover pricing that took place in
22 this case was any less sinister than in *Apex*. In fact, if anything, the opposite because, as the
23 Tribunal will recall, in *Apex* one of the complaints made by the appellants was that a cover
24 bid had not actually been placed in the end in relation to one of the projects, and that was
25 not the case for any of Mr. Aldred's client's infringements. So there is no suggestion that
26 we accept that *Apex* was more sinister, and therefore a lower starting point should have been
27 applied in this case.
28 Moving on from that to Mr. Aldred's second submission, which is a more substantial one,
29 which is that he says the OFT should have looked at the facts of each individual case and by
30 applying an across the board starting point of 5 per cent did not do so.
31 THE CHAIRMAN: He says that is what the guidance says that the OFT should do.
32 MISS BACON: Absolutely, and the answer to that is that the OFT did take account of the various
33 features put forward by the parties such as the size and market shares, but decided that in
34 the circumstances of this investigation those features were not sufficiently significant to

1 warrant different starting points. There is a relevant distinction between taking account of a
2 factor and making an adjustment on the basis of that factor. We say we did take account, we
3 did not ignore it. We looked at it and saw if there were relevant differences based on size of
4 market shares, and we concluded that in this case there were not such relevant differences
5 so as to justify adopting a plethora of different starting points. No doubt, if we had applied
6 different starting points to different infringements we would have had lots of appeals based
7 on the fact of non equal treatment. So really we are stuck between a rock and a hard place.
8 That is the answer to that point.
9 That was explained in the Decision. Can I just give you the reference. It is Decision
10 VI.122 where we explained why we looked at all of these factors that were put forward,
11 decided that they did not justify an adjustment, and Mr. Aldred has not taken you to that
12 paragraph. He has never said, and Quarmby has never said in its pleadings and skeleton,
13 why that analysis was wrong.
14 The feature that did justify a different starting point was, of course, the question of whether
15 the infringement involved a compensation payment. So there was one factor which,
16 considered in the round, the OFT thought did justify a different starting point and that was
17 taken account of.
18 Then Mr. Aldred makes a point about the effect of competition and said the OFT should
19 have taken into account that, he says, the infringements have no quantifiable effect.
20 Notwithstanding Mr. Bamford's expert report, the OFT does not accept that. The reason we
21 did not call Mr. Bamford was that, in accordance with the Tribunal's directions, the
22 Tribunal has said that we do not have to cross-examine experts whose opinion consists of
23 submissions or where we say that the matters put forward by the witness were inadmissible
24 or irrelevant. In our submission, in those passages of Mr. Bamford's report he simply puts
25 forward his submissions, and not only his submissions but his legal submissions, and he is
26 an economist; he is not qualified to put forward legal submissions. Certainly, the fact that
27 we did not call him does not mean that we do not challenge them, because we do.
28 The OFT's position is as set out in the Decision that it did not need to quantify the effect of
29 these infringements because this was an object infringement which, by its nature, resulted in
30 a restriction, prevention and/or distortion of competition. The relevant paragraphs are:
31 Decision III.99 to 100 and VI.127 to 128. Those paragraphs have not been appealed by
32 Quarmby.
33 I should add that, in any event, even if the OFT did not seek to quantify the effects on
34 competition flowing from cover pricing for the reasons set out in those paragraphs it was

1 still able to put forward a detailed qualitative analysis as to the effect and perhaps it would
2 be helpful to turn that up, paras. VI.130 to 158 – in my volume it starts at p.1657.
3 THE CHAIRMAN: Yes.
4 MISS BACON: Here is a very extensive analysis, a qualitative analysis of the effects on
5 competition produced by cover pricing in general terms, and that analysis is one of the
6 factors that the OFT relied upon when it set the starting point. Again, none of this has been
7 challenged by Quarmby. There is nothing in its notice of appeal which goes to those
8 paragraphs of the decision and says: "These conclusions are simply wrong and here is our
9 econometric or other economic or other factual evidence that contests those."
10 THE CHAIRMAN: Well either you or Mr. Beard, and I am afraid I cannot remember which of
11 you, referred us – or referred me particularly – to VI.137 last week, which seems to
12 summarise really what you are saying at the moment.
13 MISS BACON: It was probably Mr. Beard, but I will accept that.
14 THE CHAIRMAN: Page 1659.
15 MISS BACON: Mr. Singla, who was there last week in Crest and Pearce said it was Mr. Beard in
16 one of the Crest or Pearce cases. That is our point, we reach a decision based on object, but
17 we then go on to say that for the avoidance of doubt here is our quantitative analysis of
18 effects. It is not challenged. Given that that is not challenged, they do not get anywhere by
19 Mr. Bamford coming along and putting forward legal submissions that this should not have
20 been regarded as an object infringement.
21 That's the sum total of Mr. Aldred's criticisms in relation to starting point. He then goes on
22 to look at market definition and what he says is that some of the markets defined by the
23 OFT were larger than others, so those markets that were larger should have been subdivided
24 so as to ensure that everyone had the same sort of turnover in those markets and this is one
25 of the arguments I referred to at the start of my submissions where Quarmby is actually
26 objecting to the fact that the OFT differentiated between undertakings on the basis of the
27 specific facts of the individual cases. I think it would be helpful to look at what the decision
28 says on the specific markets, if you can bear it. The starting point there is decision II.1602
29 THE CHAIRMAN: Page 289.
30 MISS BACON: You will see in that paragraph that the OFT did start with the focal point. Just to
31 skim through what then happened, it assessed the possibilities for supply and demand
32 substitution, concluded that there was limited possibility for demand substitution, that is
33 p.1603, and there were substantial possibilities for supply substitution, that is p.1604. Then

1 at p.1605 it goes on to explain the questionnaires sent out to the construction companies as
2 well as clients on market definition.
3 Then there is quite a useful table which is at p.295 where it goes on to map the categories
4 and sectors of work and you will see "Public Housing", "Private Housing" then
5 "Commercial" is subdivided, so "Commercial" is the overall category, and then there are
6 various sectors.
7 THE CHAIRMAN: It is some months since I read this, as it were, book-wise, and it is sometimes
8 a little difficult to focus for a very long time, but my recollection is that these categories
9 were basically provided by the parties themselves, were they not?
10 MISS BACON: What they did was ask the parties what different types of work they did, and
11 there were a number of questionnaires. I am sorry, Mr. Aldred wants to make a point.
12 MR. ALDRED: The OFT sent the parties the questionnaire which included these categories, and
13 then the parties responded to them, because those are the categories they were asked to
14 respond to, and those categories coincide with the BERR categorisation.
15 MISS BACON: What I was going to go on to say was that after it received all the questionnaires
16 and where the parties indicated what categories their work fell into, it then went on to
17 consider whether the companies could switch between those, so it is a check whether on the
18 basis of the information provided there was sufficient switching to indicate that its market
19 definition should be amended. So, for example, if you look at para. 1629 from there on the
20 OFT considers whether the companies could switch between the various sectors of work.
21 Then if you carry on through 1632, 1633 looking at "Difficulties in entering certain sectors"
22 and so on, the conclusion in any event is at 1638:
23 "It is clear from the above that views on the ease of moving between different
24 sectors of work were highly varied."
25 Then:
26 "… the OFT has decided to take a cautious approach in relation to this issue and
27 concluded that for the purpose of this case each sector constitutes a different
28 relevant product market."
29 When it says "each sector" it is referring to the subdivisions of sectors under the various
30 categories.
31 Then at para. 1638 it specifically considered the point raised by Quarmby which is whether
32 it should adopt high level category market definition so it would be all commercial or all
33 industrial, and what it concluded was that the constraints to the supply side switching
34 indicated that a sector or product market was appropriate.

Then one further passage I want to take you to is over the page at 1646 and 1647 where the OFT considers an argument put forward by some parties based on the bare statistics, and they said: "If you look at the bare categorisation that actually breaks down the work further by reference to the type of work you are doing – RMI or new build. The OFT concluded that it was not going to go with the BERR classification, that its market analysis and the questionnaires that it had sent out indicated that the market should not be further subdivided, so this was not a case of blindly accepting the BERR categories, but sending out questionnaires, in which it aimed to check whether these categories were the right ones, and it actually considered all of the arguments put forward by Quarmby about whether it should be high level categories, whether there should be sector or subdivisions and so on, and reached the conclusion that it did on the basis of its market analysis.

So having then explained how it went about that process, can I turn to Quarmby's objections. The first objection seems to be that the OFT blindly accepted the BERR classification and the last passage that I have just shown you demonstrates that it did not. It says there specifically that "it is helpful if the BERR classification supports what we do but, at the end of the day it is our market analysis that defines what our market definition is."

If you look at the relevant parts of the decision, which I have just shown you, the OFT did expressly consider whether markets such as housing markets – the last two paragraphs – should be broken down into separate markets for separate types of work, such as new build and conversions, which are addressed in that section on new build and RMI, and just concluded on the basis of its analysis of substitutability that it was not appropriate to break that down further.

If Quarmby has an objection to that, what it would need to do would be to come to the Tribunal and say your analysis of substitutability is wrong, but it has not ever done that. What it has done is again put forward Mr. Bamford's second report in which he makes submissions as to the OFT's approach. What is really lacking from that is what you would expect to see in an economic report that actually specifically challenges the economic conclusions reached by the OFT on the basis of its market analysis. So, for example, there is nothing in Mr. Bamford's report that carries out any analysis of supply side substitutability as between the different types of work he refers to. There is no analysis of the competitive constraints that are exerted by some kinds of work on others. There is no analysis of price variance between the different types of work which could suggest a narrower market definition. Those are all the types of things that one would expect to see backed up no doubt by lots of equations and graphs and number crunching, what you would

expect to see in an economic report, which was actually squarely challenging the market definition, there is absolutely none of that. And, in no circumstances, simply putting forward submissions that the OFT could have done it a different way, the OFT could have segmented the market further, does not get them anywhere.

I should add on that point that this is not a case where an undertaking comes to the Tribunal and said "We just do not have the financial resources to do that kind of analysis, we are driven to making these high level submissions. This is not Quarmby's case. This is an undertaking with turnover in its last financial year of £42 million, it has employed experienced competition litigators, it has put in two reports by Mr. Bamford, who is Addleshaw's in-house economist, the second of which specifically addresses the market definition. If they had wanted to do this they could have done it but the did not, and we submit that is because there are not good enough grounds to challenge that in a way that it could and should have been challenged if they had wanted to. On that basis we say that the submissions on market definition should be rejected.

A related point is the negotiated turnover point, and Mr. Aldred did not raise that just now in his submissions. I hesitate to do so because it was discussed extensively last week, but I just wanted to come back on one particular question that the Chairman put to me and I answered in part, which was whether it was the case that for non-traditionally tendered projects competition did take place at a different stage, and I said "Yes" at that point, and I just wanted to reinforce that because I have done a little bit more research and we have found some guidance on framework agreements, and I want to make three further points about that.

The first is that infringement 233 is on Quarmby's own evidence an example of a two stage tender and we say that the evidence establishes conclusively that a cover price was given for that, presumably at the first stage of the tender process, so if the Tribunal has doubts it need look no further than one of the infringements in this case.

The second point is that many non-traditionally tendered projects are tendered on the basis of framework agreements, and in those kind of cases, the framework agreement when it is awarded has to be awarded pursuant to a competitive tender process. Even after the framework agreement has been concluded there is often scope for a mini-competition on particular aspects when the framework agreement is called down. All I want to do is just hand up the OGC Guidance on Framework Agreements. Somewhere I have the relevant paragraph and I am going to give it to you. If you look at para. 4.8 on p.8 that refers to a "mini competition between providers for a particular call off", so that is after the framework

1 agreement has been concluded. I do not think it is a big point, it is just an example, to
2 answer the Chairman's point last week.
3 Another kind of tender which is on non-traditional grounds is the negotiated agreements,
4 and in that case it is true that once a client decides to negotiate directly with a specific
5 contractor, there is at that point no scope for cover pricing, but just to say that there are
6 several types of negotiated procedure; one of the negotiated procedures is a negotiated
7 procedure with a call for competition which results in negotiations taking place
8 simultaneously with several undertakings. Even in the case of the negotiated procedure
9 without a call for competition, which is used in exceptional circumstances, many of those
10 will have been proceeded by a competitive tender. For example, if there has been a
11 competitive tender that has failed or, if there are additional works that are unforeseeable
12 following a competitive.
13 THE CHAIRMAN: Let us see if I have got this right. You have a tender for, say, building in a
14 hospital, and then you could have a mini-competition, for example, for the supply and fit of
15 the MRI scanner that was going into it.
16 MISS BACON: My point is that if you have a competitive tender and then something
17 unforeseeable comes along, in that circumstance you may wish to go with your original
18 provider and then go into the negotiation with him. This is all under the scope of the EU
19 Public Procurement Rules. It provides for certain cases where you can have a negotiated
20 agreement. My point is that most of these arise when there has been a competitive tender
21 already. So, it is not the case that negotiated agreements are never circumstances in which
22 there would have been competition, and therefore never circumstances when cover pricing
23 could have taken place. That is just to clarify. So, at the end of the day, it is not the case
24 that for all non-traditional tendering methods there is never any scope for cover pricing. I
25 just wanted to give you some examples to make good my answer that I gave you last week.
26 Can I move on to the intra-group turnover point?
27 MR. ALDRED: I was just going to say that there is no evidence before you that the appellants
28 engaged in framework agreements at all.
29 THE CHAIRMAN: I think it is a different point that is being made. Carry on, Miss Bacon.
30 MISS BACON: There is an intra-group turnover point. This is in the pleadings. I only raise this
31 now - and I know that Mr. Aldred has not addressed you on it - because we did not
32 understand what Mr. Aldred was saying originally in his Notice of Appeal. However, we
33 think we now understand what the submission is. We think it boils down to this: Quarmby
34 is saying that in the turnover figures that were submitted to the OFT for the purposes of

1 determining the relevant turnover, some of the figures included turnover that was generated
2 by supplying goods and services to Quarmby's parent company SJS. Those goods and
3 services were supplied on the relevant market, but then they were somehow incorporated
4 into goods or services sold by SJS that were not on the relevant market.
5 So, what they are saying is that the audited turnover figures that were supplied by it to the
6 OFT were wrong because they were not relevant turnover. This is not the latest argument
7 about wrong turnover figures. This is a previous argument they have made about intra-
8 group turnover.
9 The short answer to this is that the OFT has to rely on the turnover figures that were
10 supplied by the parties. Quarmby has never produced any accounts, let alone audited
11 accounts, to explain why, and to what extent, the turnover figures that it supplied to the
12 OFT were in this respect wrong. So, we simply have never known what this intra-group
13 turnover is - let alone seen any justification for it, let alone seen any audited justification for
14 it. In our submission, if there is anything in this point it would have been produced prior to
15 our decision and it is too late now, and the Tribunal cannot really do anything about it.
16 The next point - and this may not be in the order that Mr. Aldred takes it, but it is in the
17 order in my skeleton argument - the capping mechanism. Mr. Aldred says that the MDT
18 was a focal point in determining the level of the fine. Well, it was not. Nor did it represent
19 the OFT's assessment of the level of the fine that should have been imposed across the
20 board. This was not an assessment by the OFT that the appropriate level of fine was 0.75
21 per cent of total turnover. For the reasons I gave you last week, if it had been there would
22 have no doubt been challenges that this was unlawful because it was a crude turnover-based
23 assessment. The OFT's methodology was much more nuanced. The MDT was only used as
24 a corrective mechanism. The Tribunal will be aware that there were two corrector
25 mechanisms, both operating at opposite ends of the spectrum. On the lower end of the
26 spectrum, where the total penalty was too small by relevance to total turnover, the OFT
27 bumped it up a bit. On the top end of the spectrum, where the penalty was deemed to be too
28 high because it was an outlier, so, more than 4.5 per cent of total turnover, the OFT bumped
29 it down a bit. That was not to suggest that the middle point is where everyone should be.
30 These were simply corrections to correct for the outliers.
31 So, that is a complete answer to this point that the cap should have been lower. It should
32 not. It was simply to correct to some extent for outliers that were produced by the nuanced
33 methodology that the OFT adopted. If you look at Quarmby's total fine it was about 3.4
34 per cent of total turnover, which was well below the 4.5 per cent threshold that the OFT

1 applied. So, the reason why there are some companies that received a substantial reduction
2 was that there were few companies that were well above 4.5 per cent and they did benefit
3 from a reduction down to 4 per cent (I believe was the figure). Quarmby's was always
4 below that figure, and that is why it did not benefit from a reduction.
5 I am not going to address you on chilling effect.
6 The next point that I have is the small number of the suspect tenders. The only point that I
7 want to make is that this was addressed in my submissions last week in the Francis case.
8 Because Mr. Aldred was not there, and I think that that transcript may not have gone up on
9 the Tribunal's website -- Just to explain the OFT's position: we cannot make any
10 adjustment on this basis because the OFT's investigation was necessarily and inevitably
11 perhaps incomplete. We did the best that we could, but this was not an investigation into
12 every single company. We did not dawn raid every single company in the infringement list.
13 What we had to do was rely on the evidence that we got from the dawn raids that we did do,
14 and the leniency evidence. So, that evidence was not sufficient to enable us to conclude
15 whether or not Quarmby had loads of infringements. All that we could do was identify a
16 number of suspect tenders that had been thrown up in the leniency evidence and the dawn
17 raid evidence that we received. So, there was no basis on which the OFT could assess
18 relative culpability based on absolute numbers of infringements or suspect infringements.
19 That was the point (for Mr. Aldred's benefit) that I made last week. I drew a comparison
20 with the Replica Kit case where there was a large amount of evidence as to exactly which
21 infringements had been entered into by which parties.
22 Sir, I think that gets me through Step 1 and Step 3. I now just have to deal with financial
23 hardship and the revised turnover figures.
24 On financial hardship, no surprises. I have produced a table which sets out the relevant
25 figures based on the last three sets of accounts. You will no doubt have expected this by
26 now. Exactly the same format as the GAJ and Francis tables that I handed up. (Same
27 handed) I think that I can just deal with this on the basis of this table, and no doubt if I have
28 got anything wrong Mr. Aldred will put in submissions in writing afterwards. The bottom
29 line is that the average profit of the group over the last three years, adjusting for the
30 provision made for the fine in the 2009 accounts was a little over £1.8 million, and the
31 penalty is only 82 per cent of its annual average profit. It is also only 9 per cent of net
32 assets adjusting for the dividend payment in 2008 and a fine provision in 2009. That is the
33 bottom figure there.

1 I should note in response to the points made in GAJ about net assets that actually in this
2 case a large part of the net assets, if you look at the last balance sheet, are listed as cash in
3 the bank. So, that is over £5 million in 2009. But, you can look at the 2009 accounts for
4 that.
5 This is not a company which is going to go under if it pays the fine. They have not said that.
6 What they have said is that the fine would have been lower if a later year had been adopted,
7 but the fine was calculated on the basis of the last set of accounts that the OFT had. There is
8 no evidence that Quarmby's financial difficulties are so compelling as to fall into the
9 category of very exceptional circumstances that might justify a reduction in fine on grounds
10 of financial hardship.
11 The last point then is the revised turnover figures. The evidence for this is provided by Mr.
12 Aldred in his mini-bundle which sets out the correspondence with the OFT and the figures
13 supplied.
14 Just to go back to how the penalties were originally adopted, what the OFT did, as I have
15 said a minute ago, when I was talking about intra-group turnover, was to get the parties to
16 assess their own projects and decide which ones fell into a particular relevant market and
17 what the relevant turnover was. They asked the parties to get those figures audited and
18 certified by a qualified accountant or equivalent. Two of the twenty-five appellants in the
19 appeals against the Decision - and those two are Tomlinson and Durkan - in their Notices of
20 Appeal said that their penalty should have been reduced on the basis that they submitted
21 incorrect turnover figures to the OFT (that is, two of the appellants). What Quarmby is now
22 doing is trying to jump on the Tomlinson/Durkan bandwagon at the eleventh hour. It is not
23 only the eleventh hour, but since they did not raise this point until Monday afternoon it is
24 the eleventh hour and the fifty-ninth minute - because on Monday afternoon we got a letter
25 from Addleshaw submitting these revised turnover figures following its own re-
26 classification of mis-use projects. Addleshaw says - Mr. Aldred said today - that if those
27 revised figures are used, then that has the effect of reducing the fine on Quarmby from its
28 current level down to about £470,000.
29 The OFT does not accept that it is entitled to a reduction on penalty on the basis of these
30 figures. I want to make five points. The first is that this is not a ground of appeal in
31 Quarmby's Notice of Appeal - unlike Tomlinson and Durkan. Neither Mr. Clough, nor Mr.
32 Aldred have made any application to amend under Rule 11. Even if they did, we would
33 oppose it because none of the circumstances set out in Rule 11, in which an amendment
34 could be made, conceivably arise in the present case. This is a point they could have taken

1 in their Notice of Appeal, as did Tomlinson and Durkan. There is no good reason why they
2 should take it now.
3 A related point - it is my second point - is that it is simply too late for Quarmby to submit
4 new figures after the Decision, having changed its mind. It is certainly too late for it to do
5 so the day before the hearing starts. Quarmby had, during the administrative procedure,
6 every opportunity to submit the correct figures to the OFT. It could have asked questions
7 about how they were to be calculated. It could have asked the OFT how it was to classify
8 mixed-use projects. It did not. It would be contrary to the principles of finality, we say, if
9 nine months after the Decision an appellant could rock up and decide that some projects
10 should have been classified more favourable and submit a whole new set of figures and
11 expect the Tribunal to adjust its penalty on that basis. That is my second and related point.
12 My third point is that although Addleshaws have claimed in their correspondence with the
13 OFT (which you have seen) that Quarmby's revised figures have been certified, in fact they
14 have not been properly audited. Can I just ask you to read the letter from the accountant
15 which appears at numerous pages in this mini-bundle, but the first is p.21. The accountant,
16 Jolliffe Cork, says,
17 "Our review consists principally of making enquiries of management and applying
18 analytical procedures to the turnover statement and underlying financial data. A
19 review excludes audit procedures such as tests of controls and verification of
20 transactions. It is substantially less in scope than an audit performed in accordance
21 with International Standards on Audit (UK and Ireland) and therefore provides a
22 lower level of assurance than an audit".
23 THE CHAIRMAN: That is repeated in another letter later in the bundle.
24 MISS BACON: Yes. Then it goes on,
25 "Accordingly we do not express an audit opinion on the turnover statement".
26 Yes, this letter appears about three or four times in the bundle. So, they are covering their
27 backs. They are saying, "This is not an audit. We have looked at it on the basis of an
28 analytical review, but we are not expressing an audit opinion on these figures".
29 So, on that basis there is no reason why the OFT should accept these revised figures at face
30 value. We have not even, for example, seen a copy of the instructions that were sent to the
31 firm of chartered accountants. So, that is the third reason why this just does not get off the
32 ground.
33 Fourthly, in any event, we do not accept the new figures. In particular, they seem to
34 exclude the turnover of the parent company.

Fifthly, and for completeness, even supposing that all of the assumptions in the figures are correct, we have difficulty in understanding how mathematically they result in the reduced penalty figure of £570,000-odd. Mr. Aldred has sent a document which he claimed showed his workings. Those behind me and some back at the branch, I believe, have looked at this and have instructed me that none of the figures seem to correspond with the figures on the new turnover statement that has been provided. That is simply for completeness, we just do not understand the workings.

The bottom line is that none of this comes close to forming a basis on which Quarmby is even entitled to appeal at this point, let alone a basis on which the Tribunal can form any robust substantive conclusions about the figures that Mr. Aldred is now providing.

Those are my submissions on penalty.

THE CHAIRMAN: Thank you Mr. Aldred?

MR. ALDRED: Thank you, sir, dealing with the last point first, the figures that you have seen at p.21, which is the chartered accountant's figures for 27th April 2009, were the figures that were submitted and accepted by the OFT, and they accept them on the basis of the certification that exists. So the OFT were perfectly happy to accept that that time round. The new letter of course repeats the wording, so you will have seen that.

The figures which I have recalculated, I have just simply sought to take the figures that were the initial figures and applied the same principles that the OFT appeared to do. That is probably something that we can deal with off-line.

THE CHAIRMAN: Yes.

MR. ALDRED: I would say though that of course this point arose not through reading transcripts, but simply because my colleague, James Falle, took a very close look at the footnote in the decision when we tried to work out what the OFT had done with regard to the allocation of turnover vis-à-vis the market and spotted the point that they had allocated all turnover depending on where the majority of work had been undertaken in mixed use programmes. It was not a point that we were alive to. I suggest that it might be appropriate, if the Tribunal deems it necessary, to simply make an amendment at this late stage under Rule 11, but I am not sure that it is absolutely necessary.

THE CHAIRMAN: I think that that is a matter for you. If you feel it is necessary to make an application to amend then I suggest you do it in writing.

MR. ALDRED: Thank you, sir. I think that is all I need to say with regard to that material.

1 We had discussions with regard to the up to date financial position of the company. Of
2 course, we are in open court. I would just simply refer you again to the statement of Mr.
3 John Batty, which appears at pp.23 and onwards.
4 THE CHAIRMAN: I take it there is no dispute about the figures themselves which are on that
5 sheet? That is the sheet handed in by Miss Bacon.
6 MR. ALDRED: I am sorry, I thought you were ----
7 THE CHAIRMAN: Merely on the factual figures.
8 MR. ALDRED: I would have to take it away. What the OFT has done there is rely on the last
9 three years' figures, and of course we have put before the Tribunal the figures for the last
10 six years. That, of course, casts a very different complexion as to what has been happening
11 with regard to the finances within this business. There have been submissions made, but I
12 would invite the Tribunal to read Mr. Batty's statement.
13 THE CHAIRMAN: We will of course, and have.
14 MR. ALDRED: The OFT said that we did not take issue with regard to object and effect. In the
15 notice of appeal, sir, we say that we are not taking issue with regard to liability as regards
16 object and effect. We are not taking a position with regard to it. However, effect, of
17 course, is relevant when it comes to assessing the calculation of penalty, and that is why we
18 have made the submissions that we have today as to why we say there has been no effect
19 with regard to the tenders that have been made. That is not to say we are challenging the
20 object or effect with regard to liability, that is just simply to say that within the context of
21 guidance and penalty guidance it says there - specifically have a look at the effect of
22 competition, and that is why we have put that material before you.
23 A point was also made, sir, with regard to one of our appeal points which relates to the
24 calculation of relevant turnover when it is actually turnover of a subsidiary providing a
25 particular service to its parent company. The way this arises is if you imagine that you have
26 the parent company and a subsidiary and the subsidiary makes widgets. It sells half its
27 widgets into the market and the other half goes to the parent company, and the parent
28 incorporates those widgets into wodgets and then sells them off. The parent company in
29 this case, St. James's, does not engage in any of the relevant activity. Miss Bacon said that
30 there were no turnover figures for the parent in respect of the figures that we have just
31 provided. The answer to that is that the parent does not engage in this activity, it is a
32 property development company, it sells property, it does not sell contracting services.
33 The point that is being made there is that if a proportion of turnover is then being generated
34 because it is going to the parent who is then subsuming it in their operation and selling it

1 separately, then we simply say – and it is a little bit like the negotiated turnover argument –
2 it falls outside of the relevant turnover with regard to the operation of the subsidiary, which
3 of course is QCC in this instance.
4 That is really quite a simple point, but we do deal with it in evidence. It is the statement of
5 Roger Nelson number 4, and it is QAB 2, p.602, para.7:
6 "The provisional figures to 21 March 2010 and the final figures to 30th September
7 2009 are based purely upon the turnover of QCC and are not consolidated with our
8 parent company, SJS. I have spoken to Tim Tonkin, SJS's company secretary,
9 who has informed me that in fact, apply the OFT's methodology, SJS will have no
10 relevant turnover except the turnover of QCC in the year to 31 March 2010 or …"
11 and then it goes on to deal with the figures. Essentially, what is happening is that SJS just
12 does not have any relevant turnover, so the figures that have been put forward relate to QCC
13 only and apply to both.
14 At p.612 of that bundle, Mr. Tonkin sets out details relating to the financial affairs of that
15 business.
16 Mr. Falle has kindly indicated to me that the breakdown for that information is available
17 behind the letter.
18 THE CHAIRMAN: Thank you.
19 MR. CLOUGH: Sir, not meaning to take you right up to the line, I would just like to address one
20 point in response to one of Miss Bacon's submissions. It relates to the decision, VI,
21 para.122, and this very crucial approach to step 1 in penalty calculation exercise. It may
22 assist the Tribunal if I start by referring to para.2.5 of the guidance, which sets out what the
23 OFT says it is going to take into account, and which is confirmed by the OFT's
24 consolidated defence on penalties at para.34, para.15, and indeed set out clearly in our
25 notice of appeal at para.11.1 on p.32. The penalty guidance sets out how the starting point
26 of step 1 is to be calculated. At (c):
27 "The OFT will take into account the following factors, nature of the product,
28 structure of the market, market shares, entry conditions, effect on competition and
29 third parties and damage caused to consumers."
30 We go on to say, referring to para.2.9 of the guidance:
31 "Further, when an infringement involves several undertakings an assessment of the
32 appropriate starting point will be carried out for each of the undertakings
33 concerned in order to take account of the real impact of the infringing activity of
34 each undertaking on competition."

1 This requires, we say, the OFT to conduct a separate assessment of each infringement of
2 each party – for example, taking into account of its market shares rather than adopting a
3 fixed percentage starting point for all parties that have committed infringements ----
4 THE CHAIRMAN: Can I say, Mr. Clough, that we have been extensively referred to this. I have
5 para.2.9 almost in my memory.
6 MR. CLOUGH: I am sure you do, sir, and I really want to focus on what the OFT says, and I am
7 very mindful of something that Mr. Beard said in front of you on Friday morning in this
8 court room, which I am going to touch on in a second. It will not take me very long, I
9 promise you.
10 Paragraph 34 of the combined consolidated defence on penalty appeals, if you like, accepts
11 what I have just read out, and I will not go into that. In the following paragraph the OFT
12 accepts that there are two challenges to the assessment of the seriousness of the
13 infringement calculation: first, that the same policy applies to all cover pricing cases; and
14 secondly, that those starting points were wrong for each type of infringement.
15 In the footnote to that para.36 on p.15 there is a reference to an incomprehensible
16 submission by Quarmby about deterrence coming in at step 1, and the OFT says, "We have
17 no intention that deterrence should come in", and:
18 "The OFT does not understand how this point is said to be derived from decision
19 VI.173 which Quarmby relies upon for this purpose …"
20 and this is the key point –
21 "In any event, it is denied that VI.173 bears this point, or that the starting point was
22 specifically adjusted so as to take account of deterrence."
23 Mr. Beard said quite the opposite on Friday morning in front of you, that one of the reasons
24 why the year of turnover was going to be looked at at the year before the decision, rather
25 than the year before the infringement, was because it might possibly be higher, and would
26 be expected to be higher and would be an added to deterrence. I just want to draw that to
27 your attention in the context of the developing debate, if I can put it like that.
28 The other point I want to make is the general one, turning now to VI.122 on p.1655, how
29 the OFT says it dealt with paras.2.5 and 2.9 of the guidance, and in my submission it is
30 highly unsatisfactory and it is very clear on the face of the decision in two paragraphs. So
31 VI.122, as you are, I fear, familiar with, says:
32 "A number of Parties submitted that the OFT should take into account the highly
33 fragmented nature of the construction industry, the size of the Parties and/or their

1 small market shares in setting a starting point at step 1. The OFT can confirm that
2 it has taken the structure of the market into account in setting the starting point."
3 That is the key finding. Had the infringements occurred in a more concentrated market it all
4 would have been worse. Then it goes on:
5 "In terms of the size of the Parties and their relative market shares, this will be
6 reflected in their respective relevant and total turnover figures and, consequently,
7 the size of their individual penalty."
8 We say that is wrong, they should have taken into account these factors and explained how
9 they took them into account, and it is absolutely crucial that at step 1 that takes place. That
10 is in para.11.8 of our appeal.
11 The second and final paragraph that I would just like to refer you to relating to this is the
12 defence at para.54 on p.21, addressing the same point the OFT says – just for your note sir,
13 at para.34 on p.15 simply sets out the theory of it. Here, at para.54 we have:
14 "In reaching those conclusions the OFT (contrary to the claims of some of the
15 appellants) did take into account the structure of the market (reference VI.122)".
16 We have seen how they took it into account in that sentence that confirmed they had taken it
17 into account, otherwise they left it to the relevant turnover both for the step 1 and step 5
18 stages. Bearing in mind that the turnover at step 1 has been the same as the turnover at step
19 5, in our submission they have not taken into account all those major factors that they
20 should have done.
21 I have just got one further point, it says in para.54:
22 "Almost certainly, had they not been found only to be discrete infringements
23 but part of a wider scheme, the starting points would have been higher. [Then,
24 this is the key point] Size and market shares were, the OFT considered,
25 reflected in the undertakings' relevant turnover figures."
26 That refers back again to Decision 122.
27 Mr. Aldred has reminded me that of course market share is not reflected in turnover,
28 because you can have a very high market share with a very low turnover and vice versa. It
29 depends entirely on the relevant market but that opens another door to oblivion! (Laughter)
30 You were told that I had very great concerns about the OFT in step 1. I think there are too
31 many steps!
32 The end of this, sir, is that there is no good basis for distinguishing starting points on the
33 basis of tender value, and that is in VI.124 to 126 of the Decision. and paras.VI.125 on
34 p.1656 which says:

1 “Given the range of sizes of the tenders in this Decision and the process of
2 selection of the maximum of three Infringements which were subject to a
3 penalty, the OFT remains of the view as expressed in the Statement that any
4 increase or decrease would be arbitrary and discriminate against some Parties
5 compared with others. The OFT has therefore concluded that there should be
6 no increase or decrease in the starting point on account of the size of any of the
7 tenders. Moreover, the OFT does not consider that it is required by the Penalty
8 Guidance to take account of the tender values.”
9 With great respect, we would disagree with that as a general principle. At the beginning of
10 para.VI.124 the OFT sets out the values of the tenders that are the subject matter of this
11 decision ranging from £2,000 to £8 million. If that conclusion in VI.125 can be sustained
12 on any evidence, I would be very interested to see it.
13 Sir, thank you very much.
14 THE CHAIRMAN: Thank you.
15 MR. CLOUGH: Thank you for your patience.
16 THE CHAIRMAN: Thank you all very much, you are very prompt.
17 __________