

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 July 2010

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR JOHN PICKERING

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

(DAY ONE)

APPEARANCES

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

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

1 THE CHAIRMAN: I have some preliminary remarks, Mr. Hoskins.

2 Good morning, ladies and gentleman. We are embarking on this hearing in a rather strange
3 position in that we are going to see a number of witnesses from Durkan, from the
4 applicants, but none, as I understand it, from the Office of Fair Trading. For the Durkan
5 witnesses, we have their statements and some appended documents to which they attest.
6 They are going to be cross-examined in the course of the hearing and, of course, whatever
7 they say will be evidence in the case. But, we do not have any witness statements on behalf
8 of the Office of Fair Trading, either from OFT personnel involved in the investigation or
9 from Mansell, to whom it is alleged that Durkan gave a cover price. I note that the timetable
10 prepared by the parties for the hearing does not allow for any opening remarks on behalf of
11 the OFT. So, the plan is that we go into taking the evidence cold, as it were, without a
12 framework other than the decision. You may say, Miss Bacon, that the decision is the
13 framework, but we would welcome some indication up-front before we start on the
14 evidence that that is the case on which the OFT relies as set out in the Decision, and that
15 alone. In particular, on the question of how the general paragraphs from Mansell's practice
16 which are set out in the earlier parts of s.4 of the Decision, how those relate to the specific
17 infringements challenged in this case.

18 So far as the control issue is concerned for infringements 135 and 240, this may not present
19 a problem. We have the board minutes and the other documents and we can all consider
20 what interpretation is to be put on them, bearing in mind the legal test for control. As far as
21 infringement 220 is concerned, I have noted the comments of the President in the A.H.
22 Willis case and in the North Midland Construction case on 8th and 9th of July respectively
23 about the informality of the production of the evidence before the Tribunal in the form of
24 interview notes and contemporaneous documents on which the OFT relies. I say no more
25 about that at present, but note that the matters which concern the President in those cases
26 are matters which concern us at the moment as well.

27 A second unrelated issue relates to the correction of the figures for the mistakes that are said
28 to have arisen in relation to the relevant turnover in the markets in respect of which fines
29 have been imposed on Durkan. We have seen the witness statement of Mr. Barclay attached
30 to the skeleton argument and also the letter from Grant Thornton. I note that Mr. Barclay is
31 not one of those scheduled to be called for cross-examination. I would draw Durkan's
32 attention to the transcript of the Tomlinson hearing where further explanation was sought as
33 to how the original allocation of turnover, how that exercise had been carried out and what
34 the subsequent exercise, post decision, had been which had led to the discovery of the

1 mistakes. At the moment we do not consider that Mr. Barclay's statement is full enough as
2 to the two exercises that were carried out, and whatever the attitude of the OFT is to this
3 correction, our present view is that if Durkan is seeking the indulgence of the Tribunal to
4 correct the errors that they made then we must have a full understanding of what was done
5 originally, and what was done more recently, and why the figures were mistaken. Entirely
6 without prejudice to the principles involved in making that correction (if we were to decide
7 to do so) we would need some recalculation of the penalty, taking into account the various
8 steps.

9 Our final point is in relation to confidential information, in particular the table at the end of
10 the infringement as to the calculation of fine when we get to that. At that point we will need
11 to know whether those figures are still regarded as confidential so far as Durkan is
12 concerned. If we need to move to sitting in camera, then I hope someone will alert me to
13 that fact and we can make sure that we do so.

14 MR. BEARD: Just before Mr. Hoskins begins, the plan on behalf of the OFT in relation to this
15 matter, Madam Chairman, is that Miss Bacon is going to deal with the decisive control
16 issues primarily. She will deal with cross-examination of the first three witnesses and the
17 closing in relation to those matters. I will help out a little in relation to that. My primary
18 role is going to be dealing with infringement 220 and the penalty appeal. So in relation to
19 the evidential matters that the Tribunal highlights and that have been highlighted in
20 previous appeals – although the question was directed to Miss Bacon, it is one that I will
21 deal with in submissions in due course. However, given the structure of the hearing it was
22 not thought appropriate that there should be an interjection dealing with those matters at the
23 outset. So those are going to be dealt with discretely in relation to infringement 220, if that
24 is of assistance.

25 THE CHAIRMAN: So the plan is that we have the control issue witnesses first?

26 MR. BEARD: Mr. Hoskins is going to start with his opening this morning, which I understand
27 will take the morning. Then there will be a start with the witnesses, dealing with the
28 decisive control witnesses first and then the infringement 220 witnesses, so that all of the
29 witness evidence is dealt with continuously. Then the approach is going to be that the
30 Office will set out its submissions in relation to decisive control and in relation to
31 infringement 220 and then Mr. Hoskins will close in relation to the liability matters, thereby
32 affording him a reply dealing with all of the matters that have been dealt with in evidence
33 and in submission by the Office.

1 THE CHAIRMAN: Yes. My only query about that is that one of the witnesses is the witness in
2 relation to the 220 infringement is the subject of a summons. I am not sure whether there is
3 a particular time at which he has been told to be here, or whether the summons related to a
4 particular day. I understand he is due in at half past 10 on Wednesday.

5 MR. BEARD: Yes, that was our understanding. We hoped that that would then fit with the broad
6 timetable that had been promulgated. In other words, that decisive control witnesses would
7 take this afternoon and probably most of tomorrow, and then we will be moving on to the
8 infringement 220 witnesses, which it is envisaged will take less time. Of course, there is
9 one of those witnesses in respect of whom those instructing on the other side have kindly
10 made arrangements whereby it can be dealt with by video link at their offices.

11 THE CHAIRMAN: That is scheduled for Wednesday afternoon?

12 MR. BEARD: That is right.

13 THE CHAIRMAN: And what issue does he relate to?

14 MR. BEARD: He is the estimating manager who maintains that there was a policy that meant
15 there was no cover bidding. It is not envisaged that that is going to be a long period of
16 cross-examination but since the witness has been proffered and a witness statement tendered
17 it is appropriate that there is at least a brief cross-examination of him.

18 THE CHAIRMAN: Right.

19 MR. BEARD: Unless I can assist the Tribunal further in terms of organisation.

20 THE CHAIRMAN: No, the only thing that would be useful, I have not seen, I do not think, a
21 timetable with the names of the witnesses and the order in which they are going to be called,
22 presumably you know what that order is.

23 MR. HOSKINS: Madam, the note of 12th July set out the timetable that we had agreed, and it also
24 set out the witnesses, numbers 1, 2, 3, 4, and 5; that is intended to be the order, it is not
25 simply there are five of them, that is the current intention on the order.

26 MR. BEARD: There may be an issue that I may discuss with Mr. Hoskins at some point about
27 the order of witnesses 4 and 5, but I think that is a matter of some triviality at this stage.

28 THE CHAIRMAN: Yes, very well.

29 MR. BEARD: I am sorry, madam Chairman, was there anything else I can assist with?

30 THE CHAIRMAN: There is nothing else from me. (After a pause) No, thank you very much, Mr.
31 Beard. So Mr. Hoskins, it is for you to open now.

32 MR. HOSKINS: Madam, before I do begin my opening submissions in relation to the correction
33 of figures, as you have seen we have produced a witness statement from Mr. Barclay and
34 the Grant Thornton letter, and that was in response to a request from the OFT to clarify

1 matters. Having produced that the OFT have indicated that they do not challenge the
2 figures. So I hope it is not too cheeky but we can go away, as I say, to Mr. Barclay, and say
3 “Can you do a bit more?” but if it were possible for the Tribunal to say what it would like
4 then that will obviously be easier than us trying to guess because as far as we are concerned
5 we understand we have satisfied the OFT to this end so they have not challenged any of the
6 figures, but obviously we will bend over backwards to satisfy the concerns you have, but it
7 is up to you of course ----

8 THE CHAIRMAN: Let me express briefly then what my concern is.

9 MR. HOSKINS: Thank you.

10 THE CHAIRMAN: As I understand it, when the statement of objections was sent out the parties
11 were asked to identify which part of their total turnover related to the relevant markets
12 which were those in the statement of objections where it was alleged they had committed
13 infringement, so there may have been two or three out of the dozen market definitions. So,
14 as I understand it, the parties then went through somehow their total turnover and said:
15 “This contract goes in that relevant market”, so there would be, say, four categories, public
16 housing, offices the third one, and then other which they were not required to breakdown.
17 What seems to have been an issue is the thoroughness with which that initial exercise was
18 gone through, which might not in itself matter because if an error is made at that stage of
19 excluding turnover from one of the relevant markets and putting it in the other category then
20 there is equally likely to be an error to the disadvantage of the company by including in the
21 relevant turnover something which actually should properly have gone in the other
22 category. So at that stage you have an allocation where there may be mistakes, but it is
23 equally likely that the mistake is to the advantage or the disadvantage of the company.
24 However, if after the decision, you then go through all the contracts that have been
25 identified as being in the relevant market categories, and weed out the ones that have
26 accidentally slipped in there when they ought to have been in the other pot, then you have
27 eliminated the chance of error in one direction only unless you then go back to what was put
28 in the other pot and correct any mistakes that were made there. In other words, by only
29 going through more thoroughly the pot where you eliminate mistakes to your advantage,
30 and not going through more thoroughly the pot which is to your disadvantage, you have
31 then unbalanced the exercise that was done. If that is what has happened then there is a
32 question as to whether there has actually been a mistake properly so called which should be
33 corrected or whether what has happened is simply the result of the decision by the company
34 because there were dozens of contracts to go through at the initial division up of the

1 turnover. They were not really mistakes, it was just the consequence of having decided to
2 do it in a rather broad brush, to which the OFT has taken no objection, and I do not think
3 there could necessarily be any objection taken because, as I say, at that stage mistakes in
4 one direction are likely to be cancelled out by mistakes in the other. Then to go back and
5 look only more thoroughly at one side of the equation, I think that is something rather
6 different. I hope I have explained that clearly.

7 MR. HOSKINS: No, that is very helpful. I must admit, my understanding from Mr. Barclay's
8 witness statement is that a detailed exercise was done originally, but it was done on the
9 basis of a misunderstanding by Mr. Barclay as to the categorisation of certain markets.

10 THE CHAIRMAN: However it was done, the point may still be a relevant one, that whatever
11 misunderstanding there may have been going through that exercise initially may have led to
12 some contracts being excluded when they should have been included, and some being
13 included when they should have been excluded. If you only then, once you have a proper
14 understanding, go through the one side of it then you have unbalanced the possibility of
15 error.

16 MR. HOSKINS: I was going to come to that. It seems to me there are two points. The first point
17 you raised was the thoroughness of the original exercise; and the second point was fairness.
18 It is all very well for us to go through ----

19 THE CHAIRMAN: Fairness as regards comparing the subsequent exercise with the original
20 exercise.

21 MR. HOSKINS: Again, certainly in his witness statement he raises some issues that go against
22 Durkan's interests and some that go for it. Obviously what we will do now is ask him to
23 check it.

24 THE CHAIRMAN: He does, because there are some which are outside London which he then
25 includes in London, but there are not any in relation to relevant markets which are not the
26 three relevant markets. It may be that Durkan's business does not extend that further.
27 I think there was also a point about which companies in the Durkan Group had been gone
28 through. I think in his witness statement he says he went through the Durkan Holdings
29 consolidated accounts as they were in 2009, whereas I think that the penalty, one of them at
30 least, related to the corporate structure as it had been at the time of the infringement, and
31 included what is now Concentra. I think we need to just clarify whether we were going
32 through the same company's turnover on both occasions.

33 MR. HOSKINS: That is very helpful, and obviously we will take that up.

1 THE CHAIRMAN: As I say, I stress this without prejudice to the question of principle as to
2 whether we would correct an error in these circumstances, but if we decide that then I want
3 to be able to see it through without having to have further iterations after the hearing.

4 MR. HOSKINS: The best way to deal with that, I imagine, is a further witness statement.

5 THE CHAIRMAN: We will see where you get to with whatever queries you make. All right?

6 MR. HOSKINS: Thank you very much, that is very helpful.

7 Can I then turn to my opening submissions and they really fall into three heads. First of all,
8 I want to make some opening remarks which will orient us. I know some of the people in
9 this room have heard an awful lot of construction appeals, but to some of us this is fresh and
10 new. I would then like to make opening submissions on the control issue and then opening
11 submissions on infringement 220. As Mr. Beard has indicated, penalties, as with all the
12 other penalty appeals, is a separate half day which we will do on Friday afternoon. So we
13 will just ring-fence that for the moment.

14 The appellants that you have before you: first of all, there is Durkan Holdings Limited,
15 which I will refer to as DH; there is Durkan Limited, which I will refer to as DL; and there
16 is Concentra Limited, or what is now known as Concentra Limited, but at the relevant time
17 it was known as Durkan Pudelek Limited, which I shall refer to as DP, and the common
18 noun for a collection of Durkans that I will use will be “Durkans”, when I refer to all three
19 companies collectively.

20 THE CHAIRMAN: Can we call them “Durkan Group”, or does that mean something else,
21 because the difficulty with calling them “Durkan” is that in the decision Durkan means ----

22 MR. HOSKINS: That is what I was going to come to. The decision is not helpful on this,
23 because obviously the decision calls Durkan Pudelek “Durkan”, and then throughout these
24 proceedings the OFT has used the word “Durkan” to refer to the collection of companies.
25 The decision really is not very helpful, and it is a rather terminology as well to call Durkan
26 Pudelek “Durkan”. Certainly, it is not easy, but I pinch myself often enough going through
27 the decision. Every time I saw Durkan I just wrote DP in. If you would prefer me to try
28 and refer to them as Durkan Group I will try my best, but it may require some more
29 pinching on my part. Certainly, for the purposes of this appeal, I think the OFT and we
30 have adopted a common terminology which is DH, DL, DP and Durkan as the collective
31 noun.

32 THE CHAIRMAN: We will all try and understand what we are talking about at any given
33 moment.

1 MR. HOSKINS: Those are the appellants. There are three infringements which we need to
2 consider. First of all, there is infringement 135. The substance of that is at decision
3 paras.IV.3680 to 3744. We do not need to go to the detail now. It was a compensation
4 payment agreement between DP and Mansell. There was no cover price involved. That
5 becomes significant when we come to penalties.

6 The second infringement is infringement 220. That is Decision IV, 6159 to 6193. That was
7 an alleged giving of a cover price by DL to Mansell.

8 Finally, infringement 240 (dealt with at Decision IV, 6685 to 6711) was the giving of a
9 cover price by DP to Balfour Beatty Refurbishment Ltd. The dates of each of these
10 infringements can be found in the navigation table which appears at Annex A to the
11 Decision. The entry for Durkan is at p.1853. The relevant dates are: for infringement 135 -
12 27th January, 2003; for infringement 220 - 29th March, 2005; and for infringement 240 - 2nd
13 February, 2006.

14 Next, the grounds of appeal. The grounds of appeal are not identical for each of the
15 appellants. The first ground is what we have referred to as the control issue. It relates to
16 infringements 135 and 240 and the Decision finds DP liable in respect of both of those
17 infringements. DP does not challenge those findings. The prime concern in relation to the
18 control issue is DH's appeal, because, as you have seen, the Decision also finds that DH
19 was jointly and severally liable for the penalties imposed in respect of infringements 135
20 and 240. That is because DH is said to have exercised decisive influence over DP's
21 commercial strategy during the relevant period. One sees that analysis at Decision II, 382
22 to 442. DH appeals against that finding of liability. That is why this is called the control
23 issue. Of course, if DH is successful on the control issue, it has a knock-on effect on DP.
24 This is why DP has an appeal in relation to the control issue. The Decision bases its penalty
25 calculation for infringements 135 and 240 on the consolidated turnover of DH and DP. If
26 DH is not liable, then the only relevant turnover is DP's. Therefore, if DH wins its appeal
27 on the control issue, the penalty will be substantially reduced and will have to recalculate it
28 for DP.

29 So, those are the two appellants in relation to the control issue.

30 The second substantive ground of appeal relates to infringement 220. The Decision finds
31 that DL gave a cover price to Mansell. Quite simply, DL's appeal is, "We did not do it. We
32 did not give a cover price to Mansell". DH also has an appeal - a simple one, which is
33 simply that if DL did not do it, then DH cannot be held responsible for it. The third ground
34 of appeal are the penalties grounds of appeal. As we have seen, we have three different

1 heads. The details of the penalties in relation to the appellants are at Decision VI, 462 to
2 468, p.1749 of the Decision. I will come to those, as I explained, on Friday afternoon.
3 I was going to go on then to deal with the timetable, but I think that has probably been
4 canvassed. Just in outline, it is as set out in my note to the Tribunal of 12th July, 2010. My
5 note reflects discussions and agreement with the Office. On Wednesday afternoon we will
6 have an excursion - we go to the offices of Jones Day to use the video conferencing
7 facilities so that we can take evidence from Mr. Copeland in Canada. We will continue the
8 rest of the day there. Certainly, as Mr. Beard indicated, the intention is opening
9 submissions today. Then I will call the Durkan witnesses in relation to the control issue;
10 then the witnesses in relation to infringement 220. If the timetable works the OFT will have
11 half-day slots. The OFT will then make its closing submissions on the control issue on the
12 afternoon of Wednesday. Then it is infringement 220 closing submissions on the morning
13 of Thursday, which gives me Thursday afternoon for control and Friday -- It has been
14 designed actually so that it does not catch any of us on the hop. So, in between each of the
15 sets of submissions each party has a chance to take a breath, if you like -- to take stock
16 when it is doing its closing submissions.

17 THE CHAIRMAN: So, the submissions on penalty will be separate then from the submissions on
18 control.

19 MR. HOSKINS: Completely separate of Friday afternoon. We have treated it as if it was a
20 freestanding penalty appeal. So, just as all the other penalty appeals were half a day, we are
21 just treating this as a separate half-day at the end. If it works - which we will do our best,
22 but of course there is no guarantee - it is designed to actually give people time to breath and
23 react to what the other people have submitted. That is the intention behind it.

24 MR. BEARD: A minor issue. In relation to the excursion, as Mr. Hoskins puts it, to deal with the
25 cross-examination of Mr. Copeland, I am not sure it was envisaged that any other
26 proceedings that day would necessarily continue at Jones Day. We are obviously open to
27 the easiest means of dealing with these things. It may be that matters of timing can deal with
28 those matters.

29 THE CHAIRMAN: It remains to be seen where we have in fact got up to. As I understand it, Mr.
30 Copeland has been told to make himself available between 2.00 p.m. and 5.00 p.m. our
31 time, whatever that is in Canada ----

32 MR. BEARD: I think it is quite early morning to mid-morning. How I understand it is going to
33 work is that we will conclude the morning's proceedings here, and then the afternoon

1 proceedings will be at Jones Day. I do not want to go there at three o'clock and come back
2 at four o'clock.

3 MR. BEARD: Understood. I think it will depend on where we have got to.

4 THE CHAIRMAN: If we need to make up time, it may be that there will have to be other
5 proceedings there, apart from just the short ----

6 MR. BEARD: That is quite understood. I think the Office had not specifically agreed to conduct
7 of proceedings in any particular place beyond the cross-examination of Mr. Copeland. It is
8 perhaps best to leave these matters to be dealt with on Wednesday, depending on where we
9 have got to. I think what was actually thought about was the possibility that matters could
10 continue here shortly after the short adjournment, to actually open the decisive control
11 submissions and then, towards the end of the afternoon interpose Mr. Copeland at Jones
12 Day, but that may not be the way in which the Tribunal wishes to proceed. We quite
13 understand that dealing with all of the witnesses here, continuously, may be the most
14 appropriate means.

15 THE CHAIRMAN: I do not mind which order things go in so much. It is just that the whole of
16 the proceedings on Wednesday afternoon, I envisage will take place at Jones Day and not
17 break up the afternoon partly here and partly there.

18 MR. BEARD: Understood.

19 MR. HOSKINS: That does bring me on to my final comment on timetable, which is this: the
20 majority of the four and a half days which have been set aside for the liability issues - i.e.
21 three days in total - have been set aside for the Office to cross-examine the witnesses and to
22 make submissions. The OFT has already set out its findings in the decision, which is
23 detailed. We are quite happy to use its three days as it wishes, but the point we have made
24 to it, and we made it in the note is that certainly we should not be squeezed at the end in
25 terms of our ability to make our case. We have this morning for opening. We have got a
26 day in closing. A day and a half against three days. We will obviously use the time
27 effectively, but, please, we should not be allowed to be squeezed because Durkan has a right
28 to have its voice heard in this appeal as well. It is not just the OFT's show.
29 There is another matter which is relatively trivial, I think, but I have to deal with it. It is in
30 the OFT's skeleton argument. It had a sting in the tail. It had a postscript which was called
31 "Postscript of new evidence". Certainly to my eyes it looked as if that was seeking to give
32 the impression that DH has introduced a substantial amount of new evidence on the control
33 issue after the adoption of the decision. If that was the intention I just want to dispel it
34 because it is simply not correct. Each of the witnesses that I will call on behalf of Durkan in

1 relation to the control issue also has made an oral statement at the oral hearing with the
2 Office on 27th February 2009. The Office chose not to ask them any questions, even though
3 they were happy to take questions and that was made clear.

4 The reason why, in relation to each of those individuals, we put in witness statements was
5 not to add new information; it was simply that this is a trial. The witness statements stand
6 as their evidence. Each witness statement is backed by a statement of truth and they can be
7 cross-examined upon them. It was not an appropriate way of proceeding simply to say: here
8 is a transcript of OFT proceedings; we want that to stand as evidence. That is why we
9 produced witness statements.

10 If one does go back – Madam, as I know you had to for the disclosure application – to the
11 statements that were made to the OFT during the investigative procedure, they are in
12 substantially the same form. I am not going to take up time doing that now, but the
13 reference is in the Notice of Appeal bundles, bundle 4 tab 24 at pp.11-20. I really do not
14 want the Tribunal to have the impression that this is a case in which DH has played its cards
15 close to its chest throughout the investigative procedure and then suddenly, at the appeal
16 stage, has sprung with lots of new evidence to try to trick the Office. DH has been
17 completely open throughout this process and its position has been the same throughout: DH
18 did not control DP.

19 We did introduce some new evidence along with our Notice of Appeal. The evidence we
20 introduced were the DP board minutes for the period relevant to infringements 135 and 240.
21 We took the view that, given that there were board minutes in existence for DP, it would
22 clearly assist the Tribunal to see the board minutes that related to the relevant period. That
23 is why we put them in. It was the Office which then applied for disclosure of every DP
24 board minute from its establishment in 1992 until its sale to Messrs. Pudelek and Simmons
25 in September 2007 - a period of around 15 years. If anyone is introducing new evidence
26 (and they clearly have) it is the Office which has introduced substantial new material into
27 this appeal.

28 In order to preserve Durkan's rights to a fair hearing, the Tribunal required the Office to
29 indicate which passages in the board minutes it wished to rely on. The Tribunal also
30 permitted my clients to comment upon these passages. The passages which the OFT relies
31 on are set out in a schedule. We can look at it very briefly. It is in the core bundle 1 tab 7.
32 You can see the form in which it is set out: the document, the paragraphs relied upon. I am
33 sorry, there is a covering letter then a schedule. For each document the paragraphs relied
34 upon, and then it is what part of the defence it is relied upon in relation to. What we have

1 done (because this is an important part of ensuring the rights to a fair hearing; this is why,
2 Madam Chairman, you made the order in the way you did) when we put the documents in,
3 in bundle 2b, we put in yellow which bits are referred to in this schedule. So if we take
4 bundle 2b you can see how it works. Firstly, tab 20 second page, the highlight in yellow
5 represents what the OFT has indicated it wishes to rely upon in its schedule. The only
6 board minutes for which there is no highlighting are the ones that we included with our
7 Notice of Appeal because the Tribunal's order did not extend to that, because we had
8 chosen to put those board minutes in. So, for example, if one turns to 67 there is no
9 highlighting on that. That is one that we put in with our Notice of Appeal. The ones which
10 are not highlighted in that way are 2b tabs 67 to 70, and 2b tabs 82 to 85.

11 In its postscript on new evidence, so-called, the Office says Durkan put in new witness
12 statements. Of course, the second witness statements of Daniel Durkan and Alan Fraher
13 were submitted solely to comment, to respond to, the passages in disclosure which the
14 Office obtained. Again, it was done pursuant to an order of the Tribunal to protect our
15 rights to a fair hearing. So the impression that is sought to be given of Durkan trying to put
16 in new evidence is very far from the truth; it is actually the other way round.

17 I would now like to turn to the control issue, which is the second item I have to deal with
18 this morning. While we are getting out bundles, the next bundle I would like to go to is
19 authorities bundle 5b tab 30, the judgment of the European Court of Justice in *Akzo*. I
20 should point out that the *Akzo* judgment is a very recent and important judgment of the ECJ
21 on the control issue, but it is certainly not an isolated judgment. This issue has been well
22 trodden, certainly in the General Court and also occasionally in the ECJ. So it is the
23 culmination, if you like, of a substantial body of case law going back a certain number of
24 years.

25 Can I ask you to read some relevant passages and then after each section I will say what I
26 get from them or what is to be taken from them. The first paragraphs I would ask you to
27 look at are paras. 8 and 13 to 15. Could you read those, please. (Pause) In short, the
28 actual position in *Akzo* was this. *Akzo* did not participate in the cartel which had been found
29 to exist by the Commission. However, the Commission held *Akzo* liable for the
30 participation of its subsidiaries in the cartel, and it did that on the basis that because *Akzo*
31 held directly or indirectly all of the shares in those subsidiaries it was in a position to exert
32 decisive influence over their commercial policy, and it could be assumed that it did so, that
33 was the Commission's decision.

1 The matter went on appeal to the CFI and para. 27 of this judgment, just over the page, sets
2 out the relevant paragraphs of the CFI's judgment, they are numbered 57 through to 66. I
3 think it is helpful, if I could ask you to read those paragraphs and you will see the position
4 of the CFI? (After a pause) When you get to para. 28 it records what the CFI's conclusion
5 was.

6 THE CHAIRMAN: (After a pause): Yes.

7 MR. HOSKINS: For aficionados that was a well worn path but *Akzo* appealed the matter and
8 took it to the ECJ and if I can ask you to turn through, first of all, paras 42 and 45 there are
9 actually two grounds of appeal put forward by *Akzo*, and this is the first one. You will see
10 the heading above para. 42 "Arguments of the Parties" and if I could ask you to read paras.
11 42 and 45 first of all, please – particularly the second and third sentences of para.45 you get
12 the essence of the first ground of appeal.

13 THE CHAIRMAN: (After a pause): Yes.

14 MR. HOSKINS: If one turns over the page one gets the "Findings of the Court", that is the
15 heading above para. 54. If I could ask you to read paras. 58 to 66 we will see the Court of
16 Justice's reasoning and conclusion on the first ground of appeal.

17 THE CHAIRMAN: (After a pause): Yes.

18 MR. HOSKINS: There are really two parts to the judgment. The first part is: What is the legal
19 test for imposing liability on a parent in relation to subsidiary, and one finds that at para. 58
20 it must be:

21 " . . . that a subsidiary does not decide independently upon its own conduct on the
22 market, but carries out, in all material respects, the instructions given to it by the
23 parent company."

24 That is the issue in every single case. The second part of the judgment is an evidential rule,
25 because what the ECJ said was that we are a company, a parent with 100 per cent
26 shareholding, then it is fair to assume that it does exercise effective control, and the way the
27 reasoning works – one sees this in para.63, the court says where a company has 100 per cent
28 shareholding it is able to exercise a decisive influence over the conduct of a subsidiary, and
29 it is that ability that gives rise to a rebuttable presumption that it has in fact exercised a
30 decisive influence. But it is important to know that the legal condition for imposition of
31 parental liability is the same, it is that it did in fact exercise a decisive influence, whether
32 proved as a matter of fact, or whether proved by way of presumption which has not been
33 disproved then by the company. The test is the one set out in para. 58. The 100 per cent
34 shareholding gives rise to a rebuttable presumption, it is then for the parent company to

1 produce evidence to say that even though we had a 100 per cent shareholding, and were
2 capable of exercising decisive influence, in fact we did not, and the court basically says that
3 it is an open door, you can look at all aspects to see whether in fact decisive influence was
4 exercised or not.

5 I must admit the position we have taken is that the presumption is very unlikely to have any
6 real significance in this case, the reason being that Durkan is going to open its heart, you are
7 going to see five witnesses called on behalf of Durkan to be cross-examined uphill and
8 down dale as to what actually happened. The chances at the end of the day then of the
9 Tribunal saying “We have to rely on a presumption to decide this case”, rather than saying
10 “Having heard all the evidence we conclude either there was decisive influence or not”
11 seems to us to be the appropriate way to approach this.

12 Of course the presumption is far more important in proceedings before the General Court
13 and the ECJ where there are generally no oral witnesses. This is unusual for a control case,
14 but only because the Tribunal has the benefit of hearing witnesses. That is the first ground
15 of appeal.

16 The second ground of appeal, one picks up at para. 67 to 68, you can see the heading above
17 para. 67:

18 “The second part of the single plea in law: incorrect definition of the concept of
19 the commercial policy of the subsidiary.

20 – Arguments of the parties”

21 If I could ask you to read paras. 67 and 68 please?

22 THE CHAIRMAN: (After a pause): Yes.

23 MR. HOSKINS: What was being said here was that the CFI’s approach to the nature of control
24 was too broad. Akzo argued that liability should only be imposed on the parent where it
25 exercises decisive influence on the commercial policy of the subsidiary in a narrow sense,
26 i.e. directed it as to how to behave on the market. That was also rejected by the ECJ; one
27 sees its findings at para. 72 onwards. Could I ask you in particular to read paras. 72 to 74.
28 (After a pause) You will see a reference back to para. 64 of the CFI judgment, which, if you
29 want to refresh your memory, is at p. 6 of 13 in this particular copy. Basically, the ECJ was
30 saying you have to look at all aspects to determine the fundamental question of decisive
31 influence, was decisive influence exercised. You do not just look at whether the parent
32 determined conduct on the market. You look at all the other links between the companies.

33 THE CHAIRMAN: In this case it was 51 per cent rather than 100 per cent, and there may be a
34 question as to whether presumption arises in that case, but I think you are saying that it does

1 not really matter because you have to look at what actually happened, and we are going to
2 hear evidence about that. Is it your case that the second part of the test about looking at the
3 different links and factors and to whether there was decisive influence is the same whether
4 it is 51 per cent or 100 per cent?

5 MR. HOSKINS: If I am correct that when one has heard all the evidence one is able to come to a
6 conclusion on the question of decisive influence the presumption really just does not matter.
7 When you are deciding whether decisive influence by DH on DP you will look at all the
8 evidence.

9 THE CHAIRMAN: If it was only a 30 per cent holding and the rest of the shares were very
10 fragmented, you could still look and see whether there was, in fact, decisive influence.

11 MR. HOSKINS: I think the question of was there decisive influence is just a question of fact in
12 any individual case. It is obviously far less likely that decisive influence will be exercised
13 the lower the size of the shareholding, and certainly once one goes below 50 per cent. I am
14 not asking you to decide this case on the basis of presumptions. I just think it is going to be
15 meaningless after all the evidence you have heard.

16 So that is why really for *Akzo* for us it is easy. The real crunch paragraph in *Akzo* is
17 para.68. What we say is that when you are listening to the evidence, when you have heard
18 all the evidence, the crucial question is whether, as a matter of fact, DP was subject to the
19 decisive influence of DH in its operation. It is actually a very simple test. It might be
20 difficult to apply in certain cases because you have got to consider all the facts. You have
21 got to weigh them all up. When you ask “What is the legal test?” it is very simple, “Did DH
22 exercise decisive influence over DP and DP’s operations?” We say, when you are listening
23 to the evidence, when you are listening to the cross-examination, what you have to keep
24 asking yourselves is, “Who really ran DP?”

25 THE CHAIRMAN: The test as it is expressed in para.58 about “subsidiary does not decide
26 independently upon its own conduct on the market but carries out in all material respects the
27 instructions given to it by the company”, that is another way of saying “exercises decisive
28 influence”?

29 MR. HOSKINS: That is right. The phrase “decisive influence”, just to show it is not my
30 shorthand, one finds in para.60.

31 THE CHAIRMAN: Yes, it is expressed in a number of different ways.

32 MR. HOSKINS: I think there are probably two main ways it is put, madam. There is the
33 “decisive influence” formulation in para.60; and there is, “does not decide independently
34 upon its own conduct on the market” in para.58. If you put those both together they are

1 obviously intended to mean the same thing. For the purposes of this case I say the question
2 is, "Who really ran DP?" Was it Mike Pudelek and Colin Simmons or was it Danny and
3 Bill Durkan and Alan Fraher, and that is what this part of the case is about.

4 PROFESSOR PICKERING: In the totality of this case, of course, regarding infringement 220 we
5 have the reverse situation in that DH has confirmed that it does exercise decisive influence
6 over DL. Presumably you will be making a fairly detailed comparison of the respects in
7 which DH, and the personnel involved in DH, were adopting a totally different approach to
8 DP than to DL will you?

9 MR. HOSKINS: The evidence will be that DP was in a completely different situation in the
10 group. DL was an integral part of the Durkan Group. As you will have seen from the
11 evidence, DH was approached by Messrs. Pudelek and Simmons, who wanted to set up
12 their own company over which they would have control, and DH was asked to invest in. In
13 terms of, am I going to go through and say, "This is how DL worked and this is how DP
14 worked", the answer is no, because we accept that DL was just a part of the Durkan Group.
15 The question is, on the particular facts was DP an integral part of the Durkan Group in the
16 same way. I fear that if we were to do the same exercise for the detail of how DL worked
17 and compare it with DP we would probably be here for another three days. I do not intend
18 to do that sort of detailed exercise for DL.

19 Let us turn then to that question of who really ran DP, Pudelek and Simmons or the Durkans
20 and Alan Fraher. You will have seen the witness statements. There are five witness
21 statements relating to the control issue. In fact, there are seven because there are the second
22 witness statements from Danny Durkan and Alan Fraher. You will have seen that all of the
23 individuals involved, the two Durkans, Alan Fraher, Messrs. Pudelek and Simmons, they all
24 believed that DP was run by Pudelek and Simmons. That is what they thought was
25 happening. One sees that at a number of stages. First of all, if one looks at the
26 establishment of DP when it came into being, it was established because Colin Simmons
27 and Mike Pudelek wished to establish their own business over which they would have full
28 operational control. On the other hand, DH was attracted to DP purely as an investment.
29 I would like to take you to some of this evidence because I think it is very important. Can
30 we pick up bundle 2A and turn to tab 2. That is the first witness statement of Daniel
31 Durkan. Could I ask you to look at para.5, please. This is Durkan's view of what it was
32 being asked to do. Crucially:

1 “Durkan Holdings was attracted to Durkan Pudelek simply as an investment
2 opportunity with objectives, similar to those of Mike and Colin, of ultimately
3 selling a successful business at a profit.”
4 Then tab 6, Daniel Durkan’s second witness statement, paras.33 to 35. Professor, this deals
5 slightly with your point to me about what is the difference with DL, this goes partly to that.
6 Could I ask you to read paras.33 to 35. (After a pause) You will see crucially in the second
7 half of para.35:
8 “Similarly, through Durkan Holdings, the family was only interested in investing
9 in Durkan Pudelek since that gave it an investment in a sector in which it was not
10 active. It was not interested in the day-to-day management of Durkan Pudelek
11 That is the Durkan viewpoint of why it got involved with Messrs. Pudelek and Simmons.
12 But, we also have their perspective. Mr. Pudelek’s first witness statement is behind Tab 4.
13 Could you please read para. 6? (Pause whilst read): You will see that his understanding of
14 what his intentions were at the time of incorporation were very clear -- particularly in the
15 section which begins,
16 “The whole purpose behind Colin Simmons and me establishing Durkan Pudelek
17 was to run our own business. It was important to us, therefore, that we had full
18 operational control of the business, which we did. From the outset, when a
19 consultant Lindsay Nielson introduced us ----“
20 THE CHAIRMAN: We have read that.
21 MR. HOSKINS: Yes. I just wanted to emphasise that.
22 THE CHAIRMAN: The sentence before that:
23 “Durkan Holdings could have, in limited circumstances and subject to the
24 provisions of the shareholders’ agreement, used its shareholding ----”
25 Do you then accept that as far as the first step in *Akzo* is concerned - the ability to exercise
26 decisive influence - that is satisfied here and that what we are debating is whether there was
27 actual decisive influence?
28 MR. HOSKINS: Let us put it as a logical conclusion. The way that the ECJ has approached it is
29 that it has assumed that a parent which holds 100 per cent of the shareholding is capable of
30 exercising influence. That must be because it has all the shares. On the same logic then,
31 someone who holds the majority of the shares must, on the ECJ’s approach be capable of
32 exercising decisive influence.
33 THE CHAIRMAN: I suppose unless the shareholder agreement requires a sort of two-thirds or
34 three-quarters majority for key decisions ----

1 MR. HOSKINS: Madam, we will certainly see that because one of the things I want to do -
2 though I think this can wait until closing because it is quite technical stuff and we have
3 trampled over quite a lot of the shareholders' agreement material in the written submissions
4 to date - is that when one looks at the shareholders' agreement there are certain aspects that
5 require unanimity between the shareholders, but not everything requires unanimity between
6 the shareholders. So, insofar as there is a shareholders' agreement which does not require
7 unanimity, then there are clearly things which could have been, if people so wished, done
8 without unanimity. DH had a 51 percent shareholding. However, I will also, in closing,
9 take you through the legal position as to actually how the company was run on a daily basis
10 under the Articles of Association. The way in which a shareholder can actually control a
11 company ultimately is actually very clumsy and the way it does it is either by adding or
12 removing a director. It can call a general meeting of the company and it can use Companies
13 Act powers to add or take away a director. But, it is not actually, as a matter of English
14 company law, a situation where just because you have 51 percent of the shareholding you
15 can give a direction saying that, "You, the company, must do this". It is a far more indirect
16 form of control.

17 However, as I say, the reason why I have not dwelt on this, and I am not dwelling on it now,
18 obviously - though I am happy to answer any questions - is because I just do not think the
19 presumption ----

20 THE CHAIRMAN: No. I am not talking about the presumption. I am talking about the first step
21 - the capability to exercise control. This may turn out to be important. If what you say as
22 well - that the DH directors sat in at these board meetings and they did not say anything -
23 then the OFT may say, "No, they do not have to say anything because everyone who is
24 sitting there knows that they will ultimately prevail and therefore everyone has got to do
25 what they suspect they would like". So, I am not sure whether you have answered my
26 question about whether you accept that there was the capability of control. I am not pressing
27 you now, but just bear in mind that it may be important to distinguish between the two steps
28 in *Akzo* and decide whether both are in contention or only one.

29 MR. HOSKINS: The two steps in that paragraph in *Akzo* go to the presumption. It is because of
30 the ability to control that the Court of Justice finds that the presumption arises. The
31 question of whether in fact everyone sat in the DP board meetings and things happened the
32 way they did because the DH directors were effectively waving a big, invisible stick is a
33 matter of fact. That is why, with respect, I will take up your offer and I will not answer

1 your question now, because it is obviously something that is going to be fundamentally
2 affected by the evidence that we hear.

3 THE CHAIRMAN: The question is: Is there a big invisible stick?

4 MR. HOSKINS: I will deal with that in closing as well.

5 MISS BACON: I am sorry to rise. I am slightly concerned that Mr. Hoskins is not going to open
6 a point on the shareholders' agreement because I am not, in the current timetable, scheduled
7 to have a right of reply. He has not dealt with this in detail in his pleadings and skeleton
8 argument. So, either I need a right of reply after he has taken you through that, or he needs
9 to go through that in opening - otherwise I am not going to be able to make any response
10 submissions on that.

11 MR. HOSKINS: Miss Bacon will obviously have a right to reply on any new points that I raise. I
12 am going to keep my powder dry on this until I hear the evidence because I do not want to
13 be making submissions which are just unnecessary.

14 MISS BACON: It is not a case of keeping his powder dry until after the evidence. As he said, it
15 is a technical point. It is a point on the shareholders' agreement. He does not have to have
16 heard the evidence to take the Tribunal through that. If he is going to make legal
17 submissions about the effect of the shareholders' agreement, and matters on which
18 unanimity was or was not required, then I need to be able to know that - or, as Mr. Hoskins
19 said, have a substantial right of reply at the end because it is not something that has been
20 addressed so far.

21 THE CHAIRMAN: He says that you will have a right of reply. It is really up to him to decide
22 what he is going to include in his opening, I think.

23 MR. HOSKINS: Thank you, madam.

24 PROFESSOR PICKERING: Mr. Hoskins, you took us to Tab 4, para. 6 in Bundle 2A. In that
25 paragraph there is reference to consultations with Grant Thornton about the possible sale of
26 DP. It is clear in other respects that Grant Thornton has been acting for DH. If you had
27 been advising at that time, would you have advised DP to use the same firm of accountants,
28 business advisers if they were a fully independent company?

29 MR. HOSKINS: Sir, in relation to the certification of the correctness of the figures?

30 PROFESSOR PICKERING: No. The fact that they obviously had a common financial and
31 accounting adviser.

32 MR. HOSKINS: I do not know the answer to that. With all due respect, I am not sure it is going
33 to be relevant. Certainly the documents relating to Grant Thornton were included in the

1 disclosure that the OFT sought and obtained. So, the OFT is at liberty to ask any questions
2 it wants to ask in relation to that.

3 PROFESSOR PICKERING: I am just asking you how this fits with your assessment of
4 independence and subsidiarity.

5 MR. HOSKINS: I think one gets it from the wording and introduction of the sentence -

6 "In our capacity as shareholders Colin, Danny, Alan and I met with Grant
7 Thornton on a number of occasions to discuss the prospects of selling the
8 business".

9 PROFESSOR PICKERING: That is presumably the shareholders in DP. DP was using DH's
10 financial advisors.

11 MR. HOSKINS: I would have to check on what the status of DH was, but what they were
12 seeking was advice as shareholders as to whether DP should be sold, or not. Throughout
13 this, there will be links between DH and DP. The case is not "Were there any links between
14 DH and DP?" There clearly were. There were common directors. It was a common
15 business venture. You have seen the evidence. DH wants to go into this to make money
16 because they planned to sell the thing at the end of the day. The question is: When one
17 looks at the totality of the links, do they equal decisive influence. Do they show that DH
18 ran DP? Of course, I am not going to run shy of the fact that there were links - because
19 there clearly were. That is why I say the important question one must always keep asking
20 oneself is not: "There's another link". It is: Who ran DP? Did DH run DP?

21 Just to finish this particular line of submission, which is: What did the parties believe would
22 happen? What were their intentions when they set up DP? The final bit of evidence is Mr.
23 Simmons' witness statement at Tab 5, para. 4. You will see that not surprisingly it
24 indicates the intentions of Mr. Pudelek. "Mike and I formed Durkan Pudelek to run our
25 own business."

26 That was the intention of DH. That was the intention of Pudelek and Simmons. We say
27 that given the respective intentions of the parties at the outset, it would be very odd if in
28 spite of those clear intentions DP actually did operate subject to the decisive influence of
29 DH - because that would have to mean that one of two things had happened: either the
30 individuals involved had changed their mind as to the nature of the project - which none of
31 the evidence suggests is the case - or in spite of their express intentions DH somehow
32 silently, unconsciously came to control DP. That is pretty implausible. That is what the
33 OFT's case is: despite the clear intentions of the parties, the OFT says DH controlled DP.

1 I said one can look at this through the vista of the intentions and what people actually
2 involved believed was happening at two levels. You can look at it in terms of: Why was DP
3 set up? But, you can also look at it as to how DP actually operated in practice. Again, we
4 have evidence of that in Bundle 2A, in Mr. Pudelek's witness statement at Tab 4. Can I ask
5 you to look at and read para. 5? (Pause) One sees, over into the next tab, tab 5, Mr.
6 Simmons' witness statement and para.5. One sees his description of how DP operated.
7 (Pause)

8 THE CHAIRMAN: Yes.

9 MR. HOSKINS: What we see from that is a very detailed description of what happened in
10 practice, the way the Pudelek and Simmons ran their company. It is clear there were a
11 number of levels. First of all, contract review meetings were held every month. The
12 purpose of those meetings was to address key operational issues. Those meetings were not
13 attended by Bill Durkan, Alan Fraher or Danny Durkan, they were not reported to DH.
14 Secondly, there were Monday morning prayer meetings. Those were held on a weekly basis
15 to discuss the commercial operation of DP. Again, they were not attended by either of the
16 Durkans or Alan Fraher. The business plan, the third level, was prepared annually by
17 Messrs. Simmons and Pudelek with input from Bob Scott and the DP Construction
18 directors. No input was provided by DH, nor did DH set targets. Alan Fraher and Danny
19 Durkan did attend a business review meeting during which the annual business plan was
20 presented by the executive directors. There was no integrated group business plan which
21 involved DP. Durkan/Pudelek's business plan was entirely separate from the DH group,
22 and DH did not influence the business plan or seek to influence it. Then the fourth level:
23 Bill Durkan, Danny Durkan and Alan Fraher were entitled to attend and did attend (as was
24 seen from the board minutes) DP's board meetings. Those took place around once every
25 two months. The purpose of those meetings was to reassure DH about its financial
26 investment in DP, not to exercise decisive influence over DP's activities.
27 So that is the description from Messrs. Simmons and Pudelek as to how they ran their
28 company - the company they had set up to run themselves - and the nature of the
29 relationships between DH and DP that we say is the correct one, i.e. not a controlling one,
30 as confirmed by the practical manner in which DP operated on a daily basis. The business
31 was run by Mike Pudelek and Colin Simmons. The function of the board meetings was not
32 for DH to direct Pudelek and Simmons how to run the business they had set up.
33 Again, it is a very important point because given that all of those involved in the operation
34 of DP throughout the relevant period believed that DP was run by Messrs. Pudelek and

1 Simmons we submit it would be very surprising if they were in fact all mistaken in their
2 belief. But that is the OFT's case, despite what five witnesses who have given evidence and
3 will give evidence believed, understood, the opposite was true: DH actually controlled DP.
4 I will say a few words about the DP board minutes.

5 THE CHAIRMAN: Wait a moment. (Pause)

6 MR. BLAIR: Mr. Hoskins, there is one point that has been troubling me slightly and it is about
7 the difference between strategic control and day to day control. Both the phrases appear in
8 the authorities that you have referred us to, and I think they have both been present in your
9 submissions as well. Is there anything more that you can help us with now, or perhaps later
10 on, as to where the test lies, whether OFT have to establish that they control the purchase of
11 every paper clip, or whether strategic oversight with what flows from that in policy
12 obedience terms is enough?

13 MR. HOSKINS: They did not have to show that DH exercised day to day control, that is clear
14 from the case law. Where the line lies between the two – because obviously it is a matter
15 for you at the end of the day – is they do not have to show day to day control.

16 THE CHAIRMAN: The submissions that you are making about their subjective intentions, you
17 are not saying are you that it is a subjective case?

18 MR. HOSKINS: No.

19 THE CHAIRMAN: Just that given the evidence of their subjective intentions it would be
20 unlikely that the objective fact is that control exists?

21 MR. HOSKINS: Absolutely. That is the point.

22 MR. BLAIR: It must be intrinsic in what you are saying as well that as power ebbs and flows, as
23 it sometimes does when people change, that a company could be subject to control one day
24 but not the other. There are also issues of timing and limping control in and out which
25 could potentially arise on the approach you are submitting?

26 MR. HOSKINS: Absolutely. You will see on some of the board minutes one can see, and you
27 can see from our skeleton argument, there are certain periods in which there is more input
28 from the two Durkans and Alan Fraher in the discussions. Things do ebb and flow. But the
29 question has to be for the Office: did DH control DP at the time of infringement 135 and
30 infringement 252, absolutely?

31 I want to go on to say a few words about the DP board minutes because the OFT fought
32 very hard to get disclosure of 15 years' worth of those board minutes. I have no doubt they
33 will cross-examine uphill and down dale and hope to strike gold on them. While listening
34 to that cross-examination (this is a theme on which I have already touched this morning)

1 remember: quality not quantity. There were links between these companies, but it is not
2 simply a question of just totting up how many different types of links one can find; it is a
3 question of returning to the *Akzo* test which I have put colloquially as: did DH control DP?
4 If one looks at the board minutes as a whole, we submit it is clear that the primary purpose
5 was to permit Messrs. Pudelek and Simmons to report on DP's activities to DH, which was
6 its majority shareholder. If we can look quickly at the board minutes which relate to the
7 infringement period, I think that gives a good example of the reporting function. The first
8 one is in bundle 2b tab 66. This one is highlighted with one of the passages that the OFT
9 relies upon.

10 We do not have to get into the nitty gritty at this stage, but if one looks down the matters:
11 health & safety, 4:

12 "The Health & Safety Report as prepared by Ian Cresswell and dated 25th
13 September 2002 was duly considered ... (5) Key Features (5.1) Financial
14 Report – Durkan Pudelek Limited: Regard should be had to the report for
15 specific details ... (5.2) Cash Management – The said report as presented by AF
16 was duly considered ... (5.3a) Marketing and Estimating ... The said report was
17 duly considered ... (5.3b) Marketing and Estimating – Durkan Pudelek Interiors
18 Limited - The said report as presented by RJS was duly considered. ... (5.4)
19 Construction – The said report ..."

20 You get the picture! If one goes down all the entries what one sees very much is a reporting
21 function. Sometimes there is a discussion, sometimes not.

22 THE CHAIRMAN: Was Durkan Pudelek Interiors set up at the same time as Durkan Pudelek?

23 MR. HOSKINS: I will need to take instructions on that. Do you want me to do that now,
24 Madam?

25 THE CHAIRMAN: Yes, please. (Pause)

26 MR. HOSKINS: I am told it was set up later; it was set up towards the end of 1997/beginning of
27 1998.

28 PROFESSOR PICKERING: Was the reporting of the board minutes, the production of the board
29 minutes, in the hands of the same person throughout, and would I be right in inferring that
30 that was Mr. Fraher?

31 MR. HOSKINS: It depends what report one is talking about.

32 PROFESSOR PICKERING: Board minutes.

33 MR. HOSKINS: The board minutes themselves, I would need to check. (Pause) Originally it
34 was Mike Pudelek, then it was Mr. Fraher for a period of around ten years.

1 PROFESSOR PICKERING: So for a time the chairman of the board produced the minutes?

2 MR. HOSKINS: Mike Pudelek. William Durkan was the chairman.

3 PROFESSOR PICKERING: Yes, sorry. So the chairman of the meetings, not the chairman of

4 the board, produced the minutes of those meetings?

5 MR. HOSKINS: At the start Mike Pudelek says his effective role was to chair the meetings, then

6 yes, but he was not formally the chairman.

7 PROFESSOR PICKERING: I take that point, thank you.

8 MR. HOSKINS: I do not intend to go through all of these now, but just to give you the references

9 as to the board minutes which relate to the two, and one can see again this reporting

10 function throughout them. We are looking at tab 66, tab 67, tab 68, tab 69, tab 70 and tab

11 71. That gives you a good spread around 135. The infringement 240 ones begin at tab 82,

12 83, 84, 85. Those are the ones we appended to the Notice of Appeal. Certainly if you are

13 looking for something to send you to sleep at night I would encourage you (it is actually not

14 as painful as it sounds) to flick through this bundle, because one can go through the yellow

15 highlighted extracts quite quickly and get a flavour for what was actually happening.

16 Obviously, if we are going through in cross-examination in detail, I think it is important to

17 have an overview. Having done it myself it is actually not that bad to sit down and just flick

18 through the yellow highlighted parts and one will get a sense of what was happening in

19 those meetings.

20 If you do take up my invitation, when you do flick through those yellow parts, you will of

21 course see that there were times when Bill Durkan, Danny Durkan and Alan Fraher made

22 contributions to the DP board meetings, of course they did, because they were members of

23 the board. They expressed their views. Again, it is the quality not quantity theme, if you

24 like. The fact they made contributions in board meetings is not enough to show that they

25 exercised decisive influence over DP. One has to keep reminding oneself of that question,

26 otherwise one gets lost in: oh yes, there are lots of links; oh look, Bill Durkan is saying

27 something. You have to keep asking the question.

28 To conclude on the control issue, on one side you have evidence of the main individuals

29 involved in the operation DP, Bill Durkan, Danny Durkan, Alan Fraher and Messrs.

30 Pudelek and Simmons. All of them believed that DH did not exercise decisive influence

31 over DP. All of them believed that DP was actually run by Colin Simmons and Mike

32 Pudelek, and on the OFT's case all of those people were mistaken in their understanding

33 and belief, and we submit that that is highly improbable, but you will form your own view

34 when you hear them giving evidence.

1 The final part of the opening relates to infringement 220, we have to flick a switch in our
2 heads, this is a different sort of issue. Infringement 220 is dealt with at decision IV.6159 to
3 6193. It concerns a project at Claremont Close in London. The decision finds that Mansell
4 asked for and received a cover price from “DL”, and the infringement is said to have taken
5 place on 29th March 2005.

6 I would like to begin in relation to this issue by looking at the evidence relied upon by the
7 OFT in order to support the finding of infringement that it has made. We begin with
8 Mansell’s leniency application, and all the relevant documents for this are in bundle 3 – it
9 should be marked “Infringement 220”. The Mansell leniency application is behind tab 8,
10 you see the title page, the date and the fact it was submitted by CMS Cameron McKenna
11 LLP, the solicitors on behalf of Mansell. There is an executive summary at p.4. I would
12 ask you to read the second paragraph: “Following a very intensive internal investigation
13 ...” you will see that there is a very large number of tenders that CMS Cameron McKenna
14 unearthed that they thought might relate to cover pricing, 1,130 and 1,474.

15 THE CHAIRMAN: Yes.

16 MR. HOSKINS: The executive summary on p.4, second paragraph, and it shows the large
17 number of tenders which are covered by the leniency application. Clearly, that is a very
18 significant number, and given the informal nature of cover pricing which we see from the
19 decision it would not be surprising that some of these were included in error and, indeed,
20 that is accepted in the leniency application itself. If I could ask you to turn to p.16, para. 2.3
21 at the bottom of the page, and if I could ask you to read that, please. One sees that this list
22 is very fairly explaining the task and the difficulties involved in it and admitting that the job
23 they have done may not have been perfect. They actually confessed a potential sin of
24 omission there, but equally it could have been, we say, a sin of addition, and one sees that
25 expressly accepted in para.3.9 on p.21. If I could ask you to read para.3.9 and you will note
26 in particular the final sentence.

27 (After a pause): As one would expect from a firm of this nature, a reputable firm, an
28 indication of the difficulties of the task that they had undertaken. As part of Mansell’s
29 leniency application CMS Cameron McKenna also submitted a City Road Office summary,
30 that is behind tab 9. City Road Office was the office that dealt with the claim on closed
31 tender, so that is why it is relevant to infringement 220.

32 Section 2 is entitled: “Investigation process”, and 2.2 shows the interviews conducted by the
33 solicitors, and the people who were interviewed. I am particularly interested in, if you go
34 down the list towards the bottom of the page, Peter Goodbun was interviewed – estimating

1 manager for London. Phil Hart was interviewed, senior estimator and Alan Armstrong – an
2 important name we will shortly be returning to – was interviewed, also a senior estimator.
3 I should show you over the page, 3.4:

4 “Some additional information has been provided about the projects included
5 within the documents enclosed within this Annex 3.3 and is as follows . . .”

6 And if one goes to the bottom of p.3 you will see a Mansell reference no. 01126, a reference
7 to Claremont Close, and if I can ask you to read the entry you will see that what they are
8 referring to is that the additional information in relation to Claremont Close that they have
9 found is the print out from the Builders’ Conference, dated 15th March 2005, which we
10 have, and we will come on to, as I say, we have this additional document.

11 It is important to remember that these documents are not original contemporaneous
12 evidence. They are the solicitors’ evaluation of the evidence in submitting the documents,
13 and I will come to that.

14 THE CHAIRMAN: The schedule at tab 9.

15 MR. HOSKINS: The schedule at tab 9 was prepared by the solicitors, that is right. It is important
16 because when I come to the end of this particular part of the submissions I will say “This is
17 the original contemporaneous evidence”, and really when one has the evidence, and one has
18 the solicitors’ understanding one cannot put a great deal of weight on a document which is
19 simply the evaluation of a third party. I say the burden in this case really bears on the
20 original documentation, and I simply wish to make that distinction.

21 Also, as part of the leniency application CMS Cameron McKenna submitted a schedule of
22 cover prices for London specialised works, and that is at tab 10 – it is actually the second
23 page I want to look at. It is small print but the second page begins with 81 “Source –
24 Estimators”, and then about half way down the page – if you take the redactions you will
25 see it is the one in the middle of the redactions – 120 “Source – Estimators”, “Division –
26 South East, London specialised works 2005, reference 01126, 29th March 05 tender date.”
27 You will see it is Claremont Close. “Name of company providing or provided with pricing
28 information – Durkan Ltd.” Mansell Receiving” the code means “yes”, they are saying that
29 Mansell received a cover price from Durkan Ltd. “Mansell name – AA”, Alan Armstrong.
30 Look two above, it does not matter what the work was, “PH”, Phil Hart. I will come on to
31 this because it is very important when one come to look at Mr. Goodbun’s interview.
32 According to the solicitors, the estimator in Mansell, who is responsible for Claremont
33 Close, was Alan Armstrong not Phil Hart. Of course, we know, because we saw the
34 previous document that Mansell interviewed Phil Hart and Alan Armstrong.

1 This again, of course, is not original contemporaneous evidence, it is a document generated
2 by the solicitors for the purposes of the leniency application. We are now moving into,
3 indeed going to the only original piece of documentary evidence upon which this finding is
4 based.

5 THE CHAIRMAN: Do we have the unredacted version of this table anywhere?

6 MR. HOSKINS: I am not sure we have because it was redacted obviously to keep information
7 from us.

8 MR. BEARD: I do not think that the appellant would have an unredacted version because it will
9 refer to other companies. The Office will have a confidential version and we can try and
10 identify that and provide it.

11 THE CHAIRMAN: It is just who won the contract and what information was disclosed, that
12 seems to have been redacted even for this contract, that is because it is confidential to whom
13 exactly? It cannot be confidential who won the contract.

14 MR. BEARD: No, I do not think there is any issue as to who won the contract in this case in any
15 event, but I can certainly see whether or not we can obtain that, I do not think that that will
16 shed any further light on these matters, but so that the Tribunal has the sense of what is in
17 this document certainly we can provide the Tribunal with a confidential version and
18 obviously ----

19 THE CHAIRMAN: Let us leave it for the moment.

20 MR. BEARD: -- legal advisers can ----

21 THE CHAIRMAN: Let us leave it for the moment.

22 MR. BEARD: I am grateful.

23 MR. HOSKINS: The next document I would like to go to is at tab 7, which is the Builders'
24 Conference Interim Report, it is referred to in one of the leniency application documents,
25 this is it. "Interim Job Report (issued 15 MAR 05)" you will see "Site address" top left
26 corner is "13-42 Claremont Close, London". If one looks down to the middle of the
27 document: "The following Main Contractors are known to be competing (as at 15 MAR
28 05)" and there is a list of names: "Connaught Group" etc with contacts. "Durkan Ltd" with
29 an address, a "X" beside it, a telephone number, and I can say on instructions that that
30 telephone number is the switchboard number. The name "Guy Copeland" who, as we know
31 is going to be giving evidence on Wednesday, and was an employee of DL at the time.
32 Then at the bottom of the page two handwritten annotations: "Brian Sharpe", who we know
33 is the estimator at DL, who was dealing with Claremont Close, and then a figure in a box
34 "£1,306,000". I will come back to that document later.

1 The final piece of evidence is the interview transcript of Peter Goodbun. He was the
2 estimating manager of Mansell's City Road Office, and the transcript is at tab 12. You will
3 see:

4 "Office of Fair Trading.

5 Interview with: Peter Goodbun

6 Interviewing Officers: Sarah Mills – OFT

7 Anthony Curtis – OFT

8 Date of Interview: 17/04/07"

9 A number of points I would like to make in relation to this document. First, if you can go
10 to p.3 of 14 there is a question by Sarah Mills at the very bottom of the page – if you will
11 excuse me, I will leave out the "Ahs" and the "Ums" because even reading it, it is intensely
12 irritating.

13 "SM: Okay, in terms of active, sort of role in preparation of the actual tender and
14 pricing of the job, is that something that you would directly involved in, or?

15 PG: What, hands on do you mean?

16 SM: Yes.

17 PG: Occasionally.

18 SM: Okay. But in, in general you . . .

19 PG: I have a team of eight . . .

20 SM: Okay.

21 PG: . . . estimators working for me, invariably, I'll do the, do the odd one.

22 SM: Okay.

23 PG: Time permitting."

24 Not the most glorious line of question and answer, but what one gets from it is that Peter
25 Goodbun was not generally directly involved in preparation of tenders and pricing jobs.
26 Page 8, if I could ask you to read from the second entry of "SM" to the first entry of "PG"
27 on p.9, please?

28 THE CHAIRMAN: (After a pause) Yes.

29 MR. HOSKINS: I am going to come on to another bit of p.9. In relation to p.8, there were two
30 points in particular I wanted to draw attention to. First of all, half way down the page,
31 "Steps to take a cover would not be made until very, very close to the submission"; and
32 secondly, "If the City Road office", and this is at the bottom of the page, "If the City Road
33 office took a cover the information would not be recorded anywhere at all". Therefore, it
34 appears that the only original documentary evidence we have in relation to Claremont Close

1 is the annotated interim report, the builder's conference interim report, that we just looked
2 at. It seems to be to different when one reads through the Mansell CMS Cameron McKenna
3 leniency application on behalf of Mansell. It seems that certain officers may have retained
4 records on databases, but that apparently is not the case in relation to City Road. So this is
5 not information that was lifted from a database that recorded a cover price being taken. The
6 only documentary evidence that we have ----

7 THE CHAIRMAN: The parts in the general Mansell evidence, so in the earlier section, part of
8 section IV about putting a "C" next to things on the database, that is not in relation to the
9 City Road office?

10 MR. HOSKINS: It appears not. It is one of the points we took in the administrative procedure
11 because we said, if you look at Mansell's description of how it generally recorded a cover
12 price, that does not apply to us. Certainly, having sat ----

13 MR. BEARD: If it assists, no, it is not.

14 MR. HOSKINS: That is where I had got to with the cold towels around my head. This is not one
15 of those taken from a database which had a particular way of recording cover pricing. So
16 the evidence we have is the interim report and this interview of Mr. Goodbun, and that is it.
17 The rest is CMS Cameron McKenna's evaluation of the original evidence.
18 Page 9, in the middle of the page one sees SM, "Just the way, that's fine". Could I ask you
19 to read that question and the answer which follows. (After a pause) You will see that
20 Mr. Goodbun is giving evidence about what he would do if asked for a cover price, but we
21 say this is evidence of generally how cover prices work, and indeed the Office treats it as
22 such in the decision. What he says is there was no golden rule, and one might add
23 somewhere between 5 and 15 per cent, that is how ----

24 THE CHAIRMAN: When Mansell were giving a cover price.

25 MR. HOSKINS: That is right. Then over to p.11, please. Could I ask you read on p.11, about
26 two-thirds of the way down, "SM: Okay. Thank you. Now turning to the contract", and to
27 read over the page and stop at the PG answer just before SM, "Um, and just for our
28 completeness, we have a rather large schedule", again about two-thirds of the way down.

29 THE CHAIRMAN: (After a pause) Yes.

30 MR. HOSKINS: Two points in relation to that. First of all, on p.11, Mr. Goodbun is asked, "Do
31 you know who the estimator was?" – i.e. the estimator who was dealing with Claremont
32 Close. Answer, "It was a chap by the name of Phil Hart". As we have seen, that contradicts
33 the schedule of cover prices which was submitted by Mansell with its leniency application.
34 That was the document at tab 10. That indicates the person responsible at Mansell was

1 “AA”, Alan Armstrong. So here we have a situation in which it looks as if it is possible that
2 Mr. Goodbun’s recollection may well be mistaken. We do not know what the answer is
3 because the OFT has not produced any evidence. Was it Phil Hart? Was it Alan
4 Armstrong? We will probably know.

5 THE CHAIRMAN: We do not know the source of the “AA” on the other ----

6 MR. HOSKINS: We know that. We have a description in the leniency application of what CMS
7 Cameron McKenna did. I showed you that they had a list of individuals they interviewed.
8 You are right, we do not know for sure.

9 THE CHAIRMAN: We do not know whether it was Mr. Armstrong who said it was him.

10 MR. HOSKINS: No, CMS Cameron McKenna having conducted having conducted what they
11 described as a very thorough investigation put the name AA in the schedule.

12 THE CHAIRMAN: Is it accepted that both the giving and the receiving of cover prices, the
13 amount that is mentioned from one company to the other is not the amount that that
14 company is going to submit itself, but everyone accepts that the amount that is mentioned is
15 the amount that the person receiving the cover price needs to put in in order to be sure not to
16 get the ----

17 MR. HOSKINS: The Office is probably in a better position than I am to answer that question
18 generally, but certainly that is what is said to have happened in this case, i.e. “Will you give
19 me a cover price”.

20 THE CHAIRMAN: Yes, “Would you like to add something to it just to ensure you are out of the
21 running”?

22 MR. HOSKINS: That is right, so you are given ----

23 THE CHAIRMAN: Is that right, Miss Bacon?

24 MISS BACON: Yes, it is. The cover price received was a minimum, it was a floor, and typically
25 traders would then add a little bit on to it, but they would never go below that minimum
26 cover price because then they would be in danger of getting the contract.

27 THE CHAIRMAN: The fact that it is a floor might mean that it is actually what the other
28 company intends to bid, or that there is an expectation that actually that floor is, itself,
29 slightly above what the giver of the tender ----

30 MISS BACON: The expectation is that the price that is supplied is the minimum, and the person
31 who receives the cover will bid either at that or a larger price. Generally they added on a
32 little bit.

33 MR. HOSKINS: Madam, of course we have the evidence of Mr. Goodbun which I took you to at
34 p.9, there is no golden rule, somewhere between 5 and 15 per cent uplift.

1 THE CHAIRMAN: That was what he would add to his contract price for which he was giving a
2 cover.

3 MR. HOSKINS: That is right. That is the view of a person who gave cover pricing. That was
4 the point on p.11, Mr. Goodbun's recollection was Phil Hart. Then over the page, p.12, the
5 second question, SM:

6 "Um, ah, were these, are these your notes on this document?

7 No. That's Phil Hart's."

8 You have the point already, query whether it was indeed Phil Hart. What is clear is that the
9 annotations were not made by Peter Goodbun.

10 He then launches with enthusiasm into an explanation of the annotations on the document.

11 He was not asked by the Office whether he was giving an explanation of the annotations
12 that had been given to him by the author of the annotations, whether that was Phil Hart or
13 Alan Armstrong. He was not asked whether this was just his explanation *ex post* of what he
14 thinks the annotations might mean. Of course, there is a very real possibility that this is
15 simply his view of the document. It is not based on a communication with the author of the
16 annotations. It is not based on direct evidence.

17 Mr. Goodbun did have something to do with Claremont Close. One aspect of it is at p.13,
18 just below half way:

19 "SM: Okay.

20 PG: Um, the volume of competition in the London market is such ..."

21 Perhaps I could ask you to read from there down to his penultimate answer on that page:

22 "Um, therefore the decision to go to a similar sized organisation ..."

23 THE CHAIRMAN: (After a pause) Yes.

24 MR. HOSKINS: So what he does do, what he does have direct knowledge of, is that he decided
25 that a cover price should be sought from DL. We know from this transcript that it was not
26 Peter Goodbun who actually approached DL. He thinks it was Phil Hart. The leniency
27 application suggests that it may well have been Alan Armstrong.

28 What is important, having gone through this, is to note what Mr. Goodbun's evidence
29 amounts up to. His evidence actually goes no further than indicating that he decided that a
30 cover price should be sought from DL. He has no knowledge, on the face of this certainly,
31 of whether DL was actually approached. He has no knowledge of whether DL did actually
32 provide a cover price. It is not in this.

33 THE CHAIRMAN: On p.9 that we looked at, he seems there to be saying that the decision
34 whether to proceed or not to proceed, which I think there means whether they are really

1 going to try and get the contract or not try and get the contract, ultimately lies on the
2 bidding director. Which of these people do we think is the bidding director, or is that
3 someone more senior to Mr. Goodbun?

4 MR. HOSKINS: I presume it is someone more senior to Peter Goodbun.

5 THE CHAIRMAN: I do not know whether he means “director” there in the formal sense of a
6 director of the company or what, but there he seems to be saying that the decision as to
7 whether to take a cover is the decision of the bidding director, or maybe it was his decision
8 just to go to Durkan for the cover.

9 MR. HOSKINS: You are asking the wrong person. I do not mean that disrespectfully, because
10 that is a part of my case. The fact that we are asking these questions, each of these
11 questions is a hole in our knowledge, it is a hole in the Office’s case.

12 PROFESSOR PICKERING: Mr. Hoskins, just looking back at tab 9, we see there that
13 Mr. Goodbun is shown as Estimating Manager for London, and Messrs. Hart and
14 Armstrong are both shown as Senior Estimators. I imagine that there is a hierarchy, and
15 indeed it looks to me as though that table shows the hierarchy of the people that were
16 interviewed by Camerons. It is not necessarily unreasonable to infer perhaps that
17 Mr. Goodbun took a decision as to what was needed and delegated it to somebody to do it.
18 The other point that occurs to me is this: while one has a set of initials against each of the
19 jobs, are you inviting us to assume that as senior estimators worked alone, is there the
20 possibility that in cases generally more than one estimator would perhaps work on a
21 particular job and so might the listing of a single set of initials actually obscure the way in
22 which work actually proceeded on the estimating side of jobs?

23 MR. HOSKINS: Professor, to use footballing parlance, this is where I get out my yellow card,
24 with all due respect.

25 PROFESSOR PICKERING: At me?

26 MR. HOSKINS: At you. The question of whether the OFT has proved its case is a matter for the
27 OFT. The OFT has to have produced all of the evidence. Now, certainly what one can do
28 is to say, “Well, looking at what is there, looking at the gaps, this might have happened, that
29 might have happened”. But, as I will come to show you, when one looks at the case law -
30 and this is effectively common ground - if there is another plausible explanation which does
31 not involve infringement, then my client wins its appeal. In my submission - and I am sorry
32 to be so cheeky - it is not appropriate for the Tribunal to try and fill in the gaps with
33 possibilities. The actual question for the Tribunal to ask itself is: Is there a version of the
34 story, given the limited facts we have, which is plausible and does not result in

1 infringement? So, one actually has to ask the question the other way round, with all due
2 respect. I could, but I have not, because it is well-trodden ground, go into Article 6 as in
3 the ECHR, the presumption of innocence, etc. But, this is just the practical aspect of that.
4 We do not need to go back to that sort of case law.

5 PROFESSOR PICKERING: Could I just ask you, related to the argument that you are putting
6 before us: There seem to be two numbers - the 1.3 million that is shown on the Builders'
7 Conference sheet that is attributed to Mr. Sharpe. But, you have not commented on the fact
8 - and I am interested in your view - that on the print-out the figure shown is £750,000.

9 MR. HOSKINS: I think that is dealt with. There is a description of that. I think it may well be in
10 the transcript at the bottom of p.12. SM refers to the schedule and actually asks Mr.
11 Goodbun about the figure of £750,000. You will see his explanation at the bottom of p.12,
12 going on to p.13.

13 PROFESSOR PICKERING: (Pause whilst read): It does not actually contrast that, does it?

14 MR. HOSKINS: It does not, no.

15 PROFESSOR PICKERING: Do you make anything of that difference?

16 MR. HOSKINS: My submission at the end of this will be that every time there is a gap that the
17 OFT has not filled, it is to my advantage and the Tribunal is obliged to construe it to my
18 advantage. Absolutely.
19 Where does that leave us then on the OFT's case? Remember, I have not even come to our
20 evidence yet. I am just looking at what the OFT's finding is based on. Clearly, it depends
21 very heavily on the annotated interim report. There are a number of points. I said I would
22 come back to the report, because it is the fundamental document, for the reasons I have
23 described. Before I do that I do want to make some general submissions about the manner
24 in which the Office has conducted this aspect of the appeal. It echoes to a certain extent,
25 madam, some of the comments you made in opening. In my understanding they are going
26 to be far more critical than the way in which you made your comments. In contrast to
27 Durkan, the Office has not provided any witness evidence whatsoever to support its
28 decision. That failure is in sharp contrast both to the previous practice of the Office itself
29 and, indeed, of the Tribunal. The two best examples are *Argos* (the toys cartel case) and the
30 ***Football Shirts case (JJB, etc.)*. One sees an example of the OFT's attitude to the need
31 for it to provide witness evidence in one of the transcripts of the *Argos* case. Can I ask you
32 to go to the authorities bundle 5A? I should give a disclaimer and say that I was instructed
33 by *Argos*. One sees at para. 1 what this particular judgment is about. It is about whether
34 the Office should be permitted to adduce three witness statements in support of the

1 contested decision. Remember, this was one of the very first cartel cases to come before the
2 Tribunal and it was not clear exactly how the system would operate - whether the Office
3 would be required to produce witness statements or not. But, in this case, having failed, or
4 decided not to take witness statements during the investigative procedure, the Office
5 decided that it would like to have witness statements to support its decision for the purposes
6 of the trial before the Tribunal. It applied to do so.

7 Paragraph 24 sets out why the Office took the view that it did - i.e. why it believed that it
8 should be given permission to adduce witness statements. Paragraph 6, the final sentence.
9 (Pause whilst read): They are clearly right. The fundamental issue in a case is the
10 credibility of witnesses. You need both sides of the story. What actually happened in both
11 Argos and Football Shirts (which, again, I was involved in) was that there was extensive
12 cross-examination of witnesses produced by the Office and witnesses produced by the
13 appellants.

14 So, the Office is well aware of its previous practice and beliefs, i.e. a need for witness
15 statements; is well aware that the previous cartel cases involve cross-examination. Yet, no
16 witness statement here. That is despite the fact that DL's position, both in the witness
17 statements and the submissions made throughout the investigative procedure, was quite
18 clear: DL said, "We did not do this" and it put up the individuals. Again, there was an oral
19 hearing before the Office in which two of the individuals who are going to give evidence
20 were present. There was the (unsigned at that stage) witness statement from Brian Sharpe
21 that was produced during the investigative procedure. It was clear all along that we were
22 saying we did not do it. It was clear all along that you had the individuals who were
23 involved in Claremont Close who were saying, "I did not do it". Credibility was always at
24 the heart of that issue. The Office could, and we say should -- The sensible thing to do
25 would have been during the investigative procedure, as part of Mansell's leniency
26 application, to say, "Thank you very much, Mr. Goodbun. We would like a witness
27 statement from you". Indeed, if the job had been done properly, they would have actually
28 gone and said, "Well, is it Alan Armstrong or is it Phil Hart? We will have a witness
29 statement from you as well. If you, Mansell, do not give us the witness statements, I am
30 sorry, you will not have your leniency". It is not just a question of the OFT having to
31 chase individuals. Mansell had come to them with a leniency application. The OFT had the
32 stick. "If you want your leniency, give us the witness statements".

33 But, even having failed to do that, they could have got witness statements after the
34 Decision. That is what happened in Argos. Now, it is said in the OFT's skeleton, "Oh,

1 Durkan would have opposed that". Well, we might well have done. But, so what? Either
2 they were entitled to put in the witness statements or not, but if they wanted to support their
3 case, they have to bring them forward. If they decide after the event, after the decision, they
4 need them to support their case, and they have to fight to put it in, then so be it. But, the
5 fact is that they have simply sat back and decided to fight this case without putting up any
6 witness evidence. What does that mean? Where does that leave us all?

7 THE CHAIRMAN: At what point then did you see the Builders' Conference page and the
8 transcript of the interview with Mr. Goodbun?

9 MR. HOSKINS: Included with the Statement of Objections.

10 Where does that leave us? We know this is an appeal under s.46(1) of the Competition Act
11 1998. We know that the Tribunal is required to determine this case - this issue - on the
12 merits. It is effectively a trial. That is what we are all here for. It is a trial - opening,
13 closing, cross-examination. It is a trial. I fully accept that strict rules of evidence do not
14 apply before the Tribunal. That is clear from the Tribunal's guide to proceedings. There is
15 no requirement on the OFT to produce a witness statement. There is no rule which says that
16 if they do not, they automatically lose. But, having said that, where, as in *Argos*, as in
17 *Football Shirts*** it is quite clear that the case is going to depend on the credibility of our
18 witnesses - and this is a question where it comes down to what is fair to the Tribunal; what
19 is fair to us? The credibility of our witnesses is going to be attacked. What one would
20 expect is that a witness statement would have been produced; that we would have had the
21 ability to cross-examine on that witness statement. The witness statement, of course, unlike
22 the interview transcript, would be backed by a statement of truth. What the OFT has
23 actually done is that it has deprived the Tribunal of the opportunity of hearing evidence and
24 it has deprived us of the ability to cross-examine the relevant witnesses.

25 So, the punch-line is: What does the Tribunal do about that, other than thinking that really
26 the OFT has not behaved very well here? The answer is this: the fact that the OFT has not
27 produced witness evidence should weigh very heavily with the Tribunal when it comes to
28 consider all of the evidence before it on infringement 220. I submit that where there are any
29 gaps or inconsistencies in the Office's evidence then we should be given the benefit of the
30 doubt because the Office cannot fill in the gaps.

31 Let me take that a stage further. Let me plug that into the case law. What do I mean when I
32 say that where there are gaps or inconsistencies we should get the benefit of the doubt? If
33 it is a trivial matter, so what? You may come to the conclusion that I lose. So, what is the
34 framework? The framework is a plausible explanation. Is there a plausible explanation on

1 the limited facts we have that gives a version of events which is consistent with the facts we
2 have, which does not involve infringement on the part of DL? At their defence, para. 24,
3 the OFT cites a case called *Aalborg Portland*, which is well-known. ***** The OFT accepts
4 that it is, quoting “necessary to take account of whether any other plausible explanation for
5 the evidence had been offered”.

6 That is taken from *Aalborg Portland*. Can I ask you very quickly to look at that at Bundle
7 5B, Tab 19. Can I ask you to turn to p.18 of the report? Can I ask you to read paras. 55 to
8 57, please? (Pause whilst read) All it really is is simply a practical manifestation of the
9 presumption of innocence that comes from Article 6 of the Human Rights Convention: is
10 there another possible explanation which does not involve infringement? It looks like, from
11 para.24 of the defence, that we are in agreement on this, I and the OFT: it is necessary to
12 ask whether there is another possible explanation.

13 How does that apply in this present case then? Could I ask you to take up the Builders’
14 Conference Interim Job Report again so you have it in front of you, bundle 3 tab 7. Let us
15 just see what we know and what we do not know. You see annotations on the document.
16 There is a cross beside “Durkan Limited” and there is the name “Brian Sharpe” in a box, a
17 figure. First point: it is not clear (we do not know) whether the annotations in the interim
18 report were made by Alan Armstrong, Phil Hart, or indeed an other. We simply do not
19 know. Mr. Goodbun says it is Phil Hart but we do not even know that he is right that Phil
20 Hart was the estimator working on this job, or an estimator working on this job if indeed
21 there was more than one.

22 Secondly, the Office has not produced any evidence identifying the author of the
23 annotations, or any evidence from the author of the annotations explaining what they mean.
24 We do not know what was in the author’s mind when he wrote them down.

25 THE CHAIRMAN: We have not seen the transcripts of the interviews of Mr. Hart and Mr.
26 Armstrong.

27 MR. HOSKINS: They were not interviewed by the OFT apparently. They were interviewed by
28 CMS Cameron McKenna. We have no idea what was involved in that interview.
29 We say there are a number of plausible scenarios of these annotations which do not involve
30 any infringement by DL. One possible scenario is this. Peter Goodbun decides that a cover
31 price should be sought from DL. He tells whichever estimator it was who was responsible:
32 this is what I want you to do; he delegates the task. The author of the annotations has a
33 busy day ahead of him, so to remind him to do it, that he has got to contact, he puts a cross
34 beside the name of Durkan Limited (must call them later). At some point in the day he

1 telephones DL on the switchboard number that is given. He asks for the name of the
2 estimator responsible for the Claremont Close project at DL. The person who answers the
3 phone says it is Brian Sharpe. Very good, it is Brian Sharpe, he writes down the name.
4 "Can I speak to Brian Sharpe?" "I am sorry, he is not at his desk just now." "Do you know
5 when he will be back?" "No, I am sorry, I do not know". "Oh".
6 Time was running out. We know from Mr. Goodbun's transcripts that they ask for cover
7 prices at the very last moment because they do not want it to go out in public that they are
8 fishing around trying to get a cover price. So what the person does is he exercises his own
9 initiative and he says: this is a handy list; I will phone one of these other people. Peter
10 Goodbun is going to be really pleased with me because I cannot get one from DL, but I will
11 go back to get another cover price because we are in real trouble; there are six hours to go
12 and if I do not come back with a cover price he is going to have my guts for garters.
13 So he phones round the other contact numbers: can I have a cover price? Yes, certainly:
14 £1,306,000, write it down. I will put a box round it, because it just because in my own mind
15 I know this is not actually coming from Brian Sharpe, so I am going to differentiate it on the
16 page and put a box round it.
17 We know, we have actually got the amounts of the various tender returns on this project.
18 Can I ask you to look at Decision IV-6160 p.1500. You will see a table there. Remember,
19 there is no golden rule. Mr. Goodbun would mark up a round, 5 to 15 per cent and that
20 would be his practice. If one looks at the list of tenders and one calculates the mark ups, so
21 one takes, for example, Mulalley's value, one compares it to the £1,306,000 to establish
22 what the percentage mark up was on the Mulalley tender, then the figure £1,306,000 is a
23 mark up of 3.5 per cent on the Mulalley tender; it is 14.1 per cent mark up on the Dew
24 Construction tender; it is 18.8 per cent on the Gunitite (Eastern) Ltd tender. The Durkan Ltd
25 tender, for the sake of completeness, is a mark up of 8.7 per cent. It is perfectly possible on
26 those figures that a cover price was given to Mansell by Mulalley, or Dew Construction, or
27 Gunitite. We do not know.

28 THE CHAIRMAN: I notice also on the Builders' Conference it has got "estimated value" in the
29 top right hand corner. Is that £900,000, which is actually fairly close to what it actually
30 went for?

31 MR. HOSKINS: Again, Madam, I cannot help you because I would be speculating.

32 THE CHAIRMAN: No, I just wonder what is the mark up between the £900,000 and the
33 £1,306,000. (Pause)

1 MR. HOSKINS: Madam, that is one plausible scenario which explains all the annotations and
2 does not involve infringement. There is another possible scenario. It is a variation on a
3 theme. There is a difference in it and it is this. Peter Goodbun decides that a cover price
4 should be sought from DL. He communicates that to whichever estimator it was who was
5 responsible. For this example the estimator does not at that stage put a cross by "Durkan
6 Ltd". He has a good memory; he does not need to put that down to remember to do it later
7 and who he has to contact. The estimator telephones the switchboard number, same
8 conversation: can you tell me who is responsible at Durkan Ltd for Claremont Close?
9 Certainly, it is Brian Sharpe. Can I speak to him? I am sorry, he is not there. Do you know
10 when he is going to be back? Sorry, I do not. I am in trouble, I am not going to get a cover
11 price from DL in time. I will put a cross beside their name. Of course, a cross can be used
12 as a general form of marking, but the natural meaning of a cross is a negative. No, I have
13 not got one. It is not conclusive, but it is a possibility. It is a plausible explanation. Then
14 we are into the same scenario: shortage of time; my boss is really going to give me a
15 roasting if I do not come up with a cover price. I will use my initiative, I will phone one of
16 the other ones. As I have shown, some of the other ones, perfectly possible within the no
17 golden rule around 5 to 15 per cent could have given a cover price.
18 So on the OFT's own evidence they have not made out their case, they simply have not.
19 They cannot, at this late stage, try to fill in the gaps by saying: this might have happened;
20 that might have happened. It is not permissible. I hope, if they try to do so, the red card
21 will be produced because it really is not acceptable.
22 An interesting and very useful point in relation to this is that of course on both these
23 scenarios there is no credibility issue at all because our witnesses will say we did not do it.
24 Both the scenarios I have described are completely consistent with our evidence. So it is
25 only the OFT's case that raises a credibility issue, that raises an inconsistency issue. Both
26 of the plausible explanations I have given are consistent with Peter Goodbun's interview
27 transcript, and both of them are consistent with the annotations on the interim report. Our
28 submission is when you have that situation one should naturally favour the situation where
29 there is consistency rather than being driven towards where there is inconsistency,
30 particularly when that inconsistency is unexplained in very many material ways.
31 What have we got, then, on the OFT's case? No witness evidence; an interview transcript
32 from Peter Goodbun which goes no further than indicating that he decided that a cover price
33 should be sought from DL. He has no knowledge of whether DL was actually approached;
34 he has no knowledge of whether DL actually did provide a cover price.

1 Secondly, we have the annotations on the interim report. We do not know who made those
2 annotations, let alone what they mean. They are capable of having a perfectly plausible,
3 innocent explanation. In fact, I have identified two perfectly plausible, innocent
4 explanations.

5 With all due respect, the OFT's case is looking very weak at this stage. But of course, it is
6 weaker than that. It is not just that it does not stand up on its own two legs, because you
7 have got our evidence, and you have got witness statements from all the relevant individuals
8 involved in the hierarchy at DL's end of the project: Brian Sharpe, Guy Copeland, James
9 Briggs, Robert Clark. Their witness statements state the following: in August 2004 DL
10 introduced an official policy not to receive or give a cover price for any tender. Brian
11 Sharpe was the estimator at DL who was responsible for putting the Claremont Close tender
12 together. Brian Sharpe was aware of the official policy not to receive or give cover prices.
13 He says he complied with that policy. Brian Sharpe, in his witness statement, is adamant
14 that he did not provide a cover to Mansell in relation to this project. Brian Sharpe says he
15 has a good memory for names. He says he does not even recognise the names Phil Hart or
16 Peter Goodbun. You have the witness statements from Guy Copeland, James Briggs and
17 Robert Clark all saying that they did not provide a cover price and they had no knowledge
18 of one being given.

19 It is always risky, before the witnesses have stood up, to make submissions, but with
20 respect, if those witnesses confirm their evidence when cross-examined, then the OFT's
21 already flimsy case is, with all due respect, dead in the water on this.

22 Can I give myself a pat on the back because I said I would finish by one?

23 THE CHAIRMAN: We give you a pat on the back as well, Mr. Hoskins.

24 MR. HOSKINS: It may not last, but thank you.

25 THE CHAIRMAN: Very well. So then we will resume at 2 and then it will be the first of your
26 witnesses.

27 MR. HOSKINS: If it helps you, the order of the witnesses is as indicated in the Notice. It will be
28 Daniel Durkan, Alan Fraher and William Durkan, if you want to refresh yourselves from
29 their witness statements.

30 THE CHAIRMAN: Thank you very much indeed.

31 (Adjourned for a short time)

32 MR. HOSKINS: Good afternoon. One of the aspects that you mentioned in your opening remarks
33 this morning, madam, was confidentiality, and I just wanted to check the position. We are
34 not claiming confidentiality in relation to anything any more.

1 THE CHAIRMAN: Then it only remains an issue – I cannot remember whether this applies in
2 your case – if you are comparing your table calculation with somebody else’s table
3 calculation in a way which refers to that other company’s figures, then of course if they are
4 not here we have to assume that those still remain confidential.

5 MR. HOSKINS: I am not doing that, whether the Office is – I am not doing it. I think I am ready
6 to call the first witness as long as everyone is ready. Can I call Daniel Durkan, please.

7 Mr. DANIEL GERRARD DURKAN, Sworn
8 Examined by Mr. HOSKINS

9 THE CHAIRMAN: Can I just check whether the other witnesses that you are calling are also in
10 court at the moment?

11 MR. HOSKINS: They are all in court, madam.

12 THE CHAIRMAN: Is there any objection to that, Miss Bacon?

13 MISS BACON: No, in one of the hearings I did ask for a witness to stand out, but I am happy for
14 them to be in the courtroom, in fact it may help because I may be able to take my
15 subsequent cross-examination a bit shorter if they have heard the evidence that has been
16 given before them.

17 THE CHAIRMAN: Yes.

18 MR. HOSKINS: I do not know if you prefer witnesses to stand or sit?

19 THE CHAIRMAN: No, please sit down, Mr. Durkan, and I see you have some water there and a
20 bundle of documents in front of you.

21 MR. HOSKINS: Mr. Durkan, can you state your full name, please?

22 A Daniel Gerard Durkan.

23 Q I hope you have some bundles in front of you, including one that is marked “2A Control
24 Issue”?

25 A Yes.

26 Q If you turn through to tab 2, please, there should be a document entitled “Witness Statement
27 of Daniel Durkan”?

28 A Correct.

29 Q Could you just flick through that until p.5, and on p.5 is that your signature?

30 A That is my signature.

31 Q And can you confirm that the contents of this witness statement are yours?

32 A They are mine.

33 Q And that they are correct?

34 A They are correct.

1 Q Then the same exercise at tab 6, this should be a document entitled "Second Witness
2 Statement of Daniel Durkan", if you flick through to p.12, is that your signature?

3 A That is my signature.

4 Q Is this your second witness statement?

5 A It is indeed.

6 Q Can you confirm that the contents are correct?

7 A They are correct.

8 MR. HOSKINS: Thank you very much, there will be some questions for you now.

9 Cross-examined by Miss BACON

10 Q Mr. Durkan, I am going to ask you to have in front of you bundles 2A and 2B, we will be
11 going quite frequently to 2B. The only other bundle that I will be asking you to go to is
12 bundle 3A, and we will get to that in due course, and that is just for a few questions. Can I
13 ask you to turn first of all to bundle 2A, tab 9, which is the shareholders' agreement. I
14 understand that has not been amended, is that right?

15 A That's my understanding.

16 Q Can you turn to clause 7.2, which is on p.8 at the bottom? Can you confirm on the basis of
17 that clause that your position at DP was executive director?

18 A I was a director of the company.

19 Q And your position was executive director?

20 A I was appointed an executive, but my role actually was otherwise.

21 Q You held that role until the management buy out, is that right?

22 A I was a director of the company until the management buy out.

23 Q Your father, as I understand it, was chairman of Durkan Pudelek?

24 A Yes.

25 Q And was he the chairman right up until the time of the management buy out?

26 A That's correct.

27 Q I understand that you were deputy chairman?

28 A I may have been referred to as deputy chairman at some other point in some documents.

29 Q But were you deputy chairman?

30 A Not officially, no. My title wasn't "deputy chairman".

31 Q At the outset the other directors of Durkan Pudelek were Mr. Fraher, Mr. Pudelek and Mr.
32 Simmons and your father??

33 A And others, yes.

34 Q But at the outset?

1 A At the outset, correct, yes.

2 Q And Mr. Scott joined the board in December 1997, is that correct?

3 A I believe so.

4 Q And then Mr. Williams in February 1999?

5 A I believe so also.

6 Q So until Mr. Scott joined the board, Durkan Holdings, the parent company, had three out of
7 five board members, is that right?

8 A That's correct.

9 Q So you had effective control over the board numerically speaking then?

10 A Numerically speaking.

11 Q Even when Mr. Scott joined in 1997, so you were 3:3, your father had a casting vote?

12 A That would be correct.

13 Q So you still had control over the board at that point?

14 A We had three directors on the board.

15 Q But he had the casting vote, so if it came to a vote the Durkan Holdings side would have
16 prevailed?

17 A Not under the Shareholders' Agreement, we never had a casting vote.

18 Q Can you look at clause 5.1.4 of the Shareholders' Agreement, that is at p.5, towards the
19 bottom of the page, and it says there:

20 "All cheques drawn by the Company in excess of £2,000 shall be signed by one
21 Person nominated by Durkan and either Pudelek or Simmons"

22 Can you tell the Tribunal who was usually the Durkan signatory under that provision, was it
23 Mr. Fraher?

24 A It could have been Mr. Fraher, it could have been myself, it could have been my father. If
25 my recollection serves me correctly that was put in place because we were entering a new
26 business venture, we didn't know each other that well, but I don't recall every having to sign
27 cheques – if I did there were very few.

28 THE CHAIRMAN: So are you saying that actually nobody was ever nominated under that
29 clause?

30 A The clause was there, but whether it was implemented or not I don't believe it was, and if it
31 was it wasn't on a regular basis.

32 MISS BACON: I might ask Mr. Fraher about that too because he was the finance director, so he
33 may be able to answer that more directly. (To the witness): Can I just ask you about the

1 other companies in which you were a director. You said in your witness statement that you
2 were a director of Durkan Holdings for the past 20 years, is that right?

3 A That's correct.

4 Q I also understand that you are currently the chief executive of Durkan Ltd?

5 A That's correct.

6 Q And how long have you been a director of Durkan Ltd?

7 A Probably 19 years or thereabouts, I cannot be sure, but it is quite a while.

8 THE CHAIRMAN: In these companies, just leaving aside what people actually did, but just as
9 far as the titles are concerned, are there some directors who are called "executive directors"
10 and some who are called "non-executive directors", or are they all just called "directors" or
11 "executive directors"?

12 A In the case of Durkan Pudelek I was originally appointed as an executive director, but you
13 will see in some documents I was referred to as a "non-executive director", I believe I could
14 have been referred to as a "deputy chairman" at one point, but I think that in itself
15 demonstrates that I didn't play an executive role in the business. I sat on the board, I was
16 there purely to protect the interests of Durkan Holdings.

17 MISS BACON: Mr. Durkan, I want to ask you a few questions about the services that were
18 provided to Durkan Pudelek, and in particular the administrative services. You say that
19 Mike and Colin's role was to get on and run the construction business on a day to day basis,
20 but I understand that one of the things that Durkan Holdings and the Group did was to
21 provide them with company administration and some other services, is that right??

22 A That's correct.

23 Q I just want to establish which services were provided by Durkan Holdings or Durkan Ltd to
24 Durkan Pudelek. Can we start off with estimating services? You say that they were
25 provided a the start?

26 A Yes, I believe that's correct.

27 Q And for how long??

28 A A very short period of time, a few months if my recollection serves me.

29 Q Health and Safety, that was dealt with at a Group level I understand?

30 A It was, it was a service provided to all Group companies.

31 Q Materials buying?

32 A I believe that was a service provided.

33 Q Accounting and secretarial services?

34 A Accounting services were provided and paid for by Durkan Pudelek.

1 THE CHAIRMAN: Provided by?

2 A Sorry, provided to Durkan Pudelek, I beg your pardon.

3 MISS BACON: Provided to Durkan, this is all services provided by Durkan Holdings or Durkan

4 Ltd to Durkan Pudelek. Obtaining bonds?

5 A We endeavoured to obtain bonds when required to do so.

6 THE CHAIRMAN: Who is “we” though??

7 A Sorry, Durkan Holdings.

8 MISS BACON: That is Durkan Holdings, or Durkan Ltd?

9 A Yes.

10 Q Insurance, which I believe Mr. Fraher normally took care of?

11 A Again, that was a service provided and paid for.

12 Q IT support?

13 A That, likewise, was also provided and paid for.

14 Q I also understand that Durkan Pudelek was part of the Durkan Group website, so

15 presumably you provide overall web hosting and web administration services for them?

16 A No, they were on the Durkan website, but that was organised and taken care of by them

17 directly, because we would not have any input into what the content was.

18 Q So are you saying that the people who set up your website did not set up their part of the

19 website?

20 A My understanding is that we didn’t set the website up, they dealt directly with whoever

21 designed it, the input of whatever that material was, and it was then I presume just linked.

22 Q So what happened was you had your web designers, and then Durkan Pudelek, that would

23 be Mr. Pudelek or Mr. Simmons, would go to them and say: “We want the following

24 content on it”, but you were using the same web designers because it was part of the same

25 website, was it not?

26 A It was one website but it’s not uncommon to have different web designers. You can quite

27 easy have that when you’ve got micro-sites, which is effectively that was. I do not know

28 who designed theirs.

29 Q Did you have a different web designer for their pages?

30 A I wouldn’t know.

31 Q Office space, they shared your office space as I understand it?

32 A They had a separate lease within the building.

33 Q But in the same building?

34 A In the same building, separate lease, separate floors.

1 Q And marketing support?

2 A There was no marketing support given by Durkan Holdings.

3 Q And your time and Mr. Fraher's time, that was provided to Durkan Pudelek?

4 A There was none. I attended board meetings, other than that I've no day to day involvement

5 in the business, in how it was run, direction.

6 THE CHAIRMAN: What do you mean by "marketing support"? Are we still on marketing

7 support?

8 MISS BACON: No, we are on to Mr. Durkan's time. I was going to ask some more questions

9 about marketing later if that helps you, madam. (To the witness): We have just gone

10 through all those services, is there anything I have not mentioned?

11 A I don't believe so.

12 Q I understand that the services were paid for by an annual management charge levied on DP,

13 is that right?

14 A That's correct.

15 Q So insofar as you did anything, or Mr. Fraher did anything, and we will come later to what

16 you did or did not do, insofar as you were doing anything for Durkan Pudelek, although you

17 were not remunerated directly by them in terms of receiving a salary DL or DH would have

18 been remunerated through the management charge, is that right?

19 A Durkan Holdings was remunerated for the services provided to Durkan Pudelek, not for my

20 time.

21 Q I understand that it was not until around the calendar year 1996 that DP actually started

22 paying the management charge, is that right?

23 A No, if my memory serves me correctly, they were paying a management charge earlier.

24 Q Can you remember when they started paying it?

25 A I can't remember the exact dates, but I believe they were paying it earlier.

26 Q I think I might have to ask Mr. Fraher exactly when they started paying it. Can I now ask

27 you about DP's banking facilities. Can you turn up your second witness statement at

28 para.20, tab 6 of bundle 2A. Could you look two lines down. You say:

29 "The fact of the matter is that Mike and Colin did their own thing. For example,

30 they did not want to use the same bankers as Durkan Holdings so they made

31 approaches to the likes of Barclays Bank Plc."

32 You say that because Barclays would not give them the facilities they transferred their bank

33 to Allied Irish Bank. Can I ask you to keep that open and turn up bundle 2B, tab 89. If you

34 turn over the first page you get to the page which has got 1 at the bottom, it is the second

1 page of the tab 89. You will see that that is the financial statements for the period from the
2 date of incorporation until 31st July 1993. If you turn over, this lists the bankers for Durkan
3 Pudelek, and you will see that the bankers are listed as Barclays.

4 A That's correct.

5 Q So it is not the case that they made approaches to Barclays and did not get there, they
6 actually started off with Barclays, did they not?

7 A My recollection is certainly that they opened an account with Barclays, that's correct.

8 Q So Barclays were their bankers for that financial year. If you then turn over in the bundle to
9 the next financial statements at tab 90, they are still with Barclays then. Then if you turn
10 over to tab 91 you will see they are still with Barclays. This is for the year ended 1995.
11 Then tab 92, we are on to 1996, they are still with Barclays. If you go to tab 93 you will
12 now see that they are banking both with Barclays and the Bank of Ireland. So they have
13 opened a new bank account, but they have also kept the Barclays account. If you go to tab
14 94 you will see they kept both of the accounts then. If you go to tab 95, you will see that by
15 now, which is the year ended January 1999, they have dropped Barclays and they are with
16 the Bank of Ireland. I am not going to ask you to go through them, I just want you to look
17 at two more. If you go to tab 98 you will see that at some point in the year ended 31st
18 January 2002 they have opened a new account at Anglo Irish Asset. If you go to tab 100,
19 which is the year ended 31st January 2004, they are now with Allied Irish and the Bank of
20 Ireland. So it is not a case of going to Barclays, Barclays saying no, sorry, and then going
21 to Allied Irish. They actually started off with Barclays, did they not, and then after some
22 years they went to a variety of Irish banks?

23 A They started with Barclays and they obviously moved – yes, they did open an account.

24 Q The Bank of Ireland, Anglo Irish Asset and Allied Irish were all the bankers of DH, were
25 they not?

26 A Correct.

27 Q So, in fact, DP switched from having different bankers from DH at the outset to having the
28 same bankers as DH?

29 A They switched from Barclays because the intention was, when they opened an account at
30 Barclays, it was part of Mike's thinking in terms of strategy that he felt that they would be a
31 good source for work opportunities. That never materialised.

32 THE CHAIRMAN: A good source of?

33 A Of work opportunities. One of the areas that Mike felt that there was work opportunities
34 was in the banking sector, within the private sector, and Barclays was a bank that they

1 thought they could use as their contact to get maybe work opportunities. After whatever
2 number of years they migrated across. Because there was no work coming from that area,
3 they migrated over to one of the Irish banks. That was at Mike's request, that he wanted to
4 move.

5 MISS BACON: Mr. Durkan, this is all very different from your witness statement where you say
6 that they wanted to do their own thing, so they went to different bankers. Actually, as you
7 have just confirmed to the court, they went to the same bankers and they switched from
8 having different bankers to having the same bankers as Durkan Holdings?

9 A That's actually correct. What they did was Mike – they did do their own thing. They
10 opened accounts with Barclays and then at a later date they decided to move away from
11 Barclays. That was their choice.

12 Q Can I give you a table, and I will also hand it up to the Tribunal. (Same handed) This saves
13 you going boringly through all of the financial statements. We have just extracted the
14 bankers and the solicitors and the auditors, and this ties in with Professor Pickering's
15 comment earlier on this morning. If you look at that table that sets out, taken from the
16 financial statements, the bankers, solicitors and the auditors of Durkan Pudelek and Durkan
17 Holdings. If you look down that table you can see that Durkan Pudelek and Durkan
18 Holdings had the same solicitors, which you can see is Vanderpump & Sykes throughout
19 the period from 1993 to 2007. As for the auditors, it was Riordan O'Sullivan right down to
20 the year ended January 1999. The year end was the same for the two companies, was it not?
21 It was January of each year, 31st January?

22 A That's correct.

23 Q Then if you go over the page you will see that for the year ending January 2000, lo and
24 behold both companies switch auditors to Grant Thornton. You will also see that apart from
25 the very few early years when Durkan Pudelek were with Barclays, Durkan Pudelek's
26 bankers were bankers that were being used by Durkan Holdings throughout the period. So
27 from the year ended 1997 right through to January 2007, in each case the single or double
28 bankers used by Durkan Pudelek were the same as those used by Durkan Holdings, were
29 they not?

30 A They were the same banks, yes.

31 Q So this shows, does it not, that Durkan Pudelek was not going off on a frolic of its own as
32 regards its financial advice, nor its legal advice, nor its auditors, but following the Group
33 bankers, auditors and solicitors, was it not?

1 A No, Durkan Pudelek may have had the same bankers and they had the same auditors, but
2 that certainly indicates the auditors, that was a statutory requirement that the holding
3 company and subsidiaries were all audited by the same firm. As far as the bankers go I
4 don't believe that Durkan Pudelek ever required banking finance, but it made sense for
5 them to have their current account with obviously the Bank of Ireland or Allied Irish, as
6 they chose.

7 Q They did not have to, did they? They did not have to have the same bankers because they
8 did not at the start?

9 A My understanding is that they instructed Alan Fraher to move to the same bank, purely for
10 simplicity and so on.

11 Q Do you accept that para.20 of your second witness statement is not accurate?

12 A That statement is correct, because they did start at Barclays, but it was under their direction
13 that they wanted to move from Barclays. Alan Fraher would have followed the instructions
14 of Mike Pudelek and he would have opened an account at whichever bank he so chose.

15 Q When you say they did not want to use the bankers of Durkan Holdings, your evidence to
16 the Tribunal has just been that they instructed Mr. Fraher to open bank accounts with the
17 same banks as Durkan Holdings?

18 A Yes, but as I previously explained, they started with Barclays because that's where Mike
19 wanted to have their account, and at a later when they felt there were no work opportunities
20 coming from Barclays Alan was instructed, is my understanding, to move their account. So
21 my statement is correct.

22 Q Can I ask you about the board meetings. You attended all of the board meetings – is that
23 correct?

24 A That's correct.

25 Q There was not ever one that you missed?

26 A Not that I'm aware of, no.

27 Q The board meetings were every one to two months?

28 A I believe they were every two months.

29 Q Can I take you to the agenda for one of the board meetings. It may be that this is a good
30 time to get out bundle 3A. I think it would be helpful if we went through the agenda and
31 the reports attached to this set of minutes. The agenda is three pages into tab 1 for the first
32 set of minutes in this bundle. Was that a typical agenda?

33 A It looks pretty typical. I'm sure it varied from time to time, but it looks reasonably typical,
34 yes.

1 Q I imagine that the agenda would have then been distributed to the directors and would you
2 have had the various reports attached to the agenda?

3 A I would have, yes.

4 Q So you would have had those to look at before the board meeting?

5 A I normally got them the day of or the day before.

6 Q If you then turn on we have the previous minutes which we can flick over. The different
7 reports are separated by green pages helpfully. We then get to Health & Safety. There is
8 one page which seems to be a summary. If you turn over there is a document headed
9 “Durkan Group Health & Safety report”. That is a report by Mr. Cresswell. As I
10 understand it, he was the Group Health & Safety manager?

11 A That’s correct.

12 Q What you have is a sort of summary in relation to Durkan Pudelek and you have a more
13 detailed Group Health & Safety report.

14 A Correct.

15 Q Am I right in thinking that at your board meetings there was typically not a detailed Durkan
16 Pudelek specific Health & Safety report, but you would normally consider the group report
17 that has been prepared by Mr. Cresswell?

18 A Ian Cresswell reported on the Group Health & Safety. He would report specifically on any
19 accidents or anything that was relevant to the Group companies within his report.

20 Q So that included a report of anything relevant to Durkan Pudelek?

21 A It was. It was part of the services again that they were paying for us to provide to them.

22 Q So there was essentially common Health & Safety reporting systems and common Health &
23 Safety policies that were rolled out across the group specially by Mr. Cresswell?

24 A No, when it came down to the specific needs of, say, for example, Durkan Pudelek or
25 Durkan Limited, they would have different – there could be procedures within each
26 company that would differ purely because say, for example, Durkan Limited undertook
27 design and build predominantly in the public sector, and therefore its Health & Safety
28 requirements would be different to that of Durkan Pudelek, who operated purely within the
29 private sector. Health & Safety sometimes is driven by the needs of the client. Therefore,
30 the procedures underneath these layers were different and Mike Pudelek would instruct
31 Colin Simmons on the needs of their business, it is my belief, and Bob Barton, who is a
32 director of Durkan Limited, was the director in charge of safety within our business, and he
33 likewise instructed Ian Cresswell of his needs from contract to contract.

1 Q There might have been specific additional requirements for particular contracts, but surely
2 you are not saying that Durkan Pudelek could have, for example, lower Health & Safety
3 standards than that applied to the Group, are you?

4 A I'm not saying there was low Health & Safety standards. What I am saying is that standards
5 differed within the Group companies.

6 Q That does not make sense, does it. You have got a Group Health & Safety manager, you
7 have got a Group Health & Safety report, you report from the whole lot, all of the different
8 companies within the Durkan Group. You must have had an overarching group Health &
9 Safety policy that you were trying to follow.

10 A That is correct. The individual companies had different requirements from contract to
11 contract, and therefore they would need to -- Ian Cresswell would have direct
12 communication and involvement with each job as and when it was set up, and the needs
13 from the Health and Safety perspective.

14 Q Can I ask you to turn a few pages into the group Health & Safety report? You will see Point
15 5 - Enforcement Notices.

16 "There were no enforcement notices issued in this period. Sites have been
17 reminded that the likelihood of the HSE visiting their site in the coming weeks is
18 extremely high, and all initiatives proposed to the HSE are now in place on all
19 Durkan Group sites".

20 That implies, does it not, that you have a set of Group policies that are being rolled out
21 across all of the sites.

22 A All that it's telling you is that if there is an initiative that we were rolling out that was
23 relevant to the HSE, it would be rolled out across all sites.

24 Q Can I ask you to look at the financial reports now?

25 THE CHAIRMAN: I am sorry. I am not quite sure I have understood the point that was being
26 explored there. These are minutes of the meeting of the board meetings of DP; is that right?

27 MISS BACON: Yes, they are, madam.

28 THE CHAIRMAN: What you are saying is that at the DP meeting ----

29 MISS BACON: That was the point, yes.

30 THE CHAIRMAN: -- they discussed Group Health and Safety.

31 MISS BACON: I will come on again to Group Health and Safety. What I am trying to establish
32 is what this document is. What I was putting to the witness was that instead of having a
33 detailed DP Health & Safety report, what they had was the summary sheet, which dealt with
34 DP ----

1 THE CHAIRMAN: Where is that?

2 MISS BACON: At the front of that little clip.

3 THE CHAIRMAN: The one headed 'Safety' ----

4 MISS BACON: Yes. Exact. So, that related to DP. Then what you have is a more detailed

5 report which is the group report prepared by Mr. Cresswell, who Mr. Durkan just confirmed

6 was the Group Health & Safety manager. We can look at other examples in the other board

7 minutes.

8 THE CHAIRMAN: I am not sure how much of that you accept. Do you accept that the page that

9 is headed 'Safety' is a sort of summary of the points in the main report that are particularly

10 relevant to DP?

11 A That's how it appears, yes.

12 MISS BACON: Then there is consideration of the Group report. This is a Group report.

13 THE CHAIRMAN: Right - the one dated 4th and 5th February, 2003.

14 MISS BACON: Exactly. Yes. Prepared by the Group Health & Safety manager.

15 THE CHAIRMAN: I am with you now.

16 MISS BACON: Then, after that we get to the financial reports. The first page behind the green

17 page headed '5.1 - Financial Reports', the first page is headed 'Key Trading features for the

18 period of October/November'. This seems to be a summary of the results in the relevant

19 period in the year to date. Is that right?

20 A That's correct.

21 Q Then it is followed by a number of spreadsheets which set out the financial results for all of

22 the contracts - current contracts, completed contracts, and so on. Were these kind of details,

23 spreadsheets produced for most, or all, board meetings?

24 A They were produced for most board meetings by, I believe, the commercial director.

25 Q That is supposed to show turnover and margin figures for the projects that DP was involved

26 in; is that right?

27 A That would be correct, yes.

28 Q Then we get on, after that, to 5.2 - the next green sheet. That is entitled 'Cash

29 Management'. I am not going to ask Mr. Durkan to deal with that because those were, as I

30 understand it, compiled by Mr. Fraher; is that right?

31 A That's correct.

32 Q This is a page that was prepared by Mr. Fraher. I will ask Mr. Fraher about those. Then

33 'Marketing and Estimating'. This is actual against budgeted figures for things like inquiries

received, tenders submitted, and orders received, showing the actual number of inquiries against the budget and the variants; is that right?

A That's correct, yes.

Q This was so that the board could track how DP was performing commercially in terms of the success in getting invited to tender and converting inquiries into orders placed.

A It was a tender report, yes.

THE CHAIRMAN: Those numbers are actual inquiries received for November, December and January - 22,640; is that right? Is that some value, or something?

A Million. Million. It would be £22 million pounds worth of inquiries.

MISS BACON: You wanted to have these figures so that you could see in terms of financials where DP was doing in relation to its budget?

A This is prepared by the commercial director -- the estimating manager.

Q I had just asked you to go over the page. You have a more detailed breakdown, as I understand it, listing the various inquiries. So, this is the detail behind the summary page which you have just seen; is that right?

A I presume so, without totting numbers up, yes.

Q You have 'inquiries received' and you have got lists of inquiries. You have 'tenders submitted' and a list of tenders submitted. So, that is showing you how you get to the summary page at the start.

A I would imagine, yes.

Q Yes. If you then flick forward, at this stage we have Durkan Pudelek Interiors on board. That did drop out of the picture after a while. I do not want to go to that in detail. After Durkan Pudelek Interiors you then get Construction at 5.4. This is a detailed spreadsheet again. This looks like a detailed report on the contracts that are underway and completed; is that right?

A Yeah. That was a report, I gather, on completed and current contracts.

Q Completed and current contracts. On the right-hand column it is telling you whether there are any defects that have been cleared, and telling you about the retentions.

A That's correct, yes.

Q Then you should have behind that an A3 sheet which is folded over. This is the current contracts. It says 'Problem contracts highlighted in red'. So, some of those might have been highlighted, but on this it does not look like any of them were highlighted. But you have got some that are listed as 'poor relationships' and you have comments on the right-hand

1 side. Was this designed to let the board know if there are any particularly problematic
2 contracts?

3 A That was the standard report. I believe Durkan Pudelek used that within their management.
4 They reported to the board in this way.

5 Q Right. This was the kind of thing that was given to the board at the board meetings.

6 A It was, yeah.

7 Q If you turn over then to 'Surveying', can you just talk us through the headings in this report?
8 We have first got the 'Report on Loss-Making Contract's. Well, that is pretty self-
9 explanatory. 'Report on Budgeted Loss-Making Contracts'. What does 'Report on
10 Exposure to LADs' mean?

11 A They would be damages that the client might impose. It's a standard industry term.
12 Liquidated Assets Damages.

13 Q That says that there were none anticipated as at this point. Then we have 'Report on Under
14 or Over-Values'. Can you just explain what you understood by 'under and over-values'?

15 A Well, an under-value is if, in terms of your contract, your cashflow's behind -- i.e. the
16 valuation's below where it should be and you haven't been paid the certified amount
17 possibly. Or, an over-value's where you've been overpaid.

18 THE CHAIRMAN: Comparing what with what?

19 A You'd be comparing against the certified sum, I believe.

20 MISS BACON: Can I just break that down a little bit for the benefit of the Tribunal? My
21 understanding is that when you are carrying out a contract at various stages of the contract a
22 surveyor will go in and then certify what work has been done; is that right? That is what
23 you mean by 'certification'.

24 A Certification will be done by the client's architect normally or the project manager.

25 Q But someone will certify what work has been done and on the basis of that certification they
26 will then pay you what is owed for that done and the materials used so far; is that right?

27 A Correct.

28 Q So, when you talk about certification, that is a certification while the contract is in progress.
29 So, by 'under-valuation' do you mean a situation where they have not actually certified as
30 much work done as you have actually done? What do you mean?

31 A Well, exactly. If we've been paid 80 and we spent 100, that's an under-valuation. If we
32 spent 80 and were paid 120, it's an over-valuation. By the difference.

33 Q Right. So, an under-valuation is where you have spent 100 and you have only been certified
34 for the 80. That is why it's called an under-valuation.

1 A Correct.

2 Q So, this is a report on under and over-values and in this particular board meeting you are
3 being told there is a net under-valuation of £353,000. That means across all of your
4 contracts you are missing £353,000 which you have paid, but not been paid by the client.

5 THE CHAIRMAN: It is work that you have done.

6 MISS BACON: Exactly. It is often through sub-contractors. That is the value of the work that
7 you have done but not have been paid for by the client.

8 A Correct.

9 Q Then you go through the projects that are reporting under-valuations and the figures by
10 which they are under-valued. (After a pause): One more tab to take you through. That
11 will be the end, I think. One gets to the Strategic Projects Division. I do not want to go to
12 that. The last tab - 'Resources/Personnel' at Tab 5.6. This is a high level summary on the
13 first page of things like joiners and leavers. This is the next tab after the spreadsheets with
14 the under-values. Do you have that, Mr. Durkan?

15 A I have, yes.

16 Q On the front page that is a summary, is it not joiners and leavers, training courses, and so
17 on?

18 A That's right.

19 Q Then the next page - another A3 - 'Resources Allocation Programme'. This looks to me
20 like some kind of print-out from a diary programme or similar which specifies who is doing
21 what, when. Is that right?

22 A That would appear to be the case, yes.

23 Q Right Can I now take you back to your second witness statement that you had open a
24 minute ago? We have done with that bundle for the moment. Now, you accept, do you not,
25 that this set of reports was typical for a board meeting?

26 A That's correct.

27 Q Can you look at para. 17 of your second witness statement at Tab 6, Bundle 2A? You say
28 there that the board meetings were 'akin to audit or shareholders' meetings with very high
29 level summaries of work undertaken and budgeted'. Now, having just looked and refreshed
30 your memory by reference to what you were actually provided with at the board meetings,
31 and what you considered, do you accept that your statement in that paragraph is not
32 accurate, but in fact at the board meetings you considered extremely detailed reports on all
33 aspects of the work and personnel within DP?

1 A My statement is correct. As I have said there, our board meeting were akin to a
2 shareholders'/board meeting. I was sitting there as a director of Durkan Pudelek, but I was
3 sitting there representing Durkan Holdings. So, there was other directors at those board
4 meetings other than myself - Alan Fraher, Mike Pudelek or Colin Simmons - and they were
5 reporting their results within their various divisions to the board. I didn't - other than make
6 the odd comment as you will gather from the board minutes -- I did not influence or----

7 THE CHAIRMAN: I think what we are looking at at the moment is what information was
8 available to you at those board meetings.

9 A That level of information was available at all board meetings. Correct.

10 Q You say in your witness statement, "Very high level summaries of the work undertaken and
11 the budgeted work were provided". Actually we have just seen that what was provided was
12 the minutiae - the minutiae of contracts where there was an under-value or an over-value -
13 the minutiae of the turnover and margin on all of the contracts. There was a spreadsheet
14 with all of the contracts that you were doing. There was another spreadsheet setting out
15 whether there had been defects cleared on contracts. This is not correct, is it, this sentence?

16 A This is correct, this sentence. It is my witness statement and I stand by it.

17 Q Let us move on. Can I ask you to turn to Bundle 2B? Tab 20. On the second page of that
18 can you look at para. 7? This was the first board meeting, I understand. So I ask you to
19 look at the first paragraph which says: "The Chairman welcomed the Directors of this first
20 Board Meeting", so you know what you are looking at.

21 A Yes.

22 Q Then over the page at tab 7 – para.7 I am sorry. The Chairman, is that a reference to your
23 father?

24 A That's correct.

25 Q So your father was chairing the meeting at that point?

26 A No, he was chairman. Mike Pudelek chaired the meeting; my father was Chairman.

27 Q Your father – it said – the second paragraph –
28 "The Chairman asked Mr. D Durkan to convene a meeting with the Directors of
29 Durkan Brothers Limited to ensure proper coordination of all pre-contract
30 issues."

31 A That's correct.

32 Q Durkan Brothers Limited was what became Durkan Limited, was it not?

33 A That's correct.

34 Q You have just said that you are the chief executive of Durkan Limited?

1 A I am now, yes.

2 Q You were a director then?

3 A I was.

4 Q So he was asking you to get together with the other directors of Durkan Brothers Limited to
5 ensure coordination of pre-contract issues. Did you organise that meeting, then?

6 A If my memory serves me correctly, again if there was a meeting, I would have spoken to
7 certainly Robert Clark and James Briggs at the time.

8 Q If you then turn to the next tab –

9 THE CHAIRMAN: What does it mean: “pre-contract issues”?

10 MISS BACON: We are just going to find that out, Madam. I am just going to take the witness to
11 the report of that meeting, which should elucidate somewhat. Would you turn to tab 21 and
12 look at the front page, “Matters Arising” and then it says: “Paragraph 2 re Item 7.1 of the
13 previous minutes”. Could you just read that paragraph which is highlighted, or the two
14 paragraphs that are highlighted.

15 A Do you want me to repeat it?

16 Q No, just read it to yourself to remind yourself of what happened. (Pause) OK. So am I
17 right in thinking that the agreement that you reached at that meeting that you had with
18 Durkan Brothers was essentially to divvy up the work between Durkan Brothers and
19 Durkan Pudelek, so you would pass all the tenders except the public sector residential
20 tenders to DP, except those under £150,000 which would be passed to Durkan Brothers
21 (Small Works), is that right?

22 A The reason for that meeting and the reason I was asked to have a meeting --

23 Q I was not asking you what the reason was; I was asking you what the agreement was at the
24 meeting?

25 A The agreement was to avoid confusion in the marketplace. When Durkan Pudelek was first
26 established consultants were sending -- tenders were coming into the office, some in the
27 name of Durkan Limited, some in the name of Durkan Pudelek, some in the name of
28 Durkan just were arriving in. So it wasn't uncommon, in the early days, for tenders to be in
29 the wrong estimating department. Because we operated in different parts of the building it
30 wasn't uncommon for Durkan Pudelek to end up receiving a tender for Durkan Limited and
31 vice versa. To avoid any misunderstanding – because we've got to remember, the senior
32 managers would not be party to what the shareholders' agreement was and the details of the
33 business. I offered to explain to Robert Clark and Roger Trigg that any tenders that were
34 private sector were to be passed over because again, prior to the establishment or the

1 formation of Durkan Pudelek it wasn't uncommon for our specialist works department to do
2 some private sector --

3 THE CHAIRMAN: It was or it was not?

4 A It wasn't uncommon for us to do some what we call non public sector construction work.

5 Q Durkan Brothers?

6 A Yes, for Durkan Brothers. So when Mike and Colin formed Durkan Pudelek there was
7 some confusion where tenders were arriving to – they were coming into the wrong company
8 for both. Pudelek were receiving occasionally a tender for Durkan Limited, and Durkan
9 Limited could sometimes receive a tender that was actually meant for Durkan Pudelek. So
10 it was just to clear the air. I said: look, anything that comes in over a certain value must be
11 passed directly across, so to help them to run their business, particularly only for the private
12 sector, jobs, and to avoid confusion with our consultants. That was the reason for that
13 meeting.

14 MISS BACON: So the tender comes in, and regardless of whose desk it initially comes to, if it is
15 a public sector contract it gets passed over to the estimators in Durkan Brothers, and if it is a
16 private sector contract over £150,000 it gets sent to the desk of the estimator in Durkan
17 Pudelek, and if it is a private sector contract under £150,000 it goes to the desk of the
18 estimator in Durkan (Small Works), is that right?

19 A That's right.

20 Q OK. So this was essentially a market sharing agreement, was it not? You do this, Durkan
21 Brothers will do that, and Durkan Pudelek is going to do this?

22 A No, you're incorrect. What I just said was that it was a misunderstanding. It is very easy in
23 the post for something to arrive in the wrong estimating department. We had occasions
24 where the senior estimator in Durkan Limited would actually be pricing a job that was
25 intended for Durkan Pudelek.

26 Q But intended by whom?

27 A The consultants. But work would come in sometimes without a proper reference on it, so
28 that the estimator would pick it up and start pricing the job. This happened on a very few
29 occasions, so to avoid that confusion I explained to Robert that the private sector contracts
30 over a certain value were to be passed over, and to ensure that Pudelek's work opportunities
31 that were intended for them were not being priced by Durkan Limited.

32 Q So what that meant is if a client sent an invitation to tender for a private sector contract of,
33 say, £200,000 and they addressed it to Durkan Brothers, you did not just send it back to the

1 client and say: we do not do that kind of work; what you did was you took it and you put it
2 on the desk of the estimator in Durkan Pudelek?

3 A That was the intention, yes.

4 Q Was one of the reasons for doing this to establish different commercial strategies as
5 between the two companies? So Durkan Brothers would focus on the public sector work
6 and DP would focus on the private sector work?

7 A No, the strategies were quite clear that Durkan Limited, or Durkan Brothers as we referred
8 to it at that time, undertook public sector work predominantly. It was nothing to do with
9 strategy, it was to avoid confusion within the business.

10 THE CHAIRMAN: To avoid who being confused?

11 A As I said, it happened on a very few circumstances that a tender could come in and it could
12 be addressed to Durkan Limited, but the actual consultant may have meant to address it to
13 Durkan Pudelek. So when the business was formed there was some confusion because
14 you've got to remember that a lot of consultants --

15 Q When you talk about consultant, who are you talking about?

16 A It could be an architect; it could be a QS. All these companies are multi disciplinary and
17 therefore they could be working with a council, they could be working with a developer, so
18 there's confusion. It happened on a number of occasions where a tender intended for
19 Durkan Pudelek could end up with Durkan Limited's estimating department. They would
20 obviously snaffle it, thinking here's an opportunity, not realising it was intended for Durkan
21 Pudelek. So the purpose of this meeting was nothing to do with strategy or market share; it
22 was clear the air as to who was to do what type of work and in what sectors. Robert Clark
23 and Roger Trigg were not privy to the shareholders' agreement, and therefore didn't
24 understand how the business was to be set up or how it was set up.

25 MISS BACON: Can I take you back to the minute of that meeting. Perhaps you should just keep
26 your finger in that and turn over to tab 22 where it said the previous minutes were agreed to
27 be an accurate record of the meeting. So the minute is agreed to be accurate. At the bottom
28 of that minute it said:

29 "This expedient will be reviewed by the directors of Durkan Brothers and
30 Durkan Pudelek from time to time to ensure the market identity and thrust of
31 each company is maintained."

32 In the light of that, are you still saying that this was nothing to do with market identity and
33 just to deal with the odd error?

34 A Sorry, what minute are you referring to? Tab 22?

1 Q No, sorry, I only asked you to turn to tab 22 to confirm that 21 was accurate. Tab 21 para.2,
2 the highlighted section, the second paragraph at the bottom, the last sentence: "This
3 expedient will be reviewed by the directors of Durkan Brothers". (Pause) I am not putting
4 to you that there were not ever any errors, but I am asking you about this last sentence. You
5 have said it is minuted at the meeting that one of the purposes of this was to ensure that the
6 market identity and thrust of each company is maintained. So this is about a strategic
7 planning to ensure different market identities of the two companies, is it not?

8 A No, it's not. I think I've tried to make that point. At no point in time did the two companies
9 sit down and talk about how we were going to strategically market --

10 Q Why did you agree the minute, then? At the next meeting you said that you --

11 MR. HOSKINS: I am sorry, I think she has to let the witness finish his answers before she
12 interrupts.

13 A I tried to explain previously. This meeting was about clarifying where the tender should go
14 and to avoid the confusion because in the very early days when the business had been
15 formed, as I said already, there was confusion amongst consultants as to which company
16 within the Group would be tendering for which opportunity.

17 MISS BACON: I just had one more question on that, and then perhaps the Chairman has another
18 question. What if a consultant, quantity surveyor or client, was not confused and they sent
19 something to Durkan Pudelek that was public sector work?

20 A It would be passed back, because it was obviously sent inadvertently to the wrong company.

21 THE CHAIRMAN: What do you mean it would be passed back?

22 A If it was a public sector opportunity it would be passed back to -- passed over, I should say,
23 to Durkan Limited because our shareholders' agreement makes it quite clear that Durkan
24 Pudelek worked in the other -- the whole idea of forming the business was that Mike and
25 Colin were going to seek opportunities in the private sector, i.e. non public sector work. So
26 if, for example, they did receive a contract for a social housing job, their estimator would
27 make sure that it was passed over to the estimator in Durkan Limited because that's where it
28 should have gone in the first place.

29 Q You said, I think, initially that before Durkan Pudelek was formed, Durkan Brothers did do
30 some private work?

31 A Very small.

32 Q Did they stop doing that basically instead?

1 A Yes, when I say private work, I'm going back a long, long time now. Some of it was before
2 I even came to the UK. I know we would have built some small development work for
3 developers. We would have done --

4 Q Before Durkan Pudelek was formed did Durkan Brothers sometimes get invitations to
5 tender for the kind of work that they did not do?

6 A Correct, we would.

7 Q And then they would send them back to the consultant.

8 A Correct, and that was one of the attractions when we were approached by Durkan Pudelek
9 was that they had a record in private sector and we thought of that as being an opportunity
10 to just take a bit of an investment into a business that maybe could grow market share in
11 that sector.

12 Q So instead of turning away that work, there would be --

13 A Yes, like any business, you're not going to turn it away. If you've got a company within the
14 Group that you know can do it, you're going to pass it over to that company, clearly.

15 MISS BACON: So this is all about group synergies and you have your different divisions: you
16 have Durkan Brothers which became Durkan Limited and that does the public sector work;
17 you have Durkan (Small Works) and that does under £150,000, then you have Durkan
18 Pudelek that does the private sector work, and that was how it worked, was it not?

19 A No, we had a public sector business and we'd an investment in a private sector business.
20 That's how it worked.

21 THE CHAIRMAN: What if something very small came into Durkan Pudelek in the private
22 sector? Where would that go?

23 A I presume they would price it because that's the sector they operated in.

24 Q Right, so there was nothing that was too small for Durkan Pudelek?

25 A I can't recall the smallest job they did, but I'm sure in the early days they did quite small
26 ones just to get started.

27 MISS BACON: The minute says: "Save those under £150,000 which would be passed to Durkan
28 Brothers (Small Works)". Were you then just talking about tender opportunities for Durkan
29 Brothers, or are you saying that tender opportunities under £150,000 would be passed to
30 Durkan Brothers (Small Works) no matter who it came into?

31 A All that we were saying there was that, again in the early days we would give any
32 opportunities below the £150,000, give that opportunity across to Durkan Pudelek.

1 Q Can I ask you to turn to tab 28? This is the minutes of the meeting of 26th January 1995. If
2 you look towards the second half of that page, para. 3, and right at the bottom of that, the
3 last sentence:

4 "Mike Pudelek emphasised that the sole source of work has been his old contacts
5 and that the modus operandi of the policy has been to build on this client base."

6 So what he is there doing in the minutes is to say: "We are getting all our work through,
7 through my contacts."

8 Then if you go over to the next tab, the next meeting when the minutes were considered,
9 you will see that at para. 1b) there is a correction to that.

10 "Mike Pudelek explained that the sole source of work was not from his old
11 contracts and indeed, some of the contracts had come via Durkans."

12 Obviously there was then a discussion about this minute being accurate. Does it mean that
13 you and your father introduced some of your contacts to Durkan Pudelek?

14 A No.

15 Q What does it mean when it says: "Some of the contracts had come via Durkans"?

16 A Well I am assuming Mike was referring to, what I tried to explain in the previous minute,
17 was that if an opportunity had come in that might have been in the private sector we may
18 pass it over.

19 Q I see, so this was just referring to the implementation of the agreement that you had reached
20 earlier?

21 A Well I think Mike can explain that better than I, it's his ----

22 THE CHAIRMAN: There may be some confusion between "contract" and "contact".

23 MISS BACON: I think the first "contracts" should probably be "contacts".

24 THE CHAIRMAN: Yes.?

25 A I would say that's actually correct, as stated is "contracts" and not "contacts" because
26 Mike ----

27 THE CHAIRMAN: No, the second one, "... some of the contracts" ----?

28 A I think that's correct, madam.

29 Q Yes, but the first, the reference to the "old contracts" may be reflecting what was said
30 previously, which referred to "old contacts", do you see??

31 A I see it, yes.

32 Q Do you think that might be right??

33 A It's possible, but I think Mike can probably answer. In terms of contacts, one of the things
34 when Mike joined he set up Durkan Pudelek, he was well known in the industry, he had a

1 vast array of contacts and that's what he was growing his business on basically, so I
2 presume that's what it refers to.

3 MISS BACON: Can I ask you to turn back to tab 23? I want to ask you a few questions about
4 marketing now. Tab 23, the last page, para. 6 under the heading "Get Work": "DD made
5 known his intentions of reviewing the Group's marketing strategy", so when you were
6 making that comment would you have been referring to both Durkan Brothers and Durkan
7 Pudelek?

8 A No, I was referring to Durkan Ltd, or Durkan Brothers, because the marketing with Durkan
9 Pudelek was done solely by Mike Pudelek.

10 PROFESSOR PICKERING: Well why do we have a capital "G" for "Group"?

11 A Well I am only telling you how the actual thing operated, the minute, it's incorrect but I
12 never undertook a review of the Groups, because that would have included reviewing
13 Pudelek's marketing strategy. I wasn't party to it nor was involved in it.

14 MISS BACON: Why is this then being discussed at the Durkan Pudelek Board Meeting if it had
15 nothing to do with Durkan Pudelek, under the heading "Get Work", which presumably
16 means "Get work for Durkan Pudelek", it does not mean "Get work for Durkan Brothers",
17 does it?

18 A Again, I think the only way I can explain that is Barbara John, who is referred to in that
19 minute, I recruited her as a consultant to review Durkan Ltd's marketing and I believe, and
20 it may be within the bundle somewhere, that Mike Pudelek at a later date recruited Barbara
21 John to look at Durkan Pudelek's market.

22 Q We are not looking at what happened later, we are looking at what you said to the board at
23 this meeting?

24 A Well I certainly wasn't reviewing Durkan Pudelek's marketing strategy to show you that.

25 Q If you look back at para. 4 you refer to Durkan Brothers as "Durkan Brothers" there, and
26 this is in the minute – I am not saying you personally. So when Durkan Brothers is referred
27 to it is referred to as Durkan Brothers, it is not referred to as the Group. So when he talked
28 about "the Group", and this is you now, talking about the "Group marketing strategy" he
29 must have been referring to something other than Durkan Brothers, must he not?

30 A No, because I never reviewed this marketing strategy of Durkan Pudelek. I had no role
31 within the business, as I said earlier.

32 Q If you then look at the last sentence of that highlighted phrase:

33 "It was agreed that a co-ordination meeting would be convened following BJ's
34 report."

1 Who was being co-ordinated? Was this not Durkan Brothers and Durkan Pudelek??

2 A I don't know what context was meant to be conveyed in that minute.

3 Q Do you accept you must have been co-ordinating someone, you could not have just been co-

4 ordinating Durkan Brothers?

5 A All I know is that I never reviewed the marketing strategy of Durkan Pudelek, nor did I

6 instruct the consultant that I believe did do a report for Mike Pudelek. I think Mike Pudelek

7 can answer that and verify that later date.

8 Q Can you then turn to tab 26, p.3, para. 6.04. This is you again:

9 "DD reminded the meeting of the forthcoming Golf Day which would help market

10 the Company and Sister Company."

11 Which companies were you referring to then?

12 A In that minute I was referring to a Golf Day that was taking place, and I believe that Mike

13 and Colin had been asked if they wished to attend it. It wasn't a Group Golf Day, I believe

14 it was Durkan Ltd's day and the thinking behind that was that they could attend and they

15 could meet consultants, whatever, it was an opportunity for them to again meet potential

16 contacts. That is merely all it was.

17 Q When you say: "the Company and Sister Company" who was the "Company" and who was

18 the "Sister Company"?

19 A I don't know.

20 Q Well, it is your comment?

21 A I am referring to Durkan Ltd, okay.

22 Q The "Company" is that Durkan Pudelek, and the "Sister Company" is Durkan Ltd, is that

23 right?

24 A It could be.

25 Q So you were organising a Golf Day, which you are saying would help market Durkan

26 Pudelek?

27 A No, I wasn't organising the Golf Day, Durkan Ltd, their marketing department was holding

28 the Golf Day.

29 Q Whoever organised it was going to help market – you were involved with it, and it was

30 going to help market Durkan Pudelek?

31 A I wasn't involved in it, in organising it, all I was saying to the Board of Durkan Pudelek was

32 there was a Golf Day that Durkan Ltd were hosting and sitting on the board of that company

33 it was in my interest to offer them an opportunity to actually meet people; it was simple,

34 that was it.

1 THE CHAIRMAN: The Golf Day was hosted by Durkan Ltd?

2 A Limited.

3 MISS BACON: If you turn over to tab 27, and flick over to the second page, p.3, para. 6.01:

4 “DD suggested the recent Company Golf Day to have been most successful and

5 likely to lead to future investment in corporate entertaining . . .”

6 Did Mike and Colin actually attend it then?

7 A I don’t know who attended. I’m sure, Mike was a keen golfer at the time if I remember, I

8 don’t know who attended from Durkan Pudelek, I can’t confirm.

9 Q So you are reporting back at a Durkan Pudelek Board Meeting?

10 A I’m making a comment that the Golf Day had been successful. It was a comment, no more

11 than that.

12 Q You maintain your position that you were not at all involved in marketing Durkan Pudelek?

13 A No.

14 Q You do not maintain?

15 A No, I said I wasn’t involved in marketing the business.

16 Q Can I ask you to turn to one more tab on this, tab 65, if you just look at the front page of

17 that, that was “Minutes of The Meeting of the Durkan Group Directors” held on 31st July

18 2002. Present, yourself, some of the directors of Durkan Ltd, that is Robert Clark, Robert

19 Barton and Jim Briggs, they were Durkan Ltd, were they?

20 A They were.

21 Q Mr. Fraher who is both. Mr. Pudelek, Mr. Scott and Mr. Williams, they were Durkan

22 Pudelek, and then apologies from William Durkan and Colin Simmons. So it was a meeting

23 of the directors of the two sister companies, was it, Durkan Pudelek and Durkan Ltd?

24 A And Durkan Estates.

25 Q And Durkan Estates?

26 A I think so, I think Noel was a director of Durkan Estates, I’ll have to check that.

27 Q If you turn over to point 10.0 and 12.0 ----

28 THE CHAIRMAN: Sorry, which of those then were directors of Durkan Holdings?

29 MISS BACON: Some of them, Mr. Fraher and Mr. Durkan were directors of Durkan Holdings at

30 the relevant time, being the overall parent company. As I understand it, and I think as the

31 witness just confirmed, Messrs. Clark, Barton and Briggs were Durkan Ltd.?

32 A That’s correct.

33 Q And Loughlin and O’Dowd presumably – were they Durkan Estates? Nothing turns on it?

1 A I can't recall, I think they could have both been with Durkan Ltd, but subsequently they
2 changed.

3 Q Then if you turn over and look at paras. 10 and 12. Paragraph 10, the second paragraph of
4 text:

5 "Included within this area of discussion was the profile of the Group generally and
6 that consideration should possibly be given at this juncture to raising the financial
7 and operational profile of the Group."

8 Then para. 12:

9 "Group Marketing Strategy

10 This matter was effectively covered under point 10."

11 So this was a meeting of the directors of, among others, possibly Durkan Ltd and Durkan
12 Pudelek, and they were discussing raising the profile of all of the Durkan Group of
13 companies, which would presumably have included Durkan Pudelek?

14 A It was a Group directors' meeting.

15 Q Yes, at which you were present?

16 A I was.

17 Q And they were discussing the marketing of the Group. It does not say "Durkan Brothers" it
18 says "the Group", with a capital "G"?

19 A We didn't have a marketing strategy of the Group per se, every company operated its own
20 marketing strategy and its own marketing budget.

21 Q So why were you having a Group discussion about it then?

22 A I think it's slightly misleading in that heading because there was no Group strategy, we
23 never had a Group document, we never had a Group budget. Each company operated, just
24 me plus the directors of Durkan Ltd and Durkan Pudelek, because all these headings are
25 basically shared services, and it was purely to talk about what might be required within each
26 business under what we considered to be shared services. But the Group, it's a slightly
27 misleading heading because there were no Group marketing strategies or documents, each
28 company operated its own marketing department and marketing budget.

29 Q Can I ask you now to turn back to tab 62? I am going to ask you some questions about
30 Health and Safety, I am sorry to go over this again. Paragraph 3.07. This minute was a
31 meeting of the Durkan Pudelek, and Durkan Pudelek Interiors' Board of Directors, it was
32 one of the minutes that preceded the Group Directors meeting which we have just seen, and
33 if we look at para.3.07 there was some detailed discussion here about health and safety.

34 The first paragraph:

1 “The said report as presented by CS and which included a detailed report by Ian
2 Cresswell was duly considered.”

3 So that was a reference to one of Mr. Cresswell’s Group health and safety reports of the
4 kind that we saw earlier on?

5 A I presume so.

6 Q Then if you look at the end, the last paragraph:

7 “It was further agreed that a meeting would be scheduled in January 2002 at which
8 Directors of all Group companies would be invited to discuss matters such as
9 Health and Safety, Training, Insurance, Plant etc , and other areas of common
10 concern.”

11 So you were having a discussion about health and safety on an individual company level,
12 and then you said that there is going to be a meeting of the Group Directors to discuss that.
13 Then if you turn to tab 64, this was still before the Group Directors’ meeting, para. 4.6, and
14 this records, as you will see, that action was being taken at a Group level to implement a
15 health and safety policy, is that right??

16 A That’s correct, that’s what it says, yes.

17 Q If we then go back to the minutes of the Durkan Group Directors, which we have just
18 looked at, tab 65 – I did it this way because I just wanted to take the witness to the
19 discussion that led up to this Group Directors’ Meeting. You then see that we have the
20 Group Directors’ Meeting and at para. 1, top of the agenda, there was a long discussion of
21 health and safety. If you read down that, the Board presumably all of the Group directors:
22 “The Board deemed that a new in initiative was now required and RJB and CS, as
23 Health and Safety Directors . . .”

24 So is that Mr. Barton from Durkan Ltd and Colin Simmons from Durkan Pudelek, is that
25 right?

26 A Yes, “RJB” was Robert Barton, who was the director of safety for Durkan Ltd.

27 Q The two health and safety directors – “. . . together with Ian Cresswell . . .” who we have
28 seen is the Group health and safety manager “. . . were charged with drafting
29 proposals . . .”, so what they had to do was get their heads together, draw up proposals for
30 the Durkan companies and then, it is said, thereafter providing full implementation of the
31 same on site. So this looks like this was a Group decision at a Group directors’ meeting to
32 adopt a Group initiative regarding Health & Safety – is that right?

33 A I think what that highlights is that there were two separate Health & Safety policies, one for
34 each company. I think we were highlighting, as the Group directors, the importance of

1 Health & Safety because it would impact on things such as insurance premiums, etc. That
2 was only copper passing that ----

3 Q That is not what it says, is it, Mr. Durkan, it says that you get the two Health & Safety
4 officers of the two different companies to get their heads together, together with the Group
5 Health & Safety manager, and draft up proposals?

6 A No, they drafted their own proposals to tailor their specific needs for each of their
7 businesses. Ian Cresswell, as the Group Health & Safety manager, was then charged with
8 actually implementing those policies, but the policies were different, and they were drawn
9 up by two different individuals. They weren't drawn up together, they weren't the same
10 policies.

11 Q Can I ask you to turn to tab 77.

12 THE CHAIRMAN: Can I just ask, this zero, whether there should be a zero tolerance policy, was
13 that actually decided upon, that there would be a zero tolerance policy?

14 A I'm trying to interpret because it's obviously going back a number of years. It could be
15 referring to something like zero tolerance on people that don't wear hard hats, for example.
16 It could be that type of thing.

17 Q Yes, that is right?

18 A But I think it is good corporate governance for either board of directors to ensure that that
19 was the case.

20 MISS BACON: This is actually referred to again in the next extract to which I wanted to take
21 Mr. Durkan at tab 77. This is a Durkan Pudelek board minute. Paragraph 4:

22 "The said report as presented by RJB ..."

23 You have just said that RJB is Mr. Barton, so had he then done the report instead of
24 Mr. Cresswell?

25 A I don't know. I can't answer that, I'm sorry.

26 Q "The said report as presented by [Mr. Barton] ..."

27 That was a reference to Mr. Barton, was it not?

28 A I don't recall Bob ever actually attending a meeting.

29 Q No, he is not listed as an attending the meeting, he is just listed as being the author of a
30 report.

31 "Particular attention is drawn to the two falls from height, together with the
32 implementation of a 'zero tolerance' policy."

33 So that is presumably the policy that was discussed at the Group meeting earlier on?

34 A That's correct.

1 Q "There then followed a discussion in relation to the implementation of a 'Group'
2 policy. In summary, a meeting is to be convened to ensure that we implement a
3 'Group' policy in relation to all Health and Safety issues."

4 So, Mr. Durkan, this is saying in no uncertain terms, "We are going to implement a Group
5 policy"?

6 A I can't comment on whether there was a Group policy ever implemented or not.

7 Q This is saying, is it not, that Health & Safety was addressed as a group within the Durkan
8 Group and not at the level of individual companies?

9 A No, it was addressed at individual companies, because, as I said earlier on, each company
10 would have specific Health & Safety requirements. It's very simple. When you work in the
11 public sector, particularly when you're doing design and build.

12 THE CHAIRMAN: I can see that the standards that each company might have to adhere to might
13 be different from job to job, they might be different from public to private sector, depending
14 on what the contract requires or what the regulations require. I think what you are being
15 asked here is, putting aside just the different regulations with which each company had to
16 comply, which may be different, the policy of the Group as to what was an acceptable level
17 of accidents or how enforcement and implementation should be done, was that done at
18 Group level?

19 A Again, I'm assuming we're referring to general things. It could be Health & Safety
20 literature, for example, there could be some commonalities there, standard Health & Safety,
21 HSC, regulations that would be implemented as sort of common policies across the
22 industry, let alone companies. Within the Group and within the individual companies, they
23 would have certain requirements that Ian would have to implement for them. So there were
24 different policies below the, I suppose, Group policy,

25 MISS BACON: Can we move on to talk a bit about DPIL, and can you turn up tab 55. There is a
26 55A, but I want you to go to 55, rather than 55A, para.4.02, which is under the general
27 heading of Durkan Pudelek Interiors, and the minutes here are recording a lengthy
28 discussion on the subject of the future of the Durkan Pudelek Interiors – is that right?

29 A Tab 55A, you said?

30 Q Tab 55, not 55A, para.4, the highlighted section.

31 A I see it, yes.

32 Q If you look half way down that paragraph it says:

33 "There followed a fairly lengthy discussion on the subject of Durkan Pudelek
34 Interiors ...

1 It was agreed that this matter would be discussed further in order that the future
2 direction of DPIL may be refocused with a view to achieving its initial aims.”
3 Then you get a paragraph that starts, “The Board discussed the possibility”. What was
4 being discussed here was whether DPIL should have separate accounts from dispute. Do
5 you recollect that discussion?

6 A No.

7 Q Obviously, if you look at the minutes, it looks like the board decides that the costs of having
8 separate accounts would outweigh the benefits. You will see that from the last couple of
9 lines there. If you then turn to tab 64, this is now a few years later, and you go to the
10 penultimate page of that tab, at para.4.8 we have another long discussion about DPIL, which
11 is obviously still having problems. If you look about half way down the page you will see
12 the paragraph starting, “Certainly, from a shareholders’ point of view”. Could you read that
13 paragraph and the next paragraph. (After a pause) When it says, “Certainly, from a
14 shareholders’ point of view”, is that recording the view of you and your father?

15 A I would take it that that was the ----

16 Q When you see the next paragraph, “AF” ----

17 A My father wasn’t at that meeting.

18 Q Yes, exactly, so this was recording your and your father’s view. Then you will see the next
19 paragraph stating:

20 “AF mentioned that it was stated objective of the shareholders and, in particular
21 the view of William Durkan, that the main concern of the shareholders was to build
22 a business with long term value.”

23 Again, is that talking about Durkan Holdings, you and your father?

24 A Yes.

25 Q So your father’s view, as transmitted by Mr. Fraher, was that the best way forward for the
26 business might to be to integrate it as a division of DP – is that right?

27 A I can’t recall what the intention was going back – that’s eight years ago.

28 Q If you look at the way it is minuted this might well be achieved – that same paragraph
29 where your father is mentioned – by integrating the activities of DPIL within DPL. It looks
30 like your father was saying, “We want to build a business with long term value and the best
31 way to achieve this is to integrate DPIL within DPL” – is that fair?

32 A I think what that’s actually saying is that Alan Fraher would conveying the thoughts of how
33 my father would have assumed the business would have developed. DPIL was clearly
34 going through some very tough times and I think the general discussion here would have

1 been about to allow it to survive and to try some cost efficiencies, etc, etc, this talk about
2 integrating within Durkan Pudelek.

3 Q Then if you look at the last paragraph:

4 "Clearly it is now time to refocus the business and with this in mind it was agreed
5 that RJS [Bob Scott] would draft his initial views on the future prospects and
6 direction of the business."

7 Then he is going to report by the end of August. Am I right in thinking that what the board
8 was saying is that it is giving Bob Scott the task of going away and doing a report about the
9 future of the business, and then you discuss it further?

10 A That's how it would appear, yes.

11 Q If you turn to tab 66, para.5.7, that goes over the page as well:

12 "The said report as presented by RJS was duly considered."

13 Presumably that was the report that he had been asked to do by the board. Then over the
14 page, discussion about the predicament of DPIL. You will see in the penultimate
15 highlighted paragraph:

16 "There then followed a lengthy discussion on the subject of DPIL, and its role
17 within the DPL group."

18 And we have again:

19 "Consideration was given to the possibility of DPIL becoming a division of DPL
20 ..."

21 That is another reference to this suggestion that seems to have been floated by your father.

22 A I don't believe that the suggestion was started by my father. As I recollect it, Mike and
23 Colin – Mike, in particular, as the CEO, would have been the person giving the direction in
24 terms of what he thought was best for this company. My father made a comment, he didn't
25 give a direction.

26 Q Your father had made a comment that was discussed. If you then go to the front page of tab
27 67, we see by this point that following the various discussions at the board meetings the
28 decision had been taken, in fact, to do what had been proposed, namely to close DPIL as a
29 separate company and turn it into a division of DP – is that right?

30 A What point are you referring to?

31 Q The front page of tab 67, "Minutes of meeting of board of directors of Durkan Pudelek
32 Limited and ITS Strategic Projects Division" – is that what ----

33 THE CHAIRMAN: "And its Strategic".

34 MISS BACON: Sorry, "and its Strategic Projects Division", that is right.

1 A Yes.

2 Q The Strategic Projects Division was what had been DPIL?

3 A I can't confirm that. It may well be the case, but I can't confirm.

4 Q Previously we have had Durkan Pudelek Interiors and now we have got Strategic Projects

5 Division after you have discussed Durkan Pudelek Interiors becoming a Strategic Projects

6 Division. It looks like it has become that Strategic Projects Division. If you then go to

7 para.4.7, "Special Projects Division", are you saying that you still cannot remember if this is

8 DPIL?

9 A You could well be right, but there's nowhere in the minute here – I presume that's what it

10 ended up being. It did become a division, but whether it was called Special Projects or

11 Strategic ----

12 Q Special Projects or Strategic Projects. If you then look down four paragraphs under the

13 heading:

14 "There are a number of smaller projects mentioned on the schedule. There was a

15 clear indication given by AF/DGD that this Division urgently needs work ..."

16 So what you seem to have been saying was that there was a chronic lack of work within this

17 Division.

18 A I made a comment, yes.

19 THE CHAIRMAN: You are DGD, are you?

20 A I am, yes.

21 MISS BACON: Then, if you look down two more paragraphs:

22 "Both AF and DGD referred to the requirement of not only the Strategic Projects

23 Division but also DPL to contribute its budgeted share of overheads in the current

24 financial year."

25 Can you explain what that meant?

26 A I'm assuming, I think – my colleague, Alan Fraher, can probably explain better.

27 Q It was a comment that you made at the meeting?

28 A Well, one of us made it. We couldn't have both said it, so I'm assuming it was Alan Fraher

29 that said it, and I think he's probably best placed to answer it. However, my belief here

30 would be that Durkan Pudelek paid a service to Durkan Limited. Clearly, if we look back

31 to the finances they were obviously coming under some pressure to meet that payment, and

32 therefore that's probably where the comment was from.

33 Q What you were saying is that they had not been paying it.

34 A It doesn't say it hadn't been paid. It's just it's a contributor to the budget ----

1 Q It is quite clear that it had not been paid because you were complaining that it had not. You
2 would not be referring to their requirement in those terms, and then Mike Pudelek saying he
3 is “advised that he would using his best endeavours to increase the turnover of DPL with
4 appropriate margin, in order to ensure that he met his budget requirements” if it had been
5 paid.

6 A But, again, it does not say that it was not paid, I think. It could’ve been the percentage of
7 turnover they were due to pay. Their turnover maybe was not going to match what the
8 budget had been set out against at the beginning of the year. Again, it doesn’t say it wasn’t
9 paid. I presume that it looked as though ----

10 THE CHAIRMAN: Is this the management charge?

11 MISS BACON: That is the management charge, yes. I was going to take Mr. Fraher to that in
12 more detail, but that was a comment that had been minuted as being made by Mr. Durkan.
13 So, I thought it only fair to put it to him.

14 THE CHAIRMAN: Was it calculated as a percentage of turnover?

15 MISS BACON: That is what I am going to ask Mr. Fraher. No secret about that. I do want to
16 know how it was calculated.

17 A It would be percentage turnover, yes.

18 Q I understand that there were some occasions when the board discussed specific contracts of
19 concern. You refer to that in your witness statement. Can I take you to some of those? Go
20 back to Tab 36. I am afraid this is going to be a bit tedious because we do need to go
21 through all the board minutes for the next few years to see what was said at these.
22 Paragraph 2.02.. What I want to do is to take you through the discussion of a couple of
23 particular contracts which are highlighted. Mile End Road and Raphael House. What you
24 were doing at this meeting was discussing two problematic contracts. Yes?

25 A I was listening because I wouldn’t have been into detail. Colin’s reporting and if there was
26 a problem contract ----

27 Q There was a verbal update and Mr. Simmons explains that you were attempting settlement
28 by negotiation in one case and that you paid an adjudication fee of £1,000 in another case.
29 That was presumably to adjudicate a dispute on the contract.

30 A He obviously did, yeah.

31 Q The next meeting - Tab 37. Paragraph 2.02 again. Mile End and Raphael House. That is
32 not the only one. We have Moore House above that. Again, a verbal update on the two
33 contracts. Can you turn over to Tab 38? Offer awaited from the quantity surveyor at
34 para. 2.02. Tab 39, para. 2.01. The same update on the same contracts. If we go through to

1 Tab 44, we are still talking about the Mile and Raphael contracts - at para. 3.01 this time.
2 Tab 45, para. 2. Tab 46 - at this point the board is advised that Mr. Pudelek is going to get
3 involved with Mile End Road. Tab 47 - Mile End Road. Raphael seems to have dropped
4 out of the picture at this point. But, anyway, we are talking about Mile End Road still. "No
5 action yet to be progressed by us." Tab 48 - nothing had happened, but something was
6 going to happen, it seems. Tab 49 - the same contracts. Then we get some progress at Tab
7 50. At this point the client has increased his offer by 10K to 35K. Mr. Pudelek is going to
8 meet the client next week. He thinks there might be a problem.

9 Now, just pausing there, if you look down that minute to para. 9 - Construction Report - this
10 is, as far as I am aware the first of the construction reports from Maurice Williams. I just
11 mention it *en passant* since we are at this point in the minutes. I do not want to come back
12 to it. But, as I understand it, Mr. Williams had been appointed the construction director in
13 February 1999. So was it after that - and presumably from around May 1999 - that he starts
14 to do a construction report at the meetings?

15 A I wouldn't know when he started. I mean, if the minutes record that -- That is a report at
16 that date. Then it would be correct.

17 Q Yes. He joined in 1999, did he not?

18 A Yes, he would've done.

19 Q So, he starts to do construction reports. You have already told us about the construction
20 reports. We saw there that those reports set out the progress on the individual contracts
21 with a detailed spreadsheet. So, this would have been the kind of report that was referred to
22 there presumably.

23 A I presume so, yeah.

24 Q I carry on then the saga of Mile End Road. It is getting exciting. At Tab 51, para. 2,
25 "Following MTP's recent meeting with the client, it was decided to accept his
26 increased offer of settlement amounting to £35K".

27 Tab 52,

28 "MTP confirmed that their final offer would not be improved on and would be
29 accepted".

30 At this point we get a new contract that starts to be discussed. The Collets Health Club.
31 That is just underneath Mile End Road.

32 Go to Tab 53. Mile End Road. "Matter now sorted. Cash on its way." Collets Health Club
33 continues to be discussed. We can skip a few because they are more or less in the same
34 vein.

1 Go to Tab 56. A few meetings later, at para. 2.01 - Collets have now paid. Tab 62 - we
2 get the Construction Report with a discussion about a few specific contracts under there. If
3 you will recall, there was a page in the construction report which had a problem contract
4 supposedly highlighted in red. It was now under the Construction Report that we were
5 having specific contracts discussed. Another example of that: if you would turn to Tab 67,
6 para. 4.4 - 'Construction. MW also gave a verbal update on the problem contracts
7 highlighted in red on his report". That is explaining exactly what he is doing. Turn to Tab
8 68 - again the same thing. It is discussed under the Construction Report at para. 5.4. One
9 more tab before everyone expires with excitement - Tab 73. Paragraph 5.4, the very last
10 page, (b) "Construction Department report indicated five problem contracts". I am not quite
11 sure what the number is there, but -- five problem contracts which need close monitoring.

12 "It was agreed that if the said report was to be of increased benefit, it would
13 require revision with inclusion of pertinent financial information".

14 It seems to be saying that they wanted even more financial information about the problem
15 contracts. You will see why I took you to that. Turn back to your witness statement. Your
16 second witness statement is in Bundle 2A at Tab 6, para. 19,

17 "I recall only a few Board meetings in which the Board discussed at length
18 specific contracts of concern. However, these Board meeting were exceptional".

19 I have just taken you tediously to the board minutes over a three year period - 1997 to 1999.
20 At almost every board meeting there was a discussion of one or more problem contracts.
21 That is correct, is it not?

22 A I think you will find that the same contracts are repeated in most of those minutes. There's
23 actually only a few contracts, but there's lots of references to them.

24 Q What you were saying in your witness statement was, "We did not get into discussion of
25 specific problem contracts. We only did that exceptionally". I have just taken you to three
26 years during which during almost every board meeting there was a discussion of specific
27 problem contracts.

28 A Yes, there was a reporting of problem contracts. I didn't get involved in discussions at that
29 level because I wasn't involved in the contracts.

30 Q I was not asking whether you got involved in the discussions. You were at the board
31 meetings at which those contracts were discussed. We have just seen after Mr. Williams
32 joined the board at every meeting he presented a construction report which included
33 discussion of problem contracts.

34 A There was a report that highlighted problem contracts. Correct.

1 Q So, is it more accurate to say that actually the board reviewed the progress on specific
2 contracts at almost every meeting and that there were very frequent discussions regarding
3 problem contracts?

4 A My statement again, in my recollection, was that there was very few serious problem
5 contracts. I think some of the contracts that are highlighted there were reported to the
6 board, but they were not significant in terms of their problems.

7 THE CHAIRMAN: I think the word 'few' in there para. 19 -- I think the point that is being made
8 does not seem to apply to the number of contracts - it seems to apply to the number of board
9 meetings at which these were discussed. It is not a question of how many contracts were
10 problematic. It is a question of at how many board meetings were problematic contracts
11 discussed. I think that is what you are being asked.

12 A Again, in my witness statement I'm trying to recollect over a fifteen year period, you know
13 ----

14 MISS BACON: A fifteen year period during which at almost every board meeting there were
15 discussions of problem contracts. We have just seen them all, and we have just seen that at
16 every meeting after Morris Williams joined he presents a Construction Report. We have
17 seen the Construction Reports early on, and it has a schedule of the various contracts and it
18 had problem contracts highlighted in red. We have seen that the board meetings discuss
19 those contracts. It is not a case of a few isolated occurrences. It was every meeting, was it
20 not?

21 A Not in my opinion it wasn't, no, because we've only looked at a few board minutes there,
22 and if you look at the board minutes, the Malt House, I believe, just gets repeated in each
23 minute. As I have said before, I sat and listened. These were presented to me. My
24 statement's correct inasfar as I recollect it. The number of problem contracts, in my
25 opinion, were few and far between over the fifteen year period. The number of times it got
26 mentioned on minutes is slightly different.

27 Q Can I Take you now to Tab 67 of Bundle 2B?

28 THE CHAIRMAN: Can I just ask: In your witness statement, just in front of para. 19, you have a
29 whole list of Schedule of Disclosed Documents. So, this witness statement was drafted
30 after the disclosure of all the board minutes after the application.

31 MISS BACON: Yes - and when it is referring to the Schedule of Disclosed Documents what it is
32 doing is saying, "These are the documents which the OFT have referred to and highlighted,
33 and the paragraphs from those documents. This is what I am going to say about those".
34 That is the same in Mr. Fraher's witness statement.

1 THE CHAIRMAN: I understand. Thank you.

2 PROFESSOR PICKERING: Can I just ask: Morris Williams, about whom you are speaking, was
3 he employed by DP? Was he having a wider role within the group?

4 A He was recruited by Mike Pudelek as construction director of DP. He had no involvement
5 in any other business. He didn't come from the business within the Group to Pudelek. I
6 can't recall where he came from.

7 Q So, his reporting was as an employee of DP ----

8 MISS BACON: He was a director of DP.

9 PROFESSOR PICKERING: Yes - but as a member of the staff of DP on DP contracts. So, what
10 you have been establishing goes to the precision of Mr. Durkan's comment rather than the
11 relevance of the discussion within the DP board of these matters.

12 MISS BACON: My line of questioning goes to two things. The first is the precision of Mr.
13 Durkan's comments and the second, and we will come on to it, is the level of scrutiny at the
14 board of specific contracts. That was the point I was seeking to establish. I could have
15 taken you to all the board minutes. I chose to focus on a couple of contracts to see how
16 they developed over the three year period. The point being made is that this was a board
17 who was looking at individual contracts and the progress on individual contracts and
18 making a decision about the level at which to settle an individual contract.

19 THE CHAIRMAN: That is a different point from your health and safety point, which was a
20 Group thing. You are not saying that this is a Group - that William was doing the same --

21 MISS BACON: No, there are a number of points that I will develop in my closing submissions.
22 One concerns the integration within the Group, and the other concerns the degree of
23 scrutiny by the board over the operational decisions. I was going to come to that with Mr.
24 Durkan.

25 PROFESSOR PICKERING: It was not the responsibility of the DP Board, so it was not going to
26 --

27 MISS BACON: You see, that is not what the witnesses say. What they say is that it was very
28 high level and we did not scrutinise it; we just sat there.

29 PROFESSOR PICKERING: I understand that aspect.

30 MISS BACON: That is where this line of cross-examination is going. I have put it quite fairly to
31 Mr. Durkan that actually there was very considerable scrutiny over specific individual
32 contracts. I am not going to take you through all of the minutes, but you can turn up any of
33 the minutes and see the same thing.

34 PROFESSOR PICKERING: That was the job of the board.

1 MISS BACON: That was the job of the board; that is our submission, sir. Tab 67 para.2.2.

2 THE CHAIRMAN: We are back in 2b?

3 MISS BACON: We are back in 2b, yes. I just wanted to take Mr. Durkan to a few more tabs in

4 2b before I concluded on this point and turn to something else. "2.2 Hackney Employment

5 – certificate received for release of retention. DGD to mention the matter as --

6 THE CHAIRMAN: What tab are we in?

7 MISS BACON: 67. "Hackney Employment", I presume that was a contract of DP.

8 "DGD to mention the matter at his forthcoming meeting with Hackney

9 Executives in relation to the Hoxton Square development on which we presently

10 owe £200k."

11 So what appears is that you were having a meeting with Hackney executives, you were

12 owed some money by Hackney executives and you were going to be discussing this with

13 them. Is that right?

14 A No, Durkan Estates owned the site on Hoxton Square which happened to be 50 yards away

15 from the Hackney Employment's contractor, Durkan Pudelek who were constructing. It got

16 brought up at the board meeting by Mike that they were having a problem with some

17 payment and because I had a relationship, I bought the site from Hackney, I knew some of

18 the people in Hackney, I said the next time I meet them I'll make an enquiry as to how we

19 might resolve the situation. That was merely it.

20 Q So what you were doing was becoming involved with helping to clear up a payment that

21 was to Durkan Pudelek?

22 A I said I would mention it to somebody, but I wouldn't call it no more than that. As a fellow

23 shareholder what would one do?

24 Q This is an example of you becoming involved with collecting money.

25 A I wasn't collecting money.

26 Q You were trying to get the payment: "certificate received for release of retention". You

27 were trying to get some money out of them and you said you would mention it.

28 A I said I would speak to somebody, a contact of mine in the Council, to see whether there

29 was a way of helping the situation. I don't recall that meeting ever taking place.

30 THE CHAIRMAN: The Hoxton Square development, that was something that was owned by

31 Durkan Estates?

32 A No, we happened to own a site on Hoxton Square and it happened to be about 50 yards

33 away from a contract that Durkan Pudelek were undertaking for --

34 Q Who owned the site on Hoxton Square?

1 A We owned one site.

2 MISS BACON: We being who?

3 A Durkan Estates. But the contractor, Durkan Pudelek, were carrying out, I'm not sure who

4 actually owned it, whether it was the council.

5 THE CHAIRMAN: I see. What you are saying is that Durkan Estates owes them £200,000?

6 A Yes, we owed some back money to the council. It was just through my contact, my

7 relationship with the council in one of our other businesses, I said: look, I might be able to

8 mention your problem to them and see if there's a way of making that link.

9 MISS BACON: Can you turn to tab 87. Under para.5.1:

10 "The Board discussed the abnormal contracts and those giving cause for

11 concern (Grosvenor Street, Abercorn Close, Highgrove Pool, AIB, Swiss

12 Cottage and Potters Bar) and RJS gave a comprehensive verbal report on the

13 position at Grosvenor Street. In relation to Grosvenor Street the Board agreed

14 to spend a further sum circa £35k on an expert QS [quantity surveyor] report."

15 Then a discussion about how much you were going to have to spend to get payment of your

16 sum, discussion about fees of quantity surveyors and lawyers. If you then turn over at tab

17 88, 5.1 at this point you have agreed to spend a further sum of £30,000 on an expert

18 quantity surveyor report on the contract. So it was a decision taken regarding a specific

19 contract at the level of the board, but all of these discussions at board are examples of the

20 board taking operational decisions in relation to the commercial activities of Durkan

21 Pudelek, are they not?

22 A All I can say is that it refers to the board. Mike would have been reporting to the board and

23 that was what Colin proposed. That's what they were intending to do: to spend whatever it

24 was.

25 Q The board discussed and agreed it. It is an example of day to day decision making in

26 relation to the commercial operations of Durkan Pudelek.

27 A I'm not arguing that the minute is incorrect. I think one has to understand how the actual

28 board operated.

29 Q That is all I wanted to ask. From around mid-2001 the minutes start to record a surveying

30 report in addition to the construction report and we have gone to one of those at the start of

31 your evidence and you have explained what the function was. As you recall, it had loss

32 making contracts, under values, and over values and you explained what that was. I just

33 want to take you to the first of those in the minutes as far as I am aware. That is at tab 59. I

34 just want to take you to a few of these examples where the board is discussing under values.

1 At 4.05 "The said report by CS [Colin Simmons] was duly considered." Specific details,
2 under values in the period standing at £446k, a report on the progress of current litigation.
3 So this records problems on particular contracts. If you then turn to the next minutes at tab
4 60 you will see the same surveying report.

5 "It is worth mentioning that action is required on the under values and overdue
6 retentions."

7 If you then go to tab 69 5.5: surveying report. This one includes minutes of particular loss
8 making contracts. Report on loss making contracts, report on under values. Is it fair to say
9 that under values appeared to be a persistent problem within Durkan Pudelek at the time,
10 which was why they were minuted in detail?

11 A I can't say whether they were a persistent problem or not.

12 Q Can you now turn to tab 75 para.5.1 halfway down the paragraph:

13 "The Board considered that the way forward for this company is as follows"

14 You will see down there (3):

15 "Management must seek to ensure that under values are not tolerated and the
16 company receives its payments in accordance with the contract. This will
17 require management being somewhat less accommodating and more
18 commercially aware."

19 So it seems that under values were a persistent problem and that this was then discussed at
20 board level on a number of occasions. Is that right?

21 A I don't recall them being a persistent problem. It is not unusual for a company to have
22 certain contracts, some will be under values and some will be over. But as far as I was
23 aware, I don't recall them being a persistent problem.

24 Q What you do say in your second witness statement is that there were times when the Durkan
25 Pudelek business was not performing very well. Can I take you to one of the documents in
26 this bundle relating to this. That is at tab 30. This was an Extraordinary Board Meeting
27 called at short notice by your father in order that the following matters could be considered.
28 Can you then read the highlighted section. (Pause) If you look at numbered paragraph 1:

29 "The turnover of Durkan Pudelek Limited should not be increased without there
30 being a significant contribution to the bottom line."

31 Can you explain what that meant?

32 A It meant that work shouldn't be taken on unless it was profitable work.

33 Q So you should not just buy turnover?

34 A Not based on ...

1 Q So that was, as far as you were concerned, what DP's strategy should be, going forward?

2 A No, I didn't say that. It was proposed by my father and minuted.

3 Q The second proposal was that efforts should be made to make Durkan Pudelek a stand alone

4 company and contract directly with suppliers and bond agencies. If we look at consequent

5 discussions at the next board minutes, tab 31. That is about three weeks later. Paragraph 6;

6 "The recurring subject of getting new work was discussed and again it was the

7 view of the board that such work should only be obtained if a reasonable profit

8 margin was derived therefrom."

9 So this was not just a proposal from your father, it was a proposal that the board then

10 agreed, was it not?

11 A Yes, it was.

12 Q Over the page:

13 "The question of making Durkan Pudelek Limited a truly independent and stand

14 alone company was discussed and it was agreed by the board that efforts should

15 be made to procure this status as soon as conducive conditions prevailed."

16 So again, your father had made a strategic proposal and the board agreed it.

17 A I think it's fair to say my father made a proposal at the previous board meeting.

18 Q That was Durkan Pudelek's strategy going forward. It was going to be an independent and

19 stand alone company. That is what they were then agreeing.

20 A Well, yes, I suppose, yes.

21 Q Tab 48 para.3.03, the middle paragraph of the highlighted section:

22 "Despite the low level of secured work at this point in time, the Board

23 considered that we should continue tendering as heretofore and that the position

24 would be reviewed on a monthly basis."

25 Does that mean that there was not much secured work, you had not been very successful in

26 getting tenders, but the strategic decision was taken to continue for tendering where you

27 were invited to do so rather than tendering for fewer contracts?

28 A I don't know, is the way I answer that.

29 THE CHAIRMAN: Just to ----

30 MISS BACON: Yes, maybe you could just read and if you do not agree then tell us what ----

31 THE CHAIRMAN: Well I am just thinking, Mr. Durkan has been in the witness box for a couple

32 of hours now, I wonder whether we should have a short break.

33 MISS BACON: I do not mind breaking, I was hoping to finish by half past four, but I do not

34 mind breaking for five minutes if that would help the Tribunal.

1 THE CHAIRMAN: Why do we not do that? Is that all right, Mr. Durkan?

2 A Yes, madam.

3 THE CHAIRMAN: You are in the middle of your evidence, so I am afraid I must tell you to be
4 very anti-social during this five minutes. You must not talk to your counsel or your
5 advisers or any other members of the company who are here; it is just to give you a chance
6 to stretch your legs. We will come back at, let us say, 10 past.

7 (Short break)

8 MISS BACON (No microphone): Mr. Durkan, you were looking at the middle paragraph of 3.03
9 of the minutes at tab 48 of the bundle, and I was asking you whether this was a strategic
10 decision that was being taken by the board?

11 A It would have been a proposal, no doubt by Mike, the board would have agreed that it was
12 the way forward.

13 Q So this was the board agreeing that the strategy should be that you should continue
14 tendering as before?

15 A Correct.

16 Q Can you then go to tab 73, para. 5.1, the last line beginning: “giving an adverse gross profit
17 variance for the year of £1.393 million” – one of your financial reports. Is the phrase:
18 “Adverse gross profit margin” . . . saying that during that period DP was loss making?

19 A For the year it would be against budget, I presume that’s how we would record it.

20 Q Whether it was loss making or whether it was just under budget, there was obviously a
21 discussion about the problems, and then if you look up to the top of 5.1 it comes up in two
22 places, the top of 5.1, second paragraph: “The Board considered the adverse gross profit
23 margin for the two month period October/November 2003 of £816k.” That is not saying
24 that was £816K under budget, it is suggesting that it is actually loss making to the tune of
25 £816,000?

26 A No, an adverse performance could either be a positive or a negative. If there was a budget
27 to, say, make £2 million and you only made £1.2 million, then the adverse profit was
28 £800,000, or it could have been the other way, so it does not mean the business is loss
29 making.

30 Q What you are saying is, this was attributable mainly to RGS and Hackney College?

31 A That is what it states.

32 Q Then the next paragraph:

1 “Following a lengthy discussion on both RGS and Hackney College, it was agreed
2 that a full review would take place on all contracts in order to establish the exact
3 position in relation thereto.”

4 So what the board was saying was that we have this adverse profit margin, whatever that
5 means, of £816,000, we are now going to review all of our contracts to find out what our
6 exposure is, is that right?

7 A Yes, Colin Simmons would have made that statement because it was under his report.

8 Q But what the board was saying was that it was agreed there would be a full review?

9 A It would have agreed that, yes.

10 Q And who was going to carry out that review?

11 A I presume the commercial director.

12 Q Which would have been?

13 A Colin Simmons.

14 Q So Colin was essentially being given the task by the board of reviewing all of the contracts
15 to see what your exposure was and to prevent similar problems occurring perhaps?

16 A I’m assuming it would have been undertaken by him or his team, I have no doubt.

17 Q Okay. If you then look at the next paragraph:

18 “There were discussions in relation to the ‘atmosphere’ which prevailed within
19 Durkan Pudelek Limited which manifested itself in high staff turnover and low
20 moral. It was agreed that what had happened was now history and that concerted
21 efforts should be made to remedy the situation and ensure that we had adequate
22 personnel and resources in place to handle future work opportunities.”

23 Who would have made those comments? Was it you or Mr. Fraher?

24 A No, I presume again that would have been made by Colin and Mike, they would have been
25 reporting. First of all, I wouldn’t be close enough to the running of the business to know
26 whether the atmosphere was positive or negative in terms of staff morale, so it had to be
27 Colin or Mike reporting.

28 Q What changes did the board envisage were necessary to render Durkan Pudelek a properly
29 functioning organisation?

30 A I can’t recall.

31 Q Can you then turn to tab 74, para. 5.1? If you go down to the penultimate highlighted
32 paragraph:

33 “Following lengthy discussions, it is clear that the problem within DPL will not be
34 sorted out overnight”?

1 A Sorry, can I ask you what tab number was that?

2 Q It is tab 74, para. 5.1. I just want you to read that before I take you to the next tab. If you

3 then turn to the next tab, tab 75, we have already looked at some of it, para. 5.1, and half

4 way down:

5 "The Board considered that the way forward for this company is as follows:-

6 1) Turnover should comprise ideally 12/15 negotiated contracts in the range of

7 £2m to £3m each."

8 So that was a strategic decision being taken by the board in relation to Durkan Pudelek in

9 relation to the kind and number of contracts that it was going to take per year, was it not?

10 A It would have been based on a recommendation no doubt from Mike, as to how he ----

11 Q I am not asking who recommended it, I am saying that that was a particular decision taken

12 by the board?

13 A Someone had to make that proposal, and knowing how the business ran it would have been

14 Mike or Colin that would have recommended it, and the board would have endorsed it.

15 Q And this was a decision not only as to the number of the contracts, but also the type of

16 contacts negotiated contracts rather than putting every single stage tendered contracts?

17 A That's what it says, yes.

18 Q Then:

19 "2) Gross Profit Margin – Contracts should be accepted only where there is a clear

20 indication that the company is in a position not achieve a gross profit margin of

21 7.5% plus."

22 Is that similar to the point that your father had made in that extraordinary board meeting

23 which we looked at in February 1995, achieving profit margins rather than buying turnover?

24 A I think what my father stated in another board meeting was a comment making sure we

25 were looking for profitable work. This was clearly minuted on the back of a proposal by,

26 no doubt it was Mike or Colin and it's been endorsed and minuted by the board.

27 Q The board is making a strategic decision about the way forward for this company. "This is

28 what we have to do to get this company back on its feet"?

29 A It is agreeing that this is the way forward, yes.

30 Q And "3)" – we have looked at this already, can we just look at it again –

31 "Commercial Management/Cash Management – Management must seek to ensure

32 that undervalues are not tolerated and that the company receives its payments in

33 accordance with the contract. This will require management being somewhat less

34 accommodating and more commercially aware."

1 Are you really saying that Mr. Pudelek is going to come to the board and say: "Please can
2 we agree that I am going to be more commercially aware?" This is a statement made by the
3 board to him and Mr. Simmons saying: "Go away and be more commercially minded in
4 chasing up payment", is it not?

5 A No, it's not. I think again you have to understand how the company ran. This would have
6 been a proposal of how Mike or Colin would have suggested they were going to deal with
7 the problems, and it would appear that that Colin would have been suggesting that his team
8 would be more aware, commercially aware, of the contracts to ensure there were no further
9 undervalues. The board would have agreed that that's fine.

10 Q Then if we look on the next page: "5.2 Cash Management", this is a report being presented
11 by Mr. Fraher. Three paragraphs down:

12 "The bank position . . . indicated a current account balance of £387k. This poor
13 cash position is the result of undervalues and overdue retentions. The true figure
14 in a contracting business such as Durkan Pudelek Limited should be in the order
15 of the aggregate of the net worth of the company plus £1m for every £25m
16 turnover."

17 Was this not the same point being made? Mr. Fraher is coming along and saying: "This is a
18 poor cash balance, and this is because you have not been sufficiently commercially minded
19 in chasing up your undervalues and overdue retentions"?

20 A Alan Fraher was doing this reporting on figures that were given to him by the commercial
21 director of Durkan Pudelek, that was his function, and it was one of the services to be
22 provided. He was merely just verifying that one of the reasons why there was a poor cash
23 balance was because of these undervalues.

24 Q Over the page at 6.1 he refers to a:

25 "Future modus operandi – The said report as prepared and presented to the
26 meeting by MTP was duly considered during the meeting."

27 If we then turn a tab, that is the "Future Modus Operandi" that was presented by Mr.
28 Pudelek presented at the board meeting. He is setting out here the changes that he is going
29 to make to the business to satisfy the board that it was viable, was he not?

30 A They were his proposals, yes.

31 Q So what he was doing was saying: "I know that there are problems within DP, so here is
32 what I propose, and we need to discuss it and the board needs to approve it", that is what he
33 was doing, was he not?

34 A He was making proposals, this is how he was going I think to turn things around at the time.

1 Q So the board needed to approve the measures that he was proposing to restore Durkan . . .
2 to a viable business?

3 A We would have approved this no doubt.

4 Q Tab 80, para. 6.1, the last paragraph highlighted:
5 “Concern continues in respect of contract under-valuations and overdue retentions.”
6 - a theme that we have seen in a number of board minutes.
7 “As considered before, these areas require attention in order to establish the
8 validity or otherwise of the carrying values of these assets.”

9 So what the board is saying is Pudelek considers they need go away and pay further
10 attention to the undervalues made and overdue retentions, is it not?

11 A It’s recording that these areas need to be addressed.

12 Q By Mr. Pudelek and Mr. Simmons?

13 A By the executive, and that could have been any one of the directors within the executive
14 directors in Durkan Pudelek, there were more than four directors at that time.

15 Q This is a point that was being made by the board to the people who were on the ground
16 managing Durkan Pudelek: “Go away and sort out your undervalues and overdue
17 retentions”?

18 A It is not how it would have been put across at a board meeting. It would have been ----

19 Q It would have been put slightly more politely than that?

20 A Yes, by Mike Pudelek, he would have said “This is how I’m going to deal with it”.

21 Q Can I take you back to your second witness statement? Just to remind the Tribunal it is at
22 bundle 2A, tab 6, para. 19 again. I have taken you to the first part of this, can you now look
23 at the latter part of it:
24 “Having fully considered the implications of the recognised results (as at May
25 2004) for the year to 31 January 2004, Mike Pudelek made a presentation to the
26 Board in May 2004 concerning how Mike was going to be taking the company
27 forward; how he was setting about getting his house in order with a view to
28 getting Durkan Pudelek on track.”

29 That is the presentation we have just seen. Then the last sentence:
30 “We had no involvement in, or influence over, the actions that were in fact taken
31 by Durkan Pudelek.”

32 In the right order of discussions and the action points that were recorded in the minutes that
33 I have taken you to this afternoon, that last comment is not true, is it?

1 A It is true, because you've got again to understand how the board operated. Mike Pudelek
2 and Colin Simmons, they were co-directors who ran the business. This was Mike's plan of
3 how he was going to turn the business around.

4 Q That is not what is minuted, Mr. Durkan. What is minuted is that the board was continually
5 telling the management team of Durkan Pudelek to go away and do things, sort out their
6 undervalues and retentions, sort out the profit margins. What those minutes show was that
7 you had considerable involvement and influence in DP's commercial activities and you
8 were involving yourself in the actions that were taken by Durkan Pudelek?

9 A No, that's not, in fact, true. Again, I rely on my witness statement. The executives that ran
10 the business were Mike and Colin and their co-directors. I merely sat there and listened to
11 their reports, and if it came to a discussion that they wanted something endorsed by the
12 board we may then be asked to comment, but there's no direction given directly by myself
13 into the day to day operation.

14 Q If you take up para.2 of your second witness statement and look at the last four lines, you
15 are talking about what the minutes show:

16 "What they do show is that Durkan Holdings did not exert control through Board
17 Meetings – the Board Meetings of Durkan Pudelek were nothing more than a
18 reporting function ..."

19 Mr. Durkan, it is the OFT's case that that is an incorrect statement and that, in fact, the
20 board meetings involved very close scrutiny and direction of the Durkan Pudelek business,
21 and that you and your father and Mr. Pudelek did, in fact, influence conduct, and that the
22 board meetings were not simply there for Mr. Pudelek and Mr. Simmons to report to you.
23 Do you accept that?

24 A I don't accept that. Again, I stand by my statement. I sat on the board of Durkan Pudelek
25 as a shareholder. I had no executive role in that board. Therefore, again, I repeat it again,
26 my witness statement is correct and accurate.

27 MISS BACON: I do not have any more questions for Mr. Durkan?

28 PROFESSOR PICKERING: Mr. Durkan, I am not sure whether you have this bundle, bundle 1,
29 the disclosure documents. Could you go to tab 69.

30 MR. HOSKINS: Sir, I am sorry, I am not sure that we have it, but if it is the disclosure
31 documents provided by the OFT, it should be in bundle 2B, so hopefully if you identify the
32 document.

33 MISS BACON: It is the same document as in 2B, tab 80.

1 PROFESSOR PICKERING: It is the minutes of the board of directors of DP held on 26th July
2 2005. Item 1 in the minutes says:
3 “Daniel Durkan extended a warm welcome to David Watts.”
4 First of all, could you tell me who David Watts was, please?
5 A Yes, David Watts joined Durkan Pudelek as – I would have to confirm his title.
6 THE CHAIRMAN: Roughly what was it?
7 A I think he was MD.
8 PROFESSOR PICKERING: He is listed as a director.
9 A He was a director, I can confirm that, yes.
10 Q He is a director of Durkan Pudelek?
11 A Correct, yes.
12 Q We have been told that all board meetings were chaired by Mr. Pudelek. I wonder whether
13 you could explain why you extended the warm welcome to him at the beginning of the
14 meeting?
15 A Yes, that’s quite simple. My father wasn’t at that meeting, I believe, and as a shareholder,
16 and it would have been one of the first times I’ve met Mr. Watts. Mike would have
17 recruited him and obviously he would have met Colin, and I would have just extended a
18 welcome out of courtesy, no more than that, as I do to every board member, whether it be
19 Durkan Estates or Durkan Limited.
20 Q Thank you. A final question, you have made the distinction between the public work that
21 DL undertook and the private work that was directed towards DP. Looking at the analysis
22 of the main categories of turnover, I see that excluding DP, so I assume this is mainly DL,
23 Durkan Limited, there was quite heavy turnover, substantial turnover, from speculative
24 private housebuilding. That was certainly not public sector, was it?
25 A No.
26 Q Would that all relate to land banks that Durkan held?
27 A That would have probably – most likely related to ---- Yes, it would have related to Durkan
28 Estates, they constructed for the development business, and we would have classed that as
29 speculative.
30 Q It appears that you had a fairly substantial stake in the private sector, but not in terms of
31 working for private sector clients?
32 A Correct. We acted only for the developer.
33 PROFESSOR PICKERING: Thank you very much.

1 MR. BLAIR: Mr. Durkan, I wonder if I could ask you whether you could give a very brief
2 summary, one sentence if you can do it, of the duties of a director that are owed to the
3 company of which he is a director?

4 A In the case of my role within Durkan Pudelek, as I said earlier on, I was appointed a director
5 but my function was clearly as a non-executive, and that was from the very, very first
6 appointment. So I had no duties within Durkan Pudelek, no executive duties whatsoever.

7 Q I was not meaning executive duties, I was meaning duties generally?

8 A Duties generally would have been – you would have a role, first of all, if you were
9 appointed to a business. I didn't have a role, so I was sitting there as a shareholder merely
10 looking after our investment. I had no role in the day to day, whereas if I had been
11 appointed a ----

12 THE CHAIRMAN: I am sorry, I think you slightly misunderstood what you mean by "duties".
13 We are not asking what your job was, we are asking whose interests were you there to
14 protect?

15 A I was there looking after the interests of Durkan Holdings. I had a seat on the board
16 because of our investment in the business. It's no different to other investments we've
17 made in other companies. If we have a substantial investment we would normally have a
18 seat on the board. However, it doesn't mean that we would actually have an executive role
19 in that company. My role in Durkan Limited was completely different. I was involved in
20 virtually every facet of that business, every department. I would delegate marketing
21 strategy, I would talk to my senior directors daily, even senior management, regular site
22 visits, that I would never do – I would agree all the salaries, I'd agree bonuses. Nothing
23 went through the business without getting passed through me as a CEO, whereas with
24 Durkan Pudelek, as I said, I had no function. I think some of the documents in some of
25 these bundles show that in terms of the marketing I was always down as a non-executive
26 director. As I said, Mike and Colin ran the business, I merely sat on the board.

27 MR. BLAIR: So you can say, "I do not have to worry about anything affecting Durkan Pudelek
28 unless it impinges on DL or DH"?

29 A Or DH, yes.

30 Q That is the position you have adopted throughout your time as a director of DP?

31 A Yes, Mike and Colin had full authority in terms of running the business.

32 THE CHAIRMAN: Any re-examination, Mr. Hoskins?

33 MR. HOSKINS: Yes, I can be very brief.

Re-examined by Mr. HOSKINS

Q First of all, I would like back to bundle 3A. You were given a bundle 3A with all the reports attached. It should say "Notice of Appeal, File 3A, Durkan Pudelek Limited board minutes" on the spine. You were taken to the board minutes behind tab 1, Wednesday, 5th February 2003, and then you were taken through all the various reports that were attached to that document. How much attention did you pay to the detailed reports prior to each meeting?

A Well, in most cases not a lot, I didn't get a lot of time to review them. I would have them possibly the day before or the day of. In most cases my attention to detail would be quite limited. I would normally just listen to the general performance of the business by the executive reporting.

Q When you say you would generally sit and listen is that because there were oral presentations given as well at the board meeting?

A Yes, the respective directors would go through and report on the various sections of the report.

Q What level of detail would the oral presentations take place at?

A It was generally – I suppose you could say they were for the reading more so than the actual – if you were to go through everything else in these board minutes in great detail they would extend for hours. Our board meetings generally were quite quick. This was reporting on ----

THE CHAIRMAN: Did they realise that you would not have had a chance to read all the background documents?

A No, depending when you got them. As I said, it could be a couple of days, it could be the day of the meeting. Then you could read the documents.

MR. HOSKINS: What was the general position. Obviously, there are 15 years worth, so it is difficult, but if you can generalise. The question was: how much attention in general did you pay to the detailed reports, the written ones?

A Fairly limited.

THE CHAIRMAN: I am sorry, I did not catch that answer.

A Fairly limited.

MR. HOSKINS: You said that the board meetings were generally quite quick. What do you mean by "quite quick" – can you put a generalisation on that, how long did they generally last?

1 A Well, we didn't sit round the table all afternoon. Generally it would be a couple of hours
2 maybe, if that.

3 Q Can I ask you then to go to your second witness statement, bundle 2A, tab 6, para.17. Miss
4 Bacon put to you that this was inaccurate because she had shown you all the detailed reports
5 and she focused on the words 'very high level summaries' and suggested that this was
6 inaccurate for that reason. But, you have just confirmed that there were oral presentations of
7 the board minutes. Yes or no?

8 A Correct.

9 Q Again, can you just say what sort of level those presentations were at?

10 A It was a general overview of the various departments of the reports. That is as far as it went
11 - an overview.

12 THE CHAIRMAN: Looking at that paragraph, (iii):
13 "information was provided on any other developments that could affect the profit
14 on return of DH's investment (for example, developments in ongoing
15 litigation . . ."

16 Then there is a long list of board minutes. I am just wondering what kinds of issues would
17 you regard as being developments that could affect the profit on return of DH's investment?

18 A I assume that would be referring to if there was a problem job and it was either getting
19 litigious in some way - not that I recall many did -- But, if there was a substantial sum of
20 money outstanding or at stake we would get reports on it, and so we would see that as
21 potentially affecting the business. That's how I would see that.

22 MR. HOSKINS: Before we leave the witness statement, can you turn through to para. 19? You
23 remember that Miss Bacon showed you a large number of references in individual board
24 minutes to a project in Mile End Road. She certainly did not over-sell it when she said it
25 was very exciting. She then took you to para. 19 of your second witness statement -
26 particularly the first sentence.
27 "I recall only a few board meetings in which the board discussed at length specific
28 contracts of concern."
29 She took you to task because she said that in fact there were lots of board meetings at which
30 this was mentioned. Can you please tell the Tribunal what you mean by the words 'at
31 length' in para. 19 of your witness statement?

32 A Well, what I would class as 'at length' is if there was a job - a problem job - such as
33 referred, that maybe was in litigation or likely to go in that direction, and it could have an
34 impact on the investment -- On occasion it would get some more lengthy discussions. But,

1 generally, all those minutes that I've been referred to - the jobs I've been referred to in the
2 minutes were merely just reporting where they were. There weren't lengthy discussions.
3 So, you know, there was very, very few occasions that we had any considerable - or
4 potentially considerable - losses on a job that would've got significant airings. But I do
5 recall the Malt House being one. There was a lot of money at stake at one stage.

6 Q So, in other words, at para 19, the first sentence means what it says:

7 "I recall only a few board meetings at which the board discussed at length specific
8 contracts of concern".

9 A That's correct.

10 THE CHAIRMAN: But, is your evidence then that if there was a problem of that sort then it is
11 likely to have been discussed but they did not crop up terribly much?

12 A In a fifteen year period I can certainly recall maybe two jobs that I can remember as having
13 some high risk associated to their position - either potential loss ----

14 MR. HOSKINS: The last topic - Bundle 2B, Tab 77. These are the minutes of a Durkan Pudelek
15 board meeting. You were taken to Section 4. After a long afternoon, and given this was six
16 years ago, this next question may be taxing you too far. In the final sentence,

17 "There then followed a discussion in relation to the implementation of a 'Group'
18 policy. In summary, a meeting is to be convened to ensure that we implement a
19 'Group' policy in relation to all Health and Safety issues"

20 Do you have any idea why the word 'Group' when it appears twice is in quotation marks?

21 A Again, my recollection of this would be that there would be certain items of the Health &
22 Safety that would be commonplace to the Group. Then there was other more specific
23 Health & Safety matters that would be more common to the actual individual companies.

24 Q I have no further questions.

25 THE CHAIRMAN: Thank you very much, Mr. Durkan.

26 (The witness withdrew)

27 THE CHAIRMAN: How are we getting on in terms of witnesses? Who is going to be tomorrow
28 then?

29 MR. HOSKINS: I have all the control witnesses available tomorrow - Mr. Fraher, William
30 Durkan, Colin Simmons, and Mike Pudelek are all available tomorrow. I am hoping they
31 will be completed tomorrow, because if they are not the timetable starts to creak.

32 THE CHAIRMAN: Should we start a little bit earlier? Do you think you will manage to get
33 through all that tomorrow?

1 MISS BACON: We would be happy to start earlier if you wanted to. I had certainly hoped to
2 finish Mr. Fraher and Mr. Durkan by lunch-time, and then in the afternoon, Mr. Pudelek and
3 Mr. Simmons. There is a question though as to whether I need to put the very same
4 questions all over again to Mr. Fraher and Mr. William Durkan because, as you may recall,
5 the three give evidence in some respects in very similar terms. If I have to put to Mr.
6 William Durkan and Mr. Fraher all the same questions in relation to each and every bit of
7 their witness statement that is challenged we are going to be here all day. I wonder if the
8 Tribunal could give an indication that insofar as I have put a point to Mr. Daniel Durkan, I
9 do not have to put the same point to Mr. Fraher or Mr. William Durkan, despite the fact that
10 it is made by them in their witness statements too? It might enable us to save a little bit of
11 time.

12 THE CHAIRMAN: Unless you feel able to respond to that immediately, Mr. Hoskins, I think I
13 would prefer to leave you two to discuss that, to see whether you can come to an accord as
14 to how that should be handled, rather than me giving a direction at a quarter to five in the
15 afternoon. What do you say about that?

16 MR. HOSKINS: I am quite happy to react. It is a common problem in trials. Miss Bacon has an
17 obligation to put her case to my witnesses. Insofar as there is a common point which is
18 repeated throughout the witness statements, then generally speaking it will be sufficient to
19 put it to one of the witnesses. However, of course, if it is a point that relates particularly,
20 for example, to Mr. Fraher, as happened on a couple of instances, then that point should be
21 put to Mr. Fraher, rather than relying on Mr. Durkan's hearsay evidence. Apart from that I
22 am content.

23 MISS BACON: On that basis I will do my best to truncate my cross-examination of Mr. Fraher
24 so far as possible. I do have a whole number of questions that need to be put to him
25 specifically that will take most of the morning. It may be that I do not have to cross-
26 examine Mr. William Durkan because many of the questions that I was going to put to him
27 have already been covered with Mr. Daniel Durkan. I will do my best. That should enable
28 us to finish tomorrow reasonably speedily. In that case I think we could start at 10.30 and
29 we will get through the whole of the other control witnesses tomorrow.

30 MR. HOSKINS: That is absolutely fine. Of course, if there is anything specific to William
31 Durkan ----

32 THE CHAIRMAN: Have a little think about this overnight. I am sure Miss Bacon will do what is
33 required. We meet again at 10.30 tomorrow morning.

34 (Adjourned until 10.30 a.m. on Tuesday, 20th July, 2010)