IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22 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 FOUR)

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.

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THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: Madam Chairman, I am going to deal with the Office's case in relation to Infringement 220 and I am going to deal with this part of the appeal in four parts: dealing with the relevant evidential test, the nature of the evidence relied on by the OFT and Durkan's criticisms of it, the nature of Durkan's evidence, and then some observations in conclusion.

In doing that, I am going to refer the Tribunal to two short clips of documents that were on the file, one of which relates to the point about Alan Armstrong and the other relates to how the Peter Goodbun transcript was generated. Those are documents that Mr. Hoskins has not had a chance to digest and see. He may wish to oppose them being admitted, he said. I do not want to deprive him of the opportunity to do that. There are two options: one is that one could take five or ten minutes to allow Mr. Hoskins to look at these, but I would suggest that perhaps the better way of proceeding is I begin the submissions and before I reach the point where I refer to those documents I will raise the matter with the Tribunal, because I envisage that might be after three-quarters of an hour to an hour, and I know that other constitutions of the Tribunal like the opportunity to put a break in during the morning, and that might be a sensible point at which to do this.

THE CHAIRMAN: Yes. Do you have any views on which of those we should pursue, Mr. Hoskins?

MR. HOSKINS: I am quite happy, I just need five minutes to read the documents.

THE CHAIRMAN: Let us make a start and then take a break.

MR. BEARD: I am grateful. First, I will deal with the relevant evidential test. This is a matter that has been considered by the Tribunal in various cases, in particular in the *Napp* case, and for your notes that is at Bundle 5A, Tab 12, and in particular at para.109. The statements made there were subject to some clarification and consideration in the *AllSports and JJB* case. That is at Bundle 5A, Tab 18, para.204. Since those cases there has been at least one important House of Lords authority dealing with the matter. It is, therefore, perhaps appropriate just to spell out the position from the Office's point of view. The burden of proving an infringement of the Chapter I Prohibition is on the Office, and the standard of proof is the normal civil standard of balance of probabilities. The quality of evidence required to satisfy this standard, the seminal statement of the law is in the speech of Lord Nicholls in *Re H (Minors)*, which, for your notes, is at Bundle 5A, Tab 7, p.586, and the relevant paragraph is para.22. As it happens, that paragraph is actually set out in the

liability defence. It may be helpful if the Tribunal has the liability defence, and can turn up p.11. There you will see the paragraph:

> "The balance of probability means that a court is satisfied an even occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a fact, to **whatever extent is appropriate in the particular case,** that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegations is established on the balance on the probability … **this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.** The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

So whilst the relevant standard is always the balance of probability, the evidence required to meet that standard may differ according to the context, with stronger evidence required for an allegation that is improbable.

There is no presumption that conduct attracting a penalty, even a severe penalty, is inherently improbable. Rather, as Lord Nicholls emphasised, context is essential. This matter was considered rather vividly by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman.* The relevant passage is set out in footnote 28 in the defence.

THE CHAIRMAN: It is a very well known passage.

MR. BEARD: Yes.

> "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls explained in *Re H,* some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

These issues were considered by the House of Lords in *Re D (Northern Ireland)*, which is at Bundle 5A Tab 29. There Lord Carswell considered the evidence required to meet the civil standard, and in particular I would refer the Tribunal to para.28.

But the authority to which I would like to direct the Tribunal's attention in particular is at 5B Tab 32 *In Re B.* This concerned very different circumstances, consideration of a standard of proof under a statutory scheme relating to family law matters under the Children Act. The comments made by Lord Hoffmann were of more general application. They start at p.5/20. He makes clear in para.1 that whilst he agrees entirely with Baroness Hale who gives the principal opinion:

> "I add some observations on the standard of proof only to underline, without in any way qualifying, what she has said."

Then at para.13 p.7/20 he there approves explicitly the passage from *Re H (Minors)* to which I have already referred the Tribunal and he says:

> "I think that the time has come to say, once and for all, there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

In doing so, he comments on some of the earlier case law. Then at 14 he says:

> "Finally, I should say something about the notion of inherent probabilities."

There he is talking about Lord Nicholls comments in *Re. H*. Then he goes on in para.15,

> "Common-sense, not law, requires that in deciding this question [the balance of probabilities question] regard should be had to whatever extent appropriate to the inherent probabilities".

He then deals with it in the context of the sexual abuse considerations. If the Tribunal would read the rest of para.15. If one turns on to the leading opinion of Lady Hale at para. 69, she is there talking about civil proceedings. Then, if one goes down to para.72 she says,

> "As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently probable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be

> a dog than a lion. If it seen in a zoo next to the lion's enclosure when a door is opened, it may well be more likely to be a lion than a dog".

So, the position is clear. Balance of probability is no gloss. The question for the Tribunal is whether it is more likely than not that the infringement occurred.

Pausing just there for a moment, in opening Professor Pickering raised an issue about this. Mr. Hoskins started brandishing a fictitious yellow card. He said this (transcript Day One, p.33, line 33 onwards),

> "The actual question for the Tribunal to ask itself is: Is there a version of the story, given the limited facts we have, which is plausible and does not result in an infringement?"

With respect to Mr. Hoskins that is fundamentally wrong. It does not matter which metaphors he waves about. It is far too high as a threshold of proof. One can effectively test that. If you just substitute the word 'reasonable' for the word that he used - 'plausible' - in his formulation, you get, "Is there an alternative version of the story given the limited facts which is reasonable and does not result in an infringement?" Now, saying that a reasonable alternative version of the story exists is effectively the same as saying you have a reasonable doubt about the infringement story. It is only when you have a reasonable alternative account of events that you can have a reasonable doubt about an infringement story. So, what Mr. Hoskins' formulation does is that it tends towards a formulation that amounts to a criminal standard of proof - effectively, beyond reasonable doubt. In other words, you do not have any doubt that there are alternatives, reasonably stories out there.

Mr. Hoskins also sprinkled his opening with some references to Article 6 of the European Convention on Human Rights, and suggested that somehow the presumption of innocence supports this formulation of the relevant test.

Now, first, it is just worth noting in passing that the presumption of innocence is not a creation of the European Convention. It is a fundamental tenant of the common law. The presumption of innocence, secondly, is why, in civil cases, you have to prove on the balance of probabilities that something occurred - in other words, that it is more probable than not. You have to prove 51 percent - not just 50 percent.

So, Mr. Hoskins set the threshold for the Tribunal to consider in the wrong place. The House of Lords has confirmed where the threshold lies. It would be a significant error of law to apply the approach that Mr. Hoskins is advocating in this context.

Next, moving beyond the standard of proof to some general observations about the nature and quality of evidence required to discharge that standard, it is well-established that

improving an infringement of the Chapter I Prohibition, the OFT, or indeed any relevant regulator, does not have to rely on a specific type of evidence. Nor is there any general rule as to the volume of evidence required to prove an infringement. A single item of evidence, or indeed wholly circumstantial evidence, may be sufficient proof of a prohibited agreement or concerted practice. It may be necessary to draw inferences from fragmentary and sparse evidence in order to establish unlawful conduct.

Where you have unsupported evidence from which you are trying to draw inferences it is of course necessary to take into account whether or not there are any other plausible explanations for the evidence that has been offered, and one sees that in the account given in *Aarlborg* which is quoted and approved by this Tribunal in the *AllSports* case, Tab 18, Authorities Bundle, which is the first tab in 5B. If one turns to p.48, para.204 is a concluding paragraph following an extensive consideration of case law on the standard of proof, but I have already directed the Tribunal to subsequent House of Lords' authority which was not considered there. What is important is paras.205 and 206 just to read those paragraphs.

(After a pause) It is perhaps from para.57 of *Aarlborg Portland* which is quoted in para. 206, which Mr. Hoskins gets his reference to another plausible explanation test, but it is very clear there that what one is talking about is a circumstance as set out in para.56 of that judgment:

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

So where you have limited fragmentary documentary material and there are two interpretations of it, yes, it is quite right, you must consider whether there is another plausible explanation for the text, markings, layout, content of the documentary material if you are doing it by deduction, of course that is right, but that does not mean that the whole shape of the relevant test is changed, and what is important from looking at *Aarlborg Portland* as approved in *JJB* is that there is a recognition that limited evidence may well be sufficient.

Applying these principles to the present case three particular comments need to be made. First, the Tribunal in assessing the quality of evidence will undoubtedly need to take into account the fact that the infringements found by the OFT are serious ones for which, in many cases, substantial penalties had been imposed. Nevertheless, the Tribunal will also

need to take into account the fact that the findings of infringement are made in relation to conduct which was widespread in the construction industry and which has been admitted by a vast number of undertakings. This is therefore not a case where the infringements in issue can be regarded as inherently improbable. Ingrained practice does not become unusual and improbable simply because it is unlawful and has attracted severe penalties for a number of undertakings.

Secondly, the nature of the infringement involved very little documentary evidence of the unlawful conduct. That does not prevent the OFT reaching conclusions as to what probably occurred on the basis of the totality of the evidence before it, nor should that prevent this Tribunal doing so.

Thirdly, the OFT is required to prove that the instances of cover pricing between undertakings found in the decision occurred. It is not required to prove the precise date on which they occurred, or indeed, the specific individuals involved for each infringement. The absence of those details does not prevent, and has not prevented, the OFT from demonstrating the existence of conduct constituting an infringement of the Chapter I Prohibition.

Against that background, what evidence did the OFT have for this infringement? First of all, there is the Builders' Conference report, which we looked at in the course of hearing evidence. I would ask the Tribunal to find it at Bundle 4, Tab 7. There are three points to draw to your attention at this stage in relation to this document. First of all, the cross by the name of Durkan under the list of main contractors, the reference to Mr. Sharpe in manuscript at the bottom, and the figure next to the name of Mr. Sharpe, which is just under the eventual Mansell bid, about 8 per cent higher than Durkan's own eventual bid.

If you are to look at that document on its own, it looks odd on its face. Why is someone at Mansell, which is where this document comes from, marking up against Durkan, one of its rivals, and why is the name of a Durkan employee down there, particularly when that employee is the estimator for the Durkan job? That is especially strange, because a contact is referred to for Durkan in the main contractor list, and it is Guy Copeland, not Brian Sharpe. Mansell could have no legitimate reason for having contact with him so far as you could see in relation to this matter, contacting the rival estimator. Then there is a figure next to his name.

The name and cross refer to Durkan. It looks like this figure might also be related to Durkan in some way. If you later found out it was what Mansell bid, the natural and reasonable inference would be that that figure had come from Durkan, probably from Brian

Sharpe, the name mentioned next to it. That is what you might naturally have taken from the document just on its own.

Mr. Hoskins tried valiantly to conjure alternative scenarios. Mansell rang Durkan, found out it was Mr. Sharpe, but then went elsewhere because they could not get Mr. Sharpe or a number. Of course, reading the document alone, you cannot rule out that possibility, but looking at the document and the manuscript markings just on their own, that account given by Mr. Hoskins is not the most likely interpretation.

Of course, the key thing here is that you are not looking at the document alone without any explanation or other evidence. Mr. Goodbun of Mansell has provided evidence. The Tribunal has been taken to this transcript, both in Mr. Hoskins' opening and in the course of evidence, but there are various points that I would like to draw to the Tribunal's attention. It is at Tab 12 in the bundle. If we just start at p.1:

> "This interview is being tape-recorded … I'm Sarah Mills, an investigating officer with the Cartels branch of the Office of Fair Trading. This is interview is taking place at the offices of Freeth Cartwright … I am interviewing …"

Then the name is given, Mr. Goodbun. Then the next major piece of text:

> "This interview is part of an investigation by the Office of Fair Trading … into suspected bid rigging activity in the construction industry. This interview's taking place as part of the leniency application by Mansell plc to the Office of Fair Trading. The content of this interview may be used in the investigation and decision-making process by the Office of Fair Trading. You have the right to have legal representations present and you've chosen to do so. Is that correct? Correct."

Then it is stated that it is a voluntary interview. Then at the bottom:

> "I must warn you that if during the course of this interview you knowingly or recklessly provide information to the Office of Fair Trading that is false or misleading in a material particular, you may be guilty of a criminal offence punishable by a fine of up to £5,000 or a maximum of two years imprisonment or both. Do you understand that?"

Mr. Goodbun says, "I understand".

So what is particularly important to note here, and I will come back to it, is that Mr. Goodbun is being instructed as to the sanctions that exist under s.44 of the Competition Act that if, in the course of this interview, "you say something knowingly or recklessly

misleading or false, you will face a criminal penalty", a serious sanction. It is personal, it is the individual that faces this penalty.

THE CHAIRMAN: This interview took place on 17th April 2007.

MR. BEARD: Yes.

THE CHAIRMAN: Roughly where were the OFT in the course of their investigation? Was that at an early stage of the investigation? It was about a year before the SO went out, is it not? The SO went out on 18th April 2008, I think.

MR. BEARD: I think that is right, yes. It was relatively well advanced, but it is right to say that this is well before the SO was published because, of course, part of the process of producing the statement of objections is, of course, that the OFT is required to set out its reasons for its decision and then make available the relevant documents it is relying upon, including this. Just for the Tribunal's reference, if the Tribunal sees documents with a number in the right hand corner, almost invariably in this case that number will be the access to the file index number. So these are documents that were made available to the parties.

Looking at this transcript, what can we see from Mr. Goodbun, which is particularly relevant to the interpretation of the document that we have already seen and the finding of infringement that the Office made in its decision? The first and most important thing that one can take from this, and there is no ambiguity about it, no doubt about it, Mansell took a cover on the Claremont Close job. Mr. Goodbun, the chief estimator, said they took a cover. He knew, there is no doubt. To be fair to Mr. Hoskins, he does not suggest that Mansell is confused and that actually it was competitively tendering for the job. That means that the question that then remains is: who did Mansell obtain the cover price from? Then we ask ourselves: what evidence do we have from Mr. Goodbun on this?

Crucially, at p.13 he says he chose Durkan. That is halfway down the page. It is a paragraph to which the Tribunal has already been referred, but you may just want to refresh your memories by reading that paragraph. (Pause) So what he is saying here is: I, as the chief estimator, chose Durkan as the people from whom I wanted us to get the cover price. He is not just saying that; he is saying why he chose to cover bid in this case and why he chose Durkan. He chose to cover bid here because of the specialist nature of the job, and the people that he identified on the Builders' Conference list. He did not want to end up competing with specialist contractors in relation to specialist work. So he chose to cover bid here because of the specialist nature of the job. He remembered that. Of course, the Durkan witnesses: Mr. Sharpe, Mr. Copeland and Mr. Briggs, did not. Mr. Sharpe and Mr.

Briggs accepted that the job was a specialist one when it was put to them. For your notes the references are: Day 3 p.10 lines 28 to 30; and Day 3 p.21 lines 28 to 33.

Why Durkan? Because it is a similar sized organisation and therefore in theory it has a similar sort of cost structure and would be putting in similar sorts of price level bids. That again was an approach that Mr. Copeland recognised. The reference to that is Day 3 p.47 lines 18 to 20.

So we know Mr. Goodbun chose Durkan as the source for the cover; we know fundamentally that Mansell did cover; we know he had good reason to choose Durkan; we know why he wanted to cover. He remembered the details of this in a way that other witnesses did not.

We furthermore know from p.11 what his role was in this job. If one starts two-thirds of the way down the page:

> "SM: Okay, thank you. Now turning to the, the contract that I understand you're, you're aware of which is the external structural refurbishment of 1342 Claremont Close, London, tender date of the 29th March 2005, what was your role in, in the actual sort of preparation of this tender? (A) [I was] managing my estimator that was dealing with it."

He was intimately involved. He was the one that said go to Durkan, he was not the one going to Durkan. One of his estimators would do that. Who was that? Phil Hart. So we know a cover price was received by Mansell and used by Mansell. The managing estimator says he wanted to get the cover from Durkan. He does not suggest that the cover came from anywhere else. Instead, he explains the manuscript on the Builders' Conference document. He says that they are Phil Hart's notes, and that he was the estimator on the Claremont Close job. That can be seen from pp.11 through to 12.

At this point I was going to pick up the issue that Mr. Hoskins raised for the first time in opening, suggesting that perhaps Phil Hart was not the relevant estimator. The transcript reference is Day 1 p.34 line 11. He said that PG was not asked by the Office whether he was giving an explanation of the annotations that had been given to him by the author of the annotations, whether that was Phil Hart or Alan Armstrong.

The reason why Mr. Hoskins made this point was because he had highlighted that in the table appended to Mansell's leniency application (which is found at Tab 10 Bundle 3) that there was a reference on p.2 to "AA".

As I say, this was the first time this point had been raised. Someone with eagle eyes preparing for the case must have spotted it. But if it had been raised sooner, the Office

could have explained what had happened. Actually, after that leniency application was raised ----

THE CHAIRMAN: Are you now going to give the evidence?

MR. BEARD: I am going to deal with this and therefore I was going to pause.

THE CHAIRMAN: Yes.

MR. BEARD: I suggest that Mr. Hoskins might like to have a look at those documents and see whether or not he has any concerns about them. The reason I was just going on to say that what happened was the team went away and worked out who it wanted to interview at Mansell. The material that I was going to provide to the Tribunal indicates how that process worked in the context of Mr. Goodbun in particular, and in relation to this issue relating to Alan Armstrong.

THE CHAIRMAN: But is this evidence just relating to the question of whether it was Phil Hart or Alan Armstrong, or is it more general?

MR. BEARD: It is relating to the question why it is that the OFT was not raising issues about Alan Armstrong, given the text on the leniency application, which is the point that Mr. Hoskins raised. The documents that I refer to, you will see if they are provided, are all from the file.

THE CHAIRMAN: Yes, all right.

MR. BEARD: If the Tribunal is going to rise to deal with that, there is a second short clip of documents that I will come on to which just explain the process by which Mr. Goodbun's transcript of interview was dealt with. The Office is concerned that the Tribunal understands the process that is undertaken in relation to the preparation of these transcripts. It will be relevant to submissions that have been made by Mr. Hoskins about the nature of the evidence being relied on by the Office of Fair Trading. It may be that these are matters that the Tribunal does not require documentation on.

THE CHAIRMAN: The fact is that no-one has so far appended this transcript to a witness statement explaining how it came about. So there could have been a debate about whether this is actually evidence properly so called in the case at all, but my understanding from the way Mr. Hoskins opened the case was that he was not taking a point on whether this is evidence. It says what it says and we are being invited to interpret it. Anyway, let me not anticipate.

MR. BEARD: That is why I am cautious about whether there is any need for any further documentation. But if we are rising it might be sensible that I provide both to Mr. Hoskins.

THE CHAIRMAN: How long do you think you need, Mr. Hoskins?

MR. HOSKINS: 15 minutes/10 minutes. Certainly not more than 15 but perhaps I will be able to do it in 10.

THE CHAIRMAN: Why do we not we say that we will come back at twenty past, and if you need some more time then just let us know.

MR. HOSKINS: Thank you. I am most grateful to the Tribunal.

(Short break)

MR. BEARD: Mr. Hoskins, I understand, has no objection to the documents, but he wanted the opportunity to comment on them more accurately.

MR. HOSKINS: I simply wanted to explain what my position was. I am happy for them to go in. I have asked Mr. Beard to resist the temptation to embroider them by giving any evidence from the Bar, but, of course, I know he would never attempt to do that anyway. Thank you very much.

MR. BEARD: It is a terrible insult to say that I would never attempt to! (Laughter)

Before I return to the matter relating to Mr. Armstrong, during the course of the earlier submissions, madam, you asked about the stage at which the interview in question with Mr. Goodbun was carried out. If it assists, in the Decision the description of the Office's investigation starts at p.246. It started because there had been effectively a whistle blown or a complaint brought in April 2004. One sees thereafter that there were a series of s.27 inspections in 2004 and searches in 2005. Then one works one's way forward through quite an extensive exposition of the investigative steps that were then taken by the Office. But, just for your notes, at p.259 there is a table under para. ii.1479 which describes 'Further Interviews Conducted --' and there is indicated the 17th April interview with Mansell which was the day on which Mr. Goodbun was interviewed. Then there is further discussion of how the matter proceeded. So, it was relatively far along the way. But, of course, as is set out here and elsewhere in the Decision, part of the difficulty in the early stages of the Decision was just managing the vast amount of material. So, although the investigation had been going on for some time, it should not be presumed that there was a sort of distilled knowledge in relation to particular matters at any particular point along the way.

Just dealing with the suggestion that was made, it was made for the first time -- It is not a matter that you will see in the Notice of Application or the skeleton - the suggestion that somehow Mr. Armstrong was involved. As I say, the reason the Office picks it up is merely because, it having been raised for the first time in opening, it seemed appropriate that the Office check why it was that nothing had been said in relation to Mr. Armstrong, given that indication on the leniency schedule.

If I could just hand up this clip of documents? (Same handed) These are all documents which were on the file. The first document is an email from Sarah Mills, dated 19th March. It says, "Thank you for the information regarding the estimators". It is being sent to Jane Francis who is at CMS Cameron McKenna - so, Mansell's lawyers by this point. There it says, "I attach to this e-mail a proposed schedule for the interviews". If one turns over the page one can see a number of names and dates, but in particular the week commencing 30th April -- The name Barry Russ, and then the name Alan Armstrong. Barry Russ appeared as a figure in a number of other appeals. So, Mr. Armstrong was there mentioned. The next document is actually an e-mail of 15th March. So, it preceded that e-mail from Sarah Mills. This is actually the initial sending of a spreadsheet by Jane Francis to the Office setting out, as she described it, 'the Mansell employees connected with each contract'. If one turns on through that to no. 51. That is the third page of the table.

> "External structural refurbishment. 13-42 Claremont Close, London. London. Newham London Borough Council. 29th March, 2005. AA (Alan Armstrong?) South-East" [Then] "Alan Armstrong".

THE CHAIRMAN: Just looking at the first page, what are the headings? They are blacked out.

MR. BEARD: They are extremely hard to read, but if one turns to the back of this bundle you will find a document that has colour in it. This is not the same schedule. It is to do with other potential infringements. The only reason it is there is for the same reason the Tribunal asked: I could not read the top. What this does is set out the relevant headings, albeit for the next schedule. But, I think one can read across ----

THE CHAIRMAN: Well I do not think we can.

MR. BEARD: "Name of contact", "Location of work", "Awarding Body".

THE CHAIRMAN: Yes.

MR. BEARD: "Approximate date of tender", and then it is "Mansell estimator and/or associate and name of office", and then the last one cannot be read on that table, and I think that that is "Relevant name". I will come on to why it is a slightly different table, if I may, by reference to ----

THE CHAIRMAN: Well it looks like it is a spreadsheet and they have hidden various columns in printing out ----

MR. BEARD: No, it is slightly more complicated. Madam, if I could just take you to the next email and then it might become slightly clearer.

THE CHAIRMAN: All right.

MR. BEARD: The next email is a document B3908, and here is an email from Susan Hankey of CMS Cameron McKenna to Sarah Mills and there is an attachment to it which is the OFT interview spreadsheet and it says:

> "As I mentioned this morning, Mansell has now been through the spreadsheet of contracts on which the OFT will interview. The attached now combines:
>
> the OFT's list,
>
> the job title and office location of each named person.
>
> In a few instances Mansell's suggestions that someone other than that person named on the OFT's list might know better about the relevant contract. These suggestions come from recent discussions with estimators, where Mansell has clarified with those estimators the analysis of who had charge of certain contracts which Mansell had previously carried out on a paper basis. See items 51, 53 and 54."

So what one then gets on the next page is an extended schedule, and so that is the earlier schedule but with extended columns, and it is that which that schedule gives the titles to. If one compares what you have on that schedule is the "Name of Contract", "Location of Work", "Awarding body/client", "Approximate date of tender" and then the next bit is "Mansell estimator", and then it is the next four columns that were difficult to read, and they are the red columns. So it is "Mansell confirmation of relevant name", "job title", "office location", "tender number." I should say that is the only relevance of that document with the red in just to identify the titles on those four additional columns.

If you look at this extended schedule down at no.51 again, what you have is:

"External structural refurbishment, London Newham Borough Council, 29th March. AA (Alan Armstrong?) South East", which was as per the previous schedule, but now, under the column headed "Mansell confirmation of relevant name", it now says: "Peter Goodbun", and his job title and office location.

If one turns back to the covering email one sees in the third bullet point it said "See items 51, 53 and 54". Then in the next bullet point:

> "Assuming the OFT wanted to interview these persons, additions to your list would therefore be Peter Goodbun (based at City Road, London) ----"

So this is specific change in relation to 51. Then:

> "-- and Andrew Stanley (based in Croydon but left the business February 06). Conversely, there would be no contract attached to Alan Armstrong (on your London interview list.)"

THE CHAIRMAN: And that is because the people interviewed were all the more senior persons?

MR. BEARD: No, that is not the case.

THE CHAIRMAN: Why had not the name in the other one ----

MR. BEARD: Because that whole section has not changed. The change is in relation to the red section. So the left hand side had been left as per the previous document, so you can compare and contrast, so there is no change there. But the red section is as it is headed, starting with the column "Mansell confirmation of relevant name".

THE CHAIRMAN: So the effect of this is that it is not really a question of whether it was Alan Armstrong or Phil Hart, but rather a question of whether it was Alan Armstrong or Peter Goodbun?

MR. BEARD: Yes, and all this is doing is showing the communication that the Office obtained from Mansell, the leniency applicant, who had effectively gone through the table and said as per bullet point 4:

> "Assuming the OFT wanted to interview these persons, additions to your list will be Peter Goodbun [and that will be in the context of 51]. Conversely there would be no contract attached to Alan Armstrong."

MR. BLAIR: I hope this is not a red herring, but all the ranks of the people who are reckoned to be the relevant people are all managers rather than estimators as such, so it is chiefs rather than Indians.

MR. BEARD: I am not sure that is quite right. I mean if one looks down the job title there are chief estimators, estimating managers, section leader estimating, regional chief estimator.

MR. BLAIR: Not the rank that Mr. Sharpe mentioned of "estimator", or indeed senior estimator. There are one or two senior estimators.

MR. BEARD: There are some senior estimators, there are estimating managers. To some extent what is salient is not simply the rank but the information that the people were in a position to give. So Barry Russ, for example, in relation to a number of other cases was someone who had prepared the grand schedules – it does not apply in this case, but when Mansell made its leniency application there were a number of tables that Barry Russ had prepared which included references to various tenders where he said that a cover price had been given or received, and therefore clearly Mansell in putting its best foot forward for the leniency process clearly thought that Mr. Russ was the right person to come forward for that.

PROFESSOR PICKERING: Can I follow on? Can you tell us what the job titles were of Mr. Hart and Mr. Armstrong? I will leave you to answer that first and then I have a follow-on, please.

MR. BEARD: The only information I believe that we have in relation to Mr. Hart is as per the transcript, that he was an estimator, but we do not have any more formal job title for him.

MR. HOSKINS: Sir, if I can assist? If you go to Bundle 3, Tab 9, this is a document I took you to in opening.

MR. BEARD: I apologise, I am grateful to Mr. Hoskins.

PROFESSOR PICKERING: Yes, they were senior estimators, and Mr. Goodbun was the estimating manager. My follow-on question was why would Mr. Goodbun have said it was Mr. Hart who did the detailed estimating on this contract, or would have done, and not Mr. Armstrong, as per the Mansell schedule?

MR. BEARD: "As per the Mansell schedule". The Mansell schedule – are you referring, sir, to the schedule at Tab 10?

PROFESSOR PICKERING: Yes, I am.

MR. BEARD: That was the Mansell schedule drawn up for the purposes of the leniency application. That was drawn up subsequently. It was clearly drawn up in the process of applying for leniency and it was appended to the leniency application that proceeded it or, more exactly, it was appended as part of the leniency application, whether or not they arrived simultaneously I would not want to assert.

That schedule at Tab 10 is not a document internal to Mansell in the sense of it being drawn up along the way contemporaneously, it was a document drawn up subsequently for the leniency application.

THE CHAIRMAN: But the Mansell name on that pull-out, the A3 paper, those are all initials of people, but when it says: "Mansell name", "Mansell name" of what? Who is that indicating, or what is the significance of those initials? They do not seem to bear any relation to the initials of the people who are the "Mansell confirmation of relevant names", which mostly would be a lot of "BRs" or a lot of "KLs", but we do not see those initials there at all, we see "BPs". That column "Mansell name", those initials do not seem to be indicating the same thing as the column of "Mansell confirmation of relevant names" so far as this schedule you have just handed up is concerned, the significance of that being, as I understand it, that what we are debating is whether Mr. Goodbun misremembered who had been the estimator on this case as being Phil Hart rather than Alan Armstrong. The fact that you were told that actually, if you were going to be interviewing estimating managers, the

right one to interview for this contract was Peter Goodbun and not Alan Armstrong, I do not think that helps in deciding whether the actual estimator was Alan Armstrong rather than Phil Hart.

MR. BEARD: I think it is important perhaps just to bear in mind what the Office was being told in the email, the B3908. What it was being told was that Mansell has clarified with those estimators, i.e. those that there had been discussions because that is what is referred, the analysis of who had charge of certain contracts which Mansell had previously carried out on a paper basis. I am obviously concerned not to give evidence in relation to these matter. The A3 schedule that you are referring to where the initials appear was one done at an early stage in the leniency process.

THE CHAIRMAN: Nobody is suggesting that Peter Goodbun was the estimator on this contract. He says it was Mr. Hart.

MR. BEARD: Clearly, once the decision is made to take a cover bid then you do not have anyone carrying out an estimating process. If there had been, what Mr. Goodbun says is that it would have been for Phil Hart.

THE CHAIRMAN: Why did Phil Hart make those marks – that is a rhetorical question. I do not understand how the documents that you have handed up are said to clarify why it says "AA" in relation to that.

MR. BEARD: It is not intended to clarify. Essentially what the documents have been handed up for is just to show the process that was followed by the Office in considering who it was appropriate to interview. Initially they had those A3 schedules that were an early part of the leniency process.

THE CHAIRMAN: What, this?

MR. BEARD: The A3s. They look at those, they see the letters that are specified as Mansell names. They receive a schedule from the lawyers for Mansell, which is the schedule that is under the email of 15th March 2007. That schedule at 51 suggests that Alan Armstrong is the correct person to interview in relation to 51. This is consistent with the earlier leniency application.

THE CHAIRMAN: Wait a minute, which schedule am I looking at?

MR. BEARD: If one looks at the schedule under document B3899.

THE CHAIRMAN: If you look at this table which is attached to 3899, the majority of the names in that column are Barry Russ. Looking back at our big spreadsheet one would expect to see, if there was some relationship between this column and that column, lots of BRs in that column on the A3 spreadsheet, but I do not think there are any.

MR. BEARD: I do not think that is correct, because this table is focused on the City Road office. The spreadsheet that you are referring to covers a wider area.

THE CHAIRMAN: So this A4 schedule is the City Road office?

MR. BEARD: Yes.

THE CHAIRMAN: All right, I understand that.

MR. BEARD: So it is wrong to try and read across this more detailed schedule into the grand A3 and try and do a compare and contrast of names to lines. All I am doing is identifying that there was a line on those big A3 schedules that were part of the leniency application that pertained to this job, albeit that that leniency material contained many, many more jobs than this later more detailed schedule.

PROFESSOR PICKERING: It is not actually accurate to say that once you have got a cover then you have no estimator involved for two reasons: first of all, we have been told that the cover was sought only late on; and secondly, we have seen in evidence that there was quite a degree of subterfuge on the part of companies that were going to take a cover, but they still sent their estimator out and got him to ask questions, and so on.

MR. BEARD: That may be so. The point I was making was merely that you did not have to go through having your estimator carry out the four week estimating process. It clear from Mr. Goodbun's evidence that, in relation to the job, he did defer responsibility in relation to these matters to Mr. Hart. He says that because that is what he is saying in relation to his account of the manuscript text. He is not saying that Phil Hart is wholly irrelevant to this, it is a name that is referred to.

PROFESSOR PICKERING: Yes, but the earlier document submitted by Mansell says it was Mr. Armstrong, and Mansell in the email that you have put in this morning does not say Mr. Armstrong was not involved, it says that Mr. Goodbun would have known better about this case than Mr. Armstrong. There is a slightly different inference and there is no reference to Mr. Hart at all here. I suppose the question really is, did the OFT really overlook the possibility of finding out what Mr. Hoskins's role was, and indeed establishing whose handwriting it was on that Builders' Conference schedule?

MR. BEARD: I think the answer to the latter question is clearly not, because Mr. Goodbun gives clear evidence as to what that manuscript on the Builders' Conference schedule is, and that is set out in the transcript. So the OFT clearly had that evidence. They also knew that Phil Hart had left the employ of Mansell some time previously, because that is also referred to in the transcript of evidence. In those circumstances, when the leniency applicant is saying, "This is the person that is best able to talk to this contract", then it is right that the Office

carries out its interview with that person, asks them both about the documentary material that it has, which he is able to comment on and does so at pp.11 to 12, but also that he is the person that is able to give direct evidence about the process of obtaining a cover in relation to that job. He is the one that chose Durkan, he is the one that gave the reasons why Durkan was chosen. One can understand in those circumstances why Cameron McKenna is saying, "This is the person in charge of that contract, he is the person you should speak to in relation to it".

PROFESSOR PICKERING: And he delegated the collection of the evidence to Mr. Hart, of Mr. Goodbun's evidence?

MR. BEARD: I am sorry, he delegated?

PROFESSOR PICKERING: The collection of the cover price?

MR. BEARD: He delegated the collection of the cover price, yes, that is what Mr. Goodbun's evidence is saying. Mr. Goodbun is not saying, "I received the call from Durkan".

PROFESSOR PICKERING: The question is probably, who in Mansell made the call to Durkan?

MR. BEARD: He is not asserting that he did it, he is saying that Phil Hart was the person who was dealing with obtaining the cover from Durkan. That is clear from his evidence.

THE CHAIRMAN: Let us try and move on.

MR. BEARD: I think it is important in this context to actually go back and look at the terms of Mr. Goodbun's transcript in relation to what he said about Phil Hart. That is at Tab 12, p.11 onwards. He has been presented with a document which has been provided by Mansell, which is a Builders' Conference pre-tender report, and there is a cross on it next to the name of Durkan Limited. He is specifically asked:

> "Are these your notes on this document?
>
> No. That's Phil Hart's.
>
> Okay. But do you have any knowledge of that those notes mean at all?
>
> Oh, yes.
>
> … would you mind explaining them?"

He explains specifically what those notes are. Then, as one goes down, he says:

> "The x against the, the name would indicate the name that he approached."

So that is Phil Hart. So that is evidence of the delegation to which Professor Pickering was referring.

> "… the name of the individual is Brian Sharpe at Durkan, and the figure is the figure, the quote, that would have been given to us as the guide in which to go on."

Then Sarah Mills asked:

"… do you know the actual price that Mansell submitted for this particular contract?

It would have been slightly more than 1,306. I can't tell you [what] it was, the exact figure."

So he does not actually know, he does not recall the precise tendered figure, but he says it must have been higher than that. Of course, that is correct, it transpires. He is talking about going in slightly higher than the 1.306.

If one turns back to the document itself at Tab 7, there is no reason to doubt the account that Mr. Goodbun has given that these are manuscript notes put on by Mr. Hart following Mr. Goodbun's decision that Durkan should be the person approached for a cover price. It is worth noting perhaps that the submission date for the tender was 29th March. This interim job report was issued on 15th March. One can see that there is a stamp there saying "Mansell Construction Services Estimating" with a date on it of 16th March 2005. It is suggesting therefore that that is when this Builders' Conference schedule was received, which makes sense given it was issued on 15th. It is worth noting the initials that are in manuscript there.

PROFESSOR PICKERING: Can I just ask on this schedule, what is the significance of the last column of names: "Contact". Why would other companies want to have contact details in their competitors?

MR. BEARD: It is an interesting question from the Office's point of view. Mr. Blair raised a similar question in the course of the evidence being given. There must be a degree to which there is a concern about the way in which this system works. However, it is rather notable that an account was given that a benefit may exist for subcontractors to be able to contact main contractors. If that were the case, then one could see why what was being done here was effectively a main contractor publicising the fact that they were interested in this job. Therefore, if you were a subcontractor who wanted to be involved in it, then you knew who to contact at the main contractor. It is no part of the Office's case that the arrangements of the Builders' Conference themselves are in some way an infringement. But an interesting question arises in relation to this sort of sharing of information. No doubt those behind me will bear that in mind in considering these matters further in due course.

THE CHAIRMAN: But as far as this case is concerned, really the crux of your case is that answer of PG on p.12 that X against the name would indicate the name that he approached, the name of the individual, i.e. Brian Sharpe, and the figure is the quote that would have been given to them. That is really the evidence.

MR. BEARD: That is the evidence in relation to the Builders' Conference schedule upon which we rely. That is, of course, right. But it is not to be taken in isolation. What I have tried to do is to illustrate that you look at that document on its face and it gives you cause for concern. Just reading it, why is it there? Why is it written in this way? You have a situation where Mansell did take a cover price. In those circumstances, what you have is a situation where the key document is marked up in that way.

THE CHAIRMAN: You say: we have a situation where they did take a cover price. Clearly they have said, for the purposes of their leniency application, that they took a cover price for this. I am not clear at the moment as to whether that is accepted, whether Mr. Hoskins accepts as a fact that Mansell took a cover price.

MR. BEARD: I believe that it is accepted. I do not think any issue has ever been taken in relation to that, but of course Mr. Hoskins can clarify the position.

MR. HOSKINS: I have not taken an issue on it because I am not in a position to challenge it. It is for the Office to make that case.

MR. BEARD: There is no challenge.

THE CHAIRMAN: I think there is a point here which arose in an authority that says that where one party in a leniency application concedes the existence of an agreement, the party alleged to be the other party in that agreement is not bound in some way by that concession.

MR. BEARD: No, I am not sure that it would be said that if someone comes in for leniency you cannot contest. I can see circumstances, for example, where it might contest it on legal grounds, for example whether or not there was an agreement that fell within the scope of one of the prohibitions. I do not think that would be in doubt. But there is a difference between in principle that being the proper legal analysis, and there being any challenge to the fact that Mansell took a cover price. There is none here. The jurisdiction of this Tribunal pertains to an appeal. If there is no challenge to that, the OFT does not have to do any more than stick by the statements that it accepts, and from the basis of its decision, that there was a cover price given to Mansell. It would be wholly inconsistent with everything that is said by Mr. Goodbun in those circumstances if the Tribunal were to begin to say: actually, there is not any evidence here that there is a cover price and these things should be reopened.

MR. BLAIR: I can see that, but nonetheless, the purpose of the figure, all you have got is Mr. Goodbun's longish answer at the top third of p.12. That is only indirect evidence of what the figure means; it is not the best evidence of what it meant. That may be good enough for Mansell, but the OFT could have gone to ask Mr. Hart (even though he was somewhere else

by then). Is it not the case that you have to stand or fall by your alleged failure to go and find him to get the real answer?

MR. BEARD: No, I do not think that is correct. You have got a situation here where the question is: has an undertaking engaged in an infringement? If an undertaking comes to you in the course of a leniency process and says: we admit that we engaged in an infringement, the Office is clearly well able to rely on that admission.

MR. BLAIR: As against them, certainly.

MR. BEARD: Well, as against them. If the matter is then challenged then the issue may change. If the matter is not challenged, then in those circumstances that is the relevant finding and there is no basis on which this Tribunal could lawfully proceed suggesting that there was not in fact a cover price taken by Mansell.

THE CHAIRMAN: On the A3 pull out there are lots and lots of instances where name of company providing or provided with pricing information is unknown, a long list of unknowns. So presumably those are infringements which count against Mansell, but where there is no party who has been held liable?

MR. BEARD: I would not necessarily make a presumption that they were findings of infringement that were made against Mansell, because of the process of reducing down the number of infringements that were actually pursued (even in relation to leniency applicants). They may have come forward with well over 100 instances and in the end findings of infringement might have been made in relation to potentially more particular instances, but it would be wrong to read the matter through. As you know from the Decision, there were circumstances where infringements were accepted from leniency applicants and findings were made, but because they were "but for" infringements, in other words, infringements the Office would not have known about at all save for the leniency application, there was 100 per cent immunity in relation to those particular infringements. So with respect, I think it would be difficult to begin to re-engineer the vast exercise of analysing the evidence that was gathered here in circumstances where we only necessarily have a snapshot of what is being talked about because it is bits pertaining to a particular infringement which is the subject of appeal, but in circumstances where you have no challenge to the finding that there was a cover price accepted by Mansell. There is no challenge in the Notice of Appeal here.

It is worth bearing in mind, in considering all of this, the extent to which Mr. Goodbun has been well forewarned that recklessly giving false information in relation to these matters carries with it a significant penalty.

There are a couple of other things that I think it is also important to draw from Mr. Goodbun's transcript of evidence apart from his account of the manuscript and his direct evidence about picking Durkan and the reasons for picking Durkan. Page 5 of the transcript. This maybe of general interest in relation to the Builders' Conference. Could the Tribunal read from "SM: When pricing the job, when a job came in, how important would it be to find who the competition were on that particular job?" down to "Yes, yes." (Pause) Then if one turns on to p.8 of the transcript starting from the second box: "I've been in the industry since 1972" – this is his indication that cover pricing had been going on for some time. Would the Tribunal read down again to "Yes, yes". (Pause) What you are seeing there is that for Mansell, in the process of dealing with a tender, the Builders' Conference schedule was an important document in deciding how to deal with a tender. If they were going to go for a cover price they would use the Builders' Conference schedule as the list from which to select a person from whom to get a cover. Both of those pieces of evidence support the interpretation of the Builders' Conference document that he has given. It would have been the source of the company approach for the cover so it would be natural to mark it as such and use that as the basic document upon which any notes were to be marked. It is also worth noting on p.9 that he talks about if he were giving a cover he would set it between 5 and 15 per cent, and of course, Mr. Sharpe confirmed that general approach. For the record, the reference is Day 3 p.3 line 33 through to p.4 line 3, Mr. Sharpe.

What we have is a series of pieces of evidence given here by Mr. Goodbun, both an account of the manuscript, his direct recollection and contextual information relating to the document and how the process will work – all of which supports the manuscript interpretation that he is providing – and furthermore, sets out why it is that here, Mansell receiving a cover price, the predominant thrust of all of the evidence is that in fact it would have come from Durkan.

Indeed, the fact that Mr. Hoskins, referring to the sorts of uplift that one would see in relation to cover price, recognised that it would put Durkan squarely in the frame. But he then said that there were other people that were within that band of 5 to 15 per cent below the actual Mansell bid that therefore could have been potential providers of the cover price on that basis. He suggested (Day 1 p.30 line 20) Mulalley or Dew Construction or Gunite. The question you end up asking yourself is: is it more likely that one of those three would have provided the cover price to Mansell, or was it more likely on the basis of this evidence that it would have been Durkan? Just in passing on that, of course Gunite really would not have been a potential contender, even on Mr. Hoskins' account, because as Mr. Briggs

confirmed, Gunite is a concrete refurbishment specialist (transcript Day 3 p.22 lines 1 to 3). As Mr. Goodbun explains in his evidence, he would not have gone to a specialist for a cover price. This was something that Mr. Copeland recognised when he agreed that you go to a similar type of company with a similar cost structure when seeking a cover. The transcript reference for that is Day 3 p.47 lines 18 to 20.

So when we look at the documents and the evidence of Mr. Goodbun in the round, it is not only more likely than not that Durkan supplied the cover to Mansell, but there is no suggestion anywhere else that any other party was involved. The leniency applicant has come forward to the OFT to assist it as far as possible. It was under an obligation to do so. It has provided the only documentary evidence it has on the matter, and it is worth noting that the cover pricing process was not one where there was any great paper trial. That documentary material is itself good evidence that there was a cover pricing arrangement between Mansell and Durkan; but then we have the strong and clear evidence of Mr. Goodbun. This is against the background of course of Mansell's general evidence on its conduct. Taken together, that evidence is very strongly persuasive. It is clearly more likely than not that Mansell got its cover from Durkan and not from anyone else.

Another of Mr. Hoskins' lines of attack at the outset was that even if the evidence was strong, it was somehow flawed because Mr. Goodbun had not given a witness statement. He referred the Tribunal to the *Argos* case. The first thing to note is that the Goodbun document at Tab 12 is not notes of an interview. It is the interviews - erms and all. It is the verbatim transcript of a person's own words - no gloss, no lawyering. It is material which is gathered in the lengthy and extensive process undertaken by the OFT in preparing the statement of objections. Parties are allowed access to the file, and they are able to comment upon this material.

To the extent that the Tribunal is concerned that the interview transcripts do not contain statements of truth, it is again important to emphasise the fact that the s.44 obligation impinges upon them. Indeed, that is a stronger threat than a statement of truth, which carries with it the possibility of contempt proceedings, subject of course to the slight wrinkle as to the extent of the contempt jurisdiction that this particular Tribunal has here. It would have to be in the High Court perhaps. However, that is where a statement of truth in a witness statement before this Tribunal would eventually take one. S.44 takes you straight to a fine. So, in terms of why a statement of truth would have any greater sense of voracity to the literal words, the transcript of the tape, is a complete mystery.

In terms of the process of obtaining the transcript, the OFT follows a process of verification. When interviews or statements are obtained during the investigation, the witness is provided with an opportunity to comment on the relevant document. So interview transcripts are sent to the parties and their legal representatives for the purposes of verification of their contents. That is precisely what happened in relation to Mr. Goodbun's statement. It was sent back to him. His transcript was sent to him and his lawyers. He was then able to make any corrections he wanted to. He made one or two minor corrections. He had the opportunity to make comments on it. He did not make any further comments. That, I accept, is evidence from the Bar as to the process. It is what is set out in the second clip of documents.

THE CHAIRMAN: I do not think anyone is suggesting that Mr. Goodbun was deliberately lying in this statement. I think the question is what the statement actually says.

MR. BEARD: Yes The difficulty one has is that the attack came in a number of ways. I am trying to cover the suggestion that was being made by Mr. Hoskins that somehow it not being a witness statement - a witness statement not having been prepared beforehand - seemed to be being levelled at the Office as some sort of flaw in its process.

THE CHAIRMAN: I think rather the flaw is that because there was no witness statement tendered there has been no opportunity to cross-examine him.

MR. BEARD: I will come on to that. There are two stages that Mr. Hoskins identified: Should witness statements be a required part of the process before the SO and the Decision? For the reasons I have set out, that would be a complete triumph of form over substance, to try and translate a transcript into a witness statement when the transcript is a verbatim record under the s.44 sanction.

Mr. Hoskins then went on and said, at Day 1, p.36, line 26,

> "The fact that the OFT has not produced witness evidence should weigh very heavily with the Tribunal when it comes to consider all the evidence before it on infringement 220.".

Now, if he is simply saying that it should have been in a different form, that criticism has no force at all. In this context he then went on to refer to the football kit and toys cases, and, as I said, to the *Argos* judgment. If the Tribunal could take up File 5A, Tab 14, which is the *Argos* judgment -- It is important to see what is actually being said here. If one starts with para.1,

> "The issue before the Tribunal is whether the OFT should be permitted to adduce three witness statements in support of the contested decision, notwithstanding that

> such statements contain relevant factual material that is not to be found in the contested decision and was not put to Argos or Littlewoods in the administrative procedure which preceded the adoption of the decision. This judgment deals only with that issue".

So, this is dealing with the second stage. I have dealt with why it is no witness statements before Statement of Objections and Decision. Here was a situation where the Office actually sought to put in further witness statements. Then the background to the case is described in para.2 onwards. At para.12 there is a discussion of the administrative procedure in the case. If you could turn on to para.24, which is the paragraph that Mr. Hoskins particularly referred to and relied upon, can I ask you to read that paragraph? (Pause whilst read): He was effectively saying, "That is what the OFT should have done here". But, if one goes on to para.25,

> "The OFT's position at the first case management conference was strongly opposed by Argos and Littlewoods. It was submitted on behalf of Argos and Littlewoods that the introduction at this stage of new evidence in the form of witness statements, after the appeals had been lodged, would be in breach of Rule 14 of the Director's Rules".

Rule 14 is actually set out at para.10 of the judgment. That has now been superseded by the change in the OFT's rules. So, the relevant rules of the OFT's rules are Rules 4 and 5. For your notes, they are found in the Purple Book at p.285. Essentially, what those rules do is the same as what Rule 14 did. In other words, it requires the OFT to set out its case in a Statement of Objections and provide an opportunity for the Defendant, the person against whom a proposed decision is going to be made, both access to the file and the opportunity to make oral observations.

If one then moves on to para.28,

> "In our view, those witness statements contain significant evidence that, at first sight, is material to whether an infringement of the Chapter I prohibition has been committed. The witness statements also contain evidence that is not in the original notes of interview or indeed the decision. In general, the witness statements amplify, at first sight, to a considerable extent, the evidence available to the OFT as to whether there was an infringement, how the infringement came about and the course it took.

> The position therefore is, that the OFT seeks to support the decision with new material that is not contained in or referred to in the decision, and was not put at the administrative stage".

At para.30 the Tribunal says, "That means we have effectively got three choices: (a) exclude it; (b) admit it; (c) do something different". In other words, enable a process to be put in place such that the witness statements could be commented on. Then there is a detailed exposition of the arguments of the parties, and the relevant statutory provisions. At para.49 the Tribunal begins consideration of the previous Decisions which have related to evidential matters. The Tribunal may want to look at this in due course. I was going to take the Tribunal through to the analysis which starts at para.61.

> "The above survey of the statutory framework, the Tribunal's Rules and the Tribunal's previous decisions thus illustrates the specific nature of the procedures to be followed in relation to decisions of infringement of the Chapter I and Chapter II Prohibition adopted by the OFT under the 1998 Act.
>
> In particular, the statutory scheme is quite unlike the procedure that is normally followed in a criminal prosecution, where the offence is stated with short particulars in the indictment, but the facts relied on by the prosecuting authorities are essentially set out in witness statements then given by way of oral evidence from the witness box before the Jury, subject to the detailed rules of evidence in criminal cases. Similarly, the procedure is not akin to that followed in the former Restrictive Practices Court, and in other civil litigation, where there is a pleading, such as a statement of case, summarising shortly the OFT's contentions of fact and law, which is supported by separate witness statements which contain the evidence".

I would ask the Tribunal just to read paras.63 and 64 of the judgment. (Pause whilst read): In para.65 the Tribunal notes that the arrangements in question

> "necessarily implies that the appeal is directed against the facts and matters set out in the decision and not against other facts and matters not set out in the decision ...
>
> (2) ... based on an error of fact or was wrong in law [that is the approach in the appeal] which necessarily implies that the appeal is principally concerned with the facts as found in the decision and not other facts.
>
> (3) The Tribunal must determine the appeal on the merits, but by reference to the grounds of appeal set out in the notice of appeal. Since the notice of appal must refer to and so far as necessary put in issue the facts as set out in the decision, it

follows that the Tribunal is concerned with the facts in the decision, as contested in the notice of appeal, and not with the correctness of other facts sought to be adduced as evidence of the infringement after the notice of appeal has been lodged and which, by definition, the notice of appeal has not dealt with".

Turning to the principles to be distilled from *Napp* and the other cases -- This is the summary of the principles that the Tribunal sets out.

"The Director should normally be prepared to defend the decision on the basis of the material before him when he took the decision. The decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal ....

(2) Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented altogether ...

(3) There is therefore a presumption against permitting the Director to submit new evidence that could have been made available in the administrative procedure. (4) That presumption may be rebutted, notably, where what the OFT wishes to do is to adduce evidence in rebuttal of a case made on appeal ----"

Of course, that was exemplified in relation to the disclosure application in relation to infringements 135 and 240.

"(5) On the other hand, where the new evidence goes to an essential part of the case which it as up to the OFT to make in the decision, the Tribunal will not admit evidence that was not put to the parties in the course of the Rule 14 procedure [now the statement of objections procedure.] ...

(6) The Tribunal should resist a situation in which matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first time at the level of the Tribunal, when they could and should have been raised in the administrative procedure.

(7) If there is relevant evidence sought to be adduced on appeal which has not been the subject of the Rule 14 procedure, the Tribunal has power to remit the matter to the Director for the Rule 14 procedure to be followed, if satisfied that the interests of justice so require".

Then, what one sees after that exposition of the basic principles is that the three witness statements should not be excluded altogether (para.73); nor (according to para.78) should they be admitted. So, (a) and (b) are rejected. Instead, as is set out at para.97 ----

MR. HOSKINS: If you could, while we are here, just read paras.80 to 82, please? It will save time later. (Pause whilst read):

MR. BEARD: I would invite the Tribunal to read the entirety of this judgment. It is quite right, of course, and I will come on to this, that the Tribunal does have power to hear witnesses. Of course, it has been doing for the last two or three days - hearing witnesses in relation to these matters. But, in relation to this case, what was decided was that the OFT had proposed the relying on of witness evidence that had been prepared after the Decision. In those circumstances it was said that the evidence prepared by the OFT should be made subject to a Rule 14 procedure - what would now be a supplementary statement of objections, and so that was the conclusion of the Tribunal as set out at para.102.

So far from *Argos* being authority for the OFT being under any sort of obligation to provide witness statements after a decision when an appeal comes before a Tribunal, or even an expectation that it might do, it is entirely to the contrary, it is saying generally the OFT will not be able to do so because of the nature of the statutory structure of the procedure investigation. So what Mr. Hoskins is suggesting should have been done by the OFT as a matter of course, is what the Tribunal was effectively saying was inappropriate save in particular circumstances, and if the OFT does want to start adducing further witness material it would have to go through a new Rule 14 supplementary statement of objections procedure. So Mr. Hoskins is wrong about how his account of why witness statements should be produced in the course of the investigation prior to the decision, and he is wrong about any suggestion that the OFT should be expected to be producing witness evidence afterwards. Perhaps what he is really trying to say is: "I would like to cross-examine Mr. Peter Goodbun. If that is the case he needed to challenge the evidence by asking him to be called as a witness and he has not done that. Perhaps the reason is that he is seeking to say that that this appeal is a trial and it was somehow an obligation on the OFT to have called him as a witness, but that is wrong. The Tribunal has made it very clear in *Argos* that it is an appeal against the decision taken by the OFT and the circumstances and the manner in which that appeal is to be conducted depends on precisely what is challenged.

THE CHAIRMAN: Well it also depends precisely on what was decided, what was the basis of the infringement found, and one thing that arises from that which I think is causing the Tribunal some concern at the moment is that in your earlier submissions you have rather moved to talking about Mr. Goodbun's evidence shows that Mansell took a cover and it must have been from Durkan, whereas the allegations and the finding are that the cover was given by Mr. Sharpe. Now, my question to you is this: if the Tribunal were to accept Mr.

Sharpe's evidence that he did not give a cover price, do you accept that that means that the appeal must be allowed in relation to Infringement 220, or not?

MR. BEARD: Not.

THE CHAIRMAN: Well that does then get us into *Argos* territory in the sense that you are then moving away from the case that was in the decision and in a way that then may cause difficulties for Durkan's rights of defence, because then you seem to be saying "A.N. Other within Durkan must have given the cover price", and there is no way that we can test that; it is not what Mr. Goodbun says, it is not what anybody says.

MR. BEARD: The OFT's case is there was an infringement between Durkan and Mansell. There was an infringement between two undertakings, a cover price was provided to Mansell by Durkan. Of course, companies operate by individuals as their agents, that is of course right. So when you are assessing whether or not on the balance of probabilities there was an infringement by those two undertakings, it is right that the OFT and then the Tribunal considers what the evidence is as to whether or not on the balance of probability that cover price was provided by one undertaking to another. The Office makes absolutely clear that it thinks that the overwhelming evidence is that in the circumstances, given the nature of the manuscript notes on the document, the account of those given by Mr. Goodbun, the terms of Mr. Goodbun's direct recollection about these matters, the absence of any evidence suggesting that any of the other parties to this tender process could or did give that cover price to Mansell, that in those circumstances the overwhelmingly likely event was that a cover price was given to Mansell by Durkan through Mr. Sharpe.

However, it is just worth looking at the terms of the decision in relation to infringement 220. It is found at p.1499 in the decision if you are looking at the comprehensive set. Here we have infringement 220, the table we have seen: "Contemporaneous . . . evidence from leniency applicant Mansell – the Builders' Conference Interim Job Report", so that is documentary material. Then "Evidence from leniency applicant Mansell", that is the general leniency material. "Witness evidence from leniency applicant Mansell", that is Mr. Goodbun's material.

Then "Contemporaneous documentary evidence from other companies – Durkan Limited – Tender Summary", that is "Limited". "Evidence from other companies" this is Durkan Group setting out why it is that it considers that in fact the evidence does not stack up so it is its response to the SO.

Then one sees at the conclusion of that IV.6181:

> "In this case, the OFT considers the presence of a contemporaneous document with the name of Durkan Limited's estimator next to a figure consistent with a cover price, along with the explanation of that document by a Mansell employee and his recollection as to why Durkan Limited was approached for a cover on this tender to be sufficiently strong and compelling. The OFT notes the direct contradiction between the evidence given by PG and witness statements of Durkan Holdings and Durkan Limited employees, who deny that they engaged in bid rigging. However, unlike the Durkan Holdings and Durkan Limited witness evidence, PG's evidence is underpinned by contemporaneous documentation and is consistent with the markings made on that documentation."

It is also noted there that Mr. Sharpe did not sign his witness statement as submitted at that time.

Then one turns over to "The OFT's analysis of the evidence and finding".

> "From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.
>
> Mansell and Durkan Limited each accepted an invitation to tender for this contract.
>
> Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Durkan Limited completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.
>
> The Report provided by Mansell shows 'X' next to the entry for '*Durkan Ltd'* and a handwritten note *'Brian Sharpe'* and a figure *'£1,306,000'*. Mansell confirmed that this shows that it took a cover price from Durkan Limited and in interview PG [Peter Goodbun] confirmed that this was written by the estimator for this tender and that it shows that Mansell took a cover price from Durkan Limited.
>
> PG confirmed that the figure '*£1,306,000'* was the cover price given by Durkan Limited . . . PG also confirmed that BS would have been the contact at Durkan Limited. The document provided by Durkan Limited also names BS, confirming that he was in some way connected at Durkan Limited to this tender.
>
> The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Durkan Limited, the pattern consistent with a cover price having been provided.

> The OFT therefore concludes that contact took place between Mansell and Durkan Limited. The OFT also concludes that Durkan Limited supplied a figure to Mansell for a cover bid."

Then I invite the Tribunal to read on. So the finding, as is required by the OFT, is of a cover price given by one undertaking to another having considered the material. So in answer to your question, Madam Chairman, the answer is definitely "yes". Even if you were to accept Mr. Sharpe's evidence you would be in a position to uphold the decision because there would not be any unfairness because by the terms of that decision they clearly referred to Mr. Sharpe, and I make no bones about it, the OFT considers that the most likely outcome is that the figure did come from Mr. Sharpe, but it is open to this Tribunal to conclude that the infringement did occur on the basis of all the evidence that you have seen and heard, even if it was not Mr. Sharpe that actually provided the figure to Durkan.

Just in passing whilst we have this open, it may be of relevance just to note that the paragraph where the OFT specifically refers to not interviewing PH" (Phil Hart) is IV.6171.

PROFESSOR PICKERING: Mr. Beard, can I take you back to the transcript of the interview with Mr. Goodbun, on p.12 and the answer from Mr. Goodbun about one-third of the way down with "The "X" against the name . . ."

MR. BEARD: Yes.

PROFESSOR PICKERING: The word "name" is used three times in the first two lines. "The 'X' against the name", that presumably is "Durkan"?

MR. BEARD: Yes, because that is where the 'X' is.

PROFESSOR PICKERING: The first time?

MR. BEARD: Yes.

PROFESSOR PICKERING: Would indicate the name that he approached, well on that line we have two names, have we not? We have "Durkan" and then we have "Mr. Copeland" on the sheet.

MR. BEARD: The yes.

PROFESSOR PICKERING: ". . . the name of individual is i.e. Brian Sharpe at Durkan, um . . ."

MR. BEARD: Yes.

PROFESSOR PICKERING: I put it to you that Mr. Hart, if indeed it was Mr. Hart, was starting with that sheet of paper which had come in from the Builders' Conference, which listed the bidders for this contract and their contact names.

MR. BEARD: Yes.

PROFESSOR PICKERING: He probably had a copy of that document that also included the stamp showing that Mansell had received it on 16th March, and that he had initialled its receipt. He had pulled it out of the drawer on 29th March or whatever it was, and had been asked, apparently by Mr. Goodbun, to pursue it. We have not had evidence, so far as I am aware but correct me if I am wrong, please, that says that estimators as opposed to senior estimators, or estimating managers, would actually pursue this sensitive information, and therefore we do not have evidence that it was Mr. Hart doing it as opposed to anybody else. Likewise, we do not seem to have any evidence, certainly not direct, if Mr. Goodbun claims that it was Mr. Hart who surprisingly made the contact. We do not have any evidence that he rang Mr. Sharpe as opposed to Mr. Copeland. That statement, which is not pursued by way of follow up questioning to unravel, does not seem to me to be terribly helpful to us in establishing the sequence of events. The use of the word "name" three times could apply to three different people, three different names. First of all, it could be Durkan, secondly, it could be Mr. Copeland, and certainly we have heard on Durkan's policy, who would have been the person to have given the cover price if they had decided to do so. As I was speculating, or reflecting a couple of days go, the name Brian Sharpe could merely have come into the conversation to say that he was the estimator who had actually done the work and, of course, he was a very reliable estimator. That is what somebody seeking a cover price would need to know, "Is the price that you are putting in a realistic price, and therefore is the cover that you are giving me something that is not going to make my business look a totally silly quota for this contract, which may mean that we get left off invitations to tender for subsequent work?" I, personally, have some problem with your linking of Mr. Sharpe into the process.

MR. BEARD: Let me take it in stages. If that were right in the interpretation that you were putting on it, it is still a case where what would be being said was that the person who actually conveyed the figure had not been correctly identified as Mr. Sharpe, but nonetheless there was a figure moving from Durkan to Mansell. It is difficult to see how the natural interpretation of what you are saying would lead you anywhere else but saying that that was more likely than not.

Just dealing with the points in turn, I think in reading the term "name" in that passage, it is perhaps important just to recognise the preceding questions. They start on p.11, and we have already been here:

> "… now turning to the contract that I understand you're aware of which is the external structural refurbishment … what was your role …?

Managing my estimator that was dealing with it.

Okay. And do you know the estimator was?

It was a chap by the name of Phil Hart …"

So I think we are fairly clear that it was Phil Hart that Mr. Goodbun, who later says, "We wanted to go Durkan", was charged with dealing with this. Whether or not in other circumstances in other companies junior estimators engaged in these sorts of contacts is neither here nor there, and he subsequently moved on.

"I have a document which has been provided by Mansell which a Builders' Conference .."

– this is the schedule -

"… with a cross by Durkan Limited.

That's right.

And there's a note at the bottom which says Brian Sharpe.

Correct.

Um, 1 million 306 thousand.

Correct.

… were these, are these your notes on this document?

No. That's Phil Hart's.

… what [do] those notes mean at all?"

So effectively the interviewer has identified three notes on the document, the cross by Durkan Limited, which she specifically refers to, the name of Brian Sharpe and the figure. Then she asks:

"… would you mind explaining them?

The x again the, the name …"

and there the name must be Durkan Limited –

"… would indicate the name that he approached …"

The natural reading of that sentence must be that the term "name" is referring to the same entity on both occasions. It is, of course, right, Professor Pickering, that on that line there is another name at the end of it, it is Guy Copeland.

PROFESSOR PICKERING: Not another name, it is a name. Sharpe's name was on the document originally.

MR. BEARD: No, sorry, but in relation to interpreting the first sentence the point I am making is that the natural interpretation of the first use of the name is clearly to Durkan Limited. That would indicate the name that he approached. The natural interpretation of that second use

of the term "the name" is plainly to the same name that is used there, because it is all referring to the cross. The first sentence is effectively Mr. Goodbun's explanation of the first of the marks that he is asked about, which is he cross.

THE CHAIRMAN: I must say I had hitherto read that as meaning it would indicate the name that he approached, that is Mr. Copeland, that is the name. If you want to approach Durkan, you should approach Mr. Copeland.

MR. BEARD: There is no cross next to Guy Copeland on the document. That is not how that has been read at all.

THE CHAIRMAN: We can only speculate on what Mr. Goodbun meant.

PROFESSOR PICKERING: And that is the problem because Mr. Goodbun was not asked in the interview whether he had established this interpretation with Mr. Hart.

MR. BEARD: As I have said, the situation when one looks at document 7, with which one is familiar, if you are being asked about, "What does that cross refer to", "It refers to the name", the name would indicate the name that he approached. He is being asked what that cross is signifying. There is no cross next to Mr. Copeland. It simply would not be ----

PROFESSOR PICKERING: I am sorry, there is a cross against Mr. Copeland, because Mr. Copeland is against Durkan and the cross is against Durkan. Mr. Sharpe's name is at the bottom of the sheet.

MR. BEARD: Yes, of course, Mr. Sharpe's name is at the bottom of the sheet. I entirely accept that what is being referred to in the first sentence is not Mr. Sharpe, the manuscript reference to Mr. Sharpe, because, as I say, the questions were put in a series of separate questions about the separate markings on the document – the cross, the name and the figure. If one reads Mr. Goodbun's response, effectively the sentence and two separate clauses, are what is the X to do with, what is the name and what is the figure. He answers what the X is, it is against the name, it is against Durkan. As I say, that first sentence is answering the question that was specifically posed by Miss Mills, which was, "I have a document which has been prepared by Mansell, which is a Builders' Conference pre-tender report, shares the main contractors with, with a cross by Durkan Limited". So that is specifically what the question is about, the cross by Durkan Limited. In those circumstances, the OFT considers that the natural reading of that sentence is that the two uses of the term "name" are referring to Durkan Limited.

As I have already said, even if that were a wrong interpretation, what it would not do is suggest that somehow no cover had moved. That is plainly evidence that the cover had moved, but your interpretation, Professor Pickering, would be one that suggested that the

cover had not moved via Brian Sharpe in this context, but there would still be an infringement between the undertakings.

PROFESSOR PICKERING: Which is part of the OFT's finding, because the OFT refers expressly to Mr. Sharpe as being a link in that chain, does it not?

MR. BEARD: Yes, he is certainly referred to. I took the Tribunal, I hope without doing any editing, to the relevant section where it deals with those matters in relation to 220. What we have is a specific finding being made at para.6188:

> "The OFT therefore concludes that the contact took place between Mansell and Durkan Limited."

In the section that is dealing with analysis of the evidence and the finding, I think I emphasised that the reference to Mr. Sharpe is in para.6186:

> "Mr. Goodbun confirmed the figure of £1.3 million [odd] was the cover price given by Durkan Limited and that Mansell added a small amount … Mr. Goodbun also confirmed that Brian Sharpe would have been the contact at Durkan Limited. The document provided by Durkan Limited also names Brian Sharpe, confirming that he was in some way connected at Durkan Limited to this tender."

Undoubtedly, it is being accepted that Mr. Sharpe was a contact. It is difficult to understand what else the reference to Mr. Sharpe on that document could possibly mean. If the Tribunal concludes that he may have been a contact, but he was not the person that actually passed the cover price then the OFT does not consider that that is the right assessment and that, on the balance of probability, he was the contact and he was the person that actually provided the cover price. That would not undermine the conclusion that here was an infringement on the basis of all the evidence considered in the round.

Professor Pickering, I do not know if I can assist further in relation to that.

I was just concluding observations about witness statements but perhaps we have now moved on a little from them. The point that was being made was that there was no need for a witness statement to be provided, and if a specific challenge was being brought to Mr. Goodbun's transcript evidence, and the concern was that Mr. Hoskins or Durkan wanted to be able to cross-examine, then that is an application that they should have made. I should, in that context, just for your note provide you with the reference to the relevant provisions dealing with witness evidence. It is Rule 23 of the CAT Rules, with which you are no doubt familiar, and also 19(d), Mr. Singla helpfully reminds me.

Turning then to Durkan's evidence, we have heard Durkan's evidence that at the time of Infringement 220 it had in place a policy that no cover bidding should take place. It had

engaged in cover bidding in the past, but it was to stop, and after August 2004 there were serious consequences if you were caught cover bidding. That was the consistent evidence of all of the Durkan witnesses.

Mr. Sharpe insisted he had not provided a cover price to Durkan. He insisted that whilst he had been involved in cover pricing in the past he did not pass a cover to Durkan because the infringement was after 2004. It was not that he actually remembered anything much about this tender, he knew that there had been tenders in relation to Claremont Close, but he was adamant that anything after August 2004, after the date of the new policy, would not have involved a cover being given by him. He emphasised that the consequences of cover pricing were such and severe that he would never do it. I sought to cross-examine him in relation to the fact that it was the being caught that was crucial because the consequences were severe, he did not accept that, he said that he would not have engaged in cover pricing at all. The truth must be that if you were working in the Durkan estimating department after August 2004 the crucial thing would be that if you did anything involving cover pricing you did not want to get caught. Of course, that would mean you would think twice about giving a cover, undoubtedly, but if you did you would make absolutely sure that no one else at Durkan knew about it. Mr. Copeland specifically recognised this. He was the enforcer of a strong policy. He put in that way (day 3, p.51, lines 29 to 33), that if you were going to cover price you would not tell him or his superiors.

In the course of Mr. Sharpe's evidence, he asked rhetorically, "Why would I do it if there are all these risks?" The answer would lie in two ways. Obviously there was an ingrained culture which, as Mr. Copeland recognised (day 3, p.49, lines 3 to 6), that culture meant that there was a "you scratch my back, I'll scratch yours" approach to cover pricing that had subsisted, and that, having participated in that sort of relationship over time, being open to approaches was part of that culture.

It also meant, of course, that you were guaranteed to wipe out one of your competitors on the bid. So there was a real benefit here. Mr. Copeland recognised that (Day 3 p.48 line 28 through to p.49 line 2).

So there were reasons why someone who had been around as long as Mr. Sharpe might well provide a cover. It had been going on for years; it was a quick phone call and no-one need find out. That is, of course, until the investigation by the OFT subsequently started and people became aware of that. Mr. Sharpe was clearly terrified of this hearing and this process and all things associated with it.

He would not sign up to this statement initially. When he was cross-examined he stuck to his story. But he was defensive in giving his evidence. He did not remember the details of the matter in the way that, for instance it is clear from the transcript that Mr. Goodbun did: that it was a specialised project, for example. Mr. Sharpe and Mr. Briggs accepted, when it was put to them, that in fact it was a specialised project. The references there are Day 3 p.10 lines 28 to 30 and p.21 lines 28 to 33.

But Mr. Sharpe did not remember that. He did not remember whether or not someone might have called from Mansell in early 2005 asking about the possibility of a cover (Day 3 p.13 lines 8 to 10). In his statement he said the names Phil Hart and Peter Goodbun meant nothing to him, but when asked about the Builders' Conference document he accepted that he had received that schedule and he must have read it, and he had seen the name Peter Goodbun (Day 3 p.12 lines 29 to 34). Of course, Mr. Copeland said that he met Mr. Goodbun on a few occasions and that he thought that Brian Sharpe was with him.

THE CHAIRMAN: That was not put to Mr. Sharpe, in fairness.

MR. BEARD: No, of course, that is true it was not, but I refer to the evidence of Mr. Copeland that he gave without prompting in relation to that issue (Day 3 p.48 lines 1 to 22).

Mr. Copeland was a credible and clear witness. In answer to a question from Mr. Blair, Mr. Copeland recognised that before 2004 there had not been any invariable rule that estimators (the lowest rank of person carrying out the estimating function within the Durkan estimating office) would not provide covers (Day 3 p.52 line 28 through to p.53 line 9), and Mr. Copeland explicitly recognised that it was possible that estimators would still provide cover bids after August 2004 (Day 3 p.51 lines 25 to 28).

Mr. Clark and Mr. Briggs also recognised the possibility (Day 3 p.21 line 20 and p.27 line 29), although with greater reluctance than Mr. Copeland, which is slightly ironic given that they were more removed up the hierarchy from the operation of estimators day to day than Mr. Copeland.

Where does it all leave matters? The Tribunal obviously has to weigh all of the evidence and assess the matter on the balance of probabilities. It has to ask itself, on the basis of all the evidence, is it more likely than not that Mansell received a cover price from Durkan? It is important to phrase the question in that way.

An infringement, as I have said, is between undertakings and not individuals. Of course the evidence relates to the individuals because undertakings only act through individuals. But the relevant question is about undertakings. So is it more likely than not that Mansell received a cover price from Durkan? It is clear that Mansell took a cover. That is not

challenged. The question then becomes who provided it? Is it more likely to be one of the three that Mr. Hoskins suggested or potentially others? He suggested Mulalley, or Dew Construction or Gunite. Is it more likely that one of those three did it than Durkan? On the basis of the material the OFT had before it, it could not reasonably have reached any other decision but that it was more likely than not that the cover price was provided by Durkan. We have the document, the Builders' Conference schedule, no good alternative account of why the specific Durkan estimator, Mr. Sharpe's name was on it when a contact was already on that schedule. There was a cross singling out Durkan, and there was a specific number alongside Mr. Sharpe's name. If Mr. Hoskins' various hypotheses are correct, why are there no other indications linking to other of the putative cover providers in relation to this document which Mr. Goodbun emphasised was an important document in selecting whether or not you would tender and whether or not you would see a cover?

You have the transcript material of Mr. Goodbun clearly recalling the situation and the details of the job, giving a direct recollection about the choice of Durkan and that was so, in particular at p.13. It is clear that Durkan was the company approached, and the price provided was as indicated on the document.

In the circumstances, the overwhelming likelihood is that the price came from Mr. Sharpe to Mansell. Mr. Sharpe had every reason to conceal that from his superiors. They accepted he had the opportunity and old habits die hard. He was nearing retirement at the time. Why on earth would he tell if he had in fact done it? Concerned and scared, he would want to stick to his story now. Mr. Sharpe was the only witness who was sure beyond peradventure that there could have been no cover price. So is Mr. Sharpe's evidence such that the overwhelming evidence that the cover which Mansell took came from someone else other than Durkan? The OFT says not. Mr. Sharpe, he that did not remember or did not want to remember, what happened.

Of course, there is a further possibility that has already been canvassed with the Tribunal: the fact that Mr. Sharpe did not make the phone call himself, or take the phone call himself but the cover still came from Durkan. Mr. Copeland explained that it was a close team and all knew what was going on in the estimating office and had access to each other's materials relating to bids (Day 3 p.46 lines 1 to 24). After all, that is the question the Tribunal is facing. There was a cover. Is it more likely than not that it came from Durkan, or is it more likely than not that it came from one of the other bidders? Is it anyway likely that it came from any of the others?

The leniency applicant was under an obligation to cooperate. It did provide documentary and oral evidence as to where the cover it had received had come from. There was no hint that it could have come from anywhere else. Mr. Hoskins' alternative accounts of why there are those notes on the Builders' Conference schedule are not plausible. They are creative. They are not impossible. But those alternatives are certainly not more likely than the cover coming from Durkan. On the balance of probabilities, the cover received by Mansell was given to it by Durkan.

Unless I can assist the Tribunal further those are the submissions of the Office.

THE CHAIRMAN: No. Thank you very much, Mr. Beard. We have just gone one o'clock. We then come back at 2, or let us say five past 2, to start with your submissions, Mr. Hoskins.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Hoskins?

MR. HOSKINS: Madam, some housekeeping matters before I turn to the control issue. Mr. Barclay. It seems like a long time ago that you pointed out that there were some points of clarification. I am sorry it has taken so long - largely because everyone dealing with the case has been in court. It has taken us a while to actually finalise the thing. We have just provided a copy of a second witness statement to the Office. I have copies to hand up for you. I should say also that Mr. Barclay is going to attend tomorrow afternoon. I am aware, as you said, that you do not want this to drag on. It seemed far simpler just to have him here. He will be able to deal with any other questions that you may have tomorrow. (Same handed)

Then, some bits and pieces. The article which Mr. Clark had in his files. Then, some details of the nature of the subscription to the Builders' Conference on the part of Durkan. (Same handed)

MR. BEARD: Can I just clarify? I am not in any way doubting that this is the article, but this is not actually the copy from Mr. Clark's files, as I understand it. This looks like it is a download from the website. It would just be helpful for the record if Mr. Hoskins could confirm the position? I am not going to stand on ceremony. That is evident.

MR. HOSKINS: That is right. Mr. Clark's position is that that is the article, but rather than having to go and trawl through -- They are somewhere safe in his office, where the article might be. He arranged for it to be downloaded from the website. Mr. Beard is absolutely correct.

PROFESSOR PICKERING: 2004. Issue 30. So do you know what month?

MR. HOSKINS: It was August apparently.

THE CHAIRMAN: That would be the thirtieth week of the year. (After a pause): Thank you very much.

MR. HOSKINS: The last document - at least for the moment - are my closing submissions, of which I will hand up a written version. (Same handed)

PROFESSOR PICKERING: Can I just ask: On the Builders' Conference invoice ----

MR. HOSKINS: I do not actually have a copy in front of me. Please bear with me -- (After a pause):

PROFESSOR PICKERING: It is just a quick question. Based on the subscription, based on turnover in the range of £25 to £30 million -- I would have thought that was equivalent to Durkan Pudelek, but not to the Durkan Group as a whole. It is addressed to Mr. Riordan at Durkan Ltd. the invoice states, "Based on turnover in the range £25 to £30 million". That was not Durkan Ltd.'s turnover, was it, at that time?

MR. HOSKINS: Just bear with me. (After a pause): I was just refreshing my memory. The DP MBO was actually September 2007. I am assured that this is the Durkan Ltd. invoice. The reason why it is that figure is that there was not an annual updating. It was a declared historic figure.

PROFESSOR PICKERING: It is very historic, is it not?

MR. HOSKINS: I am assured this is Durkan Ltd.

PROFESSOR PICKERING: Thank you.

MR. HOSKINS: I would like to begin with the legal test because obviously it is important that the Tribunal is clear what it is actually being asked to apply. I am not actually sure there is very much between us, but I will come to the OFT's submissions in a minute. Back to *Akzo*, please, albeit briefly. Bundle 5B, Tab 30. Paragraph 58. I will come back to the words in particular where I deal with the OFT's submissions, but there is a further point I would like to make in relation to this paragraph. It comes up again in the Advocate General's opinion. The test in para.58 is that "the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company". Those are important words 'in all material respects'. It does not say 'in some respects'. It does not say 'in significant respects'. It says 'in all material respects'. What that shows you is that this is intended to be actually a high threshold because what the court is looking for is to see whether the parent and the subsidiary form a single economic entity. It is as if they were one company. That is why the word 'all' is there.

Paragraph 60 is the other crucial paragraph of this judgment. Again, we have seen there are two parts to it. It is important to note that it necessarily follows from para.60 that mere capability to exercise decisive influence is not enough in law to establish liability. If mere capability were enough, then we would not have needed the second limb. Therefore, what para.60 does is confirm the test set out in para.58, but para.60 is explaining the nature of the evidential rebuttable presumption. But, the test is the same. In para.58 it is 'in all material respects follows the instructions given to it by the parent' and in para.60 it is couched in terms of exercising decisive influence. But, mere capability is not enough.

We then come to the second ground of appeal. We have looked at these paragraphs before. We can take them quickly. Paragraph 74. Again it is important to look at the actual wording.

> "It also follows from para.58 of this judgment [i.e. test] that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in para.64 ---"

So, you have to look at the factors in para.64 of the judgment under appeal. We have looked at those the other day. They are on p.6 of 13. Those factors are pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cashflow, stocks and marketing. So, you have to look at that. It is a necessary part of the consideration.

> "-- but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the company".

We know the relevant factors may vary from case to case. We know it is not exhaustive. But, it is a searching inquiry that is required.

That brings us to the Advocate General's opinion at Tab 31. Can I ask you to turn through to paras.89 to 93? I know you have looked at them, but you may just want to refresh your memory on those paragraphs and then I will make my submissions. (Pause whilst read):

What the Advocate General is saying is that parental responsibility, parental liability can arise either from the direct or the indirect exercise of decisive influence by the parent over the subsidiary. Paragraphs 89 to 90 deal with direct exercise of decisive influence. That includes specific instructions as to market conduct; interference in the day-to-day business of the subsidiary; or, indeed, an instruction to take part in the unlawful act.

Indirect exercise of decisive influence. She deals with that in paras.91 to 92.

> "A parent company may exercise decisive influence over its subsidiaries ... Thus, a single commercial policy within a group may also be inferred indirectly from the

totality of the economic and legal links between the parent company and its subsidiaries".

The phrase 'single commercial policy within a group', I say, reflects what one sees in para. 58 of the judgment - the 'in all material respects' language. It is clear that the Advocate General was not trying to depart from the court's existing case law, and that terminology of 'in all material respects' has been seen at umpteen cases leading up to *Akzo*. You can see that from *Akzo* itself. It cites the previous authority.

So, the Advocate General is not trying to create new law. She is confirming the existing law. But, that is another way one can look at it. Is there a single commercial policy within a group when you look at the totality? Again, it is important to look at the breadth and the depth of the inquiry and, indeed, the nature of the single commercial policy that is required. One sees that at para.92.

"For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct ----"

So, one is not looking for a patchwork, although there is a bit of a policy here that applies across the group. One is looking to see whether there is a single commercial policy across the group. One is looking to see if the subsidiary and the parent are the same entity - because that is what this test is about.

There are two aspects of this opinion which require clarification. Paragraph 92. Miss Bacon referred to this in her closing submissions - the final sentence:

"-- even a company's mere membership of a group may influence its market conduct, in relation, for example, to the question of with whom that company should actively compete".

Now, it is not entirely clear what that means, I have to say. But, I can tell you what it does not mean. What it clearly does not mean is that mere membership of a group is sufficient for parental liability to arise because if that were the case the analysis set out in the preceding paragraphs (and one sees in the judgment at paras.58 to 66 which repeats the existing case law) would be superfluous because parental liability would arise in respect of every subsidiary. That is clearly not the case. So, simply being part of a group is not enough.

The second point that requires clarification is mere capability. Madam Chair, you pointed out in relation to the questions at para.91 that there is a bit of ambiguity; it looks as if that

might be talking about mere capability. Indeed, one sees an echo of that sort of capability type ambiguity in para.93.

> "In the end, the decisive factors were that a parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary".

But, clearly, the Advocate General was not intending to suggest that mere capability is enough. I say that for two main reasons. First, it would be inconsistent actually with the rest of the opinion, in particular para.75, if I could ask you to turn back to that.

You see again it is a reflection of what one sees at para.60 of the judgment. The two limbs, and I have already made the submission that if mere capability was enough you would not need the second limb. So there is an ambiguity but it is quite clear if the Advocate General was meaning to move the law along and say if mere capability is enough it would have flashing lights 'round it.

The second point is even if she was intending to move the law along silently without flagging it up, the question was asked: "What is the state of the Advocate General's opinion, and if it conflicts with the judgment of the court it is the judgment which prevails and, as I have submitted, para.60 of the judgement is clear that mere capability is not enough, so we can put mere capability to one side.

Let me turn to the OFT's submissions. In the OFT's closing submissions reference was made to the words "in particular" in para.58 of *Akzo* – I have just highlighted them when we looked at it, and it was suggested therefore that independent conduct or decisive influence, whatever the test is in *Akzo* it is put in those two ways is not the only test, and what was said is that one has to look at all the relevant factors – that is the way Miss Bacon put it. I have to confess it was difficult to discern the practical purpose of those submissions. First, as Miss Bacon quite fairly accepted in her submissions, and it is reflected in the OFT's written closing at para.5, the decision is based on the decisive influence test. Therefore, it is not open to the OFT as a matter of procedure to say there is another approach, "this is what it is and we are relying on it now". Miss Bacon, perfectly fairly did not suggest that that should happen.

Even if one is curious, the Office did not even suggest what other test might apply because an injunction to look at all relevant factors is not a test of liability in itself, because you have to know why you were looking at all the relevant factors, for what purpose, to what end? The case law is clear *Akzo* is decisive influence or instructions in all material respects. In the end – I will be on the safe side – there is very little dispute (if any) between the Office and Durkan as to what the legal test is. One can see that indeed from the title of the

OFT's closing submissions – it is called "OFT Closing Submissions on Decisive Influence" – there is your test.

As I submitted in opening, the crucial question is whether, as a matter of fact the subsidiary decides independently upon its own conduct on the market or carries out in all material respects the instructions given to it by the parent company. Another way of putting it is the decisive influence.

Before I leave the legal test let us note a couple of things which are not enough to establish parental liability. As I have already indicated, the mere fact of being a subsidiary, a member of the group, even a 100 per cent subsidiary is not enough – one sees that from para.16 of *Akzo.*

Equally, the mere fact of there being common directors is not enough. Miss Bacon referred to this in her closing submissions, and it is also reflected in the decision because what the OFT says in this case, there is a presumption of liability because of the 51 per cent share and common directors, but they accept it is a rebutable presumption so it logically follows that the mere fact that you have common directors is not enough, and that is important because what it means is that where there are common directors what the Tribunal has to ask itself is what do they actually do? Do they exercise decisive influence? Did they issue instructions in all material respects?

I am now at the bottom of p.5 of the written document, and this is a point I made in opening and so I can take it very quickly. It is clear what the respective parties' intentions were when they established DP, DH saw it purely as an investment. Colin Simmons and Mike Pudelek wanted to establish their own business over which they would have full operational control, and I took you to the witness statements in opening and I have set them out here for ease of reference, we do not need to go through them again. I do say, given the intentions of the parties, it would be very odd given those clear intentions, if what they actually did in practice departed from those intentions.

In cross-examination Mr. Pudelek indicated that they already had an offer on the table from venture capitalists. He referred to 3i and I think the name was "Trillion" – that is how it appears on the transcript.

What they were actually doing is they wanted to set up their own business they were going to run and they were looking around for a means to do it. One option was venture capital. In the end they went to Durkan Holdings but that is an indicator, a confirmation that they saw DH as an investor, that was the nature of the partner they were looking for.

Interestingly, Mr. Pudelek also said (para.35 of the note in cross-examination) It might be

helpful if I was just to suggest had we gone to 3i and Trillion for the venture capital they would probably have had a lot more to say than the Durkans said. Of course, nobody would suggest that Durkan Pudelek and the venture capitalists were one and the same company, a single economic entity.

THE CHAIRMAN: So you are saying that a venture capital company is less likely to have decisive influence over a company which invests than a company in the same line of business ----

MR. HOSKINS: It will depend on the nature of the relationship. The point I am making – maybe I am trying to push it too far, if that is the case I apologise – is that what was on the table was an investor or DH. Insofar as the evidence is that Durkan Pudelek, i.e. Colin Simmons and Mike Pudelek were looking for an investor, then what I am trying to do is contrast on one side the nature of venture capitalists and DH with, on the other hand, an integrated group which is really one single economic entity. I do not really want to put the point any higher than that.

Let me turn to the nature of the investment, because the OFT's closing refers to the fact that the investment by DH and DP was not a capital investment, but it does not actually go on to explain why that supports the OFT's case. With respect the basic dynamics of the deal are clear from the evidence. What DH obtained were shares, and in my own note at the bottom of p.7, para.37 I have crossed out the word "investment" and replaced it with "shares" because I think that is a more accurate way. What DH obtained were shares in the company to be set up and run by Messrs Simmons and Pudelek with a view to obtaining money on the subsequent resale. I have given you the evidence of Mr. Bill Durkan, but you can take that from a number of sources.

What did DP get in return? That is the question that was being batted around yesterday. What they received was a flying start because, for example, if they had gone to 3i and Trillion they would have been given money and they would have had to have used that money to set up all manner of administrative and financial services. The big attraction for them going to Durkan was at Durkan they had access to established resources at Durkan. That is what the crucial part of the deal was for Messrs. Pudelek and Simmons. The whole point about going to Durkan for these resources was rather than getting money and having to set them up themselves was it would enable them to develop the business more quickly. I have set out an extract from Bill Durkan's cross-examination, and Mr. Pudelek's which makes that absolutely clear. Mr. Pudelek's evidence:

> "We were about creating an image that would allow us to actually build the company a lot more quickly than if I had taken the offer from 3i and Trillion. We had 40 years experience with Durkan that we could draw on in terms of resources that were tried and trusted. In the early days it was a great comfort to us that we were able to actually use people."

Bill Durkan had the same view as the court above, if you look at his answer. He is asked, I think it was by you actually, Madam Chairman: "What was the investment you were putting in?" His answer: "The investment at the early stages, how shall we put it, our facilities that we provided for them, and I guess that was an investment at the early stages". You were absolutely right, that was the prize, that was what Messrs. Pudelek and Simmons wanted. It is important to note at this stage that what this was, was a bespoke business agreement. There was something in it for both sides, but it was not a standard parent/subsidiary set up, it was a bespoke business deal between individuals.

The bespoke nature of this particular arrangement is confirmed by the existence of the Subscription and Shareholders Agreement [SSA] because an SSA is not a necessary document. The reason why there was an SSA was because this was a bespoke deal, and both sides had concerns and wanted a contract to reflect their different interests. So the mere existence of the SSA confirms the special nature of this relationship. Again, we say it confirms actually that these were not intended to be a single economic entity; they were not intended to be one and the same company. The whole point of the SSA was that Messrs. Pudelek and Simmons on one side were concerned to keep themselves apart from the Durkans. They did not want to be swallowed up, they wanted to make sure that they could run their company; that is why there was an SSA.

I am moving on to p.9 heading "51 per cent shareholding and ability to control". DH held 51 per cent of the shares in DP. In its closing submissions the OFT indicated that this gave DH, as the majority shareholder, the ability to control DP by dissolving the board and appointing new directors, that is absolutely right, that is what the majority shareholding gives you. But I think it is important that the Tribunal should understand why that is the case.

If I could ask you to turn to Bundle 2A, Tab 8, please? What one has here are the various statutory documents, Articles of Association and Memorandum of Couldridge Limited. We picked up from the evidence that the way Durkan Pudelek was founded is that Couldridge Limited was bought and then the name was changed to Durkan Pudelek. If you turn through four pages you should come to the Articles of Association of Couldridge Limited.

You will see the heading "Preliminary", if you could read Articles 1 and 2, please? You will see – it is pretty standard form – it incorporates Table A with certain specified exceptions in Article 2. We have Table A in Bundle 5B at Tab 42.

If I could ask you to turn to Regulation 78, you will see there the power of the shareholders by ordinary resolution to appoint a director. That is how the ability of a majority shareholder to appoint directors comes about. The ability to remove directors is actually found in Statute. If you turn over to the next tab we see an extract from the Companies Act 2006 – actually for most of the period of DP's existence it was the Companies Act 1985 (which is just over the page) which governed. You will see there the power to remove directors under a resolution, and obviously if you are a majority shareholder then you can exercise that power because you have the majority. It is standard there.

Do not put this bundle away yet because I am going to come back to Table A in a minute, but there is an extra layer in relation to Durkan Pudelek about the ability to appoint and remove directors because there is a provision relating to this in the SSA, and that is clause 4.4. The SSA is Bundle 2A, Tab 9, and it is clause 4.4 on p.5:

"Any individual Shareholder shall be entitled to be … a Director …"

So Mr. Pudelek and Mr. Simmons have a contractual right to be a director. Therefore, they had special protection over and above the standard Table A, because they had a contractual power to restrict the way in which Durkan Holdings could use its majority shareholding - again, we say, clear evidence that this was not a single company, it was a bespoke business deal with two parties, with obviously a common interest but very separate interests which they kept separate. What that shows is that in terms of what the shareholding gave in terms of control was it gave an indirect ability to appoint or remove directors but Messrs. Pudelek and Simmons, and, as we know, it was a power that was never exercised. At best it was an indirect power.

I said I would come back to Table A, because again that gives us the legal framework for the operation of the company.

MR. BLAIR: Can I just stop you there for a moment. That provision in the Subscription Agreement, 4.4, was that trumped by s.303 of the Companies Act 1985?

MR. HOSKINS: Well, in my submission, it would not be.

MR. BLAIR: Because the agreement is not between it and him – is that your reason?

MR. HOSKINS: My reasoning is that what the Act gives is a power to remove directors by virtue of ordinary resolution, i.e. by vote of the shareholders.

MR. BLAIR: Which they could always do.

MR. HOSKINS: The point is that the power of DH as a shareholder was contractually constrained in relation to Messrs. Pudelek and Simmons. Let me put it this way so that we see it practically. Let us assume there had been a fall out and DH was going to wrestle control of the DP board and it indicated that it was going to call a shareholders' meeting and propose an ordinary resolution to remove Messrs. Pudelek and Simmons. What would Pudelek and Simmons have done? They would have gone to the High Court under the SSA and they would have obtained an injunction against DH on the basis of their contractual right.

MR. BLAIR: Would the judge not have said that 303(1) stops that from being given?

MR. HOSKINS: In my submission, it is not mandatory because one can still, as a shareholder, agree as to how one will exercise one's rights.

MR. BLAIR: Notwithstanding anything in any agreement between it and him?

THE CHAIRMAN: And notwithstanding anything in its Articles.

MR. BLAIR: Yes, so they have a right under the Subscription Agreement to be, or to be appointed a director, but they can be removed the next day by the company.

MR. HOSKINS: That is any agreement between the company and the director. What that means is that if the company has entered into a financial arrangement, a contract, to pay the director, it does not stop them being removed, but that says nothing about the powers of the shareholders *inter se*.

MR. BLAIR: Was it not in the company's articles that the Durkan Holdings was truncated?

MR. HOSKINS: Not in relation to this, no.

THE CHAIRMAN: This Subscription Agreement is not the Articles of the company?

MR. BLAIR: No.

MR. HOSKINS: Sir, perhaps I am not being clear. Would it help if I explained my understanding?

MR. BLAIR: All I need to know is do they have an entrenched right to be on the board, whatever the Durkan side wanted to do about it?

MR. HOSKINS: A contractual right, yes, which arises from the SSA.

MR. BLAIR: Which could survive any statutory attack on it?

MR. HOSKINS: Yes, because the exception here is intended to override an agreement between the company and a director, not an agreement between the shareholders *inter se*. The way in which Pudelek and Simmons would ensure that the right in 4.4 of the SSA was protected would be by going to the High Court to get an injunction against DH to stop them exercising their rights as shareholders in this way.

The punch line to this, as I have just said, is that as a lever of control, it is a very indirect one, even at that very simple level one sees what the nature of the control is that is given by the 51 per cent shareholding.

To complete the picture on the nature of control arising by virtue of the shareholding, arising by virtue of presence on the board which the SSA also conferred on Durkan Holdings, I said I would go back to Table A, and this time we need to look at Article 70, powers of directors:

> "Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors, who may exercise all powers of the company …"

Then, could I ask you then to turn to Regulation 88:

> "Subject to the provisions of the articles, the directors may regulate their proceedings as they think fit … Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the chairman shall have a second or casting vote."

So the company is to be run by the directors, the directors may regulate their proceedings as they think fit, and questions arising at a meeting shall be decided by a majority of votes – not by a majority of shares, by a majority of votes.

I should say – Miss Bacon was worried about me keeping my powder dry – last Friday, i.e. before the hearing started, I went to her and I pointed out that Article 1 of the Articles of Association incorporated Table A. I gave her a copy of Table A. I told her the Articles that were relevant, and I gave her a copy of the legislation. I am obviously perfectly happy for her to have a chance to reply on that legal point when I am finished. That is the point I was referring to when I said I did not want to tilt at windmills, I wanted to see the way that the OFT put its case. In her closing she referred to the nature of the control by the shareholders, and that is why I thought it was important for the Tribunal to see the complete picture, and that is the complete picture.

You can put this away if you have finished with it, and I am back at para.45 of my submissions.

In the OFT's closing at para.14(d) the OFT states that until 1997 DH not only had a majority shareholding in DP but also had a majority representation on DP's board. As I go through this, we will see it is a recurring theme of the OFT's case to look at the very first few years of the operation of the company. I will make more of that as we go through, but it is a recurring theme, and it is not an appropriate way to approach the question in this case.

From 1999 onwards, however, the fact is – and this is a clumsy formulation but it is the only way I could express it accurately – the DH representatives on the DP board were in a minority at the majority of DP board meetings. Let me make it easier to follow that. I think we have all been trying to do our own running tally of who sat in which meetings, when, and what we have produced is a nice colour chart which sets out all of the board meetings and indicates who attended when. I hope it is an easy way of keeping track. (Same handed) What one sees in the early days when there were five directors, three – and I will call them "DH directors", it is a clumsy way of saying the DH representatives who were on the DP board – when one gets through to 1999 on the second page, what happens is that we get new DP directors, i.e. directors on the DP board who are not DH affiliates, Robert Scott, Maurice Williams. When one takes, therefore, from 1999 onwards, the position is that the DH representatives on the DP board were in a minority at the majority of DP board meetings. As we have seen from Article 88 of Table A, if anything had ever gone to a vote, it is the majority of votes that would have counted. So at that board level after 1999, if anything had gone to a vote the DP representatives would have trumped the DH representatives, and the only means of DH exercising its control would have been through the removal or appointment of directors in the way I have described previously.

PROFESSOR PICKERING: Or by demanding a poll?

MR. HOSKINS: By demanding?

PROFESSOR PICKERING: A poll.

MR. HOSKINS: That would not have helped unless there was equality and a casting vote, but that was not the position.

PROFESSOR PICKERING: No, but the poll is of shareholders, and you count by the number of shares, do you not?

MR. HOSKINS: At Table A, the way in which the company has been managed is by the directors who exercise all the powers. The shareholders' powers are to appoint or remove directors.

PROFESSOR PICKERING: That Article starts by saying, "The Directors may arrange their proceedings as they see fit".

MR. HOSKINS: Yes, and they decide how they say fit, it would have to be a vote at the board meeting, and if the DP representatives said, "We do not want a poll, we will go by Table A rule", which is the majority, then they would defeat any attempt by the DH representatives to require a reference to the shareholders.

The other point on this, if one actually looks then at when the infringements took place – if you go to the bottom of p.2, infringement 135 was 27th January 2003, and infringement 240

was, over the page, 2nd February 2006. During the relevant periods around those infringements the DH directors were always in a minority.

So the control which is given by the 51 shareholding is limited, and it is indirect. It is the power to appoint and remove directors, but not Simmons and Pudelek.

What this table also shows is that far from maintaining or increasing whatever hold it had over DP's operations, what DH actually did over the years was it loosened any ability to control it might have because it allowed DP to appoint it own men to the board – Robert Scott, Maurice Williams, Hugh McGill, David Watts, Bob Cummins. Over time what we do not see is DH holding ----

THE CHAIRMAN: Why do you say that those are DP men rather than DH men?

MR. HOSKINS: I am distinguishing them from the representatives on the DP board who were the DH board members – i.e. William Durkan, Daniel Durkan, Alan Fraher – who were there to, as they put it, protect DH's interests.

THE CHAIRMAN: You are not suggesting that the Durkans or Mr. Fraher were unhappy with the appointment?

MR. HOSKINS: Not at all, quite the opposite. My point is that they were happy for their presence on the board to be diluted. So, for example, what one might have imagined is Mike Pudelek and Colin Simmons coming along and saying: actually, Robert Scott is doing a good job, we need him, we want him on the board, and that DH said: that's fine but we're concerned about keeping control; we have got control and we want to keep it, so we'll appoint a new director ourselves just to even things up. The point is they did not do that. They were content for DP to run the business, to set up the board the way that it wanted to.

Of course, the OFT looks at what happened in the very early years and says there was no material change, that is simply not correct. One has to look only at this, for example, to see the material changes that took place over the period.

I think Mr. Blair made the point in opening that one has to look at this over time as things ebb and flow. They clearly did. You cannot simply look at something that happened in 1993 and say: there you are, decisive influence through the whole period.

What we know is that DH could not rely on its 51 per cent shareholding to issue direct instructions as a matter of law to DP how to act. It was an indirect stick, appointing their own directors, and they never exercised that power. We know that. All that legal analysis was actually confirmed by Mr. Pudelek's view. What he said (para.47 of my submissions) is:

"You've lost an important point, if I may suggest. Sitting around a board room table everybody is equal. The shares are not on the table, okay, so nobody's voice carries more weight than the others. Some of them are a lot more eloquent than me, but we can live with that."

This was not a situation where everyone was sitting thinking: oh, the DH guys are here; they have got 51 per cent of the shares; they are the guys in charge. Far from it. That was not correct legally and it was not correct as a matter of respect for the people who were there. It is a point I will come back to and develop a bit further later.

As we have seen, of course, in the SSA certain acts required the consent of all shareholders. We saw examples of those: clauses 6.1, 9.1, 13 and 15.2. Again, that is something that is inconsistent with DH and DP being the same entity, the same company. You just would not have that sort of thing if they were the same company. What that shows is this was a bespoke business agreement between two parties.

I specifically refer to clause 15.2 because that provided that DP could only advance finance facilities to DH if all the shareholders agreed. So there you see a very clear bit of control that Pudelek and Simmons had. It was not that DH could come along and dip into DP's finances thank you very much. That could only be done with Pudelek and Simmons' consent.

Then, of course, there were a number of formal points about the SSA, again a recurring theme of the OFT's case and where, in our respectful submission, it really falls down. One area where it falls down is it is always trying for form over substance with the OFT. Yes, William Durkan held a casting vote. He never exercised it. Indeed, nothing was ever put to the vote. William Durkan held the position of chairman of DP, Daniel Durkan executive director, Alan Fraher finance director. I will come on to the evidence, but, as you know, our case is that they did not in practice take part in any of the strategic decisions of DP. They left it to Pudelek and Simmons. I have given the reference at the top of p.11 to the witness statement evidence in relation to that.

In that witness evidence (it is actually attached to Mr. Fraher's second witness statement) would you read Bundle 2A Tab 7 para.4. (Pause) The table itself is at the back of that tab. You have William Durkan, who has been described as the titular figurative chairman. No mention whatsoever of Danny Durkan or Alan Fraher. We submit this is very powerful evidence that despite the fact they had these formal titles, they are absolutely right when they say that does not reflect the role they played in DP. The date of that is 1st February

2004. We prefer the evidence which actually relates to the time of the infringement rather than the early 1990s.

MR. BLAIR: So where do we suppose the finance function was in that organisational structure?

MR. HOSKINS: As we know from the evidence, it was with essentially Colin Simmons, with Mike Pudelek as well helping. But the nitty gritty of the finance we are told was Colin Simmons. That was the evidence.

We have, of course, William Durkan who held the formal title chairman, but in practice he did not chair the meetings. We saw Bill Durkan give evidence. I think that was perfectly credible. Someone can have a formal title but prefer to actually leave the hard work (I am sure he is not shy of hard work) of those meetings, and he was perfectly happy to turn up and have Mike Pudelek run them. That is what happened. That is what they all say.

Let us come to the provision of services, because that is one of the key factors about understanding this case. As I have said, the correct question was: what did DH put in? They put in their services. Mr. Fraher used the phrase that they provided a bureau, a service facility arrangement. That is exactly what happened. You see it in the SSA under the key provisions. Clause 7.3 provided for the provision of services. The very fact that provision of services was regulated, there was a right to require the services in the SSA again confirms the bespoke nature of the arm's length business deal. It is entirely consistent with that. It is not the sort of arrangement one would expect to find within a single economic entity; it would not be necessary.

We know that the main way in which the services were provided was through Alan Fraher who particularly provided accounting and administrative services. At para.51 of my note, Mr. Fraher's description:

> "… it was implicit in that agreement that Mike and Colin were going to run the business and we would provide full administrative services on day one and they were paid for within that service charge."

So Mr. Fraher made it clear that he was not providing those services as a director of DP. He was not remunerated by DP for being a director. He was providing it as an employee of DL, pursuant to the SSA. That is entirely consistent with the whole raison d'être of this arrangement. That is what was supposed to happen.

His involvement in preparing and/or presenting financial cash management reports, preparing annual budgets, were subject to instruction by Pudelek and Simmons. He did not tell Pudelek and Simmons what to do; they told him what to do. They gave him the information.

You have seen his evidence (I will come to it in a bit more detail). He did not seek to exercise or involve himself in the strategic running of the company. He did not see it as his role. He was there as a provider of services. He did not even attend the crucial monthly contract review meetings, or the weekly prayer meetings.

PROFESSOR PICKERING: Can I just ask – sorry to interrupt you – were the services of Mr. Fraher recharged as part of the management charges from DL to DP?

MR. HOSKINS: My understanding is they were, absolutely. That is absolutely correct.

One sees (para.54) and it came up a number of times, Mr. Fraher's description of his role in terms of the finance.

> "… any information I prepared for Durkan Pudelek was based on information that was given to me by the Executive Board of Durkan Pudelek … I may have reformatted that …. [It] was a bit like a jigsaw."

He was very clear on that evidence. We picked over the budget, the famous budget, a bit and Professor Pickering pointed out that the truth was it was not really a budget; it was a forecast of certain figures. The way Professor Pickering put it, and Mr. Fraher agreed, was it was more like a forecast of certain figures rather than something that is driven by decision taking from within that company. Mr. Fraher agreed. That again confirmed Mr. Fraher's evidence: he was being given information; he was putting it into a certain format. He was not the one taking the decisions.

It was suggested in the OFT's skeleton (I am not sure it went quite as far in its closing) that Mr. Fraher took overall responsibility for legal, health and safety, and employment issues. Again, a feature of the OFT's case; it keeps overstretching itself in terms of the evidence available and the conclusion it seeks to reach. It is quite clear from the evidence that Mr. Fraher, so far as he did perform such tasks, did so subject to instructions from Messrs. Pudelek and Simmons, and he did it pursuant to the obligation that DH had to provide services to DP under the SSA. I have given the evidence he gave, the references in relation to employment and legal issues, in relation to health and safety.

It was the great [Confidential case on unfair dismissal that was referred to, and it was said: here is an example of the board getting its hands dirty. With respect, if you look at Mr. Fraher's evidence in cross-examination he said that the decisions were made by Simmons and Pudelek in relation to [Confidential] Day 2 p.23 lines 6 to 12).

So yes, he did provide services other than accounting and finance, but it was all subject to the SSA. The evidence on that was clear. We know that DL provided a number of other services to DP pursuant to the SSA. We had the list that was at the start of Danny Durkan's

cross-examination. Again, I have given you the reference for that. It is difficult to draw up but it was exactly that. You have seen the evidence of Mr. Fraher that what was intended was that the services that DH could provide should be provided if DP requested them, and in return DP would pay for them.

That brings us on to the payment. Again, the payment obligation shows that this was a bespoke arrangement between two sets of parties. That is what DP was. It was an arrangement between two sets of arm's length parties. The SSA clause 7.3 required the payment of 5 per cent of gross turnover after the very initial date. That was the provision. What we know is that DP refused to pay. We know that DH was not very happy about it. One sees that in the board minutes. But that shows the independence of the two companies. If it had been part of the same corporate structure, the same company (because that is the test: are they part of the same company?) there would not have been a stand off about payment. The parent would have made sure the payment was made. What do we get? We get a stand off. Simmons and Pudelek say: we are not paying you that. They are at arm's length.

What happened, actually, because they refused to pay was there were negotiations. The evidence is consistent. Messrs. Pudelek and Simmons "aggressively" negotiated a more favourable charge for services for DP. That is the evidence of Mr. Simmons. It is also the evidence of Mr. Fraher on the other side. Aggressive negotiation is not the parent having decisive control; it is the two commercial parties protecting their interests. Those negotiations reflect the essential dynamic of DP from the start. DP were buying services from DH. It was a bureau service. It was arm's length. That is what was happening.

It does not matter that the negotiations did not take place annually, I would suggest. The point was they took place once, they were aggressive, Pudelek and Simmons signed up to a deal they were prepared to live with or were happy with (we do not know which) and that is what carried on. but it was an arrangement that was aggressively negotiated between commercial distinct people.

A formula was agreed to apportion the common costs, based on the relative turnover of each company within the group. It appears from Mr. Fraher's evidence that really what was being done was that the turnover was used as a proxy for use of the shared services. There was a receptionist and he looked at the relative terms and said: I will pay that much for the receptionist – a perfectly standard way to divvy up shared costs.

The fact that the formula that was aggressively negotiated was one based on the relative turnover of the companies again is not evidence that they were the same company; it is

simply evidence that there was a formula after aggressive negotiation that Pudelek and Simmons were happy with. As we know from the evidence, you will remember Miss Bacon, in cross-examination, saying, "Well, that is only about 1 percent, is it not?" What they got was that they started with 5 per cent. "We are not paying that." They drove a hard bargain and ended up paying 1 per cent - or the equivalent of. That is not evidence of them being one entity. It is the opposite. They were commercial people at arm's length.

Let me move on to the operation of DP. How did it work? How were decisions taken? I dealt with this in opening. I can take it quickly. Paragraph 61 of the note. There were contract review meetings every month. They were to address key operational decisions and they were not attended by - if I can use the phrase again - the DH directors. They were not reported to the DH directors. There were Monday morning prayer meetings. They were weekly. They discussed the commercial operation of DP. Again, the DH directors did not attend. There was a business plan for DP. It was prepared annually by Colin Simmons and Mike Pudelek with input from Bob Scott. No input was provided by DH. DH did not set targets. There was a presentation of that business plan at a review meeting attended by Alan Fraher and Daniel Durkan. There was no integrated group business plan. Remember the words of the Advocate General - 'single commercial strategy'. Well, there was no integrated group business plan. Durkan Pudelek's business plan was entirely separate from the Durkan Holdings Group. Durkan Holdings did not influence the business plan, or seek to influence it. That was not realistically challenged in cross-examination. Then we have the board meetings once every two months. I will come to that. I will deal with that in detail.

That set-up - the description of how the company operates - again tallies completely with the evidence that the company was actually run by Pudelek and Simmons. They were the brains. They were the decisive influence. They were not subject to instruction by DH. A number of examples just popped out. This is not intended to be an exhaustive list of cross-examination. It is just to confirm the independence. I have made the point about the refusal to pay the 5 per cent. Another quite striking one was the question put to Mr. Pudelek. He said that he was aware that DL were introducing a policy not to accept cover pricing. It sounds like it is shown probably in the same memo or the same article. "Have a look at this." He said, "No, I'm not doing it. You're on the moon." Again, if this was one company Mr. Clark would have told Mr. Pudelek what to do. We know what Mr. Pudelek would have said to him.

The nature of the board meetings. Of course, as directors, Bill Durkan and Danny Durkan and Alan Fraher were members of the board. They participated in board meetings. They attended. But, of course, as we know, the fact that they were common directors is not enough in itself. One has to look at what they did. The OFT effectively accepts that.

In response to the question Professor Pickering put yesterday, "Well, does it matter what hats they turn up with? Does it matter if they come with a badge saying 'shareholder of DH'? Does it matter if they come with a badge saying 'Director of DP?" That does not matter. What matters is what they actually did at those meetings.

All of the witnesses that we heard believed that DH did not exercise decisive influence over DP. They are not legal experts, but they can understand the question: 'Did the DH directors exercise decisive influence over the company?' Answer: 'No'. It is not conclusive, but it is very powerful evidence because these are the people who sat there once every two months. That is what they thought was happening. The OFT's case is that while they were sitting there, thinking this is what was happening, in fact the opposite was happening. They were actually being controlled by DH.

Let us look at Bill Durkan and Danny Durkan together. What was their role at the board meetings? Of course there were instances when they made comments at the meetings. But, common directors is not enough. One would expect directors to attend. One would expect directors to say something occasionally. It is not enough. But, the truth is - and I am not going to take you, again, through all the 2B documents - that if one does flick through (and I said this at the start, but I said it sort of jokingly, but it is a heartfelt plea) chronologically the yellow highlighted bits - and those are the bits that the OFT relies on - and if one looks at them in context, it is quite clear that Bill Durkan and Danny Durkan actually spoke sparingly at those meeting, and when they did speak what they said was in the way of a comment or opinion. It was not a direction. In our submission the conduct one sees in the board minutes is entirely consistent with their evidence that they were there to keep a watching brief - not to exercise decisive influence.

It is quite clear there is this notion of the invisible stick. I cannot remember who came up with that phrase - it might have been me in opening. But, what you have got is Bill Durkan, who sometimes attends board meetings, and when he does, he does not say very much, but he has got this big invisible stick behind his back. If you ever cut up rough, he would whip it out and say, "You must do what you are told!".

It is clear that Mr. Pudelek held Bill Durkan in the highest regard. Why not? That is one of the reasons they went to Durkan in the first place. It is clear that he would listen to his

opinion. But, it does not mean that Bill Durkan exercised decisive influence over DP. Mr. Pudelek made that clear in re-examination. I have set out the exchange at para.67.

"Who was responsible for setting DP's commercial strategy?"

"Colin and I."

"Who was responsible, to use that word again, for DP's success or failure?"

"Me. Colin. 50:50."

Another facet of the OFT's case, particularly this cross-examination, was willing to wound, but afraid to strike. That is the phrase that is sometimes used. They could pussy-foot round the issue, but, of course, in relation to the big stick they did not actually put the question to Mr. Pudelek and Mr. Simmons: "Look, we have Bill Durkan in the room. Did you feel obliged?" Mr. Blair, however, asked the obvious question. He asked it of Mr. Simmons. He said to him,

> "In the course of yesterday and today we have heard a great many responses saying that there were queries raised by the Durkan representatives, observations, comments, questions, highlighting. Never a command. I am interested in your reaction to those suggestions, comments and highlighting. Did you feel you had an obligation to comply with them?" "Not at all. Mike Pudelek and I ran the business. The comments made by Danny Durkan, William Durkan and Alan Fraher -- Great. Thank you very much. Sometimes they were actually quite helpful, but 99 percent of the time we had already made those suggestions anyway."

That is the death of the big stick argument. That is the only time the question was put, and the answer was quite clear.

Now, in our submission, it is quite clear that mere participation in a board meeting does not equal decisive influence, does not equal in itself instructions in all material respects because if that were the case the common directors would be enough.

Alan Fraher. What did he do? He says that he saw his role at DP board meetings as being to raise issues and to ask relevant questions to protect the interests of DH - not to instruct Messrs Pudelek and Simmons how to run their company. A typical comment:

> "I didn't intervene. I highlighted the matter. It was up to the operations board of Durkan Pudelek to sort it out".

You heard his evidence. Although he had the role of finance director, he did not fulfil that role in practice. He drew the distinction. He said, "I had the title of finance director, Durkan Pudelek. I was not the finance director of Durkan Pudelek. Had I been the finance

director of Durkan Pudelek, I would have done something about this. I would've been beating the table". He would also probably have been signing the cheque for the 5 per cent search charge. He did not seek to throw his weight around. He did not seek to tell Pudelek and Simmons what to do. He highlighted issues, but he was perfectly aware that the company was run by Pudelek and Simmons. That is what Bill Durkan wanted. That is what DH wanted. They wanted the company to be run by Pudelek and Simmons. That was the whole point of setting this bespoke arrangement up.

Mr. Fraher summarised the nature of his contributions at 71(a).

> "Much of what I said at those board meetings was for the benefit of Danny Durkan and Bill Durkan when he was there. I wanted to highlight the situation".

With respect, if you read the board minutes that description of cross-examination is entirely consistent with what one sees of his interjections. Then at 71(c) of the note, "My note was totally nominal. The services I provided to Durkan Pudelek was through Durkan Ltd. for services for which they paid".

Then, quite an insightful comment,

> "The comments I made -- I had dual roles to a certain extent at the board meetings. I was privy to the information that I would have seen through Durkan Ltd., but my role at the board meeting was to be the eyes and ears on behalf of Durkan Holdings Ltd. and the protection of its interests. I had no operational duty within Durkan Pudelek".

Again, we submit that is entirely consistent with the content of the board minutes. He is flagging things up for the attention of Bill and Danny Durkan. He is not seeking to instruct Pudelek and Simmons what to do.

If I move on to the detailed reports that were provided prior to the board meetings? This is para.73 of the note. Danny Durkan was shown the written reports which were appended to the agenda for the board meeting dated 5th February, 2003. We all remember them. The reports were detailed. No doubt about it. But, Danny Durkan indicated that they were generally provided to him on the morning of the relevant board meeting or the day before. Therefore it is not surprising that he therefore had little time to consider them. We were told in evidence that the reason -- I cannot remember whether it was Mr. Simmons or Mr. Pudelek who said, well, the reason they did it in this way was that they wanted to be completely transparent. If they had wanted DH to guide them, to instruct them, they would have given this detailed information well in advance of the board meetings. They were not being given all this information so that they could influence, direct Pudelek and Simmons.

The detailed written reports, as we know, were the subject of short oral presentations at the board meetings. In Danny Durkan's witness statement he referred to very high level summaries of the work undertaken. I need to take you to this because the OFT's construal of the evidence does not stand up, and they suggest that Danny Durkan's position is not sustainable. Bundle 2A, Tab 6.

> "The board meetings were akin to quasi Audit or Shareholders' meetings, where (i) very high level summaries of the work undertaken and budgeted for were provided".

In the OFT's closing, at para.36(b), they suggest that this is not sustainable because in fact detailed documents were provided prior to the meeting. With respect, that is not an accurate description of Mr. Durkan's evidence. It is quite clear from para.17 that he is describing what occurred at the board meetings. "At the board meetings very high level oral summaries of the work undertaken and budgeted." So, I just ask you again, I am afraid, this is a characteristic of the OFT's case -- There was an exchange yesterday about paraphrasing. We are all guilty of it. One has to be very careful when one sees in legal submissions a paraphrase -- I would ask you just to be very careful both when you read my submissions as when you read the OFT's submissions -- I have endeavoured to put in as much of the raw material as possible, but you will have your own view of the evidence. But, beware of the over-stretching. Beware the allegation of not-sustainable. I have at least one other example of that which I need to flag up, because it is only fair to Mr. Durkan that I do that.

THE CHAIRMAN: I thought that when you re-examined him you took him to (iii) and said that that was -- because he was taken to all of the board minutes and then he was taken to his witness statement and it was put to him, "Well, it is not true that there were only very high level summaries of the work undertaken". I think then, in re-examination, unless I am mis-remembering this, you took him to (iii) as showing that actually the witness statement was not inaccurate because reading the paragraph as a whole he was not saying that there were only very high level summaries of the work because he was also saying that information was provided on any other developments that could affect the profit on return. I may need to check that.

MR. HOSKINS: You have highlighted the reason as to why one should not rely on counsel's paraphrasing. That is certainly not what my intention was in re-examination. That is not the way I understood I put it. If one looks at the transcript day one, p.88.

MISS BACON: No, I am sorry, it is actually p.89 where the witness is taken to para.3.

THE CHAIRMAN: No, but it was I who took him to (iii) rather than Mr. Hoskins.

MR. HOSKINS: If one looks on p.88;

> "How much attention did you pay to the detailed reports?"
>
> Not a lot."
>
> When you say you would generally sit and listen is that because there were oral presentations given as well at the board meeting?
>
> Yes, the respective directors would go through and report on the various sections of the report."
>
> What level of detail would the oral presentations take place at?
>
> It was generally …."

– etc., you can see what it says.

Then my submission is what the OFT says, when you look at the first sentence of para.17 they say that it is not sustainable. My point is simply that what he is saying in para.17 is a description of what occurred at the board meetings, at which very high level summaries were given. He is not intending to suggest that the written documents provided prior to the meeting were very high level summaries.

The next topic is para.74, I called it "Board 'decisions'". You will note that I put inverted commas around "decisions" for obvious reasons.

The nature of the operation of the board was described by Mr. Simmons in his cross-examination. I have set out, it is quite a lengthy extract at the bottom of p.18. I think this was in response to a question from you, Madam Chairman.

> "Just thinking back to the board minutes – I do not want to go back to them now – there is a number of times where it says this report was considered, or duly considered and approved. … can you say in the generality of cases where it says that in the minutes 'This was duly considered and approved' did that mark any particular length of discussion in the topic of the report?
>
> (A) Not particularly. I can see why people reading those minutes in hindsight … might think that."

Then you ask again for a bit more clarification.

> "That phrase 'duly considered' what does that signify as to how much debate, if at all any, there had been?"
>
> Virtually none."

So that is Mr. Simmons' description of what happened at the meetings and what is to be understood – one understands the use of formal language in the minutes, "it was duly

considered", "It was decided, it was approved", it is the sort of language one would lapse into in drafting board minutes because one wants to be formal, but the actuality is as Mr. Simmons described, it is not at all surprising that that is what happened.

That position was confirmed by Daniel Durkan's evidence, para. 75. He was referred to some examples of so-called decisions taken by the board. I have given the example of one, 29th November 06. He explained that Messrs. Pudelek and Simmons reported to the board and pursued a course of action.

So we have Mr. Simmons and we have Danny Durkan both giving the same description of the dynamics of the "decision making" role of the board. It is quite interesting that of course the OFT, probably because they could not find one, but it did not put a single example to Danny Durkan of a situation where Messrs. Pudelek and Simmons put a proposal to the board meeting which the DH directors disagreed with and took steps to over rule, because there are none. So there is no example of the big stick coming out.

THE CHAIRMAN: Well the one that comes closest to that, I suppose, in that it is the one that is seemingly against their interests, as it were, is this example at the beginning which was the decision that they should not pursue contracts which fell within DL's purview or turf, and there one might have expected Pudelek and Simmons to say: "Too bad, we are in this to build up the company as quickly as we can, and that means taking any business that comes our way."

MR. HOSKINS: Madam, the evidence, particularly in the witness statements, I think one has it, of Messrs. Pudelek and Simmons is that they were experienced in the private sector, that was the plan for their business. That was the operational plan, it was to operate in the private sector, that is where their expertise was, they had no desire to work in the public sector because it is a different sector, and one gets that from both their witness statements. So that is not a matter against their interests – I am going to come back to this, because I actually say when you look at the board minutes on that, it shows again the companies were keen to preserve their independence. It was not so much that DH or DL were saying to DP: "You must not come in and steal our work from the public sector", DP had no desire to have it. The reference for that is the witness statements of Pudelek and Simmons.

MISS BACON: I am sorry to rise again, in relation to this point, actually Mr. Fraher did give evidence of an instance where a proposal or a suggestion by the DP directors, Mr. Pudelek and Mr. Simmons was overruled by DH, and that was the issue of the overheads, and he talked for some length about the argument that he had had with Mr. Pudelek and Mr. Simmons, and he said it is his handwriting that is recorded on the minutes where they

wanted to pay zero contributions, they wanted to maintain a zero contribution and eventually after some small exchange of views they agreed they would pay a contribution of some £107,000. There was an issue as to where that appeared in the financial statements, but that was gone into in some considerable length in the cross-examination of Mr. Fraher, so it is just not right for Mr. Hoskins to say I did not put to the witnesses that there was no instance in which the Pudelek and Simmons' view was overruled by DH, because there was.

MR. HOSKINS: Madam, the subtlety of the questioning obviously escaped me. That example was the product of aggressive negotiation. It was not an example of DH overruling DP, the evidence is there was aggressive negotiation, but not surprisingly Messrs. Pudelek and Simmons have a starting point in the negotiation, but they come to an agreement somewhere else, they move up, that is normal negotiation. It does not mean that DH is directing Pudelek and Simmons, and remember the evidence was that SSA was 5 per cent and, as Miss Bacon put it I think it was to Mr. Fraher, they ended up with actually paying about 1 per cent. I am sorry, if that is an example of DH controlling DP, DH had a contractual right to 5 per cent and yet it was prepared to be beaten down by Pudelek and Simmons to a new formula which equated to 1 per cent. It is entirely the opposite.

PROFESSOR PICKERING: So you are saying that the SSA was not hard and fast at all, and any of its terms could well be varied at the wishes of some of the parties?

MR. HOSKINS: That is right, and that example is an example of them being varied at the wishes of Pudelek and Simmons, indeed, the way they brought about the variation was simply by refusing to pay. Put that up against the case which is, they are the same company, that DH controls DP, that DH directs DP, it is the opposite, it proves our case. DH could have stood on its contractual rights and it did not. That is not the evidence of someone who controls. We also had an example of where a proposal by William Durkan was apparently taken up by the board, and we spent an awful lot of time in the years 93, 94, 95 – board minutes to 1995.

But, with respect, the fact that on one, or even a limited number of occasions a DH director made a suggestion at a DP board meeting that was taken up is not inconsistent with DP being run by Pudelek and Simmons, common directors is not enough. The fact that a director makes a comment at a board meeting is not enough. The question is whether, properly analysed, the DH directors decisively influenced or issued instructions in all material respects to DP. Again, the OFT failed to refer to a single example where a DH director made a proposal that Pudelek and Simmons disagreed with that they were obliged

to adopt. That question was never put in that way. Again, Miss Bacon says I subtly did this, and I subtly did that, but there is no clear example of that.

It was suggested there was control over individual contracts. It was suggested that the DP board spent its time getting its hands dirty with particular unfair dismissal cases, etc. The way it was put to Danny Durkan in cross-examination was:

> "Actually, the board reviewed the progress on specific contracts at almost every meeting and there were very frequent discussions regarding problem contracts."

Danny Durkan's response: he confirmed it was as in his witness statement:

> "I recall only a few board meetings which the board discussed at length specific contracts of concern, however those board meetings were exceptional."

He confirmed that in re-examination and again, if you do the painful exercise of flicking through that is entirely consistent with the board minutes. Yes, there are certain items that are reported, but in terms of there being lengthy discussion about these sorts of issue there are very few.

So with respect, the OFT suggestion that this was a board who was looking at individual contracts, and the progress of individual contracts, and making a decision about the level at which to settle an individual contract is simply not made out on the evidence. Individual contracts were exceptionally discussed at length, and there is no evidence that the DH directors directed Messrs Simmons & Pudelek how to deal with them. Common directors is not enough, the presence of common directors at the meeting is not enough, you are looking for direction, you are looking for instruction.

We say the truth of the matter is in the following exchange. I should have said in the note it is para.83, it is actually Danny Durkan's cross-examination, T1, p.85:

> "That is not what is minuted, Mr. Durkan. What is minuted is that the board was continually telling the management team of Durkan Pudelek to go away and do things, sort out their undervalues and retentions, sort out the profit margins. What those minutes show was that you had considerable involvement and influence in DP's commercial activities and you were involving yourself in the actions that were taken Durkan Pudelek?
>
> No, that's not, in fact, true. Again, I rely on my witness statement. The executives that ran the business were Mike and Colin and their co-directors. I merely sat there and listened to their reports, and if it came to a discussion that they wanted something endorsed by the board we may then be asked to comment, but there's no direction given directly by myself into the day to day operation."

That is absolutely accurate if one looks through the board minutes.

We have the benefit in this case of an independent pair of eyes. We have heard some mention of the Horvath Report, it was not put to any of the witnesses in cross-examination, it was well trailed in the notice of application, defence and skeletons. Let us look at the famous Horvath Report. He was an independent consultant and, as explained in the second Danny Durkan statement at paras.24 to 27, in light of concerns about DP's performance, DH commissioned Robert Horvath to produce a report on whether it could or should retain its investment in DP, that is what he was asked to do.

The report is at Bundle 2B, Tab 103. "Durkan Pudelek Report, October 2006. Prepared by Robert B Horvath 5 November '06". Could you turn through to p.5, please? You will see there is an Executive Summary.

Then p.6, which is the second page of the Executive Summary, the first bullet point at the top of that page:

> "The formal Board meetings (held every two months) await the Executive team's proposals for something dynamic but nothing comes."

The board is awaiting the executive team's proposals. That is not a board who instructs, who is active, who directs, it is a board who is passive, it is a board who waits for Messrs. Pudelek and Simmons to tell them what they are going to do.

> "Organisational Structure"
>
> Poor and ineffectual with little real accountability. The hands on style of a small entrepreneurial business is no longer appropriate once divisionalisation has taken place and the staff numbers have grown".

Again, that is entirely consistent with the evidence as to the reason and the manner in which DP was set up, it was to be an entrepreneurial business run by Pudelek and Simmons, and here we are, all the way through, in 2006 and that is still the case. It is their baby, it is their company.

Page 7, the bullet point at the bottom of the page:

> "I believe Mike [Pudelek] is correct and that without a new and refreshed leadership the Shareholders should sell the business. Mike feels that the ability for him to be an entrepreneurial leader has gone and that he is creating a bigger beast than he can manage within the current systems."

Again, it was an entrepreneurial business.

Can I ask you to turn through to p.10. There is a section which is entitled "Capital and Intellect", and it is p.11 that I would like to look at, second paragraph:

"The board has not iterated a clear strategic vision that the CEO is working to."

I hold that up against the test in *Akzo*, and that is very telling.

Then the real gem, p.13, the middle of the page there is a heading "Organisational structure":

"The Statutory Board meet every two months … in itself this is sufficient for the shareholders' needs. For an executive team this is too little. These meetings are *quasi* Audit and Shareholder discussion. There was little documentation of the Strategic direction at the statutory board level. There is no discussion of how the Executive Team are meeting the goals set out in the Shareholders' Agreement."

That is an independent person's view of the way in which DP's board functioned. It is entirely consistent with the evidence of all the witnesses who participated in these board minutes. It is entirely inconsistent with the OFT's case.

THE CHAIRMAN: He does not seem to be saying that this a deliberate policy. He seems to be adopted a critical stance by what he is saying here, namely that this is being mismanaged. He is not saying that they do not do this because they have decided that they do not want to have any involvement and they have just let Pudelek and Simmons have their head, they are saying this is the board, they should get more involved because they are just letting it all ----

MR. HOSKINS: With respect, madam, they are not saying they should get more involved, he is reporting on what the position is. He is being critical, and what he is doing is reporting the actual position. I actually say the evidence is that they did make a conscious decision at the start that this is how this business would be run, as an entrepreneurial business by Pudelek and Simmons, and DH would stand back. Let us assume they had not formally at the start had that discussion and that agreement, and let us assume they had not had proper discussions, this company had been set up and it so happened that over time this the way it had run, with the board sat back, Pudelek and Simmons took on an entrepreneurial role and the board was actually a *quasi* audit for shareholder discussion. It does not matter how they go there, it is still not a single corporate entity for the purposes of *Akzo*.

It does not matter how you get there. In fact, we know how they got there in this case, but it does not matter that you get there by accident or design. In fact, it was by design in this case.

MR. BLAIR: It still raises the interesting question of whether you are entitled to have a better shot at avoiding your legal responsibilities by doing your job badly.

MR. HOSKINS: That is a fair comment, but that is the truth of what was happening. One says, actually, no, because these were all men who were clearly aware of their legal obligations

and they were punctilious about them and so therefore they took part – even if that was the case – remember, common directors are not enough. Even a director, a common director, who was a barrack room lawyer swatted up and knew exactly what his obligations were, the fact that he sat there would not be enough.

If it is true, and I do not want to cast aspersions on my own clients, that when you ask the question, "What are their formal obligations as directors", they did not know. You might say that is not a very good thing for a director to say, but, with respect, it is irrelevant to the question which is before the Tribunal in this case, which is did they exercise decisive influence? I fully understand where the question comes from, but with respect it is irrelevant to the legal issue in this case.

MR. BLAIR: There is a related question to that, though it may appear slightly different. Under the Shareholder Agreement, the board meetings and the reporting obligations were supposed to be monthly. That happened, according to your Hearts and Hibs document here, the green and the red, for the first three or four months, but after that it slid back down to two or worse. Is that in favour of you or against you, bearing in mind the force that they apply to the Shareholder Agreement?

MR. HOSKINS: The reason why I stress the Shareholders' Agreement is that it shows they were at arm's length. The fact then that neither party insists on the Shareholders' Agreement is actually a neutral element. If, for example, DH controlled and was unhappy and said, "Remember, we want a monthly meeting", that would be one thing, but what we actually see, as a matter of fact, is that the meetings slip into this more elongated timetable, and nobody was concerned. If the ethos of DH was, "We want to control DP, we want to be on top of what they are doing", one would have expected them to insist on the more regular board meetings. The fact they were happy to allow this to drift, the fact that they did not insist on their contractual right, actually shows that they were relaxed about what Pudelek and Simmons were doing, rather than seeking to control what they were doing.

PROFESSOR PICKERING: Is the Horvath Report really not a report as at 2006? It seems to me that it is saying that the initial spirit and drive within DP has gone. The operational drivers of the day to day business have got tired, the rest of the board have probably not realised the extent of the problem and this is where we are now. 2006 is not necessarily indicative even of 2003.

MR. HOSKINS: I suspect, Professor Pickering, he is looking backwards and he is saying the entrepreneurial model, which is how this company is supposed to operate, is not working. So he is looking backwards.

PROFESSOR PICKERING: This is 14 years. Is he saying it has never worked?

MR. HOSKINS: What he is saying, to be fair, and I think it does come out of these quotes, is that it is no longer working because the company ----

PROFESSOR PICKERING: Yes, as at 2006.

MR. HOSKINS: -- because the company has become too big. What he confirms, what he states in the report, is that the model has always been an entrepreneurial one, i.e. the company was run by Pudelek and Simmons – that is what he says. 2006 is a good date because that is the period of the infringements we are talking about. That is why it is so pertinent. If things do ebb and flow then we know where we are in 2006. My submission is that it is quite clear that he was saying that this was always an entrepreneurial model. What has happened is that it is now no longer working. The fact that it is an entrepreneurial model confirms my submissions.

I was going to go on to the DP board minutes. Would you like me to wait a minute, madam?

THE CHAIRMAN: No, that is fine, thank you.

MR. HOSKINS: I am at p.22 of the closing submissions, headed "DP board minutes". As you know, we have disclosed every DP board minute from 1992, that is incorporation, up until the sale, the MBO, on 10th September 2007. There are a number of general comments I would like to make about the board minutes. One is of course that if one takes the OFT's approach and one looks just at specific entries one gets a rather skewed picture, because what one is trying to determine is whether DH controlled DP in all material respects. You do have to look at them as a whole and that is why I asked you, if you do have the time and inclination, to do that exercise of flicking through them. If you do that exercise then we say it is clear that the primary purpose of the DP board meetings was to allow the reporting function to take place. I gave examples in opening of the ones round about infringement 153. In that period, if you look at them, it is very much, "Report", "Report", "Report", "Report", that is what is happening.

The second point is, and this goes to the initial meetings, the OFT's understandable concentration on 1992, 1993, 1994 and 1995, in the early days there was a certain amount of discussion involving the DH directors. That is not surprising, it was a new baby, it was bedding down. Yes, DP valued DH's experience – all perfectly understandable. But that level of discussion was not maintained thereafter. It is the ebb and flow point. Really the relevant question is, "What was the position at the time of the relative infringement?" I am not saying on a particular day in a particular month. That is the question that we are

actually looking at. Even at that early stage, if one looks at the discussions that were taking place, what is actually happening is that William Durkan makes a suggestion, makes a comment, gives an opinion, he is actually doing it and stressing the need for DP to stand on its own two feet. He was doing that in 1992, 1993 and 1994. He did not want to have to direct DP. I have set out the main quotes – p.22, para.91, board meeting 2.11.93, and these are ones that you have seen and you can look at them in context, but these are the important passages. "Wherever possible", and this is the famous, as Miss Bacon would have it, market sharing agreement, and I will come back to it:

> "Wherever possible Durkan Brothers will concentrate on public sector residential opportunities [etc, etc] This expedient will be reviewed by the Directors of Durkan Brothers and Durkan Pudelek from time to time to ensure the market identity and thrust of each company is maintained."

To keep them independent.

Board minute 8.3.94:

> "AF made known his view that the company should have a remuneration reward package …"

Remember Mr. Fraher was asked about this, he was worried that the DL people would get jealous of the flash cars of the DP people

> "… The meeting agreed that the potential of the company must not be jeopardised by any undue influence …"

Undue influence by DH – i.e. "Leave us, we understand the sensitivity, thanks very much, leave us to get on with how we pay our staff".

February 1995, William Durkan proposed *inter alia*:

> "Efforts should be made to make Durkan Pudelek Limited a stand alone company …"

That is what the original intention had been and that is what he was endeavouring to make sure happened. One sees that at the follow up meeting, 22.3.95. These are the early years, but even in the early years Bill Durkan is not saying, "I am going to tell you what to do", he is saying, "I don't want to tell you what to do".

The third general point which I have touched on already is, of course, one can see it is written down, there were occasions when Bill Durkan, Danny Durkan, Alan Fraher, as members of the board, made contributions. They said something at the meetings, they expressed their views. That does not equal decisive influence, it does not equal instruction in all material respects. Common directors are not enough, the OFT accepts that.

If you actually again look at the spread of the minutes over the whole of the 15 year period, there are actually very few occasions when DH engaged in detailed discussions about DP's activities at anything even approximating a strategic level. I have identified three main occasions when that happened. First of all, concerns about the level of risk to which Durkan Group was being exposed in 1995. Secondly, concerns about the poor performance of Durkan Pudelek Interiors. We saw some of that in cross-examination. The general point in relation to this, and it comes out of the evidence on Durkan Pudelek, is that the mere fact that discussions took place at board level does not indicate that DH exercised decisive influence over DP. Common directors are not enough. The fact that comments or even proposals are made does not equal instruction, does not equal decisive influence. Danny Durkan put it this way in cross-examination:

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

Again, you will have your own view, but if you read the board minutes we say that is an entirely fair description of what was happening.

The final time when one did see lengthy discussions was in 2006/2007 when there were concerns about poor performance, but again even when it looks as if DP is in serious trouble, you do not see the DH directors rolling their sleeves up and saying: this is what you are going to do, which is remarkable. They did not do that. The funny thing was, I guess, it comes back to the start of it which is what did DH have to lose? The answer is: not very much. The interest it had in DP was if it was sold it would get money, but if DP failed they did not lose anything because DH had not put a large capital sum in. Do you remember the investment was simply to allow DP to use DH's services. It was not actually going to lose anything. It was going to lose the chance of something.

THE CHAIRMAN: It had lost the opportunity over that period of time to move into private sector work in a different way, and during the time that they were involved (using that in a neutral sense) in DP they were not expanding DL or setting up some other 100 per cent owned subsidiary to expand into private sector. So it was an opportunity cost.

MR. HOSKINS: With respect, that is right absolutely. That is my point. They were not going to lose money; they were going to lose an opportunity. With respect, there is no evidence that they had an interest in expanding into the private sector. In fact, the opposite. The witness statements indicate that their business was in the public sector. What they saw with DP was

a chance to make money on investments where DP would work in the private sector. But there is not actually evidence that this was seen as a strategic move by DH into the private sector. You get that from the witness statements.

PROFESSOR PICKERING: What about the impact, if DP had failed, on the recognition and perceived quality of the Durkan brand? Surely that is a significant risk?

MR. HOSKINS: It was a risk, and yet if you go to the board minutes in 06/07 one does not see intervention by the DH directors. One does not see an attempt to tell Pudelek and Simmons what to do. I have given the references, I have made the submission. There is nothing to be gained by me ploughing through the individual ones. You will form your own view. I simply say: please go back and look at those particular ones in light of the submission I make. Is there instruction in all material respects, even in these times of (crisis is probably too strong a word) bad times? The answer is no. What one has is, on these particular three occasions, discussions minuted in the board but not direction, not instruction.

The final section begins at p.25, it is called Miscellaneous Points. I am afraid, with all due respect, one did hear the side of the barrel being scraped on occasions in relation to some of these submissions.

The first point: group identity. OFT closing para.29 suggests that DH controlled DP because the witnesses sometimes used the phrase "Durkan Group" to suggest that DP was part of the Durkan Group. With respect, that is simply a non sequitur because subsidiaries are generally described to be a member of a group of companies headed by their parent, but we know from the case law that the mere one is a subsidiary of a parent, the mere fact one is a member of the same group as a parent does not equal decisive influence in the actual sense. So I am sorry, there is no magic in the use of the word "group". It does not equate to the *Akzo* test.

Mike Pudelek was very candid in his evidence. He, as a businessman, was very happy to extract any benefit he could from association with the Durkan name while retaining control of his own company. He gave that evidence in a number of ways. I have set out para.11 of his witness statement which deals with a number of the issues, particularly, for example, the logo.

> "I conceived a logo that was intended to distinguish Durkan Pudelek from Durkan Holdings, since we operated independent of each other and in different sectors. We took advice from external branding consultants on the Durkan Pudelek livery specifically to create a logo that would distinguish Durkan Pudelek from Durkan Holdings. However, whilst we had our own

> distinguishing logo, we were mindful of the need for 'marketing' purposes to retain some reference to the Durkan Group because it is a respected and trusted name in the trade."

He was not ashamed, he did not hide it. Of course he was going to make whatever he could out of the Durkan name. That does not meant that he was ceding control in his company to Bill Durkan, Danny Durkan, and Alan Fraher. Interestingly, at the end of the quote:

> "Further, when Colin and I effectively purchased Durkan Holdings' interest on 10th September 2007, we ensured that we could continue to use the 'Durkan' name for one year thereafter."

It is hardly going to be said DH controlled DP after the sale. It shows he was making commercial advantage of it. He certainly was not giving up control of his company as the price of that. He was just coat-tailing, marketing.

Danny Durkan was asked a few questions about marketing. He was referred to board minute 8th March 1994. Perhaps we can go to that one. It is 2B 23.6.01

> "Get work. DD made known his intentions of reviewing the Group's marketing strategy and that the involvement of Barbara John would provide some added impetus."

Remember, again, this is one of the very early years, it is March 1994. He was asked about this in cross-examination. I have set it out at para.101 of the note. He confirms;

> "The marketing within Durkan Pudelek was done solely by Mike Pudelek [and] I never undertook a review of the Groups because that would have included reviewing Pudelek's marketing strategy."

So Danny Durkan certainly did not think there was a group marketing strategy which he was directing and responsible for.

The famous Golf Day, I am sorry, a golf day in Autumn 1994, who organised it, who came? For this to get anywhere the OFT has to show that there was a group marketing strategy. A few colleagues organising a golf day is really not evidence of that. It is not evidence of a group marketing strategy in Autumn 1994; it is certainly not evidence of a group marketing strategy at the time of the relevant infringements, some nine/ten years later.

Finally, we had the reference to the meeting of the Durkan Group directors, which we saw on a number of occasions. Remember that one. There was the Gordon Brown heading, etc. Again, Mr. Durkan was asked about that.

> "We didn't have a marketing of the Group per se, every company operated its own marketing strategy and its own marketing budget … there was no Group

strategy, we never had a Group document, we never had a Group budget …there were no Group marketing strategies or documents, each company operated its own marketing department and marketing budget."

With respect, the independence of DH and DP when it came to marketing could not be clearer. The suggestion that these few scraps show that there was an overall group marketing strategy, a single commercial strategy encompassing marketing (to use the Advocate General's phrase) driven and directed by Danny Durkan, I am sorry, the evidence gets nowhere near that.

Health and Safety. It was supplied pursuant to the SSA. This is not in the note, but one gets that from the cross-examination of Danny Durkan (T1 p.42 lines 17 to 30). Again, Danny Durkan was asked about health and safety policy. He indicated that whilst there were certain aspects of health and safety which had to be applied across the industry, each company had different specific health and safety requirements because of the different nature of the work and particular jobs. He also said that DP had its own policy under the supervision of Colin Simmons, DP's health and safety director.

Again, with respect, the evidence just simply does not amount to a finding that there was an overarching, one size fits all, group health and safety policy. DP did maintain and apply its own policy. There may have been some very general level of matters that were common to the industry, but again if one looks at the test, if one looks at the Advocate General's perspective, a common commercial strategy, one facet of which might be health and safety, we do not even get the single health and safety policy.

The so-called tender coordination meeting. I should have put quotes around that and the heading as it arises in the text for obvious reasons. This was the meeting between Durkan Brothers and Durkan Pudelek to address the issue of tender coordination, as it is put. Again, it is 1993. So much of this evidence is in the first few years.

THE CHAIRMAN: Are you saying, then, that the balance of work changed, that they did move into the public sector?

MR. HOSKINS: No, not at all. I am just going to – the OFT says there was this meeting, the agreement was made, and they say that this shows that there was decisive influence. I am going to explain why that is not the case. We know from Danny Durkan's cross-examination that the purpose of the arrangement was to avoid confusion as to which tender was intended for which company. He explained in cross-examination and one sees it in the witness statements as well: DL traditionally concentrated on public sector work and DP was set up to carry out private sector work. They had different interests from the start.

They were not giving anything up in substance. That is already what they each did and wanted to do.

This agreement, we say, is not evidence of DH controlling DP; it is actually DH saying: OK, we recognise we are independent; we will not encroach on your business and you are not going to encroach on ours. Control and division. They are not bringing DP into the group hug, into the single economic entity. Quite the opposite. DP is standing up for itself. Again, (and this is all 1993) the final sentence of item 2.01 in the board minute for 2nd November 1993 reflects the separate nature of DH and DP. It is another of these phrases one finds continually in the early period:

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

They wanted to be separate. That is what this was about.

PROFESSOR PICKERING: One of the benefits of having two subsidiaries that are operating in different segments of the market presumably is that they do not therefore compete with each other and therefore there is the opportunity to profit maximise in each segment. I know that it would be argued that in this sector there is quite a lot of competition from other companies, but is it not a rational strategy within a single organisation to handle different market segments through different subsidiaries?

MR. HOSKINS: Yes, but it is also rational for two separate companies.

PROFESSOR PICKERING: They would not necessarily stay separate.

MR. HOSKINS: But in this case the question is: did they? But that is a perfectly rational strategy in the context of this bespoke business agreement. Pudelek and Simmons wanted to come in and run a private sector business. DL concentrated on the public sector.

PROFESSOR PICKERING: But they also aspired to move into more negotiated contracts and away from tenders.

MR. HOSKINS: But not in the private sector. That is not the evidence, with respect. The evidence does not show that DL had, in 1993, there or thereabouts, an intention, a desire to move into the private sector and that the way they decided to do it was through the arrangement with DP. The evidence is that when DP approached DH and said they wanted to do work in the private sector it was attractive to them as an investment.

PROFESSOR PICKERING: But later on it was DP, was it not, that wanted to move more into negotiated work and away from tendered work?

MR. HOSKINS: But not in the public sector.

PROFESSOR PICKERING: The evidence is that it was in the public sector that the balance was more towards negotiated work.

MR. HOSKINS: That type existed in the private sector. There is no distinction. You cannot say tender work equals public sector and negotiated work equals private sector work

PROFESSOR PICKERING: Of course not. There are always outliers.

MR. HOSKINS: We do not have the evidence that one was more exceptional than the other. Of course, tender work is common in the public sector, but, equally, so was the negotiated work.

PROFESSOR PICKERING: I am sure, as you said, we have all been keeping our own tallies. My calculation is that over the years 2001 to 2007 - that is, to the following 31st January - more than 75 per cent of the revenue to Durkan Holdings minus DP came from negotiated work and over the same period more than 75 per cent of DP's revenue came from tendered work.

MR. HOSKINS: But there is no evidence that DP had a desire to move into the private sector, with respect. I am sorry. -- into the public sector.

THE CHAIRMAN: Even when times were very hard ----

MR. HOSKINS: There is no evidence, madam.

THE CHAIRMAN: I suppose the question for us is whether there is no evidence of that because they did not desire it, or because they knew that if they tried, they would get a strong word down from ----

MR. HOSKINS: Madam, with respect, there is enough to consider in this case in terms of just assessing the evidence there is. But, with all due respect that is not the start of speculation which really we should be indulging in. The OFT is defending its decision. The evidence is that it is clear at the outset what the intentions were, and there is no evidence to suggest that DP ever changed its strategy and cast a longing eye on the public sector. That was not put to any of the witnesses. The evidence in the original witness statements talks about the expertise in the different sectors. Simply, there are barriers to entry, if I can use the common phrase. It is not simply that one day DP wakes up and thinks, "Actually we will move into public sector work". It just does not work like that.

Para.113. Another aspect of this is that some of DP's contracts have come via Durkan. Again, why does that show that DH controlled DP? DH were shareholders in DP. If Bill Durkan could do a favour to DP and improve his shareholding, he would. But, giving someone a contact is not evidence of a single commercial strategy. I should say that para. 113 is actually quite useful because it sort of ties up with the submission I have just been

making. Danny Durkan states in cross-examination, “We had a public sector business. We did an investment in the private sector business. That is how it worked”. There is the distinction I was trying to get across.

Introduction of contacts. It is the same point I have just made - the fact that Bill Durkan says, “Actually, have you thought about speaking to so and so, whilst they are in the betting shop?” Again, that is not evidence of decisive control. The site visits -- Well, what can I say? They were infrequent, once-a-year courtesy visits that ceased in about 1995. We had Mr. Pudelek’s colourful description of the social nature of the visits. The OFT closing at para. 39(d) suggests that these site visits by Bill Durkan meant meeting clients on behalf of DP. But, that is not the evidence. Again, I put a little flag up: Please do not trust counsel’s paraphrasing. “Chairman: With those site visits would you both meet the client on the site?” He does not answer the question. He goes into the description of how he and Bill Durkan enjoyed their day. I am sorry. Again, the site visits in 1993, 1994, 1995 in the betting shop is not evidence - not serious evidence of decisive control.

Payments to and from DP. The point has been made - and, Professor Pickering, you have made it as well - that ‘payments were made between you’. One sees them in accounts moving between DP and other group companies. There is an explanation of that. It is the second statement of Mr. Fraher at paras.27 to 28. Perhaps we can turn that up at Bundle 2A, Tab 7, paras.27 to 28. There is actually a very detailed description of why you see the money going to and fro - an explanation of why it does not show control. Some of these are referred to in cross-examination, but these particular passages were not even challenged in cross-examination. One sees the ‘furbs’. One sees the refurbishment of Durkan House One sees the motor car hire agreements. One sees the reference to the speculative residential developments. Referred to in cross-examination, yes. Challenged in cross-examination, no. So, again, the suggestion that just because one sees money moving between the companies in the accounts they must be treated as the same company -- I am sorry. Not on this evidence.

A related issue - loans. In the OFT closing para.35, it is suggested that the £200,000 interest-free loan was made from DP to Durkan New Homes Ltd. in the year ending 31st January, 1997. Paragraph 118 of my note. Mr. Fraher commented on this as follows:

> “My view is that it never lent money to Durkan New Homes. I appreciate what this says here, but I suspect - I am just wondering, is this one of the contributions that it paid towards their participation in a couple of joint ventures ... I believe, on the hop now, that it might have been something towards the few spec

developments that we did on a joint venture basis and they paid a contribution, £200,000".

Now, again, the nature of the investment in Durkan New Homes as explained in second Fraher (Tab 7, paras.22 to 24) was not challenged in cross-examination. (Pause whilst read): Then Mr. Fraher explained why he did not consider the sum to be really alone. This is para.120 of my note.

"So, you are saying that the audited accounts and the audited financial statement is incorrect in this respect."

"Probably in the description but the £200,000 is actually shown there in 'Debtors', an outgoing by group undertaking £200,000".

That is entirely accurate because if one goes to DP's accounts for the year ending 31st January, 1997 -- I do not know if you want to turn them up. I took you to them in re-examination. It is at Bundle 2B, 93.

THE CHAIRMAN: Do we need to go to that?

MR. HOSKINS: Madam, I took him to it in re-examination. You may well remember it. There is the heading 'Debtors'. There is an entry 'Amount of Group undertaking - £200,000' which is entirely consistent with Mr. Fraher's evidence. Again, if we are talking about loans, if that is the evidence it does not even really stack up on this particular one because it looks like it was an investment - DP using its own money; Pudelek and Simmons using the money to make an investment. It is not an intercompany loan where money is just being switched around within a single economic entity.

Reference to controller in the accounts. We saw a number of points. The main one was that if you look at DP's accounts it referred to DH as its 'controller'. This was dealt with in the second Fraher statement at para.31. It is an accountancy term. Madam Chairman, you made the point - and it is correct - that the accountancy term 'controller' is not synonymous with the *Akzo* test. One can actually see that from the Decision itself. If we go to the Decision at p.102, tucked away at Footnote 501, you get a description of the legal and accountancy position. (Pause whilst read): So, for example,

"--the parent company's interest in the subsidiary is held exclusively with a view to subsequent resale ... the parent company is still required to report the activities of the subsidiary but as assets controlled by the parent ----"

I did not do these accounts. We do not have the evidence of who did. But, that is an explanation of how the use of the term 'control' which is not synonymous with the *Akzo* test.

Madam, you made the point in relation to clause 2.2 of FSR8 - again we have the definition of 'control' as the ability to direct control. It is not the *Akzo* test. Mr. Pudelek, to his credit, was spot on. He did not know the legal niceties. He was asked about it.

> "It may be that in the accounts - sorry, let me rethink what I am going to say for clarity -- yes, for accounting purposes Durkan Holdings are given here in auditing parlance by Grant Thornton as being the controlling company, the reality is 100 per cent certain the controllers of Durkan Pudelek were Mike Pudelek and Colin Simmons".

We can give him a Gold Star. He was spot on without knowing the detail.

The next heading is p.31 of my submissions - 'Collecting Money'. Again, it is an isolated trivial incident relating to Hoxton Square. Danny Durkan knows someone in Hackney. He says, "I'll have a word with them". It is not decisive influence.

Infringement 135. In its closing at para.46 the OFT suggests,

> "Fraher has admitted direct involvement in Infringement 135 through seeking to obtain the compensation payment".

With respect, that substantially overstates what Mr. Fraher has accepted because the actual infringement, i.e. the agreement to make the compensation payment, took place in January 2003. Mr. Fraher had nothing to do with it until December 2003, almost one year after the actual infringement. He says he was asked by Colin Simmons to assist in collecting a debt. He says he was not told and was not aware of what the nature of the debt was. One finds in the Decision, the way it is put, that,

> "This is clear evidence of a director, an employee of Durkan Holdings taking business, financial and operational decisions for and on behalf of DP, even to the extent of having direct involvement in respect of an infringement".

With respect, it is evidence of Alan Fraher assisting in debt collection subject to the instructions of Pudelek and Simmons.

The OFT says in its closing at para.48 - and I think we need to turn it up just to see these points - that, "Mr. Fraher in fact almost certainly knew what the payment was for". That was the way it was put. You may remember those paragraphs. Paragraphs 48(a) and (b). "It is not unusual for somebody to lead you down a track and then suddenly pull the plug --" Mr. Fraher was not referring to previous incidents of compensation payments. Madam Chairman, I think you picked up the point yesterday in Miss Bacon's closing. What he was actually referring to was situations where Durkan would do some work on behalf of another company in relation to a job that was then aborted. I have set out his evidence.

> "I could only speculate - it is speculation, this is not within my knowledge at the time - that they could have been sharing costs on a job, they could have been working on a tender, perhaps Durkan Pudelek were going to do a job for them and brought to a certain stage and as aborted ----"

That is not an unlawful act. It is a perfectly lawful act. He is explaining a situation in which what he was asked to do would be perfectly acceptable. So, I am afraid the OFT's reliance and suggestion that he was basically accepting that he had done this in the past for compensation payments just is not correct.

Then, para.48(c),

> "Now, in truth, at the back of my mind I said if there was no contract signed and so on, there was dodgy ground".

The OFT say, "Oh, dodgy. That means he knows there was something unlawful going on". Well, let us read what he actually said,

> "There were many cases where we would chase payments, but if your contract isn't in place, or you haven't got all the legal documentation it's a hard fight to try to get money through a court".

That is what he meant by 'dodgy ground'. Difficult to enforce if you do not have the correct documentation. So, with respect, the three examples given of why Mr. Fraher must certainly have known that he was being asked to collect a compensation payment simply do not support that submission.

You saw both Mr Fraher and Mr. Simmons being cross-examined in relation to this point, they were both embarrassed about it – for different reasons but they were both embarrassed about it. The point is that both were adamant that Mr. Fraher did not know what the purpose of the payment was and Mr. Fraher's first statement, para.17 is very candid. He admits that with the benefit of hindsight he could and should have asked for more information, but the fact is that he did not and again with respect to the OFT business is not all straight lines, neat little boxes and compartments. Life is not straight lines and neat little boxes. With all due respect there is no reasonable basis upon which the Tribunal can conclude that both Mr. Fraher and Mr. Simmons are lying about this point because, let us make no bones about it, that is what the OFT is asking you to do.

Common professional advisers. The OFT established that DP and DH had certain solicitors, accountants and banks in common, but again one sees that that this is an example of "willing to wound but afraid to strike". They did not ask Colin Simmons or Mike Pudelek why they had common bankers, solicitors, or auditors. They did not ask whether it

was as a result of their independent decisions or was a result of instructions from DH. So at best one has a bit of circumstantial evidence there.

In relation to auditors, Danny Durkan explained there was a statutory requirement that the holding company and subsidiaries should all be audited by the same firm.

The final miscellaneous point is the counterfactual case. Remember, this is the suggestion that the market sharing and information sharing arrangements entered into were so obviously unlawful that it is not credible that all the various businessmen involved did not believe that they were a single economic entity and therefore were safe from the reaches of competition law.

Again, with all due respect, whilst the various witnesses called may now have a fuller understanding of competition law issues, the idea that they were experts in competition law entering into these sorts of arrangements is completely fanciful. Crucially, Mr. Blair pointed this out, this argument is not a pure legal argument: were these unlawful or not? It depends on the perception of the witnesses, because unless they were aware of the legal consequences of this act or that act that this point just simply does not arise, and that is clear from the OFT's closing at para.54. The way they put the case is this:

> "It is quite plain that DH and DP would *not* have regarded agreements between the Durkan companies as being subject to the Chapter I prohibition."

The case is built on what the various actors would have known. The point was not put to any of the witnesses. Miss Bacon said she did not want to put a legal point to them, but the point is based on their understanding of the law, without that evidence it simply does not fly, and the idea that they are competition law experts and arranging their affairs accordingly again is just not real life.

Where does that leave us? There were clearly links between DH and DP, but we know that that is not enough; we know that from the case law. We are looking for carried out instructions in all material respects, we are looking for decisive influence, the Advocate General talked about "single commercial policy", but you saw the breadth of the sorts of issues she was considering, that one would need to have a single commercial policy. It is a question of substance not form. The fact of common directors is not enough. The question is: what did they actually do? The board meetings only took place once every two months. The general nature of them is confirmed by Horvath, it is quasi audit and shareholder discussion, and that is consistent with the evidence from the participants.

The common strategy was not set at board meetings, it was set by Pudelek and Simmons, the key operational issues taken at monthly contract review meetings, the prayer meetings, DH directors were not present.

If one looks at the board minutes, the number of lengthy discussions on any topic was limited, and in any event the fact that the matter was discussed and the DH directors participated in discussion does not equate to giving instructions in all material respects.

With typical candour, let us not fault him for that, Mr. Pudelek confirmed that the decisions as to commercial strategy were a matter for him and Colin Simmons, the buck rested with them, that is what he thought he was doing. There was no invisible stick, it was his baby.

We have the reliance on the opinions expressed by William Durkan in the earlier years, they were opinions not instructions. The evidence quite clearly shows that after 93, 94, 95 things moved on, and it is clear that even in the early years Bill Durkan's prime concern was that DP should stand on its own two feet. That was the whole point of the agreement in the first place.

Alan Fraher was responsible for providing a lot of services pursuant to the SSA, that was the *quid pro quo* , that was the investment in the deal, it is not decisive influence, but he acted pursuant to the instructions of Pudelek and Simmons. He did not tell them what to do, they told him what to do, it is quite clear. At board meetings it is right that Alan Fraher would sometimes highlight issues but he did not direct. He was eyes and ears of DH, he did not tell them how to run their business. Again, it is not much fun, if you look at the BMs we say it confirms all of this.

Unless you have any questions that is all I wish to say on the control issue.

THE CHAIRMAN: Thank you very much, that is very helpful, Mr. Hoskins. Miss Bacon, do you have anything you want to come back on on the Shareholder Agreement and the Table A points? Or do you want to think about it overnight?

MISS BACON: I was planning to reply, if at all, tomorrow at the end of Mr. Hoskins' closing submissions. I think we would like to think about it overnight, if that is possible.

THE CHAIRMAN: For my part it would be more convenient to hear anything you have to say on that first, unless you object to that, Mr. Hoskins, just to finish with the control issue.

MR. HOSKINS: No. madam.

MISS BACON: Did you mean immediately now, or tomorrow morning?

THE CHAIRMAN: Tomorrow morning.

MISS BACON: That is entirely acceptable, we can do that.

THE CHAIRMAN: I am assuming it will be fairly short.

MISS BACON: If anything at all, but we are happy to do that first thing tomorrow morning.

THE CHAIRMAN: How are we getting on – Mr. Beard, yes?

MR. BEARD: Sorry, I was going to raise merely a matter that I forgot at the outset of this afternoon, which was to ask formally that Mr. Singla could be released for this afternoon and for tomorrow morning.

THE CHAIRMAN: Well, I retrospectively allow him to be absent this afternoon and prospectively acknowledge his absence tomorrow morning.

MR. BEARD: I am most grateful.

MR. HOSKINS: In terms of timing, subject to any questions you may have I shall be significantly less time on Infringement 220. What I would imagine is I finish on that and move straight into penalty instead of hanging around until after lunch.

THE CHAIRMAN: Quite. So we will start at 10.30 tomorrow morning. Thank you very much.

(Adjourned until 10.30 a.m. on Friday, 23rd July 2010)