IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1122/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

THE HONOURABLE ANTHONY LEWIS
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

AH WILLIS & SONS LIMITED — Appellant

– v –

OFFICE OF FAIR TRADING — Respondent

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HEARING

APPEARANCES

Mr. Matthew Cook (instructed by Field Seymour Parkes) appeared on behalf of A.H. Willis & Sons Limited.

Mr. Daniel Beard and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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THE PRESIDENT: Good morning ladies and gentlemen.

MR. COOK: Sir, good morning. I, of course, appear on behalf of the appellant, A.H. Willis & Sons Limited, who I will refer to as AH Willis or Willis throughout. My learned friend, Mr. Beard, appears on behalf of the Office of Fair Trading.

Sir, this is, of course, an appeal against both liability and penalty. Subject to your agreement, sir, what Mr. Beard and I have discussed is that we should deal with liability first. You will hear all the submissions on liability and then hear all the submissions on quantum and penalties afterwards.

Starting then with the issue of liability, we have of course put in a witness statement from Mr. Mark Willis, which is exhibited to the Notice of Appeal. The OFT has confirmed that they do not wish to cross-examine Mr. Willis. On that basis, unless you wanted me to formally call Mr. Willis to confirm the truth of that statement ----

THE PRESIDENT: I do not think we need you to do that.

MR. COOK: Thank you, sir. Sir, of course, AH Willis has set out its position in some length in writing already, both in the Notice of Appeal and in the skeleton argument. It will not surprise you to know that I do not intend to repeat all of those submissions today, and would not be given an opportunity to do so if I tried.

THE PRESIDENT: We are very grateful to you, and we have read them.

MR. COOK: Thank you. Obviously, I am not going to make all those points, but I would say now that we do stand by all of those points and we rely upon them in full. I am just basically going to try and hit some of the high notes in front of you orally. Turning then to the alleged infringements, the OFT's case is that AH Willis was involved in three cover pricing infringements, each in relation to a single ender and in each case the basic allegation is the same - that AH Willis was approached by Mansell for a cover price and AH Willis agreed to, and did in fact, provide a cover price to Mansell and Mansell bid for the tender on that basis. In each case there are a number of other parties to the tender, and it is not suggested that they were involved in any way in an agreement with either Mansell or Willis. In relation to two of the alleged infringements - that is, 188 and 215 - that is essentially the whole of the allegation against AH Willis - that an unspecified person at Mansell approached an unspecified person for whose actions Willis is legally liable at some unspecified date a cover price was requested and provided. Now, the position in relation to alleged infringement 224 is quite different. In relation to infringements 188 and 215 AH Willis has done the investigation internally and simply has not found any story to be able to tell. As far as it can tell there was no contact with Mansell at all. That is as far as the

investigations have managed to go. In relation to infringement 224 the investigation has uncovered what went on and in fact, as the OFT has rather seized upon that and bases its case upon what AH Willis has discovered.

THE PRESIDENT: This is Mr. Elbourn.

MR. COOK: That is the Mr. Elbourn story, of course. The third party contractor, Mr. Elbourn, was hired to prepare costings. He was the one who spoke to Mansell. In relation to this, of course, the OFT is not challenging the evidence. They in fact accept and rely upon that being what happened. They also accept that Mr. Elbourn is a third party contractor who runs his own business and he works for a number of companies in addition to Willis. It is also not suggested that in dealing with Mansell that Mr. Elbourn was acting with the knowledge or actual authority of any director or employee of AH Willis. So, what is said here is that we are liable either because Mr. Elbourn is part of the same undertaking as Willis, or that he had ostensible authority to act on AH Willis's behalf. Now, when one talks about ostensible authority - I will come to deal with that in more detail - it is important to think about ostensible authority in relation to Mansell. There may be a distinction between ostensible authority that you have in relation to one party based on the representations that have been made about the authority in relation to another party or in relation to the world at large. So, the key must be that Mr. Elbourn had ostensible authority as in relation to Mansell to deal on behalf of Willis.

THE PRESIDENT: Ostensible authority to give a cover price or to do what?

MR. COOK: Well, it is said effectively that he had authority to enter into arrangements/agreements on behalf of AH Willis. That appears to be the assumption.

THE PRESIDENT: Unlawful ones, yes.

MR. COOK: Of course, authority to enter into an unlawful agreement, yes. I would accept that, in reality, if he was given authority to deal with Mansell on behalf of AH Willis the fact that he chose to exercise that in an unlawful fashion would unfortunately be no way out for me. He did not have actually authority, but did he have ostensible authority to enter into transactions with Mansells on behalf of Willis.

THE PRESIDENT: Just one question on the facts. I think I saw two slightly different versions in the skeletons maybe, or maybe in the appeal and the defence, but it is common ground that the request for a cover price came after the submission of the tender documents. The first conversation related simply to getting an extension of time from the architect.

MR. COOK: Yes.

THE PRESIDENT: But not for a cover price?

MR. COOK: I think it is being said that effectively there were three relevant contacts, relevant in the sense that they happened, only one of them was relevant for the cover pricing. The first one was a contact that presumably would have happened before the date of submission and that was simply a request that Mr. Elbourn should join in in seeking a general extension. Then we have the request for a cover price which, factually, Willis say is "based on what Mr. Elbourn has told us", that happened after Willis had submitted its bid. Effectively the OFT does not put forward any evidence to the contrary. Factually that is the only evidence that there is. It appears to be that that is the position. Then there is reference to the fact that some time later, after the bids had been submitted, the University of Reading comes back, Willis is the winning bid, Mansells comes second. In those circumstances, after a bit more of breakdown, it appears that Mr. Elbourn helped out Mansells by providing them with a bit more of a breakdown.

THE PRESIDENT: The one on which the infringement is based is the middle one, is it not?

MR. COOK: Yes, absolutely, Sir.

I must start by dealing with 224, which is the Mr. Elbourn infringement. Mr. Beard has to establish either that Mr. Elbourn is part of the same undertaking or that he has ostensible authority, and I need to show you that neither stands.

Turning first to the undertaking point, and before looking at this in detail, Sir, I would invite you to take a step back for a moment and just recognise that in this kind of industry the extent to which sub-contractors are used, particularly for what is a small business, as AH Willis is, where it has a relatively small pool of staff, and in practice will sub-contract out a huge number of what one might refer to as specialist trades. So, depending on Willis's requirements, the nature of the job, etc, they might use a variety of sub-contractors, say plumbers, heating engineers, painters, electricians, the whole variety, scaffolders, roofers, a whole variety of specialist trades that might be engaged on a sub-contract basis. They may be engaged one, they do not do a very good job, will never be engaged again, or they may be engaged once because that is a very specialist trade that will not be required again, or it may be that they do a good job. If you are an electrician, for example, you might be required on most jobs. They may end up being engaged once or many times, but it will always be on a case by case basis, job by job basis, to provide particular specified services agreed for the purpose of that job.

Willis of course also uses other forms of professional rather than just trade sub-contractors. They use cost estimators of course, which is what Mr. Elbourn is, and no doubt in

appropriate circumstances it will use a variety of other professionals, structural engineers, lawyers or accountants.

It is important also to recognise that this does not just work one way. The nature of the business that AH Willis has also involves the fact that AH Willis is regularly a sub-contractor to other parties, and one of the key people it provides sub-contracting services is in fact, Mansell, and this is through the Civil Groundwork Division of AH Willis, you see a mention by Mr. Willis in his statement that there is volume of business about £200,000 a year in the past that AH Willis has done for Mansells. There is a huge number of sub-contractors doing a variety of jobs both across the industry as a whole and in the context of a business like Willis, and you may be the contractor on one job and sub-contractor on another or vice-versa.

It is an obvious point but it is important to recognise, that any sub-contractor, any party contracted to provide services, is at some level required to comply with the instructions of the party it is contracting with. That may seem like an obvious point, but they are obliged to do the job they have been hired to do, to carry it out in the way that they are directed, at least in general terms by Willis, which is very important on building sites where issues like Health & Safety will make it vital that the job is carried out in a particular way in a particular manner. So any sub-contractor is in practice obliged to comply with instructions. It may be that the instructions do not need to be wholly specific because to some extent you are hiring a professional in to do the job in the right way, but they are obliged to comply with those instructions.

It is also important to recognise that each of those businesses is effectively running its own independent business, and the viability of that business will depend on its ability to acquire work from Willis and a variety of other builders out there, and they are assuming the financial and commercial risks of that wide business. But in the context of a single job, if you have an electrician that is hired in to do the electrics on a building project that electrician is only taking the financial and commercial risk associated with the electrics on that job, he is not taking any wider risk on the job as a whole, because he is not agreeing to do the job as a whole, he has a deal with Willis to provide just the electrics, Willis is the one that is taking the general risk on the job.

The reason I start looking at this as a general point, it is important when one comes to look at Mr. Elbourn to see him not simply as being a single example, but to see him as being what he is which is one of many sub-contractors that AH Willis contracts with, and to see the extent to which Mr. Elbourn is in some special category – either all those sub-

contractors are part of the same undertaking as Willis, which will be extraordinary and have some quite extraordinary consequences, or there must be some special factor which makes Mr. Elbourn part of the undertaking which no other sub-contractor would be. It is important to recognise what the impacts of the undertaking question actually has.

First off it has the obvious consequence that the contractor is liable for the actions of the sub-contractor, even though he is doing things that he never should, could or would have been permitted to do. Strictly, it works both ways. If you are part of the same undertaking then strictly you are both liable for the infringement, which leads to the position where the sub-contractor is equally technically liable for the infringement if it is committed by the main contractor. That is the logical consequence of what is being said here. If you are part of the same undertaking you must be part of the same undertaking both ways round.

The other effect of treating two businesses as being part of the same undertaking, and one sees it all the time with parents and subsidiaries, is you look at the entire turnover of the undertaking, meaning the turnover of both businesses for the purposes of determining penalty. One starts adding up turnovers by doing that and again one can get the old situation conceivably where a sub-contractor might be part of an enormous organisation and suddenly by treating the sub-contractor as part of a wider business that turnover issue can massively inflate well beyond anything associated with the turnover of that particular job or the turnover of the main contractor.

The other consequence which is fundamental in this situation is to recognise that the one thing that you cannot do if you found that both two businesses are part of the same undertaking is find that they are party to an anti-competitive agreement with each other, because an anti-competitive is an agreement between undertakings. If therefore you are part of a single undertaking you cannot have an anti-competitive agreement because that is internal.

So, by stretching the definition of 'undertaking' you in fact prevent anti-competitive agreement existing. I made the point earlier that, of course, AH Willis provides subcontracting services to Mansell. The logical extension of that would be that AH Willis could not have committed an infringement with Mansell if it was part of the same undertaking as Mansell. Now, I am not suggesting that that is the right answer here today. I am saying that that is the absurd development ----

THE PRESIDENT: If it was a subcontractor to Mansell on a particular job and it was therefore part of the same undertaking, then they could not be.

MR. COOK: Yes. If it is right that merely being a subcontractor is enough to treat you as being part of the same undertaking. But, I am saying that all of these propositions end up creating very real problems, particularly one can create situations where, as is often the case, there might be one subcontractor offering services to a variety of potential bidders - something specialist where there might be one, or only a few, subcontractors who can provide that particular field. So, it may be offering services, or offering to provide services, to a number of potential bidders creating a very confusing scenario.

So, we say it would obviously create extraordinary results if every subcontractor was treated as being part of the same undertaking as the company it contracts with. That clearly cannot be right. Of course it is not right. The question ultimately, as the OFT says in para. 22 of its liability defence, is the extent to which the subcontractor is carrying out an independent economic activity and the relevant principle which is cited at para. 23 of the OFT's liability defence (which we do not dispute) is of course taken from *Marlines S.A. v. Commission*. The passage reads,

> "-- where an agent works for his principal, he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking".

To be clear, we do not dispute in any way at all that there are some situations in which the relationship between two technically separate businesses will be such that one business can be regarded as an auxiliary organ forming an integral part of the latter's undertaking. That is the touchstone that needs to be addressed.

Much of the case law in this area has dealt with sales agents. Particularly on the continent that is because you have a category known as a commercial agent where it is commonplace for sales agents to be theoretically self-employed, but in reality almost akin to employees. So, you have situations in which an agent will be an exclusive agent and all he will do is this business. In some cases he may do that for his entire life - or many years of his professional life - working for and selling the products of a particular company. In those circumstances the reality is that you will often have situations where, sometimes for historical reasons, there will be a spread and, in some regions of Europe they will use a sales agent and in other cases it will be their in-house salesmen. But, their relationship with them, while technically distinct in terms of employee or self-employee will be very similar and have very similar features, including potentially the way in which they are paid. Both may be primarily or exclusively on a commission basis. In terms of the extent to which one

is taking risks of an independent business will be in practice very little different between the two situations. Certainly in those circumstances one can readily see why the courts have held that the sales agent is, in practice, an auxiliary organ of the company which is really an integral part of the entire business.

In the case of Mr. Elbourn though we are certainly - there can be no doubt - in a very different category from somebody who is effectively an employee. He is running his own independent business. He works for companies and businesses other than Willis. So, he is certainly not in that category of being the paradigm example. I will come back to whether he is sufficiently close to be an auxiliary organ in any event, but he is certainly not within that sort of paradigm example of somebody who will be treated as, you know, effectively akin to an employee.

What then is the characteristic which would render Mr. Elbourn, who is obviously carrying out his own independent economic activity, being different from all the other subcontractors who are carrying out their own economic activities such that he should be treated as an auxiliary organ forming an integral part of Willis's business?

The OFT focuses on a couple of points. Firstly, it focuses on the fact that Mr. Elbourn was bound to carry out AH Willis's instructions. But, as I have already submitted, that in practice is true of any contractor that is used - because in practice any contractor is bound to do as it is instructed to do by the party that has paid it to provide services. It is not being suggested that Mr. Elbourn was in some way in some completely different category. He was being paid to provide particular services in the same way as an electrician or a plumber was being paid to provide services, and to do so in practice to do the job he was being paid to do, but to some extent how he chose to do that, when he chose to turn up to work, what tools he chose to use in his job -- all those matters as one would when one hired any subcontractor, the specific way one chose to do the job would be down to the contractor, but in accordance with the instructions on the part of the employer.

So, there is nothing in that which distinguishes Mr. Elbourn from any other subcontractor in the industry.

What is also being said by the OFT as its second point is that Mr. Elbourn was part of the same undertaking as AH Willis because he assumed no financial or commercial risk in relation to the contract in question, which was a contract with the University of Reading that was being tendered for. The reason they say he was not really taking a financial or commercial risk was because he was not himself offering to provide the contract services. But, again, all they are doing is identifying a factor which is true of every single

subcontractor. The subcontractor is not offering to provide the contract as a whole. All he is offering to do is his little bit of it as a contract with Willis - whether that is the electrics or the plumbing or whatever else. So, any subcontractor is taking, effectively, the commercial risk, the financial risk associated with the service that he is providing. That is the nature of his business - but no wider financial or commercial risk, and certainly not a wider commercial and financial risk in relation to contract as a whole. So, again, all they have done is identify a feature that is true of every single subcontractor.

Where does that leave their case? In my submission it leaves them with somebody who is simply the same as any subcontractor. He is an independent business and therefore there is simply no rational basis to treat him as being part of an auxiliary organ integral to AH Willis's business. That is the test. The question is whether you are effectively so integral to the business that in practice you should treat Willis as being liable for the actions. That is the impact of what is being done here. You are saying that there are times when subcontractors are effectively so integrated within the business that you can properly start to say," They are so close to being within your business that you should be responsible for their actions as opposed to the general position where, if somebody is outside the business they are responsible for their own behaviour effectively". That, we say, is the touchstone that the OFT simply has not managed to address in relation to Mr. Elbourn to identify any factor - simply because there is no factor - which takes us out of the standard run of subcontractors.

It is also important to note that the OFT just did not have the confidence of its own convictions in this argument. It relies upon the notion that Mr. Elbourn is part of the same undertaking, but it does not follow it through to the logical extent of what that would mean. As I have already submitted, if Mr. Elbourn is part of the same undertaking, he should be the addressee of the Decision because he is part of that undertaking. Equally, if he is part of the same undertaking, his turnover should have been relevant. It may be that he does not have any turnover in the specific market under consideration, but certainly when he came to address the MDT his turnover should have been included as total turnover. In practice it may have made no different to Willis's fine because the fine was much higher anyway, but that is beside the point. That will be the consequence of the argument the OFT wishes to run. The flaw in it is shown by the fact that the OFT itself was not willing to go that far.

The reason why we say that the undertaking point simply cannot stand - unless one can treat every single subcontractor as being part of the same undertaking as any company it works for, and the rationale for doing that will be simply extraordinary because what you are doing

is saying that you are responsible for anyone that works for you regardless of how tiny a little job they do -- The fact that it is a one-off is simply, in my submission, absurd and, to be fair, it is not something that even the OFT suggests is the right conclusion.

The next line of argument is the ostensible authority issue. The point being made is that Mr. Elbourn acted with the ostensible authority of Willis, and so we are vicariously liable for his actions in dealing with Mansell. Important points to note: one, it is not being suggested that he had actual authority; two, the OFT are not suggesting that there is any form of assumed understanding in the industry about the kind of authority that a third party cost estimator will have. This is not a situation in which ostensible authority is based "cost estimators always have this kind of authority". It is not being suggested that it is based on that kind of general understanding.

Also it is noticeable that the OFT has not sought to advance any direct evidence from anyone at Mansell about how they saw Mr. Elbourn in this context. You are invited to draw inferences based on comments in the documents, but the OFT has not done the obvious thing of asking the individuals involved what they thought Mr. Elbourn could or would do, or was in a position to do.

How does the OFT advance its case? What it does is make the point, and this we agree is factually absolutely correct, that AH Willis gave Mr. Elbourn specific authority to submit the tender return. We say that, in practice, that was basically an administrative process, but AH Willis had decided what level of bid to go ahead with, but since the documents were most conveniently with Mr. Elbourn he was given authority to sign and post the tender return to the University of Reading. It is contended that that, in practice, is sufficient to give Mr. Elbourn ostensible authority against all third parties in relation to this tender. So that is the reason why it is treated as being good enough as against Mansell. It is against all third parties based on that permission to submit the tender to the University of Reading.

Sir, it is quite helpful to see how the OFT puts its case in this regard and in particular the liability defence at paras.25 to 27. Picking it up at para.25, I start by referring to footnote 39, which we see in the fourth line of para.25, because that sets out what I would agree is an absolutely correct, unsurprisingly, since it is from **Bowstead & Reynolds**, statement of the law of agency in this regard.

THE PRESIDENT: Sorry, which bit?

MR. COOK: It is footnote 39, which is a quote from **Bowstead & Reynolds**, a leading textbook in this area, which has a summary of the principles in Article 72 set out there:

> "Where a person, by words or conduct, represents or permits it to be [represented] that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority …"

Certainly we would agree with that as an absolutely correct statement of the law. Breaking that down though, what it involves, therefore, is, firstly, a representation, a representation which is either made by Willis or which Willis permits to be made. So it has to be a representation that derives from Willis in some way. Secondly, the counterparty needs to deal with the agent on the face of that representation. So the important thing is that the counterparty is the one that needs to be aware of and rely upon that representation.

If we now go to para.26 we see, applying those principles, how the OFT seeks to make good its argument. They start off by making the point here about the representation – that is para.26(a), so we have:

> "… Willis explicitly consented to Mr. Elbourn generating and signing tender returns … Willis thereby represented that Mr. Elbourn that Mr. Elbourn was authorised to act on its behalf in relation to the submission of its tender for Redlands Road."

It is significant to note that what the OFT does not grapple with is who was that representation made to. The only person it was made to, since it is not suggested that Mansell would ever have seen this tender return, or would have any reason to do so, the only person it could have been made to was the University of Reading. So it is not a representation that goes anywhere near Mansell.

THE PRESIDENT: The relevance of Elbourn to Mansell was that he knew what the figure was?

MR. COOK: Yes, absolutely, he knew what the figure was. We have made the point, he knew what the figure was and in reality he was somebody who no doubt might have had half an eye on getting some work from Mansell who were one of the bigger players in the area. That was the only reason. That is a point we would very much make, Sir, that was all they were doing, they were going to somebody who would get them the information, and the notion that they were going to him because he was in a position to do anything on behalf of Willis is simply absurd.

THE PRESIDENT: It is difficult to see how they could be relying on any representation. Why would they be interested? The just wanted to know the figure, or a figure which was higher than the figure.

MR. SMITH: Mr. Cook, I see that in para.26 of the defence and in your submissions there is a reference to "ostensible authority" and "vicarious liability". Are you equating those two principles, or do you see them as distinct?

MR. COOK: It depends what you mean. The term "vicarious authority" means different things in the context of whether you are talking about an employee or whether you are talking about an agent. Certainly one of the disagreements between the parties, and arises in part from the *HSBC* decision, is in the context of that difference, and in the context of an employee you are vicariously liable for effectively anything that the employee does that is connected ----

MR. SMITH: In the scope of his employment, yes.

MR. COOK: Yes, related to the scope of his employment. In the context of an agent – and that is the second part of footnote 39 – you are looking at "is the agent acting within the scope of their actual or ostensible authority?" It is only in those circumstances that it is brought home to the principal. Vicarious liability is co-terminus with authority, actual or ostensible, in the context of an agent, it is not in the context of an employee.

Turning then to para.26(a), that is the representation. The representation simply does not bit in any way to do with Mansell.

The next point that is being made is 26(b), which is:

> "Mr. Russ' evidence that 'Willis' was approached for a cover, and the contemporaneous document records the cover being obtained from 'AH Willis' rather than Mr. Elbourn. This indicates Mr. Russ's (accurate) perception that Mr. Elbourn was acting for Willis in relation to this tender."

Again, in relation to this, there is an acceptance in the OFT's liability defence at para.17(a) that it appears that unsurprisingly that Mr. Russ, who might well not have been the person actually involved in these, has no direct recollection of many of these tenders. What he is doing is looking at his documents and saying, "Yes, that seems to be Willis because that is what it says". The notion that one can draw anything from the fact that Mr. Russ looked at the document and thought it was Willis, in my submission, is simply wrong.

One is left then with a contemporaneous document recording the cover being obtained by AH Willis, and if the work book records "AH Willis" in brackets it means it is a cover from Willis.

The notion that that can be treated as saying that Mr. Elbourn was acting with actual or ostensible authority in relation to Mansell is simply absurd. Sir, as you said, the point is that this was a price that was coming from Mr. Elbourn but the important thing was that it was a price that reflected what another bidder was doing, and that other bidder was AH Willis. So, in practice, the only interest from Mansell's point of view was the fact that it was a price based on Willis's price, not that it was coming with actual or ostensible authority from Willis.

THE PRESIDENT: You mentioned Mr. Russ, Mr. Cook. At some point, it does not relate necessarily to this issue, I would be interested to hear your submissions on what weight we should give to the interview notes. We have not got a statement from Mr. Russ, and he is not giving evidence, as I gather. It may be that you will be coming to that anyway.

MR. COOK: I will come to Mr. Russ in more detail when we come to the other two alleged infringements. The suggestion is that you can infer from this that Mr. Russ is saying that Mr. Elbourn had ostensible authority to act for Willis. That, in my submission, simply cannot be right. If the OFT wanted to make good that point, it could have asked Mr. Russ that question easily enough, and it chose not to do so.

The other point made in sub-para.(c) is the point, and this refers back to the first transaction that we talked about earlier on today, which is the first interaction between Mansell and Mr. Elbourn which was talking about the extension, and again it has been suggested this provides evidence that Mansell consider that Mr. Elbourn had authority, represented AH Willis; again in my submission that simply does not follow. The reality was that Mr. Elbourn may well have been an appropriate person to talk to in the context of this because he will be the person who would know who to ask at Willis, but there is simply no suggestion they were going to him in the belief that Mr. Elbourn had authority to make decisions on behalf of Willis himself unless they believed he had that authority, that was simply asking somebody to act as messenger and that is an entirely different matter. Again, the evidence does not stack up to suggest it was more than simply asking Mr. Elbourn as a suitable messenger.

Again, in my submission, on the second limb of argument there is no basis to suggest that Mr. Elbourn was acting in any way with the ostensible authority to act for Willis, and just stepping back from the legal test, in my submission that clearly must be right. If you are talking about the kinds of people that one would expect an employer to make sure are aware of competition law requirements, to carry out compliance training with one expects people to do that with employees, directors, in order to make sure that you are not liable. One does

not realistically expect any company to go out and every single time it employs a subcontractor, even if that subcontractor is coming in for an hour or two hours to fit a bit of wiring, or a boiler, to ensure that the compliance chain has been gone through because realistically one is treating those as separate businesses, compliance is their responsibility for their business and you take responsibility for your own business. Simply to treat AH Willis as being responsible for people in the sub-contracting status of Mr. Elbourn is, in my submission, simply unrealistic, as well as being legally wrong.

Turning now to alleged infringements 188 and 215. In relation to these infringements we just have an unparticularised case that AH Willis is legally responsible, and was asked to provide and did provide a cover price to Mansell. We say that the only evidence that the OFT advances in practice is a single document and that is Mr. Russ' (of Mansell) work book, so this is the stage at which I can address the point about what weight you should give Mr. Russ' evidence.

The reason that I say you should give, in practice, no weight to Mr. Russ' evidence is you see the sections that we quote in our notice of appeal, it is quite clear and accepted by the OFT at para.17(a) of their liability defence, that Mr. Russ, it appears, has no direct recollection of any one of these individual tenders. So while he can assist in terms of explaining what the notations should mean, and certainly we do not disagree with that reliance to that extent, he does not provide, and cannot provide any direct evidence to say "Yes, I remember I talked to somebody at AH Willis" or "I was told that I talked to somebody at AH Willis". All, in practice he is doing is looking at the document in the same way that we can look at the document and say: "If that document is right then this is what happened", or "probably would have happened". But ultimately his evidence is essentially wholly parasitic upon the accuracy or non-accuracy of that underlying workbook document.

The same is even more fundamentally true of the second piece of evidence that the OFT relies upon, which is Mansell's leniency application, because again there is no suggestion that that is anything other than a wholly parasitic document prepared by lawyers who have taken, with no direct knowledge themselves, the workbook, looked at it and said: "That is what the workbook says and if that is what the workbook says this will be the position."

Ultimately all of the evidence comes down to the single reference in the workbook.

In the context of that single reference in a workbook ultimately the one of the questions the Tribunal needs to consider is: "How reliable is that kind of evidence available?" Of course, the OFT makes the point that it has been shown to be reliable in other cases and reference is

made to the variety of other infringements that decisions have been made in part based upon the workbook; in some of those situations it has proved to be correct.

The point I make in relation to the work book, obviously there is a reference to AH Willis, it is in brackets – that is a notation that has been explained. So if that reference is right, then that indeed would be very strong evidence. The problem is it is difficult to be reliably confident that it is right, and the reason for that is that this is a document that is on its face unreliable. The reason why I say that it is on its face unreliable is in relation to infringement 224, which is the one we have just been dealing with, the Mr. Elbourn infringement, there is a statement in brackets. There is an "AH Willis" firstly in brackets, and we have a second statement, which is also in brackets which, in itself is slightly misleading because we are told that brackets means it is cover price, but it is a statement in brackets saying "HN Edwards won it". It is agreed and accepted by the OFT that HN Edwards not only did not win that contract but was not even participating in the tender.

THE PRESIDENT: Is it helpful just to have it in front of us while you are making your submissions?

MR. BEARD: Sir, we are conscious that the copy of the workbook that is at annex 1 of the defence is not the easiest document to read so we have copies of a clearer version of this and they are on A3. I have provided a copy to my learned friend, that is effectively annex 1, so that is the copy of the workbook that is relied upon in relation to these matters. So if Mr. Cook wants to make submissions it might be useful to refer to that version.

MR. COOK: I think it is helpfully highlighted, so if we pick it up on the first page. My learned friend will want to say on the first page you have "(JJ McGinley)" they are in brackets and that is an example of another infringement which is effectively not being challenged. You see there at the bottom of the page and highlighted just "(JJ McGinley)".

THE PRESIDENT: Yes.

MR. COOK: If we now go to the penultimate page and we see there the second section that is highlighted, there is "(AH Willis)" there in brackets and "HN Edwards won it". One can start to draw some reasonable conclusions given the same references above potentially about how that mistake came to be made – the specific way it came to be made may be a different matter but ----

THE PRESIDENT: They were not in it, were they?

MR. COOK: HN Edwards were not in that infringement, but there is a very similar reference above, and it may be that it was duty payment from that, but the problem this shows is that this is a document that is unreliable, and I would say that reference is doubly wrong, and it

is doubly wrong because HN Edwards not only did not win it, it was not participating, and the price was not coming from Willis it was coming from Elbourn. Certainly in relation to HN Edwards that is just a point that establishes ----

THE PRESIDENT: No, sorry, which of the infringements – is that 224?

MR. COOK: That is 224, yes.

THE PRESIDENT: That is infringement 224, 12 and 16.

MR. COOK: If one goes up the page, the other highlighted "14 Redlands Road", will be one of the other infringements.

MR. BEARD: 215.

MR. COOK: 215, thank you. Willis is, unsurprisingly, not in a position to do much testing of this document generally. The vast majority of these tenders it will have nothing to do with, it is not in a position to know much about them. But on the very small number where we can look there is immediately an acknowledged and admitted error. In my submission, that casts a considerable amount of doubt upon the reliability that we can place upon this document. In many ways it is not surprising that a document of this kind would not be scrupulously accurate, this is not a formal or official document where you need to be taking a significant amount of care to ensure it is right. It is not being suggested these final comments were in practice of great importance going forward. Moreover, we had confirmation from Mr. Russ himself that in practice he only filled the workbook in weekly.

THE PRESIDENT: Did he always fill it in? Is that the position – no one else did it, he did it?

MR. COOK: It is his workbook, yes, so Mr. Russ would be the one who would fill it in. He also says that in some cases he might put the name in one or two weeks early based on the party that he expected to provide a cover price – so the name might go in in anticipation of something that never happened, or go in some time after something is thought to have happened.

The other issue is that it is not suggested by the OFT that Mr. Russ was directly involved in any of these tenders himself. His evidence records that he had a four man team of estimators and that business unit managers were also involved in the tender process. So, that is multiple people who might have been involved in any form of wrongdoing that was going on. In my submission there is a clear scope there for Chinese whispers getting around in terms of exactly what had happened; who was providing things. The conversation could easily be, "I tried Willis. They weren't around. So, I got somebody else". You know, that gets wrongly recorded as Willis. The point is that the reliability of this document is, in my submission, significantly in doubt.

Set against that, then, we have the evidence that AH Willis itself can put forward. In relation to this, ultimately all AH Willis can say is that it has carried out an investigation itself and it simply cannot find any evidence basis for concluding that there was any contact with Mansell or certainly any contact that constituted an anti-competitive agreement.

THE PRESIDENT: It was your client's investigations that gave rise to the Elbourn details.

MR. COOK: Yes. Exclusively. I would say that is very important because what it does show -- I recognise the Tribunal will see, or may have seen, parties coming before the court who, in practice, committed the infringement and are now trying to conceal it. I would suggest it is important to recognise that AH Willis has, in practice, found a story, confessed to those facts, brought them out before the OFT -- Legally I may be right or wrong. You may decide I am right or wrong in terms of whether those facts mean that we are guilty and responsible. But, Willis has tried to provide a full and comprehensive story, even when that might have disadvantages for it. You should view the fact that Willis simply cannot find anything in relation to these other two alleged infringements through the prism of that knowledge that Willis has provided information where it could discover --

If we start for a moment just by assuming that AH Willis is innocent, it is important to recognise what it is that an innocent party could do in terms of trying to show that it did not commit the alleged infringements. The reality is that proving a negative is impossible. We cannot prove that every single telephone call that was made to our offices during a period six/seven years ago did not come from Mansell. One would not even begin to know how one would start to find the telephone numbers of everyone who called us that kind of period ago. So, we cannot prove the negative. All an innocent party could ever do - all we could ever do - is say, "We carried out the investigation. We have asked all the people who could possibly have had access to this information. They are telling me that nothing happened". That is the only answer that can sensibly be given.

Part of the reason why that is the only answer we can give is because the OFT has chosen to present a wholly unparticularised case. Now, it is important to recognise that this is not a situation in which the OFT has turned every stone and has put before the Tribunal the best evidence it could conceivably have got. On the contrary, despite having effectively fully co-operation from Mansell as part of the leniency application, Mansell had to provide any assistance the OFT reasonably required. It made no attempt, the OFT, to identify which individual was involved in obtaining a cover price on the part of Mansell; which individual at AH Willis is said to have been involved; when it might have happened. This is not a situation where the OFT is trying to get those answers and has not managed, some years

after the events. On the contrary, if you look through the transcripts it is apparent that none of those questions were ever even asked.

Now if we had specific allegations, in those circumstances you would expect Willis to be in a position, at the very least, to try and meet those allegations. If it is said that a particular individual is involved, then you can try and see if they were out of the country, if they were in hospital, and put evidence from them directly before the Tribunal saying, "No, that is simply not true". But, without that particularisation all we can put forward - all any innocent party could ever put forward - is simply a case that says, "We cannot find any evidence. We do not believe we did this". That is what Willis indeed puts before the Tribunal.

So, the situation is ultimately this: you have a single documentary reference in relation to these infringements. There is no supporting material behind that because all the material that does exist is effectively purely parasitic. That single documentary reference comes from a document which is shown, on its face, to be unreliable and inaccurate in places. At times I would accept it has been shown to be right. That example shows that it is not always right. Then you are faced with Willis' clear evidence - which I would suggest and submit you should see as being reliable for the reason I have already suggested - that Willis does not believe that it did anything wrong and cannot find the evidence that there was contact of any kind.

Ultimately the question is: Has the standard of compelling evidence been met? In my submission, it has not in this context.

Sir, unless I can assist further, those are my submissions on liability.

THE PRESIDENT: Thank you, Mr. Cook. Mr. Beard?

MR. BEARD: Mr. Chairman, members of the Tribunal, in relation to liability I will deal with it in a series of four topics, if I may. First, the nature of the relevant evidential test; secondly, the evidence relied on in relation to infringements 188 and 215; thirdly, the points relating to infringement 224 - the Cyril Elbourn points, if one can put it that way; and, finally, one or two wrap-up points.

Firstly, turning to the relevant evidential test, the appellant's submissions are scattered with references to the need for strong and compelling evidence. In his closing there my learned friend referred to the need for compelling evidence - language which has previously been used by this Tribunal, in particular in the *Napp* case at para. 109. Just for your notes that is in Bundle 2, Tab 31. Obviously, that statement in *Napp* by the Tribunal was subject to clarification and consideration in *JJB*, which for you notes is at para. 204, Volume 3, Tab 42. I will take the Tribunal to that case in due course. Since that time there has been at least

one important House of Lords authority dealing with matters of relevant evidential test. It is therefore perhaps appropriate just to spell out the position because I understand that although there have been the pleasure of many hearings before various constitutions of the Tribunal, there has not actually been any particular consideration of these authorities.

The burden of proving an infringement of the Chapter I prohibition is on the OFT. The standard of proof is the normal civil standard - balance of probabilities. As to 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 is at Volume 1, Tab 24. It is quoted in our liability defence at p.2, para. 4. For your notes, this is at p.586. I will just read it out, if I may.

> "The balance of probability standard means that a court is satisfied an event 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 I mind as a factor, 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 allegation is established on the balance of 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 or probability, its occurrence will be established".

So, what we have here is the relevant standard is always the balance of probability, and evidence required to meet that standard may differ according to the context - hence the reference to whatever extent is appropriate in the particular case - with stronger evidence being required for an allegation that is inherently improbable. But, there is no presumption that conduct attracting a penalty, even a severe penalty, is inherently improbable. Rather, as Lord Nicholls emphasised, context is essential. The improbability of an event must be judged on the facts of each case.

This was a matter that was considered rather vividly by Lord Hoffmann in *Secretary for the Home Department v. Rehman* which is in Volume 2 of the authorities at Tab 36.

THE PRESIDENT: This the lion in Hyde Park.

MR. BEARD: Lions and alsatians. I will simply read, if I may, the relevant paragraph.

"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 of Birkenhead explained In re. H (Minors) (Sexual Abuse: Standard of Proof) at p.586, 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".

Since that exposition (which is quoted again in the liability defence) there have been two House of Lords cases. The first is *re. D (Northern Ireland)* which is at Volume 4, Tab 61. But the case I was going to take the Tribunal to is *In re. B*, which is in fact in an additional bundle of authorities. One would not have thought it possible with the twelve volumes that an additional one was needed, but we overlooked this.

THE PRESIDENT: More probable than not.

MR. BEARD: I do not know in what form it comes?

THE PRESIDENT: Could it be Bundle 13, I wonder?

MR. BEARD: It may well be.

THE PRESIDENT: We have that now.

MR. BEARD: I will leave the court to read the headnote at the court's leisure. It is vastly different circumstances. It is to do with child custody and a particularly statutory test. The context really is not of great significance or assistance here. The important consideration begins on p.17. In this section Lord Hoffmann is giving an exposition and consideration of a range of authorities concerned with the burden and standard of proof. Through the early paragraphs - and in particular form para. 5 onwards - he considers various strands of case law that have considered the relevant burden and standard of proof. I am not going to place any emphasis on those paragraphs. If one turns on to para. 12 at p.20 Lord Hoffmann is explaining there that a degree of confusion has arisen in relation to some of the case law and the manner in which it should be interpreted, but he then goes on at the bottom of para. 12 to quote Dame Elizabeth Butler-Sloss in *In re. U*. That quote is, itself, essentially an approval of, and quotation of, the passage to which I have already taken the Tribunal to from *In re. H*. Then at para. 13 Lord Hoffmann says,

"My Lords, I would invite your Lordships fully to approve these observations. I think that the time has come to say, once and for all, that there is only one civil stand of proof and that is proof that the fact in issue more probably occurred than not".

Then he says he is not going to try and disprove particular statements of Lord Steyne, and so on. Then he goes on at para. 14 to quote specifically that part of Lord Nicholls to which I have already referred the Tribunal.

"The court will have in mind as a factor, to whatever extent is appropriate in the particular case ----"

At para. 15,

"I wish to lay some stress upon the words I have italicised. Lord Nicholls as not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common-sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities".

That is an emphatic and clear statement of the law. It is given a further exposition by Baroness Hale in her judgment. If one turns on to p.32, para.62, starting at the bottom of the page, handily sub-headed "The standard of proof", she again quotes from *Re H*, and then rehearses again in some detail some of the preceding case law which Lord Hoffmann had already referred to. The part I would direct the Tribunal to is at para.70 on p.35:

"My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) … is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be take into account, where relevant, in deciding where the truth lies."

Paragraph 71 is rather particular to that case. Then 72:

"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 improbable 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 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 is seen in the Zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

That is the approach to be adopted. One looks at the circumstances of the case and whether or not a particular allegation is inherently improbable, not the seriousness of the allegation, not the seriousness of the consequences.

The second point to stress is that it is also well established that in proving an infringement of the Chapter I prohibition the OFT 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 wholly circumstantial evidence may well be sufficient proof of a prohibited agreement, and it may well be necessary to draw inferences from fragmentary and sparse evidence of unlawful conduct. It is necessary to take account of whether any other plausible explanation has been offered. In that regard I would take the Tribunal to volume 3 of the authorities, tab 42. This case is sometimes referred to *Allsports* and sometimes referred as *JJB Sports*. It was, in fact, both of those cases. It is just that in certain skeletons it is referred to as one thing and in others it is the other, but it is the same case. The page I would refer the Tribunal to is p.59. This is a section of the judgment which was dealing with issues to do with the burden and standard of proof. For your notes it starts at para.164. There was consideration of *Napp* and consideration of various other judgments. With due respect to the Tribunal, following that recent House of Lords authority I think it is unnecessary to revisit all of that. The authority is now extremely clear, and therefore the conclusions at para.204 about "strong and compelling evidence" and "standards", and so on, should be read properly in the light of the judgments to which I have taken the Tribunal.

The material I wish to refer the Tribunal to in relation to this second point, the nature of the evidence in these sorts of case, is to be found at para.206. It is focused in particular here on price fixing cases, but the same rationale applies in relation to all unlawful agreements and concerted practices. In particular it is the quotation from *Aalborg Portland v. Commission*, which is approved by the Tribunal, that is of crucial importance. At paras.55 to 57 of the judgment of 2004 it is said:

> "55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the

activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

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

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

That account applies equally in relation to bid rigging and cover pricing. As is emphasised in *Apex*, and I will take the Tribunal to it in due course, here we have a situation where effectively the parties to the cover pricing arrangement committed deception on those receiving the tender. They know full well that these are not matters you should not be engaging in. Although there have been in a number of the appeals expressions of righteous indignation that textbooks, and so on, somehow suggested that cover pricing was a permissible activity, in fact it is clear that these cover pricing activities were not ever declared to tenderers, not in relation to any of the infringements.

THE PRESIDENT: We have got one example in one of the cases that we have had where someone rang up the client and said, "So and So wants a cover, is it all right if we give them one?" and the client said, "Fine".

MR. BEARD: There were cases in the course of the investigation where such things were identified, and they were not actually pursued in general as infringements.

THE PRESIDENT: We have looked at those.

MR. BEARD: Absolutely, but the point is a simple one: here you were not declaring it to the person receiving the tender. You engaged in the deception. You engaged in the deception in relation to a matter where you would not necessarily hold a great deal of documentary material, and therefore the *Aalborg Portland* principles and analysis apply in the context of these sorts of arrangements.

Aalborg Portland itself, again, unfortunately is not in the bundle. There is a copy of the Advocate-General's opinion in *Aalborg Portland* in the supplementary bundle. I actually

have copies of *Aalborg Portland* itself if the Tribunal wants them. They do not add a great deal, frankly, to the quoted passage. So unless the Tribunal ----

THE PRESIDENT: If you have got copies why do you not give them to us.

MR. BEARD: I will provide them to Mr. Bailey and Mr. Cook.

THE PRESIDENT: We are probably going to rise for ten minutes at some point this morning so that might be a good time.

MR. BEARD: Perhaps I could press on with this introductory section and then we could pause for ten minutes and I will then move on 188 and 215, if I may.

THE PRESIDENT: Of course.

MR. BEARD: Applying these sets of principles, the principles from in *Re B,* applying in *Re H (Minors)* and the *Allsports' Aalborg Portland* analysis to the present case, three comments need to be made. First, the Tribunal, in assessing the quality of their evidence will undoubtedly need to take account of the fact the infringements found by the OFT are serious ones, for which, in many cases, substantially penalties have 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 extremely widespread. The Tribunal is well aware of the extent of the investigation that was undertaken by the OFT and the process by which it actually had to be narrowed down, that at one point there were thousands of potential or suspected infringements which amounted to, in total, just in relation to the value of the contracts at issue, around £3 billion.

In the construction industry there has been now an admission by vast numbers of undertakings. Many people came in for leniency, many people accepted the fast-track offer. This is not, therefore, a case where the infringements at issue can be regarded as inherently improbable.

Secondly, the nature of the infringements involved are such that there is very little documentary evidence of the unlawful conduct, but that does not prevent the OFT from reaching conclusions as to what probably occurred on the basis of the totality of the evidence before it.

Thirdly, the OFT is required to prove that the instances of cover pricing found in the decision occurred. It is not required to prove the precise date on which they occurred, the specific individuals involved in those infringements. 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 – and in parenthesis, nor has it ever prevented the European Commission from doing so either.

All of those points taken, it should not be suggested that the OFT took any deliberate decision to advance an unparticularised or general case; nor that no attempt was made by the OFT to identify how unlawful arrangements were made, as Willis has sought to suggest. Rather, it reflects that the reality of the evidence available for this infringement, and indeed most infringements, has not enabled detailed evidence to be elicited. The OFT's evidence against Willis was derived not only from contemporaneous documentation, as had been preserved by Mansell and to which I will come in relation to the specific infringements, but also from lengthy interviews with Mansell's group commercial director and managing estimator in Mansell's North-East region, a chief estimator in Mansell's Nottingham office, a senior estimator in the Nottingham office, the estimating manager of Mansell's London office, and Mr. Barry Russ, who was the managing estimator in Mansell's Slough office as well as being the author of the workload reports. So questions were asked of a wide range of people about how Mansell went about dealing with cover pricing. The fact that specific recollection of specific events and specific individuals could not be recalled by these people and, therefore, no further questions were asked about specific events, does not in any way detract from the force of the evidence. As I will go on to show, that material clearly shows that on the balance of probability the infringements which are found against Willis were committed by Willis and Mansell, and in those circumstances it is right that the OFT made findings of infringement and imposed the penalties.

I would intend now to the specifics of the infringements, so if now is a useful for the Tribunal?

THE PRESIDENT: We will have a ten minute break. Thank you very much.

(Short break)

THE PRESIDENT: Yes, Mr. Beard?

MR. BEARD: I was turning to deal with the evidence in relation to infringements 188 and 215.

The Tribunal will recall that infringement 188 which, for your notes, is at decision IV.5182, concerns a tender for refurbishment of a farmhouse and cottage in Didcot which is owned by the University of Reading. Willis, Mansell and two other companies were invited to tender, the winning tender was that of Cavendish Construction, Willis' bid was the second lowest, Mansell placed a higher bid, the decision finds that Willis gave Mansell a cover price in relation to its bid.

Similarly, infringement 215, that is decision IV.6018, concerns a tender for the conversion of flats of a building owned by the University of Reading. Willis, Mansell and a number of other companies are invited to tender, the winning tender was Crown Construction, Willis

and Mansell bid, Mansell's bid was higher, again the decision finds that Willis gave Mansell a cover price in relation to this bid.

As set out in the decision at some length in relation to infringement 188 from p.1328, and in relation to infringement 215, at p.1475, the OFT bases its finding of infringement in both cases on the following matters. I was not going to go through the details of that.

THE PRESIDENT: No, all right.

MR. BEARD: The following matters are: a general explanation by Mansell's representatives of Mansell's participation in cover pricing. I have referred to some of the interviews that were carried out already this morning. The relevant passages there are in paras. IV.470 to IV.502, which starts at p.494 of the decision. That sets out much more of a background of how Mansell operated in the industry more generally and provides support for the specific material then provided by and relied on by Mr. Russ and used by the OFT. Indeed, the OFT does rely on a table submitted by Mansell as part of its leniency application listing both tenders as instances ----

THE PRESIDENT: Is this the second piece of evidence you rely on?

MR. BEARD: I was going to say this table is a distillation of information from the interviews and from Mr. Russ' workbook, it is actually annex 2 in the defence, but it was provided pursuant to the leniency application and it draws very heavily upon Mr. Russ' workload reports.

THE PRESIDENT: Yes.

MR. BEARD: What it clarifies are the directions of cover pricing and so on in relation to those matters.

THE PRESIDENT: Annex 2.

MR. BEARD: Yes. We have larger copies of that as well.

THE PRESIDENT: Yes, that would be very helpful.

MR. BEARD: (Same handed) I am not going to refer to this table, but just so that the Tribunal has them.

THE PRESIDENT: What does it tell us about Willis that the workbook does not tell us?

MR. BEARD: Into this has been input the basis on which the particular projects were either received a cover price or passed a cover price and sets out some more details about the reasoning, but it does not take matters a great deal further than the workbook itself, certainly in relation to the specifics.

THE PRESIDENT: We will need to know exactly what it says about Willis, so do take us to it because I do not have it in my mind at all.

MR. BEARD: If one looks at the fuller page what you have here is a distillation of the various project names by reference. On the left hand side you have Mansell's own internal reference number, the relevant tender date is the next column, then you have the project name or reference, which is the same as is used in Mr. Russ' workbook, those first three columns one will see come out from Mr. Russ' workbook. There is "Project type", that is a broad categorisation by market which is different from Mr. Russ' workbook, there was no such designation there. The project bid value is an outturn price. Mr. Russ' workbook provides more detail and I will explain that in a moment.

Then it has the name of the company provided with pricing information, so this is the counterparty column, so it is a summary. Then you have two columns indicating whether Mansell was giving or receiving the cover.

In relation to the three infringements we are concerned with they are all receipts, but there are a number of "G"s one can see as well, and the next column is the part of Mansell which was dealing with the relevant projects, so that is not of great relevance. Then the final column is a reason for the cover pricing. That is input by way of the comment of the Mansell employees who assisted their lawyers in providing this table which was submitted as part of the leniency application. So in some ways it is more detailed than Mr. Russ' workbook, it does have some input from the interviews, and therefore does contain relevant information that was used by the office in the consideration of infringements relating to Mansell.

THE PRESIDENT: I have just had a very quick look through, I cannot be sure but is Willis only mentioned on p.1?

MR. BEARD: No, I think the three particular infringements we are dealing with are found, if one uses the numbers down the left hand side, 19, 24 and 41.

THE PRESIDENT: Yes, we are not dealing with 10 ----

MR. BEARD: No.

THE PRESIDENT: -- because although that is Willis that is not ----

MR. BEARD: Yes, and 23 is also Willis, and 42 is also Willis.

THE PRESIDENT: The ones we are dealing with – you did mention them?

MR. BEARD: 19, 24 and 41. So taking them in turn, 19 correlates with infringement 215, 24 correlates with infringement 224, and 41 correlates with infringement 188.

MR. COOK: Sir, my version of 19 is blanked out.

THE PRESIDENT: It is not on ours.

MR. BEARD: No, I am sorry. It should have a document number in the corner B1351. Here is another copy. I should say that this contains confidential information, I have provided it to my learned friend but it has not been passed to those behind him. Obviously it is the figures that are confidential in relation to these sorts of matters, and the same is true of Mr. Russ' workbook. It does contain certain relevant information. Just working through the material relied upon. First we have the general explanations from Mansell's representatives, then we have the leniency submission that is this, and then we have the electronic workload reports from Mr. Russ, the Mansell managing estimator. I passed up earlier an enlarged and clearer copy of those, they are at annex 1 when my learned friend was making submissions earlier.

THE PRESIDENT: Yes.

MR. BEARD: It should have in the top right hand corner "B3539", which is the OFT internal document number. If the Tribunal wants to mark this as effectively "annex 1" to the defence, that is what this is.

THE PRESIDENT: And who prepared this?

MR. BEARD: This is Mr. Russ' document. The one we have just been looking at is the leniency document which is at annex 2, and that was compiled presumably by Mansell and its lawyers.

THE PRESIDENT: Forgive me for asking, is this the actual document? It is not a typed up version, it is the actual document?

MR. BEARD: No, this is the printed downloaded version that was provided to the OFT and this is copies of it. That has been confirmed by those who dealt with this behind me.

THE PRESIDENT: Yes.

MR. BEARD: We have that table but, in addition, there is evidence from interviews with Mr. Russ who explained how he recorded cover bids in his workload reports. In other words, we got an explanation of this from Mr. Russ, part of which is quoted in the defence. The important points to note from that explanation ----

THE PRESIDENT: The interview notes?

MR. BEARD: Yes, and they were just going in this regard to explain how he had filled in the document, and if one looks at that document what one sees is matters that Mr. Russ explained in his interviews. The first point is that where Mansell actually tendered a job, in other words put in a real bid, he would put a figure in the left hand numbered column which is bid, because what we have on this table is on the left hand side a column which is the internal reference numbering for Mansell, then we have job descriptions, then we have a description under the heading "Our Bid", and it is "bid net provision percentage margin"

and then “other bids”, “result” and some “remarks”. The crucial parts of the document for these purposes are obviously the “location and description” in order to specify with what we are dealing. The net and bid columns and the remarks column are relevant because where Mansell -- Mr. Russ explained that where Mansell was actually pitching in for a bid it would put a proper figure in the bid column, but where it was taking a cover it did not. So, you see instances where there is no entry in the bid column and there is an entry in the net column. Perhaps the most relevant of these for our purposes is the penultimate entry on the page, which is numbered 72597 - High Wycombe - Repairs to 13 Wimpey. No fines. House”. There you see there is a gap in the bid column; there is an entry in the net column; and if one works one’s way across one sees in parentheses the name ‘J.J. McGinley’. The other thing that Mr. Russ explained about how he filled in this table was that when he had received a cover in relation to a tender he would put the name of the person who provided it in parentheses in the remarks column.

So, what you have here, on Mr. Russ’ account is, in relation to the High Wycombe job, which they had internally numbered 72597, they had received a cover (they had not put in a real bid, but had received a cover) and therefore had not filled in the main bid column, and that cover was from J.J. McGinley. The reason I highlight that particular row -- I am sorry, sir. You look troubled by that analysis.

THE PRESIDENT: No. No.

MR. BEARD: The reason I draw attention to that is because that particular job is actually relates to infringement 91. So, infringement 91, which is not concerned with Willis, but is an infringement involving J.J. McGinley and Mansell, was actually evidenced by this. In our skeleton argument we have listed out the various jobs that resulted in infringements where Mr. Russ’ table was used. I have just got a navigation for that list in the skeleton which I hope is of assistance to the Tribunal. I have provided it to my learned friend. (Same handed)

THE PRESIDENT: Thank you. So, this is a slightly expanded version of what you have got in your skeleton.

MR. BEARD: Essentially it is the skeleton. So, it picks up the infringements where Mr. Russ’ workbook was used as evidence. This is in addition to the other material I have already referred to - the interviews and leniency, and so on. These are the cases where Mr. Russ’ workbook was referred to. What we have done is to list out the infringements. I should note that there is a variation between this list and the skeleton because we realised we had made a mistake. 153 in the skeleton is 154 here. We have then included the references in the

Decision, both the paragraph and the page numbers, just for your notes and assistance we hope. Then we have listed out the parties giving the cover. So, these are the counterparties to the infringement. Then the final column is just the reference. It was intended that this might assist the Tribunal in considering the consideration of Mr. Russ' workbook.

Having that on one side - and I will come back to that full list - what we have got here is a situation where we have a table from Mr. Russ. I have shown you infringement 91, which is the McGinley one, which is the fifth in the navigation table. If one turns on two pages you will see that there is a highlighted line across the middle.

THE PRESIDENT: Yes. Oxford Re-Roofing.

MR. BEARD: That is infringement 154.

THE PRESIDENT: That is the one that is 153 in your skeleton.

MR. BEARD: Yes. It is 154. The person providing the cover bid was Apollo. Of course, Apollo did not just provide one cover bid. If one turns over the page you will see highlighted four lines on that page. The first is Didcot, Willington Down Farm. That is infringement 188. Since that is one of the infringements at issue, just to focus on that for a moment -- What we have there is Didcot, Willington Down Farm. No entry in the bid column. Entry in the net. Read across: (AH Willis).

THE PRESIDENT: "Less prov". What does the column mean after net. You did explain, I think.

MR. BEARD: Less provision. That is the provision they are making presumably in relation to their account.

THE PRESIDENT: They have that in some of the covers and not others, do they not?

MR. BEARD: Yes. There is an explanation of that.. Mr. Woolf points out that in the transcript at annex 3 at pp.21 to 22 -- I will perhaps leave the Tribunal to refer to that. It does not in any way undermine the fundamental analysis which is where you have a gap, a net entry and then parentheses at the end. There was a consistent approach by Mr. Russ that those were accepted cover bids, and they were cover bids provided by the person mentioned in the parentheses.

The next one down that has been highlighted -- I should say that these highlights were not on the original document. We have just provided this to navigate the way round.

Hillington, Sutton Court shops, external refurbishment. Again, gap in the bid column. Reference in the net column. Apollo. That is infringement 199.

The next highlight is Bracknell, Mount Pleasant, Phase 4 - window replacement. Again, a gap in the bid column, an entry in the net column, Apollo. That is infringement 203.

Where it says Price Schedule Calls that was where a bid had gone in and then the person seeking the work had actually said, "Well, we want a more detailed price schedule provided". Of course, if you have been cover bidding then you have got to do something about getting some more details in, which explains why it is noted.

The next one highlighted on that page - Sunninghill Refurbishment - 10-12 Bowden Road.. Gap. If one reads across - Francis. That is Francis and Barrett. Infringement 208. Then, one turns over the page again. There are two further highlights. Reading University, 14 Redlands Road. Gap in the bid column. Entry in the net column. AH Willis. That is infringement 215.

Finally, for these purposes, one sees the highlighting on Reading University, Refurbishment, 12 & 16 Redlands Road. Gap in the net column. At the far side - '(AH Willis)'. This is where there is an additional parenthesis saying that HN Edwards won it, which it is accepted is not correct. But, I will come back to that.

THE PRESIDENT: Infringement 224 is ----

MR. BEARD: That is Mr. Elbourn.

THE PRESIDENT: Then where a price schedule was called for, was it not?

MR. BEARD: Yes. But, that is not marked. What that shows is how the material was used for a number of the infringements that one finds in the navigation table I have provided to you. The only reason I have not taken you to the earlier ones in the navigation table. It is simply because they are in another section of Mr. Russ' workbook. It is not just the 3539. There is another document which covers the earlier ones.

But, just working through then that navigation table, what we have is infringement 22 where Connaught was the party giving cover. There, apart from the more general evidence from Mansell, there was reliance on Mr. Russ' workbook and Connaught did not dispute the facts alleged against it. It took the FTO.

If one takes infringement 42, the party giving cover was Try Accord. Again, reliance on the workload report. Galliford Try, the parent company, accepted the OFT's FTO and did not withdraw it when this infringement was put in the SO. Of course, it is worth noting that Galliford Try is the parent company that has brought a penalty appeal and has not sought to challenge anything to do with fining of liability here.

The next up is 43 on that table - relying on Mr. Russ' workbook. In its response to the SO J.J. McGinley specifically admitted hat it engaged in cover pricing activities on this tender and did not seek to challenge any liability.

Infringement 69. The party giving cover was Francis. That was a case in response to the SO. Francis did not contest the OFT findings. Again, penalty appellant before this Tribunal, no challenge being brought on liability.

Infringement 91. J.J. McGinley. Again, specifically admitted in relation to the SO response.

Infringement 97. The same thing. J.J. McGinley specifically accepted that it engaged in cover pricing.

Infringement 154. Apollo. Again, relying on Mr. Russ' workload. Another penalty appellant, not challenging liability in relation to this finding.

Infringement 188. Willis.

Infringement 199. Apollo again. The same point.

Infringement 203. Apollo again.

Infringement 208. Francis is giving the cover. Again, a penalty appellant. No challenge.

Infringements 215 and 244 - we are back with Willis.

So, what we have here is a situation where Mr. Russ' workbook sheets approach this matter in a consistent manner. Sometimes in cartel discussions one talks about looking for the document that is a smoking gun, the confession. Those things very, very rarely exist. Normally, one is trying to tally different people's diary entries or understand obscure codes and pricing formulae. Here we do not say, "This is a smoking gun in the sense that it is a direct evidence of communication between two parties at a particular time", but we do say that this is powerful evidence that here we had a situation where cover prices were being taken from the particular companies concerned. The corroboration of that document comes in part from the fact that it is being consistently applied; it is not challenged; it works as a basis for understanding whether or not cover pricing is being accepted here. So, the OFT's case is based upon a reliable contemporaneous report, implicating Willis in cover pricing. Of course, in addition to that report, we have the background evidence from Mansell. We have Mr. Russ' account of how he compiled the report. The fact that certain entries were made at different times does not alter the strength of the entries. The entries are reliable. They are good evidence. When one is assessing whether or not it is more likely than not ----

THE PRESIDENT: Can we just touch on this? I am afraid, I have read the interview, but, as you know, we are in a lot of cases and it was a little while ago. Is it correct, as Mr. Cook said, that Mr. Russ says that he sometimes put them in in anticipation of what he expected to do? Or that he expected someone else perhaps ----

MR. BEARD: In relation to the particular cases that he was asked about here, he said he had no direct recollection of cover pricing. That was not really surprising given the lapse of time. One can see from this schedule that there was quite a lot going on even just in relation to Mansell - because I have only highlighted the particular infringements which arise on the basis of Mr. Russ' workbook in the Decision. When one goes through it one can see there are all sorts of parenthentical entries all the way down all the pages. Mansell's leniency application made that very clear. There was an awful lot of this going on with an awful lot of other companies. So, it is not surprising that he does not remember the particular instances. He does say that he considers that this table is accurate and sound, and he does so in relation to these particular infringements.

THE PRESIDENT: You see, we have not got him here giving evidence and being cross-examined. We have got to do the best we can. However, just to ask you again, does he say that on occasions ----

MR. BEARD: Yes. He says that there were circumstances where he would. That was not the normal course of the way that he operated in relation to this table. He does not say that in relation to these particular infringements relating to Willis.

THE PRESIDENT: He only says that in respect of certain infringements, does he?

MR. BEARD: He makes a general point that he may on occasion have done so, but in relation to these infringements he does not say that.

THE PRESIDENT: I am sorry, I am not clear what you are saying. Are you saying that he made a general point that on occasions he put them in anticipation, but that he expressly excluded these instances.

MR. BEARD: No, it was not express. It was not express, but these were not instances where he said he thought he had put these in ----

THE PRESIDENT: So he said that in respect of specific infringements?

MR. BEARD: No, he made a general comment saying, "There may have been occasions where I put the entries in in anticipation of actually receiving the cover bid". In saying that, he did not suggest that there were any circumstances where he made the entry before he received the cover bid but then actually did not get a cover bid. There is no suggestion of that in his interview. What he said was that there were circumstances where he made the entry before the cover bid was actually received. He did not specify that there were any particular entries of that sort, and he did not say that in relation to any of these infringements. I hope that assists in answering the question.

THE PRESIDENT: He was not able to say whether the entries appeared in his work book were received by him as covers or by one of his team?

MR. BEARD: No, he certainly did not say that. Indeed, in most circumstances it would have been by members of his team and he would have then entered them. There is no doubt about that, there is no suggestion that Mr. Russ was the only person that would ever receive a cover bid, and therefore would have been expected to be the person that would remember whether or not particular contact was made.

MR. COOK: Just to be clear, Sir, I believe Mr. Russ was not asked any specific questions in relation to those issues in relation to these infringements. He was not asked what he did in relation to this infringement.

THE PRESIDENT: As I understand it, he would not have remembered anyway if he was not.

MR. BEARD: The difficulty for the Office was that he made it clear that he did not remember specific instances, and in those circumstances further questions trying to elicit information where he has made it clear he does not remember a particular circumstance would not have assisted anyway. What he did say and was confident about was the accuracy of this table.

THE PRESIDENT: With respect, how accurate could he be about it? How confident could he have been? He would be relying upon someone else to tell him what had happened, would he not?

MR. BEARD: That may well be correct, that if it was another individual within the organisation who actually received the cover bid, but Mr. Russ would have no point in putting in an entry in parentheses or entering a particular figure unless he was actually told it. What he was saying was, "I did not randomly generate these figures, I did not put them in arbitrarily".

THE PRESIDENT: For all we know, it could be double or triple hearsay. We just do not know, do we, how he acquired the information which led him to write any of these entries in that.

MR. BEARD: He says he does not remember particular instances, and therefore one could not be assisted by it. If one has a schedule where he does remember what the entries meant, or omissions in entries meant, and has explained that and has explained the accuracy of it and explained how it came to be put together in broad terms, there is no good reason to doubt that this operates as good evidence that cover bids were being received as he explains that drawing upon the table that he prepared.

THE PRESIDENT: What about Mr. Cook's Chinese whispers point? You appear to be saying that single, double or triple hearsay is as good as hearing from the horse's mouth.

MR. BEARD: I am not trying to be quite so bold, I hope. What I am saying is that where one has a document that has been prepared by someone within the organisation that is prepared contemporaneously – when I say "contemporaneously" I leave aside the point that ----

THE PRESIDENT: Weekly.

MR. BEARD: Yes, weekly. It was done at the time that these cover bid processes were being undertaken. In those circumstances, if someone explains how they went about it, even if they were not the person receiving the cover bid but were collating the information, one can rely upon that material as setting out good evidence that, in fact, a cover bid was received by that organisation and it was received from the entity that is specified in the table. If you have a systematic process for recording these matters and you were doing it at the time there is no good reason to consider that those entries are wrong. If you are the Office and you are looking at this document and saying, "Does this entry in this line tell me whether or not, on the balance of probabilities, I should considered that a cover has been received by Mansell from Apollo or Francis or JJ McGinley?" one says, yes, because what we have is a situation where the systematic preparation of that gives us confidence that that line is accurate.

That is then reinforced by two matters. One is the background evidence as to how Mansell was operating that we draw from the interviews and other material we received from Mansell. The second is the fact that there is a multitude of cases drawing upon this document in relation to which no challenge has been brought. In relation to those other cases what we have is a situation where the parties involved have not challenged the finding of liability based on the same evidence that is used here. In those circumstances, we can have greater confidence in the document that we are relying upon.

Those matters taken together reinforce the reliance that is placed by the Office on the particular line which has been explained to us by Mr. Russ, and no issue is taken as to the explanation given by Mr. Russ in the interpretation of the table.

Mr. Woolfe helpfully points out that at p.21 of the transcript Mr. Russ does say that as the person leading the term he was aware that a cover was being taken in any case where a cover was being received and would therefore enter it on the table. We do have that structure in place and the evidence as to how it operated.

MR. SMITH: Do we know how he was made aware in the chain of communication from the member of his team to Mr. Russ?

MR. BEARD: No, the understanding was that it was a direct communication between the member of the team and Mr. Russ, and then the entry was made, but there is no specific detail as to whether or not there were logs or anything of that sort. We do not have details

of specific communications between the team members and Mr. Refuses. Mr. Russ, as I say, says he does not remember specific instances in any event.

MR. SMITH: No, but in general terms, can we say how it was done? Would one member of the team have picked up the phone to Mr. Russ, or how would it work?

MR. BEARD: I do not think he goes as far as to say there was a systematic means, that it was only by telephone. They were all working out of the same office, as we understand. In those circumstances, the understanding of the Office was that there was a range of ways that it might be communicated, but sufficient detail would be communicated to understand what the figure was that was being received and from whom it was being received, which enabled the completion of the table, as I say.

THE PRESIDENT: What was the purpose of the table, of doing it after the event?

MR. BEARD: The table covers rather more than just cover pricing. It is providing a presentation of the tender exercises with which Mansell are involved more generally. I do not think it is suggested that Mr. Russ created it for the purpose of monitoring cover pricing arrangements. What was relevant to Mansell, as we understand it, was having an idea of the tendering exercises they were involved in, the ones that they were winning and losing as well. Obviously, if you are putting in a cover price you do not count that as one of your losses if you are doing any kind of analytical assessment because plainly you were not intending to win. Therefore, that would be an explanation as to why you would specifically want to include cover pricing if you wanted to do any subsequent analysis.

THE PRESIDENT: I can see it might be important to know which was a cover price because then you would not, as you say, count it as a loss. What would be the particular importance of recalling the name of the person who provided the cover price?

MR. BEARD: We are slightly into the realms of speculation here, but one can see that in circumstances where there was an awful lot of this going on, understanding from whom you had taken cover prices at different times in relation to different clients might be highly relevant if you wanted to do it again in future. One can see that having that information would be potentially useful. Beyond that it would be speculation. It was simply a matter of working out who was involved in these transactions. I cannot take the matter further than that, and I do not believe that in the interviews there was specific exploration of the broader purpose beyond that which I have referred to already. Certainly it was not an arbitrary matter. It was only being done on information.

THE PRESIDENT: As I say, some bits of information might be more important than others and therefore one might take more care about them, getting them accurate.

MR. BEARD: Some bits of information I suppose might be more important than others, but in relation to the question of whether or not this is good evidence that there were cover prices received by Mansell from the people that are specified, the consistent approach indicates that that is good evidence. Whether or not further material in relation to this may or may not be of interest and be subject to more detailed scrutiny is beside the point. It does not undermine the evidential value of the material and the explanation of that material that has been provided to the Office, against, as I say, the broader background of Mansell's activity. As I say, what we have here is the OFT basing its case upon a contemporaneous report implicating Willis in cover pricing for the tenders. That is supported by the evidence provided by Mr. Russ, the author of the report, which confirmed that the cover bids were entered in precisely the way in which these tender entries were explained more generally in the decision; and how that report was to be interpreted. This evidence, taken together with the material about there being a consistent approach by Mansell which involved taking, and indeed, to some extent, giving cover prices, is exactly the sort of evidence that shows that AH Willis's involvement was more probable than not.

The only mistake that has been identified in relation to this table is the reference in relation to HN Edwards on infringement 224, which I pointed out, which is on the final page with highlights in the long table. There is any irony about reliance upon that particular error because, of course, in relation to that infringement, 224, no issue is taken but that a cover price was given to Mansell. The contention is that the cover price was not given by AH Willis, it was given by Mr. Elbourn autonomously. Actually a cover price was given. So the idea that that somehow suggested the point in parenthesis in 224, "AH Willis", which was what Mr. Russ understood was the provision of a cover price from Willis, is ----

THE PRESIDENT: I think the point being made is just a general one, that not huge care was necessarily taken about the accuracy of every entry.

MR. BEARD: It is obviously borne out to the extent that that particular entry there is wrong, but it is not borne out in the fact in relation to the crucial fact here as to whether or not a cover price was provided in relation to 224. Clearly Mr. Elbourn's evidence and Willis's evidence here actually support the entry that was made on this table in relation to 224, and there is contrary evidence. So, going back to where we were on the balance of probability, one has to look at this in the round against a background where these sorts of activities were clearly being undertaken on a regular basis and frequently by Mansell, and it had prepared and monitored those activities at least through Mr. Russ, as we have seen in relation to the table.

THE PRESIDENT: Mr. Beard, speaking for myself, one thing that struck me as curious about the procedures is that one does not have, as it were, a statement by Mr. Russ giving these explanations. One has interview notes which are not signed – I do not know to what extent he verified them, or had a chance to, but was a deliberate decision taken not to do that, or was it just that no one thought to be take a statement?

MR. BEARD: I do not think it is either of those matters, the way in which the OFT has proceeded in very many investigations has been to rely upon interview material and documentary material and explanations given in interviews that assist it in considering the documentary material, and it considers that evidence in the round, and decides whether or not it has met ----

THE PRESIDENT: Well it does not have much status, does it, as evidence? It just so happens that Mr. Cook has said that it is the parts that he does not dispute, but as a general practice it is an odd practice not to, as it were, have a signed statement prepared, so that it can be tendered and, if necessary, people can ask to cross-examine. This is just notes of an interview.

MR. BEARD: Obviously these may be broader concerns about the way in which the Office goes about its exercises that the Tribunal expressing and therefore may warrant broader consideration, but for the purposes of this consideration as I say there are two things to be said. One is this is the way the OFT has gone about its work and one would need to consider more precisely the extent to which it was necessary for the Office to prepare witness evidence or indeed tender particular individuals for cross-examination in relation to proceedings, if it were to proceed, because one has to bear in mind, of course, that the way in which the office proceeds is on the basis of quite a detailed and involved procedure, involving investigation, gathering material, putting back that material to the parties, allowing them to make representations in relation to it and so on. So one should not automatically presume that in order to deal with a particular infringement the OFT has to therefore present a case somewhat akin to an American mechanism of bringing an infringement to court, the statutory scheme that exists and the manner in which it is being operated is different from that, so I would not want ----

THE PRESIDENT: You take your own administrative decision, and if you are convinced then obviously you can take a decision, but bearing in mind that these things can be challenged - there may be cases where the documents are good enough, the documents speak for themselves but here we have a document that does not speak for itself.

MR. BEARD: Understood.

THE PRESIDENT: Therefore, speaking again entirely for myself at the moment one would have expected to see the explanations for the document put in the form of a witness statement.

MR. BEARD: Yes, well I am loathe to embark on a broader exposition here in circumstances where no issue is taken in relation to this particular matter, in the context of this particular case, and clearly the evidence provided by way of interview that provides an explanation of the table is not contested. The interpretation of the table, which is the crucial piece of evidence which is drawn from Mr. Russ is not contested here and therefore it is clearly not a case in relation to this. But one would have to explore more generally certain issues about the nature of the interaction between the Office and this Tribunal in relation to how evidence should be presented, and at this stage I would not want to make submissions on behalf of the OFT because there is a question mark that must arise, which has not arisen in relation to these particular appeals about how the jurisdiction of this Tribunal works. It is obviously an appellate jurisdiction, and in previous cases there has been a wide ranging scrutiny of some evidence, albeit it does not go to the sorts of evidence being produced that you, Mr. Chairman, are referring to because if one thinks about some of the earlier appeal cases where evidence was brought forward, it was not evidence necessarily on behalf of the OFT in those circumstances, it was actually evidence by others, so I think there may be a larger chapter that has to be written and discussed in relation to these matters, the interaction between the OFT, the requirements of evidence for the OFT and the role of this Tribunal and the nature of its jurisdiction in scrutinising these matters.

THE PRESIDENT: I am not sure it is just this Tribunal, with respect, because I think the quality of decision making also to some extent depends upon having the right material in a proper form so that your clients can consider it themselves at the administrative stage.

MR. BEARD: The point is well made, and that is understood. The OFT is obviously conscious that when it is considering evidential matters it needs to be cautious about theses sorts of issues. But, as I say, in relation to these matters it is a rather wider point and I would not want the Tribunal to go away with any sense that the OFT were accepting that what would be required ordinarily are witnesses providing statements or tendering themselves for cross-examination, that may be a motive -----

THE PRESIDENT: I am not at the moment asking you – I am just indicating what I would expect normally in a case where the documents do not speak for themselves.

MR. BEARD: I think the question of normality here is perhaps one against which it is difficult to draw a clear control, because the process of the Tribunal in other cases, as I say, is not to operate on that basis, and therefore ----

THE PRESIDENT: I think there has been criticism in the past of pure interview notes being ----

MR. BEARD: I am not suggesting there has not been criticism, the question is whether or not those criticisms have been met without the steps that you, Mr. Chairman, are envisaging here, and therefore I think this may be a matter for another day.

THE PRESIDENT: You say that but it might be a matter for this case, because we have to consider the quality of the evidence which you are putting forward. We do not have a witness giving an explanation, we do not have Mr. Russ able to be cross-examined ----

MR. BEARD: Quite so.

THE PRESIDENT: -- and we do not actually have some of the answers to questions that we would be interested in knowing, because you cannot give evidence yourself, and so it is not pertinent to this case, it goes to the quality of the evidence that we have to decide whether we are satisfied on the balance of probability.

MR. BEARD: Obviously this Tribunal needs to consider the quality of the evidence before it, and it must do so against the test of whether or not on the balance of probabilities this evidence makes out an infringement, and the Office's point is that on the balance of probabilities this evidence clearly does. There may be concerns that the Tribunal has that further steps might have been desirable or might well have been taken, but those steps do not impugn the evidence that is provided; there is not good countervailing evidence, Mr. Cook has been entirely candid, quite properly so, that Willis says: "We simply do not have evidence in relation to these matters, the evidence from Mr. Russ and Mansell is clear, it has been properly explained."

THE PRESIDENT: Well there is no evidence from Mr. Russ. I am sorry, there is no evidence from Mr. Russ.

MR. BEARD: Well there is evidence as to how ----

THE PRESIDENT: There is an explanation ----

MR. BEARD: Yes, that is the key evidence.

THE PRESIDENT: It just so happens that that is accepted, that may be fortunate that it is accepted, but if it was not accepted ----

MR. BEARD: Well if it was not accepted there might be other things that might need to be done.

THE PRESIDENT: But it is against that possibility that one perhaps needs to consider, and that is why I asked you whether or not it was a deliberate decision as it were, as a policy, not to take statements in relation to factual matters of this kind, or whether it was just there were too many cases here for you to be able to do that.

MR. BEARD: Certainly in relation to this case there would have been significant practical difficulties in relation to this. There were interviews in relation to hundreds of suspected infringements, and trying to develop that would have rendered the process even more cumbersome in circumstances where we have heard in other appeals criticism levelled about the time that was taken in relation to this investigation, so there would be real practical concerns here, and clearly the decision was taken within the Office that the evidence on the basis of interview would be that which was relied upon. Of course, it is part of the reason why great emphasis was placed on the leniency scheme and the Fast Track Offer admissions process because of course each of those submissions provides confirmation that no challenge is being brought in relation to an infringement finding, and it is for that reason that I referred the Tribunal to the various other cases, where actually the process that was followed by way of the investigation does act as some form of corroboration.

THE PRESIDENT: Yes, produce admissions and so on.

MR. BEARD: Some parties have come along and said the FTO does not have any value, and that is just not true. If someone comes along and says: "We are admitting and we are not challenging something" that is a fact that the OFT effectively banks for the purposes of interpreting other material and considering the infringements more generally.

MR. SMITH: Mr. Beard, I am just looking at your very helpfully enlarged annex 1, and p.2 of it.

MR. BEARD: Yes.

MR. SMITH: What is troubling me slightly is a lack of consistency on the part of Mr. Russ, and if I could just show you a few entries. If you look at 02-00152 Bordon it is a bid value of £1,200,000.

MR. BEARD: I see, that is actually the third page in that bundle. Could you repeat the number.

MR. SMITH: The bid value, it has a bold entry, is "£1.2 million – it is Bordon and St. Lucia Lodge alterations".

MR. BEARD: Sorry, could you give me the estimate number from the left hand side column.

MR. SMITH: Yes, the estimate number is 02-00152.

THE PRESIDENT: I think it is the fourth page.

MR. BEARD: There are multiple page 2s, I am very sorry. It is just the form in which this ----

THE PRESIDENT: It is the fourth page in, it is 2004.

MR. BEARD: I have it, "Borden St. Lucia Lodge alterations".

MR. SMITH: First of all this looks like a genuine bid because our bid has been entered, but someone has put into the remarks "One of Two" (Felthams) pricing second stage." So query how brackets are being used there. But then looking immediately below, one has the

next entry which is clearly a cover because the bid is blank, and there it says not brackets around "Ascot Environmental Services", but simply "Cover from Ascot Environmental Services". Then just a couple more examples on this page, going down to "03-00873" "Mapley Framework", it is about 15 up from the bottom, there is just a blank altogether, presumably nothing was done here.

MR. BEARD: Yes, it may not have occurred at all, it may have been a framework agreement being entered into. I think there are a range of ways in which framework agreements can be reached. Just dealing with the first two. Obviously the parentheses here are different. I suppose if there had been an issue in relation to this particular transaction that would be something that could specifically have been asked of Mr. Russ, because he was asked about each particular entry in the course of interviews.

Second of all, it is systematically different from all the other cases where parentheses are used, where they are used for cover pricing and it is almost invariably just the name at the front of the box and perhaps some comments thereafter.

MR. SMITH: There are two more at the very foot of the page. If you look at a "Cover from Latimers", and "cover from Knowles & Son", with then (Knowles 3rd).

MR. BEARD: Yes.

MR. SMITH: What we have is one page of this spreadsheet, and different practices in terms of how one records covers.

MR. BEARD: Undoubtedly that is right, I do not begin to question, sir, your reading of it, but none of that impugns, with respect, the interpretation of the simple parenthetical entries of names in circumstances where no bid was listed in the first column, and the explanation given by Mr. Russ in that regard. The fact that it is spelt out and not put in shorthand in the three examples that you give detracts not at all I would submit from the explanation given by Mr. Russ in relation to those entries, which are relevant to the findings that were particularly made in this case, but I am not for a moment suggesting that it is anything other than a different language being used there than in the particular ones upon which the Office relies. I am sorry, Mr. Smith, were there any other matters?

MR. SMITH: No, no, that was very helpful.

MR. BEARD: Thank you. I am about to turn now to the Elbourn and Agency point. I note the time, and I apologise for the length of my ----

THE PRESIDENT: No, because we have detained you a little. Do you want to start after lunch?

MR. BEARD: I just wonder, it is going to take me more than five minutes to deal with the agency point, I wonder whether it might be appropriate. Obviously I do not want to constrain Mr. Cook's time in relation to this afternoon's penalty appeal.

THE PRESIDENT: Would it be inconvenient to start at a quarter to two?

MR. BEARD: Certainly not from my side. I will try to hasten my way through the remainder, and I think the Elbourn point is ----

THE PRESIDENT: We should be all right, should we not?

MR. COOK: (No microphone) If it helps, I do not think I will be as long on liability …

THE PRESIDENT: If we start at a quarter to two we should be okay.

(Adjourned for a short time)

MR. BEARD: I was just moving on to deal with infringement 244 and the Elbourn agency point, as I think it has been referred to. Willis admits that the price which Mansell used in its bid was obtained from Mr. Elbourn, the costs estimator, who was acting for Willis at the time and who had prepared the relevant figures before Willis' own bid. But, Willis then claims that it is not legally responsible for Mr. Elbourn's conduct in this respect. The OFT disagrees. The principle basis for that is that as a matter of European and domestic competition law, Mr. Elbourn did not engage in an independent economic activity in relation to the preparation and submission of the Redland Road tender, and therefore on the balance of probabilities it is right to find that Mr. Elbourn was part of the Willis undertaking as a matter of competition.

Of course, the notion of an undertaking is a term that is special to competition law. It is a used that is used in both domestic and European competition law, and by virtue of s.60 of the Act one must apply the meaning that is applied in the European jurisprudence to that terminology. A description of the nature of undertaking is usefully found in the Guidance at Volume 11, Tab 133. I should say that this Guidance is not the penalty guidance which has been the subject of numerous appeals. This is the rather more basic guidance that is provided on agreements and concerted practices. It is, effectively, the general guidance on the Chapter I prohibition and Article 101 (as it now is) of the European Treaty. (It used to be 81 and before that 85, just to make all case law research almost impossible).

The relevant passage to which I would take the Tribunal is on p.5 of the internal numbering. Here is a very simple outline description of the notion of undertakings, drawing on some of the key European case law. What is clear from 2.5 is that it includes companies, firms, businesses, partnerships, individuals operating as sole traders, co-operatives, associations,

non-profit-making organisations and sometimes public entitles (although the situation is slightly more complex in relation to public entities). In 2.6,

> "Article 81 and the Chapter I [so, obviously, now, Article 101 and Chapter I] prohibition do not apply to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although, having a separate legal personality, enjoys no economic independence. Whether or not the entities form a single economic unit will depend on the facts of each case".

So, it is a very wide concept of undertaking for the purposes of competition law. It applies to any entity engaged in economic activity. Groups of companies will ordinarily form part of the economic undertaking. So, for example, a subsidiary which operates on a free-standing basis day-to-day is nonetheless caught within the scope of the notion of undertaking when it is engaged in the same sort of economic activity as the parent. The parent has decisive control, but there is no suggestion that the parent must be ordering unlawful conduct in order to be caught by the scope of the definition of undertaking for the purposes of competition law.

So, in the context of cover bidding it may be done without the specific knowledge of the parent, but both entities, still within the same undertaking, still subject to the infringement because it is the undertaking that commits the infringement for the purposes of the Chapter I prohibition. There have been numerous cases before this Tribunal - not least in relation to these appeals - where parents and subsidiaries have both been fixed with liability in relation to infringements, but no issue has, perfectly sensibly, been taken on this fundamental point.

So, what about agents? Are they different? The answer to that is, "No". The case law of the European Court is clear. Mr. Cook has already referred you to the *Marlines S.A. v. Commission* decision. The full decision is now found in the additional authorities bundle at Tab 4, but we have set out in our defence the terms of the relevant paragraph. It is clear from the case law that an agent can in principle be regarded, if it can be regarded, as an auxiliary organ forming an integral part of the latter's undertaking, bound to carry out the principal's instructions, and it will form part of an economic unit with the whole undertaking. That is an approach which has been repeatedly confirmed. Indeed, the only issue that has tended to arise in relation to agents is the problem that Mr. Cook did touch

upon, which is that agents want to avoid the application of Chapter I prohibition or Article 101 at all in relation to the agreements they have with principals. Indeed, there is guidance that deals with that. It is, in particular, in the vertical restraints guidelines that are promulgated by the European Commission. Those set out how agents are not to fall within the scope of the Chapter I prohibition where they enter into agreements or arrangements pertaining to their agency status.

There is one note of caution. Those guidelines are not in the bundles. The Purple Book is out of date in that regard. The new guidelines on vertical restraints were promulgated in May of this year. I do not think they do anything differently in relation to agency status from the previous guidelines which are in the Purple Book, but, nonetheless, it is worth having that in mind if the Tribunal is going to have regard to any material there.

So, applying this broad concept of undertaking to the situation we are dealing with, what is clear and uncontested is that at the time of the infringement Mr. Elbourn was engaged in economic activity. What was he doing? He was carrying out estimating for jobs for Willis and preparing tenders for them. So, in relation to the infringing activity - in other words, the cover pricing, the provision of that tender material, the preparation of that tender material - he was undoubtedly acting as an auxiliary of Willis in the language of *Marlines*. What he was doing was pricing work for Willis, setting the principal's pricing. It was not an autonomous activity. It was an activity for Willis itself. The comparisons being drawn with electricians and plumbers, and so on, are not apposite in this regard. I will come back to the relationship in relation to subcontractors more generally, but it is worth noting that what was being done was the pricing of Willis' own work that was being undertaken by Mr. Elbourn. This was not a situation where Mr. Elbourn was being required to do some wiring on a floor or install some particular plumbing. He was actually carrying out the pricing function -- the price estimation function for Willis. That is something that he was not doing on his own account. He was clearly working for Willis in that regard. He was much like, effectively, a part-time employee. Certainly from the point of view of competition law he could be treated as such because competition law does not stand on ceremony in relation to particular legal form. As one sees in that general approach to undertaking, an undertaking can involve a whole number of legal entities, and it is a single undertaking. Here, again, the fact that someone is an agent rather than a part-time employee makes no difference for the purposes of the analysis.

In the course of his work he prepared an estimate for the University of Reading job in relation to the refurbishment of 12 and 16 Redlands Road. We have already seen from Mr.

Russ' schedule that actually Willis did quite a lot of work for Reading University - there are a number of mentions of Willis relating to Reading University work. There is no doubt that in the present case Mr. Elbourn was bound to carry out Willis' instructions in relation to lodging any bid on behalf of Willis. Indeed, as Willis itself says in the Notice of Application, in submitting the bid documentation Mr. Elbourn was acting in accordance with the specific instructions of Willis and he had no power to determine whether a bid would be made or the level of the bid.

Willis then claims, however, that Mr. Elbourn cannot be regarded as part of the same economic undertaking since he is self-employed and works for other companies, other than Willis, and bears risks for his own business of providing cost estimation services. Now, this is both wrong and misses the point. It is wrong because, of course, when Mr. Elbourn carries out the tender preparation work he is doing it for Willis and not for himself. But, in any event, the question is whether Mr. Elbourn forms part of the same economic entity as Willis in the market in which Willis offered the construction services in respect of which the cover pricing occurred. That he plainly did. Willis has offered neither argument, nor evidence contradicting that conclusion. It is undisputed that Mr. Elbourn did not himself offer to supply contract services for the tender and as pointed out in the Decision he assumed no financial or commercial risk in relation to those services. Those are the hallmarks of a genuine agency arrangement for the purpose of which the agent is not to be regarded as part of a separate undertaking.

It is also common ground that Mr. Elbourn was the agent of Willis in relation to the preparation of the tender, as I have said, the signing of the tender returns and the submission of the tender. It therefore follows that Mr. Elbourn was, for the purposes of the tendering activities, part of a single economic entity, together with Willis. Willis has therefore been properly held responsible for the cover price given.

Indeed, it is just worth bearing in mind the consequences if Mr. Elbourn is not part of the Willis undertaking for these purposes. First of all this means that Mr. Elbourn is a separate undertaking entirely. There is an infringement here. There is no doubt about that. There is an infringement here. So, what is impliedly being said is that the infringement is between Mr. Elborn and Mansell. They engaged in a concerned practice and as soon as you articulate that proposition one can see why it does not make any sense, because Mr. Elbourn was not there trying to carry out any function on his own. He was trying to carry out a function for Willis.

Just in passing, on the subcontractor's point, Mr. Cook, on numerous occasions, said it would be quite absurd if subcontractors could be treated as part of a single undertaking with a principal when those subcontractors went off and did other work for other people. We simply do not accept that that is absurd. There may well be circumstances that where subcontractors are carrying out, for instance, pricing work for their principal, and they enter into arrangements with rival bidders, providing pricing information, they too would be subject to a finding of infringement, and it would be a finding of infringement that related the undertaking as a whole. It will depend on all the circumstances. Again, the references to plumbers and electricians *per se* do not assist you because if the plumber or electrician is simply carrying out work and is having no contact with rivals, and is not exchanging any relevant sensitive information and is not charged with any of those functions, then, yes, there may be separate analysis and different analysis there. What one has to focus on is, in essence, what constituted the infringing behaviour, and, for the purposes of that infringing behaviour, were the activities that gave rise to the circumstances ones which were being performed by Mr. Elbourn as part of the undertaking?

THE PRESIDENT: So, what he was actually doing, as it were, officially is a part of it, is it? So, take the case where Willis had asked their solicitors to check the tender documents for them, and it just so happens that on the tender document they had already filled in the price that they were going to tender. Suppose that Mansell knew the solicitor and rang up and said, "Can you let us know what the price is because we are late and we want to put in a cover price?" Would the solicitor then, for that purpose, be part of the undertaking - because his work was, as it were, too far removed from working out a tender price?

MR. BEARD: It begins to become difficult. Mr. Cook rightly said that the lawfulness of the activity does not determine whether or not it would draw someone within the scope for the purposes of ostensible authority. The same must be true here for the definition of 'undertaking'. The difficulty with the solicitor example, I think, is that it is so vastly far away from a situation where someone is actually engaged in preparing the tender and the pricing, and the estimation, which is at the very essence of where this unlawful activity rests. You can see a situation where it might be argued that the solicitors are effectively on a frolic of their own there, because it would fall foul of their professional duties to be conveying those sorts of information, and it would not be expected of a solicitor that they would be having communications with a rival tenderer unless there was some sort of standing instruction or arrangement with the principal for whom they were acting. I think the example, with respect, may be a difficult one. In principle, the fact that someone has a

particular external relationship to an undertaking is not in and of itself determinative of whether or not they are part of that undertaking.

MR. SMITH: You are not suggesting that every act of Mr. Elbourn is attributable to Willis. What test do you say we should apply in determining which acts, assuming he is part of the undertaking, are attributable to the undertaking and which ones are not? I heard you use the words "a frolic of their own" a moment ago.

MR. BEARD: It is activities relating to the tendering and estimation services that he carries out for Willis. Those are the activities that are in question. Certainly, for these purposes, if there is an unlawful infringement in relation to those activities, the conveying of price sensitive information, we do not immediately see why any of those circumstances would not fall within the scope of activities conducted as part of the undertaking.

MR. SMITH: But putting it a little more generally, you are contrasting work that is done in the scope of his employment versus work that would be a frolic of his own, and the former would be attributable to the undertaking and the latter would not be.

MR. BEARD: The reason I used the language "a frolic of his own" was in the context of the solicitor example, because there you have got someone that is reviewing a document for an entirely different purpose. They are not there to carry out the estimation and provide the price. Then to be engaging in contact with a third party with whom you otherwise have no relationship, professionally or otherwise, seems particularly strange. The language of "frolic of your own" is undoubtedly language that draws upon the domestic authority in relation to ostensible authority and vicarious liability. It may well be that if someone is carrying out a complete frolic of their own, or is doing something that is wholly unrelated to the core activity they carry out for the relevant undertaking, you would not say that that activity fell within the scope of the undertaking's activity.

One has to go back to the nature of the definition of "undertaking". It is to do with an economic entity performing actions on a market. So the delineation is going to tend to be what are the activities that relate to the actions on the particular market. Here you are talking about construction work, bidding for work, setting the prices for that bid work, and in those circumstances to suggest that fell outside the scope of the relevant economic activity that was part of the undertaking is one that we simply cannot see.

One can get a situation, for example, in conglomerate company groups where you have a parent and a multitude of subsidiaries, and some of the subsidiaries are engaged in completely different activities, from a subsidiary that is engaged in some sort of commodity dealing, engages in some sort of bidding practice that is unlawful. In those circumstances,

you would identify the subsidiary and the parent as part of the economic undertaking. You would not necessarily assume that any other subsidiary would automatically be treated as part of the undertaking for those purposes. So even when one is talking about the more orthodox arrangements that have been subject to consideration in the case law, you can see that core theme coming through. When one is talking about the test one must look at the economic activity in question. Therefore, when one comes to talk about frolics of one's own, one is talking about matters that fall well outside what economic one is focused on for the purpose of the infringements. One starts by working backwards from the acts which concern you.

MR. SMITH: I am just trying to articulate the test. Is it less "frolic of one's own" and more "economic activity of one's own"?

MR. BEARD: I think that is right. I think the difficulty comes with the solicitor who is just doing something very, very different and unless you have a standing instruction it is very difficult to see how that could fall within the scope of the economic activity *per se*. It may be possible – it may be possible – to delineate it in that way. Certainly, using a solicitor to communicate information, pricing, in that way certainly would not mean that an undertaking would necessarily be able to claim that it had nothing to do with the infringement. What I do not want to end up concluding or suggesting is that if someone who does not fulfil a function of the relevant sort is not engaged in that relevant sort of economic activity at all. If one was to lift something from a photocopier and pass it across when they were doing something completely *ad hoc*, that would not necessarily impute liability or be treated as part of the undertaking.

MR. SMITH: What would be your answer if you had, say, one of Willis's sub-contractors, say an electrical sub-contractor, walking into Willis's offices, happening to see a tender price and leaking it to Mansell because Mansell want to know it? Is that on the sinister side or is that on the ----

MR. BEARD: I think one would have to look at the circumstances in which the electrical sub-contractor was operating. If it was conveying a tender price in relation to which it was involved and it was an activity with which it was concerned then one could see that there may be difficulties. If it just happens that someone is an electrical sub-contractor on one job, takes a tender and passes it to another person, we would not necessarily be dealing with the same situation here. I think it may be that the circumstances and the different tests have to be considered on a fact specific basis. Here what we say is that the function that Mr. Elbourn performed was so much a core part of the activity of preparing the bids for the

relevant tender processes, in those circumstances his activity in relation to the preparation, distribution and the lodging of the bids, and so on, did mean that for these purposes he should be seen as part of the undertaking in relation to all of this tendering activity, and when it came to providing an unlawful cover price to Mansell that fell within the activity with which he was engaged for Willis.

MR. SMITH: Thank you.

THE PRESIDENT: Just following on from that, would it follow, therefore, Mr. Beard, that if someone in Mr. Elbourn's position was contacted by someone in Mansell's position and asked to give them a price because they wanted, effectively, to undercut it, they wanted to get the contract and they wanted the price estimator, and he gave it to them, clearly that would be an infringement, would it?

MR. BEARD: Yes.

THE PRESIDENT: They could be cheated and at the same time be responsible for the infringement.

MR. BEARD: The added element there is that it runs contrary to the interests of the principal undertaking, whereas in this situation it does not run contrary to the principal undertaking. Is that not the difference that you are identifying, that in this case essentially you are giving a cover to someone else so you are effectively knowing that that competition is eliminated from the tender process to your benefit.

THE PRESIDENT: On the facts of this case we are asked to assume the facts are that they had already put their price in, so there was not any particular benefit to them.

MR. BEARD: It is not a detriment to them. The situation that you are positing is that there is a positive detriment to the principal, whereas in the case that we are dealing with you do not have any tension between the position of the principal and the action taken by the agent.

THE PRESIDENT: That is an important factor in determining whether Mr. Elbourn is part of the undertaking.

MR. BEARD: It may well be material, because if you are acting contrary to the economic interests of your principal it is less easy to see why one treats that as part of the economic activity of the principal undertaking, because if you are actually trying to undermine it one could see that a further point could be taken against you.

THE PRESIDENT: The economic activity is the same, is it not, because the economic activity is that of preparing a tender and submitting a tender to the University of Reading. It just so happens that he reveals that information and they use it in a different way. Instead of putting in a cover price, they ----

MR. BEARD: All I was doing was pointing out the differences between the two situations. I am not here trying to suggest that the situation you propose would necessarily fall outside the scope of (a) an infringement; and (b) Mr. Elbourn being treated as part of the undertaking. In many sorts of cartels you get situations where there is a "you scratch my back, I'll scratch yours" situation, where people do take losses at certain times with a view to there being compensatory arrangements in future.

Ironically, some appellants have come forward in the course of this set of appeals and said, "Actually, the OFT should have made a broader finding that that was really what was going on here". The OFT said, "We do not have sufficient evidence on the basis of this investigation to say that is what going on, that there is an implicit understanding that 'if you give me a cover today then I will give you one tomorrow if you need one' type of arrangement". In those sorts of circumstances certainly I would not want to be suggesting that you could presume that it was necessarily a case where Mr. Elbourn fell outside the scope of the definition of undertaking ----

THE PRESIDENT: It is no part of your case here that anyone at Willis knew about this cover.

MR. BEARD: We say Mr. Elbourn is part of Willis for these purposes and therefore ----

THE PRESIDENT: That is your case, that Mr. Elbourn provides everything you need.

MR. BEARD: That is the reason why we are not seeking to challenge the witness evidence that is put forward where Mark Willis says, "I did not know about it", but whether or not other people knew about it is separate and we do not have evidence in that regard. We do not challenge Mark Willis's evidence.

THE PRESIDENT: It is not part of your case that anyone at Willis had ----

MR. BEARD: We are not resting the analysis here on that, no, that would not be correct. We are saying that where you have a situation like Mr. Elbourn's, he is to be treated as part of the undertaking, and I was diverging to deal with the sub-contractor situation and simply saying the particular contractual relationship, whether it is a part-time employee, strictly speaking an agency relationship, a sub-contractor that carrying out similar sorts of functions, those legal mechanisms do not matter for the purposes of competition law.

MR. LEWIS: Mr. Beard, can I just explore one other approach to this with you? I am picking up really on what Mr. Cook said this morning about the range of sub-contractors that companies generally have in the building industry, and clearly a small family firm of the kind we are considering today would be expected to have quite a large number of small sub-contractors. Can we explore this in relation to a different kind of illegal activity. For example, suppose a sub-contractor engaged, shall we say, in plumbing or electrical work

was to be in breach of Health & Safety regulations, does the fact that they have committed an illegal act in any way affect the extent to which they are part of the economic activity?

MR. BEARD: I think one has to take it in two stages. If a sub-contractor committed a breach of Health & Safety, first of all, one would need to assess what the particular infringement was, and it would be a statutory infringement, since Health & Safety law is statutory, and of course it would not be based on the framework of competition law with which we are dealing here. Therefore, you do not have the same concept of an undertaking engaging in activity for which it can be liable under Health & Safety law in the same way that you can here. On the other hand, the fact that a sub-contractor engages in illegal activity does not necessarily take it outside the scope of ordinary vicarious liability for a parent company or an employer. One has to look at the particular domestic law on vicarious liability to assess whether or not the actions of the sub-contractor could effectively be imputed to the parent company, and I would not be so bold as to make presumptions as to how that would work in particular situations, I think the legal analysis would be potentially relevantly different in those circumstances, so I am sorry I am not able to fully answer the question, but equally I am not sure that the comparison will necessarily shed light on the central notion here which is the inclusion of somebody within the scope of economic undertaking, albeit that I will make some remarks about ostensible authority and so on.

As I say, you have a situation where what is essentially being said is that Mr. Elbourn is an independent undertaking and that is where the infringement lay, and the analysis underpinning it is wrong. Indeed, if Mr. Elbourn was a separate undertaking the agreements between Mr. Elbourn and Willis could end up being subject to the operation of Chapter I and Article 101 which again would be a bizarre conclusion to be reached in relation to the analysis of an agent relationship. More broadly, if Willis could effectively step aside from liability by saying "It is not us but Mr. Elbourn, he is the agent and he is the one that is liable", one can immediately begin to see how the proper enforcement of competition law could begin to become undermined by particular legal structures being put in place, and that is precisely the triumph of legal form over substance, which this very broad concept of undertaking is essentially intended, or has the effect of avoiding. In the circumstances, one could only conclude that, as a matter of economic substance, Mr. Elbourn was carrying out Mr. Willis' estimation and tendering process as part of a small family firm – one understands that one brings in people to assist in that regard, but that in those circumstances and for those purposes Mr. Elbourn was clearly part of the Willis' undertaking and therefore Willis is liable.

The second basis on which the OFT suggests that Willis should be held liable is that as a matter of domestic law Mr. Elbourn acted with the ostensible authority of Willis, and therefore Willis is vicariously liable for his acts. The doctrine of ostensible or apparent authority is in very broad terms, that if you appeared to the world as having the authority of a principal then the world can take you as having that authority, and the result is that the principal is bound by your actions.

In reality, this ground does not add a great deal to the overall analysis of the concept of undertaking, it merely reinforces and confirms that Mr. Elbourn must be considered as part of the same undertaking, it is effectively a parallel basis for concluding that Willis must be held liable for the actions of Mr. Elbourn, he plainly had the authority to prepare and set tenders. As a matter of fact, he clearly had apparent authority to exchange tender information, we have already seen from the table that Mr. Russ took it that he was receiving a price from Willis. If one takes the language of **Bowstead & Reynolds**, which is set out in the section quoted in the OFT's defence (p.14) to which Mr. Cook has already referred. There is set out the language of **Bowstead & Reynolds** there is no dispute about that representing the relevant course. But having that language in mind effectively Willis by words or conduct, represented or permitted it to be represented that Mr. Elbourn had authority to act on its behalf in relation to tendering matters. As such Willis was bound by the acts of Mr. Elbourn in respect to anyone dealing with him as an agent, to the same extent as if such person had the authority he was represented to have even if he had no such actual authority.

To pick up a point, Mr. Chairman, you raised earlier, there was no need for there to be any specific representation to Mansell in this regard. Indeed, it is clear from recent case law a strict finding of ostensible authority is not necessary. Instead, it is sufficient that the conduct of the agent is closely connected with acts which he was properly authorised to do. This can be drawn from the authority of *So v HSBC Bank* which is in the additional authorities bundle at tab 2. This is a transcript of the judgment so it does not have a headnote, and it related to a rather complex fraud. I am sorry, I may be overstating it, the case concerning the fraud was complex, the fraud itself was rather straightforward – the shifting of money to one bank account under a misrepresentation and then disappearing the money out of the back end of the bank account.

The relevant passage to which I would refer the Tribunal starts at para. 53, p.10 of 20, vicarious liability. 53 is just setting out the context in relation to a letter of instruction that was at the core of this claim. In 54 what was being suggested there is an ordinary course of

employment test should be used for whether or not an employer had vicarious liability in relation to the employee.

THE PRESIDENT: So this is nothing to do with ostensible authority, vicarious liability.

MR. BEARD: The two things are linked. If I could take you to paragraph 55:

> "The House of Lords considered the appropriate test for vicarious liability in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48. That case concerned the liability of a firm for the fraudulent conduct of one of the partners. Under s. 10 of the Partnership ct 1890 where a person suffers loss due to the wrongful act or omission of a partner acting in the ordinary course of the business of the firm, the firm is liable to the same extent as the partner so acting. Both Lord Nicholls and Lord Millett, with whom other members of the Committee agreed on the point, equated the position of partners under s.10 of the 1890 Act with that of employers. They both emphasised that vicarious liability rests on an underlying legal policy which recognises that carrying on a business enterprise necessarily involves risks to others. In Lord Millett's words: 'Vicarious liability is a loss distribution device based on social and economic policy.' Lord Nicholls, with whom three of the other member of the Committee agreed, emphasised that, for that reason,, liability for agents should not be strictly confined to acts done with the employer's authority. He said that, authority not being the touchstone, the best general test is that the wrongful conduct must be so closely connected with acts the employee was authorised to do that the wrongful conduct may fairly and properly be regarded as done by the employee in the course of the employee's employment."

Then he goes on in paras. 56 and 57 to expand on that and discuss the test, the *Salmond* test. In particular in para . 57, this is where the phrase " a frolic of one's own" is used to describe the sorts of conduct that would fall outside the scope of vicarious liability because one did not have authority to do it and even beyond that there was no sufficient policy reason to impute the liability to the principal in those circumstances. So the two concepts overlap. I would not, with respect to Mr. Cook, although it does not perhaps matter for the purposes of today's hearing, accept that vicarious liability and ostensible authority are effectively co-terminus concepts, in other words, only where you have ostensible authority can you impute vicarious liability to a principal. Here it is clear that you may go further, and a principal can be vicariously liable beyond the point where ostensible authority has been given, but that does not matter for the purposes of today's hearing. I am sorry, Mr. Smith?

MR. SMITH: Reading this it just seems to be concerned with vicarious liability to echo the point the President just made, it does not seem to be saying anything about "ostensible authority"?

MR. BEARD: It is talking about the nature of the authority, authority is not just a touchstone, one needs to consider whether or not the wrongful conduct in question is sufficiently connected and, given the interrelationship of the two concepts ----

MR. SMITH: I see that. If I am driving a car and I am an employee, and I run someone over the question is: am I driving a car on my employer's business, or am I going off piste to do something on my own, and that is a very hard question, whether that is attributable to the employer or not, and that is where the "frolic of its own/scope of employment" has to come from in vicarious liability, but I am not sure that is the test in agency cases where one is asking: "Does an agent, who does not have actual authority, nevertheless have ostensible authority?"

MR. BEARD: One can see that the two tests are different, because the question is almost a category area to ask if you have ostensible authority to go off on a frolic of your own driving a car in a different place, it is just not the right question to be asking. The two concepts are therefore different. I think the only reason for referring to this authority is to indicate the circumstances in which the nature of the relationship between a person's conduct and the liability of a principal, and it is worth stressing that that case is not just focused on employment, and in that regard we would depart from Mr. Cook's reading of it, that it is talking about the fact that an employee is a particular type of agent in those circumstances, but all we are drawing from that authority is simply that where you have a situation where the conduct of an agent, in that case an employee, is such that it is closely connected with the principal activity with which they are dealing, then the principal will be held vicariously liable, and that, to our mind, provides some sort of analogy where one is considering the situation as to whether or not someone should be treated as having ostensible authority, but we do not take it any further than that, and it must be accepted as rightly indicated by Mr. Smith that that authority focuses on the nature of vicarious liability and is not principally concerned with ostensible a authority.

THE PRESIDENT: But it does indicate that there is a certain confusion about what you are seeking to prove in this way, because ostensible authority, as Mr. Lewis has just pointed out, you are holding someone out to someone who they want to hold to a contract, and the question is whether the principle is bound, it is normally done in terms of contractual relations.

MR. BEARD: Yes, that is right.

THE PRESIDENT: Whereas vicarious liability is normally in the context of a tortuous liability for the acts of another, and which do you want to be using?

MR. BEARD: The truth is the process of considering the doctrine of ostensible authority for assessing whether or not Mr. Elbourn can be treated as part of the undertaking can only be a matter by analogy because, of course, as you rightly say, Mr. Chairman, the doctrine of ostensible authority is really seen in the context of a contractual relationship when someone is being bound. So we are here dealing with a slightly different situation. What we are asking ourselves is whether or not Willis should be imputed with the relevant liability in relation to the actions of Mr. Elbourn. We say that one can draw some assistance in carrying out that analysis from the doctrine of ostensible authority.

THE PRESIDENT: I do not see how you can because the whole basis of ostensible authority is you are holding someone out and making a representation to somebody upon which they are entitled to rely. Now, who is entitled to rely upon Willis' holding out? Is the fact of what you are saying that Mansell are entitled to rely upon the fact that Willis had employed Mr. Elbourn as their cost estimator and therefore Mansell was somehow entitled to rely upon that through the doctrine of ostensible authority? I say to you if that is the case, what on earth should it matter? All they wanted was the information, they were not seeking to enter into a contract with ----

MR. BEARD: That is absolutely right.

THE PRESIDENT: So is "ostensible party" of any relevance.

MR. BEARD: It is for that reason that I set out the principal ground as being the analysis of whether or not he fell within the scope of the undertaking because I think it is right to say that the doctrine of ostensible authority is not going to get the analysis home in these circumstances. The question is the extent to which it assists in analysing the situation as to whether or not someone should be treated as part of an undertaking. To that extent the doctrine of ostensible authority has been developed which says: "You do not need specific representations", it is how you appear to the world, maybe a material analogy for your analysis of whether or not Mr. Elbourn falls within the scope of the notion of 'undertaking'. To pick up Mr. Smith's point in rightly identifying the fact that the *So* case is focused on vicarious liability, what one is there doing is looking at circumstances which, as, Mr. Chairman, you rightly say, is the imputation of tortuous liability. Well, we accept that, here, we are not dealing with tortuous liability. Of course there is the collateral prospect of tortuous liability, but this is not in and of itself tortuous liability. This is a statutory finding

that can give rise to tortuous liability by way of a breach of statutory duty claim being brought subsequently. But, it is different and we accept that. It is for that reason that neither of the concepts of ostensible authority, nor that of vicarious liability are full square as a basis for finding the relevant connection between Mr. Elbourn and Willis, but they may be of assistance to the Tribunal in making findings in relation to the nature of undertakings ----

THE PRESIDENT: We really come back to that.

MR. BEARD: Yes. The OFT squarely places its weight on the principle ground of, "He is part of the same undertaking".

MR. COOK: (No microphone): Sir, just so that I am clear: is my learned friend saying that despite the decision he does not advance any positive case to defend the Decision that ostensible authority is a satisfactory ground for making my client liable? If that is the position, then my submission will be slightly shorter in reply?

THE PRESIDENT: Mr. Beard can answer that, but I think I know what he is saying. I think he is using these by analogy in order to back up the way he puts his argument on undertaking.

MR. BEARD: Yes.

MR. COOK: But currently the Decision says we are liable for two reasons, and if he is dropping one of them then ----

MR. BEARD: I am sustaining the first of those reasons ----

THE PRESIDENT: The undertaking.

MR. BEARD: Yes.

THE PRESIDENT: I think you have got your answer.

MR. BEARD: That, in the circumstances, deals with the agency point. There was one final point that was not pursued by Mr. Cook very heavily - a fourth ground of liability appeal - which was that there was no effect on Willis. It is in writing. It was not pursued orally It is a matter which can perhaps be picked up in due course if anything is said further about it in the context of the penalty appeals. But what that amounts to is saying that there was no unlawful concerted practice here on the basis that there was no impact on Willis. That is plainly wrong. That is not a correct analysis of whether or not a concerted practice exists in relation to the delivery of a cover price. In that regard this Tribunal may wish to have specific reference to *Apex*, which is found in Volume 3, Tab 46. If I may I will just briefly refer the Tribunal to the penalty defence, which we will be coming on to, but if I may just refer you, for you assistance, refer you to the penalty defence ----

MR. COOK: (No microphone): There may be some confusion here. It may arise from how the Notice of Appeal is worded and how the words fall in the notice of appeal. I am not saying that a failure or inability, necessarily inability, to take account of the information gets us off the hook. The reality is that the simple transaction, if we were involved in it, would be infringement nonetheless. It might be a significantly less serious infringement if the presumption is that we took account of the information ----

THE PRESIDENT: It goes more to the penalty, does it?

MR. COOK: (No microphone): It does. It is a challenge. It is under the section on the challenge on liability to the extent to which it is an aspect of the finding of what we have done wrong, which we challenge, much in the same way that if you are in front of a criminal court, you say, "No, it was not murder. It was manslaughter". You are saying it is a slightly different kind of infringement. Now, to some extent, of course, I am not saying that it is not infringement of the Chapter I prohibition.

THE PRESIDENT: Really that is not a liability point.

MR. COOK: (No microphone): It is not saying it is a complete and utter liability, I hope we made it clear in our skeleton. That is the position.

THE PRESIDENT: It comes back to me now, when I read that bit of your skeleton I wondered as to why it was in the liability bit rather than in the penalty bit.

MR. COOK: (No microphone): It is the features of the characteristics of what we are said to have done which we disagree with, that is completely wrong.

THE PRESIDENT: This goes to the point that, as it were, the request only came through after you submitted your tender. Therefore it would be ----

MR. COOK: (No microphone): -- perhaps impossible to rely upon. The cover price has effectively two sides, or two sides to the assumption of what goes is wrong. One is that you receive notice that a party is not going to be bidding and you take account of that; secondly, you then give them that price which they rely upon. Effectively in those circumstances only the second exists. I am not denying that is an infringement. It is less serious than one that involves both, but I am not suggesting it is an overall defence.

MR. BEARD: I think that makes my submissions very brief. Unless I can assist the Tribunal further, I will await the penalty.

THE PRESIDENT: Than you very much.

MR. COOK: Sir, if I may, I will come back first on some points arising on liability.

THE PRESIDENT: You are going to reply on that.

MR. COOK: Starting off with the first point my learned friend made - the burden and standard of proof. Despite the time taken I do not anticipate there is actually that much between us. It is quite clear that we say it is in para. 24 of our Notice of Appeal that the burden of proof is one on the balance of probabilities. That is not in any way in dispute. Equally, of course, as my learned friend was at pains to point out, this is conduct which involves dishonesty. I would certainly submit to the Tribunal that in conduct that involves dishonesty, as he put it, then, in my submission, you should take more persuading on the basis of the evidence that that is indeed what took place than you would if there was a suggestion that there had been negligence. That is, of course, the historical reason why the Tribunal has used the term 'strong and compelling evidence' in looking at conduct of this kind. So, I would simply suggest that that language remains correct. It remains correct as an expiration for that principle that you were looking at on the balance of probabilities, but some things are more difficult to prove on the balance of probabilities than others in terms of the kind of persuasion you might require may be slightly greater because they are inherently less likely, and dishonesty (which is what is being submitted) that we committed falls into that category.

THE PRESIDENT: Mr. Beard says it is not inherently less likely. It is not inherently unlikely to have happened because every time they looked at something, they found more of these things going on; it was so widespread.

MR. COOK: In relation to that you say 'every time we looked at this, we found this going on', the reality is that there are thousands of companies across the country. They found 103. Over a period of (measured in multiple years) we committed a small number of infringements. In some case large numbers, but in some cases quite small numbers of infringements. To suggest, based on that that it is likely activity for any individual party to participate in dishonest behaviour, or likely to do so in the context of any individual tender is, in my submission, going wildly further than he has any evidential basis to push forward. Ultimately the position in this case is really one of weighing the evidence - looking at what the possibilities are. Ultimately you have heard it said, talking primarily here of 188 and 215: "Well, there is no evidence from Willis". There is, of course, evidence from Willis, which is that they have looked and they cannot find any basis to show that they were involved in any form of conduct with Mansell. That is on one side of the line.

THE PRESIDENT: They found some, did they not? They gave full details of it.

MR. COOK: That is fundamentally important. That is 224.

THE PRESIDENT: Arguably it is relevant for 2.l15 and 188 as well, is it not, or not?

MR. COOK: It is relevant in the sense that it shows that when Willis tried to look, firstly, it shows that Willis is honest because Willis did come forward and provide that information. It is perhaps important to recognise when that information was brought forward, that was the volunteering of the information in relation to Mr. Elbourn which was done at a stage of the fast track offer. We did not accept the fast track offer. So, at that stage you simply said, "We think you have been committing these infringements. What is your position?" So, we were not provided with any evidence that the OFT had, but at that stage we came back and volunteered the best story that we could put forward. So, it is very much a situation of volunteering evidence. Sir, it is relevant in terms of establishing that Willis, on the face of it, looks like a very honest and credible party who is putting forward the best story it can. In terms of whether you can sort apply a similar fact pattern, it has happened in relation to one; therefore it must have happened in relation to the other two. In my submission, where the evidence shows quite different things - which is, we can find a story in relation to one, but not in relation to the others, one could not assume that that was the position. Ultimately, there is still the circumstance that the OFT needs to show that a party that Willis was responsible for committed the infringement, and the fact that Mr. Elbourn may have felt happy to have done this in relation to 224 provides no indication that another party, vis-à-vis because it has not been suggested that Mr. Elbourn was the one doing it, did it in relation to the other two. So, there is a similar fact pattern if that is why you are suggesting, sir, my submission does not go anywhere in this context.

So, on the other side we have to see what the OFT's evidence is and what kind of weight you can attribute to it. One is obviously looking here at the notion that AH Willis was involved and what one gets from the documents in that regard. There are a couple of possibilities that I put forward here. They are simply designed to demonstrate that there is a credible basis for concluding that the evidence that there is could simply be wrong or misguided - a couple of credit possibilities: (1) we would say simply it is credible - more than credible - that there is simply a mistake in those documents. I will come back to the detailed points, but they are a mistake, or, alternatively, as one has in relation to 224 – Ultimately it depends on you being with me, but if you are with me that Mr. Elbourn is not part of the undertaking and we are not liable, then the indication that AH Willis is involved demonstrates nothing about whether the party he might have been able to provide the price to was actually somebody for whom Willis is legally liable. There are a couple of scenarios that we talked about today. We talked about the electrician who comes in and is able to provide the figures. Those kind of circumstances. There are a number of circumstances

where, even on my learned friend's analysis, they will be outside the scope of Willis' legal liability. But, nonetheless, from the point of view of Mansell, ultimately as long as they have got numbers that they know originate from Willis they do not really care if those have come through in a way that make Willis legally liable for providing them or not. So, there is that uncertainty about whether the notation brings it home in any way to a party for whom Willis is legally liable.

Turning to the weight of evidence that there is, my learned friend went through a sort of list of four or five items that are meant to be this body of evidence that builds up to show that Willis was involved in wrong-doing. He named a number of different individuals from Mansell that they had interviewed. You may have noticed, when he was saying it, it was Mr. X from Nottingham. Another Mr. X from Nottingham. The reality is that all of those people do not assist in any way at all because they are from a different part of the country They do not deal down in Reading, or Slough (which is, of course, where Willis is based). It is only Mr. Russ who can provide any evidence of cover pricing in that region that would have any relevance to Willis.

The second point that was relied upon was of course the leniency application. Again, in relation to that, you have seen the document. It is simply a lawyer's attempt to put forward in simple form the results of the other forms of evidence. It has no independent status in terms of establishing anything because there is no indication it added anything from other evidence provided. So, it has no independent status.

Then we come to the workbook. In relation to that, there are a couple of points I would make on the workbook. I will just show you a couple of passages from the interview notes of Mr. Russ which you will find attached to the liability defence at Tab 3. If I could start, sir, with p.13 of those notes, at the bottom of the page -- Unfortunately there is as very little literal transcript which makes it a little bit different to read at times. It says,

> "Okay, and, um [and I will try and ignore some of the more obvious unnecessary words], in terms of recording covers, in terms of covers you'd taken, or given, um, we've mentioned on the workload, and there, there was a tender results sheet. And we're gong to come on to look at that obviously a few of those later ..."
>
> "Yes. Yes."
>
> "... that you would sometimes put who you'd taken the cover from?"

The question being asked is, you know,

> "Who would you put you had taken the cover from on the worksheet?"
>
> "Yes, I would".

"And were there any other ways in which you would indicate that a cover had been taken or given?" "Not really, no, because no-one else would be particularly interested, to be honest".

That was in relation to the point I raised earlier, and you raised, which is: How important was this document? He is saying there, "No-one else really cared. It was not all that important". That, in my submission, is confirmation of the fact that this really was not a document of tremendous importance where enormous care and attention needed to be taken. The next passage I would fill in -- Again, it was a question you asked, sir. It was whether I was right to say that sometimes they would fill things in one or two weeks earlier. That is p.20. About two-thirds of the way down the page,

"Um, ah, and, and just fill, just fill out the, out the figure, and because I would have put the figure and the name in. Um, if I knew in advance and it was a week or two earlier that we were going to be getting some help from such and such, I may well have put their name in, just to say, well look that particular one, you wanted to take a cover, and this, this is the company that say they're going to help us".

Sir, that makes good the point that sometimes it might be put in one or two weeks in advance as a matter of expectation, and one simply cannot know whether an expectation turned into reality or not.

I would also refer you to p.21. it is talking here about some of the processes involved. This is a section about six or seven lines down.

"-- in terms of these contracts, would it generally have been yourself who, who would make was making the contact to, to get the cover on these, or ...?

"In the main, I would say, yes. Um, although I may have got one of the other estimators, just to say, look, ;'Do you mind ringing ---"

He talks about the possibility of saying, "Can you go and ring X, Y, Z and A and B", but that is primarily in terms of finding out who was bidding. Again, I rely upon that. It is simply him handing it across to somebody else with a potentially fairly broad instruction to talk to several people. I very much suggest it comes back to the Chinese whispers point, the second and third and hearsay points. When you are saying, "Talk to several people", it is readily easily impossible to see how mistakes can happen in terms of reporting back.

MR. BEARD: In relation to that section I would ask the Tribunal to read on the next question as well.

THE PRESIDENT: Yes, "So you were always aware", that one?

MR. BEARD: Yes. I made submissions on that point.

MR. COOK: Or, if a cover was taken, indeed, but in terms of the accuracy with which it was reported back who a cover was taken from is the point I am making there. What is being ultimately provided there, as a matter of evidence, is the knowledge that it might well be somebody else within the organisation and the information of specifically who it was would have to be passed back, and ultimately that kind of process inevitably leads to the potential for misunderstandings and confusions.

In terms then of saying, "You can trust this document, it has generally been good", and of course you have been pointed to ten or so other examples where the document has turned out to be right, right at the least to the extent to which the party has not chosen to challenge liability in those contexts. To be quite clear, it would be shocking if every single entry in a table like this was wrong. I am not suggesting in any way at all that that is what expects. The question is, is every single entry in this table right? If every single in this table is not right, or it is unreliable then the fact that sometimes it is right only shows that there is a possibility that it right in relation to Willis. When one weighs that it is possibly right against the fact that Willis's evidence is that that was not the position, then, in my submission, one cannot reach the standard of, even on the balance of probabilities, concluding that an infringement was being committed. It is quite clear that it is not always right. There is the HN Edwards example, the brackets are in the wrong place in that, the fact that in that context it did not mention the pricing schedules had been asked in relation to that tender. There are a number of other examples where the terminology varies throughout the time. It is simply that this is a document that was prepared for internal purposes without a great deal of care, and it would not be surprising if mistakes crept in.

Turning then to Mr. Russ's evidence, I just wanted to show you, Sir, the nature and kind of questions that Mr. Russ was being asked. Would you go to p.37. Can we start almost exactly in the middle of the page: "Okay. The next contract we have is 14 Redlands Road, Reading University", and go almost exactly over the page, one has there, and I would not expect you to read it, Sir, but if you have the opportunity to do so at another point, an analysis of three tenders all in relation to Willis in the course of a page, and that was the kind of level of questioning that was being asked of Mr. Russ.

We refer to the fact that he says, "so we, we took some help from Willis, by the looks of it", which one finds in the second section there.

THE PRESIDENT: That is on p.37?

MR. COOK: That is on p.37, yes. In relation to that, it is quite clear what is being said is that he looking at the document, i.e. the work sheet, and saying, "From the look of it, I am reading the document, the document says that, I have got no reason to doubt", but ultimately this is not a question of independent evidence. That is in part why we have not taken the point that Mr. Russ is not here and not giving evidence because Mr. Russ has given no evidence that is relevant in the context of showing that Willis was involved in these alleged infringements. So all he is doing is parasitically looking at the documents and saying, "That is what the document says".

In this context, in my submission, it is relevant to look at the absence of the kind of questions that one would anticipate should be asked in a situation like this. It is quite clear that Mr. Russ was not necessarily the individual who would be involved in cover pricing in any situation. What he was not asked was, "Who was the member of staff involved in a particular tender?" While he might not immediately remember that, presumably that would be a piece of information that could be readily established, not least because the infringements you talk about for Willis are at the end of 2004 and the beginning of 2005, and this interview is in early 2007. So we are not talking about many and multiple years beforehand. Presumably it would have been possible to establish who was the individual involved in doing this. It was 1st May 2007, the interview, so it would presumably have been possible to find out who the relevant person was. Once you talk to the relevant person then you could find out exactly what had gone on. The OFT simply did not bother even asking those kind of questions.

What it also did not ask is who was the individual at Willis that is meant to have been dealt with. Again, if Mr. Russ cannot remember any specific example of an infringement he should nonetheless, if he has dealt with Willis on a number of occasions, as is the allegation being made by the OFT, he would presumably remember in relation to a party he had dealt with relatively recently who he had dealt with at Willis, the kind of person he talks to, "Oh, I was always talk to X, Y or Z", but again that was simply not a question that the OFT made any attempt to try and establish. Again, that becomes highly relevant in terms of the extent to which Willis can answer these points. The OFT had the opportunity to ask questions like that, chose not to do so, and on that basis all Willis can do is say, "We found no evidence", because there is no specific case to meet.

It is highly relevant as well to what my learned friend says is offered in these kinds of cases. You do have to build your case on scraps of circumstantial evidence and build it up like that. Of course there are circumstances where you have cartels where it is concealed, all the

parties are denying any involvement in it, and you do have to build it up. This is a different kind of case because Mansell was here helping, and willing to help, the OFT, obliged to help the OFT, and they simply were making no attempt to try and put forward the kind of direct evidence that should have been readily available. So they are pursuing it on the basis of what I would suggest is very weak evidence, having had the opportunity to do more if they wished.

For those reasons, in my submission, there is not the kind of evidence standard that is required here to show that Willis was involved and committed 188 and 215.

Turning to 224, it is clear that we are looking at the single economic entity point, the single economic unit, as being the relevant ground. In relation to this section, there was a very weird moving back and forth by my learned friend in terms where he talked about solicitors. There is a confusion of language, in terms of whether he is talking about you being a single economic unit or whether he is really talking about agency principals. Even in this context there was a lot of talk of whether you are on a frolic of your own, whether you are outside the scope of the job you are being asked to do. The reality is whether you are part of the economic unit test should be something that you can judge without looking at specific authority on anybody individual specific point. It is a question of, are you part of the same business unit as the principal company?

In relation to that, it is helpful to understand what you are talking about in terms of what is the economic activity we are concerned in. Again, there was a very peculiar attempt at times to say that the economic activity is the preparing of tenders. While that is an economic activity that Mr. Elbourn engages in, in the sense that because he is a cost estimator and what he does is assist drawing up calculations of what should be included in a tender on a pricing basis, but, as I understand it, the job he fulfils effectively is a quantity surveyor who anticipates that you will need 20,000 bricks to do the job and that costs £X. While he engages in the economic activity of costing and is paid money for the provision of that service, the economic activity that Willis engages in is the supply of building services in the relevant market. We are talking here about the residential market in the South-East of England. That is the relevant economic activity. The only reason why Willis is engaged in tendering is so it can perform that economic activity. The question therefore is, in the context of that activity, providing building services, trying to get building work, is Mr. Elbourn part of that single economic unit? The reality is, in the context of that, that Mr. Elbourn is doing exactly the same job, a job that is necessary for Willis to be able to obtain work and perform work, that any other sub-contractor performs. Equally, to provide

building services, if you need to do electrics, you need to hire an electrician; if you need to quantify what you are going to price it at you may need some help from somebody who can assist in adding it up or just doing the work of adding it up. The point is that one would not say with any of those, in my submission, that they are part of the same single economic unit in circumstances in which they are basically *ad hoc* third party contractors being used as appropriate.

It was tempting at times to talk about Mr. Elbourn as though he was, and the phrase was used, "a part-time employee". That is simply not an analysis that one finds anywhere in the decision to suggest that he is so closely linked to Willis that he becomes a part-time employee. It is simply not the case. What we have is the evidence showing that he is running his own separate business, quite separately out taking his own risks of his own business separately and independently from Willis.

In terms of the economic activity that one is interested in, the economic activity that Willis does, Mr. Elbourn is providing something quite different, and he provides that as a sub-contractor to Willis.

A number of times my learned friend headed across in terms of the solicitor analogy. I was tempted to try and say it was your example, Sir, if a solicitor handed over this piece of information, would he be within the same economic unit or not, and it was suggested that that was a poor analogy. In my submission, it is an exactly correct analogy.

Fundamentally, in both cases what can be taking place is exactly the same, which is the solicitor could well be advising on how to draw up the tender documentation, including the inclusion of pricing information within that. There is no fundamental difference between the job being done intrinsically there. They are both providing a particular category of services which Willis requires. The question of whether they are part of the same economic unit as Willis should therefore be answered in the same way. What my learned friend started to try and answer was the fact that, of course, the solicitor might be so far out beyond the limits of his authority that he is on a frolic of his own.

As soon as one starts talking about language, firstly, he is using the language of employee vicarious liability, which is quite wrong, but as soon as you are into that language what one is talking about here is the extent to which an agent is acting within the scope of his authority and therefore the principal liable for his actions.

Sir, the question you asked was, "Is agency not really about contracts?" Sir, agency is in part about contracts, entering into contracts, but the other side of agency is also liability for torts committed by an agent. In the context of liability for torts committed by an agent what

you are fundamentally asking in the context of actual and apparent authority, ostensible authority, are central to that. This is the second half of the footnote I referred you to which has the **Bowstead & Reynolds** section, which is footnote ----

THE PRESIDENT: Yes, 39 or something.

MR. COOK: Footnote 39, the second part of that:

> "A principal is liable for loss or injury caused by the tort of his agent, whether or not his servant, and if not servant, whether or not he can be called an independent contractor, in the following cases …(b) … in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent …"

You are talking about liability for torts, which is the second side of agency. One is looking at whether they are within the actual or apparent authority of the agent. What my learned friend started to move into is saying, "Of course, that is really what one is thinking about in the context of the solicitor, the solicitor might be so far away from what he is meant to be doing". The reason why a solicitor is so far away from what he is meant to be doing is he is not meant to be handing price information to competitors, but that is equally true of what Mr. Elbourn is not meant to be doing. He is not meant to be providing price information to competitors.

There is an aspect here of the fact it is said that Mr. Elbourn is not acting contrary to the interests of Willis. There is always the concern here that the reality is that Mr. Elbourn was scratching the back of somebody who had the potential at Mansell, it is a very big company, to provide him with a great amount of work. So whether he was doing that for his own private benefit would additionally be an issue one should consider. The reality is that one does not need to because we are talking about territory and the question is whether he is in actual and current authority, because there is no need to use the bizarre forced circumstance of trying to force Mr. Elbourn into being part of the same economic unit, when it is quite clear that he is not because he is a separate business doing separate things, and when he comes to help Willis in that context he is doing no more than any other sub-contractor.

It is suggested there will be bizarre consequences if we treated Mr. Elbourn not being part of the same undertaking. First, that our contract with Mr. Elbourn would be open to competition law challenges. There is no difficulty with that. Most contracts are subject potentially to competition law challenges, it does not create a problem on a day to day basis, and the reason of course why the vertical guidelines deal with agents is just because agents can be, and generally are separate economic undertakings, such that there will be a

competition law issue that arises – or maybe a competition law issue that arises – from their contracts with their principal. It is only those very limited specific cases of a commercial sales agent with somebody who in practice is so closely locked to their principal that they become an integral part of their business. It is only in that very rare circumstance that they do become part of an undertaking and competition law challenges are ruled out. Again, we are faced with the usual spectre of unless you extend the definition of undertaking all sorts of attempts could be made in order to escape competition law by using agents, absolutely not. The reality is firstly, if in reality the agent is acting with the knowledge and instructions of his parents, there is no question of you escaping liability there you are responsible for his actions because he is acting on your behalf. So there is no problem with saying in those circumstances but it brings it home to exactly the correct test which is when an agent is acting with the knowledge, on the instructions of, with authority – actual, apparent or ostensible – then in those circumstances the parent, or the principal should be liable.

In circumstances in which an agent is doing things that are outside the scope of what he is allowed to do then in my submission that is simply a step too far.

THE PRESIDENT: If he was an employee you would not be able to argue he was part of the undertaking, would you?

MR. COOK: No, there would be no question he was part of the undertaking. But the nature of the employee relationship, or the *quasi* employee cases which one has, which are the commercial sales' agents who are effectively employees in everything other than pure legal status for tax reasons or for whatever else. The reason why one is liable for them is effectively they are within your business unit, you control them on a complete basis, and so you are the one expected to ensure that have compliance training in issues like that.

When one is talking about third party contractors they are separate and they are responsible for the separate aspects of their business. You would not expect to be there checking up on them, and making sure that they are not engaging in anti-competitive behaviour because that is something that they need to ensure that they are complying with the law.

THE PRESIDENT: So the normal cartel set-up, of course, actions are required by the principal in order to make the cartel effective?

MR. COOK: Yes.

THE PRESIDENT: So because the prices have to be altered in accordance with the cartel arrangements, and so on and so forth the principal must know about anything his agent does, otherwise the whole thing becomes. It is rather different, because all really that was

required here was some information being delivered, and the only thing Mansell had to do was find someone who had the information.

MR. COOK: Absolutely, and the example of the document being stolen from the photocopier is a very good one. From Mansell's point of view, it would have been equally delighted with that, or if somebody had a girlfriend who was a temporary secretary, was in a position to ring up and say: "You couldn't just tell me what the number is?" Any of those circumstances from Mansell's point of view were more than satisfactory, because they did not want anything in terms of Willis actually doing something, they just wanted access to the numbers. But to say that we are liable because an independent third party provided those numbers when we do not have the sort of relationship with him that basically makes us responsible for his day to day business is, in my submission, where the OFT goes wrong here.

Those are the points I wanted to come in reply on liability. Unless there were any questions I was simply going to move on to quantum.

THE PRESIDENT: Yes.

MR. COOK: In these submissions effectively I am of course going to assume against myself that I have lost on liability, or I have lost on the relevant one in liability, so I am not going to talk about alleged infringements, I am just going to proceed as though I have lost without trying to add the word "alleged" in every couple of seconds.

The question ultimately is that if you find against me we are liable for three infringements, the question is: was the penalty imposed by the OFT consistent with those infringements or was it, as we say, flawed, excessive and discriminatory. I recognise the Tribunal will have heard a number of submissions by now about the penalty methodology adopted by the OFT ----

THE PRESIDENT: My colleagues have not.

MR. COOK: Your colleagues have not. What I was going to say is the penalty methodology adopted by the OFT led to a variety of very different outcomes for very similar forms of behaviour, and in many ways AH Willis is the paradigm example of the extraordinary results that can arise in terms of how disparate the results can be.

To make that good there are a couple of preliminary points I wanted to make. First, it is important to recognise that each infringement relates just to a single tender. Secondly, each of the infringements is said to have been committed in the same relevant market, and that is private housing in the South East of England.

Thirdly, Willis, of course, is a very small business comparatively in this field and, as a result, he obviously does his business in a limited geographical area, in fact all its business is in the South East of England in a comparatively narrow number of fields. As a result, Willis' turnover in this relevant market in 2008, which is the year on which the penalty is based, its turnover represented over one third of its total turnover in that single market.

The fourth preliminary point I would ask the Tribunal to note that each of the three infringements is said to have been committed with the same counterparty which is Mansell. Those are the preliminary building blocks.

The outcome of that was that the OFT adopted a starting point methodology for each infringement that was 5 per cent of turnover in the relevant market, three infringements, 3 x 5 gives you a total starting point effectively of 15 per cent in the relevant market, for three infringements relating to three intenders, or you can look at it differently, which is how the OFT does, a pattern of behaviour in this relevant market which involved infringements sometimes being limited. Their penalty for that – total penalty, starting point – was 15 per cent.

Secondly, of course, we do a large amount of our business in that market, the total penalty imposed by the OFT at the end of stage 3 – I look at penalty at the end of stage 3, and I say that is a relevant way to look at it, because what one is doing at that point is eradicating some of the influence that arise from matters like leniency where effectively parties are being treated differently for reasons that relate to their circumstances. At the end of stage 3 one is looking at the bulk of the main penalty.

At the end of stage 3 Willis' penalty amounted to 4 per cent of its total UK turnover. It is highly instructive to compare that 4 per cent number to the level of penalties incurred by other parties to this decision.

THE PRESIDENT: You say "total UK turnover" actually it only has turnover in the UK.

MR. COOK: Yes, I was making the distinction there between in the relevant market as opposed to total turnover. It has no overseas' turnover.

If I could ask you to turn to annex A to the notice of appeal. We have included there a schedule showing the individual penalties imposed on the parties to the decision. Party 1 is AH Willis itself actually, and the numbering here follows the numbering of the parties to the decision. AH Willis end up with 4 per cent at the end of stage 3. If one looks at party 2, what I have done you will see is I have put in brackets, or by dashes showing the nature of the infringements, if I have not put an explanation in that means that was three standard

cover pricing infringements. If it is two or one it is included, if somebody was a compensator that is identified separately.

So party 2 we see there is just three cover pricing infringements, and its penalty is 90 0.78 per cent of total turnover. Party 3 similarly, 0.91. If one simply skims down there are an immense number of examples there of other parties, party 18 is 0.75 which is the lowest, all three infringements, they all walk away with penalties that are a bare fraction.

THE PRESIDENT: Party 33 get closest to you, does it?

MR. COOK: Yes, but that is the spread. Compared to Willis' 4 per cent, to party 2 at 0.78, so Willis end up with a penalty that is effectively five times higher.

THE PRESIDENT: Some of these are based on various companies that have a vast turnover in billions worldwide.

MR. COOK: Yes, that is true. Party 11, another one I might draw to your attention, that was a compensator, so it has committed three infringements but it is a compensator, and it gets 1.13 per cent of its total turnover. Similarly with party 15, again it is a compensator, it gets 1.18 per cent of its turnover.

If one goes throughout that one can see that the level of penalties varied between 0.75 for three standard infringements i.e. non-compensation infringements, it varies between 0.75 and Willis at the top end at 4 per cent, and Willis ends up with a much higher level of penalty than many people who, on the OFT's reasoning are much worse, they are compensators.

So the question then becomes to the Tribunal in my submission why is it that Willis deserves the penalty that is up to five times higher than parties who, on the face of it, have committed the same type of infringement – three infringements, a practice of anti-competitive infringements, settled practice, but that is exactly the same as it is being alleged that Willis committed. Of course, there are two purposes behind penalties, one to reflect the seriousness of the infringement, and secondly to provide an appropriate level of specific and general deterrence. So the question is whether there is anything about seriousness or deterrence which warrants such disparate treatment and, on the face of it, disparate and grossly unfair to Willis.

In terms of seriousness, there is no suggestion in the decision that Willis' infringements are any better or worse than those committed by other non-compensators. I would make two points briefly, which is to say that in practice it is probably right in my submission to view Willis' infringements to being less serious than those committed by other people. I rely upon two factors in that regard. First, in relation to infringement 224, Mr. Elbourn's role, I

would submit, is relevant. Now, even if you are against me, and you say that nonetheless we are legally responsible for Mr. Elbourn's actions, in my submission it would nonetheless be relevant, even if we are legally liable and therefore had committed an infringement, in terms of determining the level of culpability and the appropriate level of penalty it would be relevant to take account of the fact that it was an action committed by a third party outside the scope of what in any way at all he was meant to be doing. So, in my submission, that would make it less serious.

There was also the point that we addressed a little bit a moment ago which is the fact that on the facts of 224 the evidence shows that Willis could not have taken on board or we can rebut the classic presumption that we are assumed to have taken advantage of the knowledge that Mansell will not be bidding because the evidence shows that we did not receive that information at all, but if we are right to be an undertaking that Mr. Elbourn did not receive that information until Willis had already submitted its bid, so Willis simply could not take it into account, those are more by matters of diversion. At worst we are the same as everybody else, at best we are perhaps a little bit better. But at the moment if we look at this as being the same as other parties who committed three other pricing infringements, we get this bizarre unexplained disparity in the level of penalties imposed.

The reason for that disparity in penalties arises from one factor, and that is the fact that we get the same starting point percentage of 5 per cent applied to turnover in the relevant market. What that means is the level of penalty that a party receives is almost exclusively dependent upon - unless the MDT comes in and applies -- the starting point is almost exclusively dependent upon the level of turnover they had in that market. We get the extraordinary circumstance in which Henry Boot (which is an example we refer to in the Notice of Appeal), which received a penalty of only £3 for one infringement -- It received a penalty of nearly £2 million for other infringements because those were in markets in which it had a lot of business. In that market, for some extraordinary reason, its turnover in 2008 was £44. So, it received a penalty of £3. Surprising, but nonetheless due. The penalty becomes exclusively due to the level of turnover that you had in the market generally in which that infringement was committed. In fact, it is slightly more bizarre than that because the level of penalty is actually not due to your turnover in the market at the time. The penalty is due to your level of turnover in that market in the year before the Decision. So, you might have committed your infringement four/five/six years beforehand, but the penalty is determined by your turnover in the market in (from Willis' point of view) 2008.

THE PRESIDENT: I think 2008 was the year for everybody, was it not?

MR. COOK: I think it is 31st December, 2008 for Willis, but it will be wherever the year end falls within that period.

What that does is create this bizarre circumstance that if you had a very big turnover in the market when you committed the infringement and it goes down, you get a small penalty. If you had a small turnover and it goes up, you get a very big penalty.

THE PRESIDENT: There is a logic in there, is there not? I suppose if you commit the infringement in the context of a particular market activity -- At least it is not unconventional - and I think the Guidelines have said this - that you look at the damage. It is relevant to the damage done by the infringement to see what the market is. It is relevant, in a sense, to the seriousness and the fine that should be imposed to see how active you are in that market.

MR. COOK: Sir, I am coming on to the reason why now. As a general proposition, sir, you are absolutely right. In the classic circumstance, and when one thinks of an ordinary price fixing cartel, it does make sense to look at turnover in the total market and apply a starting point percentage to that because your cartel activity is going to affect that entire market. So, its seriousness is measured by: How bad is your behaviour? What turnover are you performing that bad behaviour in relation to? However, this is an entirely different kind of infringement. It is an infringement that relates, on its face, to only a single tender. As a result the other 100 or 200, or two, or even no tenders in which you participate are unaffected by that behaviour. In those circumstances there is simply no good reason, in my submission, putting it very simplistically, why a party who commits a single infringement in relation to a single turnover in this market should receive a multi-million pound penalty if they happen to have a lot of business untouched by that infringement in that market, compared to a party who gets a tiny penalty because they happen to have a small amount of business which is untouched in that market.

The ultimate point to bear in mind here is the fact that all of these businesses are ones where they were ultimately trading in multiple markets. The OFT did slice and dice the markets in a very particular way. I am not criticising that as a matter of market definition. But, in circumstances in which you found that somebody has a settled practice of anti-competitive infringements, there is no reason to think that is settled practice that is delineated, or limited, in some way by reference to the kind of slicing and dicing that the OFT did by reference to, "Was that a hospital or was that a school?" So, the nature of the wrongdoing is not limited in that way. The wrongdoing in practice is limited to the individual tender.

In my submission, there is simply no logical justification based on seriousness for saying that because you happen to have a bigger or smaller level of non-infringing turnover in that market, you have a smaller or larger level of penalty. In fact, it ends up being something -- it becomes a punishment in many ways for being a small business because if you are a small business it is likely that you actually only trade in a relatively small number of markets. So, it is likely that if you are a company that trades -- Let us think about it purely in geographical terms -- If you trade across the UK you will trade in ten or so geographical markets. If you are a local business, like Willis, you will trade in just one geographical market, which means that in practice if you have a settled practice of anti-competitive infringement and you impose a penalty by reference to 5 per cent of whichever market the three most up-to-date infringements occur - and here, of course, what the OFT did was to look at the three most up-to-date infringements -- If you are a small business you are much more likely to be hit in a market in which you happen to do a lot more business than if you are a big company which has a hugely greater number of markets in which you trade and probably in which you are committing infringements. It becomes this sort of peculiar circumstance where you have a party which has potentially committed a number of infringements, but the level of penalty can vary hugely based on the order in which you commit those infringements. So, if you commit, simplistically, four infringements - and one of them happens to be in a market that is a big part of your business, and the other three are in smaller parts of the market - if you committed the three infringements in small markets later in time, then the large market is ignored for the purpose of penalties. So, purely as a question of pure coincidence the order in which you commit infringements can make an enormous difference to the level of penalty that you incur. So, using the Henry Boot example, if Henry Boot had committed a slightly different order of penalties, then the £3 penalty could have disappeared and the multi-million one could have appeared instead.

THE PRESIDENT: With this many parties you are always going to be able to point to some discrepancies, are you not?

MR. COOK: The question is, sir, whether you can point to points that are discrepancies or whether you are at a level where the range of penalties imposed is - as in my submission it is - so wildly disproportionate that it is beyond any possible level of reasonableness and fairness. Where you have a gulf where some parties are ending up with penalties that are five times larger than those of parties that are effectively being treated in the Decision as being identical wrongdoers. In my submission that is simply wholly unjustifiable. What is it that justifies that? What is the seriousness ----

THE PRESIDENT: This is your 4 per cent point really, is it not? That is the main point here.

MR. COOK: This all becomes the 4 per cent versus the 0.75 per cent point (0.75 per cent being the lowest penalty that anybody got for three infringements). But, all of those become the same point. Whether you look as the individual methodology being wrong, or you step back and you say, ultimately, the final penalty imposed was simply too high, in my submission the penalty imposed on Willis is demonstrably excessive.

THE PRESIDENT: Do you take the specific point about the 5 per cent?

MR. COOK: I do take that specific point. I will come to the 5 per cent. The next point I was gong to make - which is the other reason why this is excessive - is that the way to look at it is to say, "Well, what kind of penalty might Willis have got for more serious infringements?" This is making the point here about the three times 5 per cent because Willis's effective starting point is 15 per cent (three times 5 per cent). You would think if Willis had committed the most serious form of price fixing agreement it possibly could have done - 10 percent as the starting point percentage, because 10 per cent is the absolute maximum - if that infringement had occurred in relation to every single transaction within that relevant market, the fine would have been 10 per cent of the turnover in that market. Now, what is being said here is that Willis committed three infringements, and if one sees that as a pattern of anti-competitive behaviour it is necessarily, (a) that cover pricing is accepted to be far less serious behaviour than the worst, most awful form of price fixing behaviour; and (b) behaviour that is not going to apply to every single tender if it applies to more than three. So, one is talking about behaviour that does not apply to every tender and is less serious. But, Willis ends up with a penalty of 15 per cent of turnover in the relevant market or, if it committed the worst form of behaviour conceivable, it would have been a maximum of 10 percent. In my submission that demonstrably must be wrong.

It is perhaps relevant as well to think about it -- because, of course, the point can be made, "Yes, but you committed three infringements. Therefore you deserve a bigger penalty". But, to think about it in the context of, "What would have happened if, on 1st January one year Willis had sat down with Mansell [that is the allegation, that we deal with Mansell] and said, 'Right. This year we are going to give you a cover price whenever you need it. So, do not worry. Just ring us up whenever you need one and we will give it to you'. That would be a single agreement - a single infringement. But in practice it would have the features of being a number of tenders being affected. Of necessity, the maximum penalty we could have got for that would have been 10 per cent of turnover in that relevant market.

However, since it was cover pricing it would not affect the whole market. More realistically

you have got a lower penalty. To try and suggest that that is a behaviour warranting a much smaller penalty than 15 per cent ----

THE PRESIDENT: It might have done you for each when you did as a separate 5 per cent, might they not?

MR. COOK: Well, it would be difficult to say. If you were part of a single agreement ----

THE PRESIDENT: They might have done you for that as a separate agreement, plus each one.

MR. COOK: The basic point I am making, sir, is that if you think about the worst form of conduct, we end up with a penalty which is much higher than the worst form of conduct could have got.

THE PRESIDENT: Yes. If you had sought to fix the prices entirely in your market with all your competitors, that would have been a cartel. It would not be cover pricing. It would be a serious cartel and you would have been 10 per cent. That is your point.

MR. COOK: Exactly, sir. Those are points, effectively, that we make in terms of general propositions about the methodology which resulted in disproportionate and ludicrous results.

We make two other criticisms of the OFT's approach: firstly, the failure to take account of the fact that Willis was not an instigator. I need not develop that too much. These are all infringements which are meant to have been instigated by Mansell. In my submission, an instigator should be punished more severely than a party that does not instigate.

The other point we make is in relation to the general analysis of cover pricing. This is an attack on the 5 per cent as simply being excessive. It is an attack on the way in which the OFT analyses the effect of cover pricing and the harmful effects that it has. Now, we have dealt with this in detail in our Notice of Appeal. We have looked at paras. 80 to 107. I am not going to repeat the detailed analysis which we set out there. What I will just do is summarise the principle challenge we make to the OFT's analysis, which is that the OFT proceeds on the basis of a number of assumptions and presumptions about the effect that cover pricing has on competitions and prices which are clearly and necessarily false on the facts of AH Willis' case. To be clear, this is not a challenge to the fact that cover pricing involves an infringement. In the context of penalty, that is not in doubt. The question is: Is it an infringement which warrants a 5 per cent starting point? When one is talking in this context about a number of features, you firstly must bear in mind that you are talking about an infringement which assumes you are applying it to a single transaction -- a single tender. Is it really right to say that it warrants a 5 per cent starting point penalty for a single tender which, by definition, affects a tiny proportion of the market.

Beyond that, the OFT draws a number of conclusions. Firstly, they say that it reduced the number of competitive bids that were submitted; it deprived the tenderer of an opportunity of seeking a replacement bid; it prevented other contractors who wished to place a bid from participating in the tender and gave the tenderee a false impression of the nature of competition in the market. The reliance in that regard is placed on the Tribunal's decision in *Apex*. It is no part of my job here before you today to try and persuade you that *Apex* was wrongly decided. I am making no submissions about whether those findings were correct as a matter of fact on the facts of the case in *Ape*x. The Tribunal concluded they were. The question is: Are those findings correct on the facts of these alleged infringements in the case of Willis? As we set out in detail at para. 95 of our Notice of Appeal, in our submission, on the facts of these alleged infringements they simply are not correct assumptions to make. Firstly, cover pricing did not reduce the number of competitive bids submitted in relation to these tenders because Mansell had already decided that it was going to submit a bid -- It had already independently decided - so, not in collusion with Willis - that it did not want to win the tender, and so it was always going to put in a bid designed not to win. So, that is the position. There was always going to be Mansell not trying to win.

In terms of Willis, all these tenders relate to situations in which there are multiple other parties participating. Willis' knowledge that one other party is not going to try and win is not information that is useful because Willis still has to try and beat all the others. So, Willis still faces effective competition, and so Willis still had to put in a competitive bid. So, if one thinks about the counterfactual - and this is where, in my submission, the OFT's analysis is flawed in this regard - the counterfactual is what would happen without cover pricing? Well, Mansell has already decided that it wants to participate. It has already decided that it wants to lose. So it is not going to try and bid competitively. Willis has already decided it wants to win, and it carries on trying to do so. So, it's bid is always going to be, and remains, competitive. Therefore, there is simply no effect on the number of competitive bids.

In terms then of depriving a tenderee of an opportunity of seeking a replacement competitive bid. Again, Mansell has already independently decide that it was going to place a bid, designed to be a non-winning bid, that it was going to place that bid rather than notifying the tenderee that it would not be competing. In those circumstances, once again, if one looks at the counterfactual, what is the counterfactual without cover pricing? Mansell would still have participated because it had decided it was going to participate but it would still put in a non-competing bid. The tenderee would never had an opportunity of going out

to ask another party to participate. For the same reason a cover pricing infringement in these factual circumstances could not have had any impact upon third parties who might have had the opportunity to come in and bid if Mansell had dropped out because Mansell was not going to drop out.

Then again, the question about whether the tenderee was given a false impression of the nature of competition in the market. The false impression was created by the fact that Mansell was going to be given the impression of trying to win when it was not really doing so. That was a false impression it was always going to get as soon as Mansell had made that decision, and that was nothing to do with cover pricing.

Ultimately the OFT concludes that 5 per cent is the right starting point percentage for an infringement which had all of those adverse effects. On the facts of AH Willis's cases, if the infringement took place, it did not have any of those adverse effects, so the figure of 5 per cent must necessarily be excessive and too high.

Sir, those are the points I wanted to make in relation to penalties.

THE PRESIDENT: Thank you. Mr. Beard?

MR. BEARD: Sir, I am conscious of time, I think I am going to be longer than half an hour.

THE PRESIDENT: We can sit a bit longer.

MR. BEARD: I apologise for that. I will, however, try to get through it relatively quickly. I am conscious, however, that two members of the composition of this Tribunal have not heard submissions in relation to the generality of the penalty.

THE PRESIDENT: Indeed.

MR. BEARD: Obviously, a number of points have been made are set out in the consolidated penalty defence which explains in broad terms the way in which the OFT went about its business in relation to penalty setting. I will just draw out, before I turn to that line of consideration, a number of quick points. First of all, what constitutes a fair penalty must be considered by reference to the process that is followed. If fair principles and a fair process are adopted in relation to the setting of penalties, this Tribunal should be extremely slow to reach a conclusion that somehow the outturn figure is, itself, unjust or unfair.

Second, the guidance promulgated by the OFT: it is required to promulgate that guidance pursuant to statute, it must have regard to that guidance, it is guidance that is only promulgated once it has been approved by the Secretary of State and clearly if the OFT did not follow that guidance it would be subject to severe criticism. Of course, the guidance is not a mathematical formula, and therefore the Office does exercise a degree of discretion – a "margin of appreciation" it is sometimes referred to in some of the documents.

Nonetheless, a number of the key parameters are set out and we are bound to follow them unless we have very good reason to. In particular, that relates to the year of turnover that we are applying, both the relevant turnover at step 1, and indeed the total turnover that we consider in relation to step 5. It is also material in relation to the fact that at step 1 we do consider relevant turnover, and we apply a percentage to that relevant turnover. "Relevant turnover" is explained in the guidance as being "turnover in the relevant market".

It may be useful to pull out the guidance in question. It is in volume 11, tab 135. This is the 2004 version of the guidance. There has been some debate in other appeals about the effect of earlier guidance. One can see from the guidance, in particular section 2, how a systematic approach, adopting a starting point, which is a combination, described at para.2.3, of the seriousness of the infringement and the relevant turnover of the undertaking. The seriousness of the infringement is assessed against a broad measure of 0 to 10 per cent of that relevant turnover. It is relevant turnover in the last business year which is the most recent business year.

Step 2 is an adjustment for duration in relation to the penalties being set.

THE PRESIDENT: The phrase "last business year" has been the subject of discussion, has it not?

MR. BEARD: Yes, I am sorry, "last business year" has been subject to discussion. The Office's position is a clear one, which is that "last business year" means the same in para.2.7 as it means 2.17. In 2.17 it is specifically defined as referring to the year prior to the decision. That is consistent with the statutory language of the Turnover Order 2004, which was specifically amended in that context. There is no doubt that the words "last business year", if one used an ordinary language meaning, mean the most recent year. In the context of where one is applying guidance at the point of a decision, it is absolutely clear what that means. There is no room for differential years to be used or interpolated into guidance. I have rather foreshortened what has been somewhat extensive argument unless, Sir, you wish me to expand on that further at this stage.

THE PRESIDENT: No.

MR. BEARD: This is no part of ----

THE PRESIDENT: There is a certain tension between that and the factors you look at in 2.5.

MR. BEARD: In relation to 2.5, it is worth stressing two things: first of all, when one is considering seriousness, one does look at relevant market turnover. That is undoubtedly right. It is worth remembering that seriousness is not simply a corollary of impact. What one is doing when one is assessing the seriousness of a penalty is essentially putting a measure on the degree of opprobrium that should be attached to a particular activity.

When one is doing that and punishing someone for an unlawful activity there is no good reason why that should be done by reference to some old turnover figures when is imposing a financial penalty rather than the more recent in order for the punishment to fit the infringement, using the most recent is appropriate.

The second point to bear in mind is that there is an interaction between the two policies that are being pursued in relation to penalties, the two broad policies. One is capturing the notion of seriousness, and the other, as Mr. Cook rightly said, is capturing the notion of deterrence.

There are two dimensions to deterrence: specific deterrence – in other words, deterring the particular infringer; and general deterrence – deterring all undertakings in the market that might be considering engaging in these sorts of practices. In relation to both types of deterrence obviously you want to target it at the undertaking as it is now – the scale of the undertaking as it is now – in order to administer, to put it loosely, the pain concomitant with the scale of the undertaking as it is. Therefore, using most recent turnover makes sense in relation to that policy. Of course, there is an interaction between "seriousness" and "deterrence" because when one embarks on the exercise of applying a penalty figure through the step 1 process, it may well be that the figure that you reach does afford specific and general deterrence so that no further adjustment is required. In those circumstances, the idea that you should be using a different turnover but the most recent one would be highly anomalous and, as I say, in any event would be plainly contrary to the terms of the guidance and is something that the OFT does not consider is open to it in this case in circumstances where there are no good reasons for this sort of differential approach.

THE PRESIDENT: Remind me, you have not taken a specific point on year of turnover?

MR. BEARD: No, that was why I was rather skating over that.

THE PRESIDENT: I thought, in fairness to my colleagues, I should mention it.

MR. BEARD: I hope that is a brief rehearsal of an issue, perhaps not so much for today but gives some background.

In any event, one moves through the steps. Step 2, adjustment for duration, is not relevant in relation to these cases. Because they were specific incidents there is not an adjustment for duration. That is normally when you have a long running arrangement, an upward adjustments is made.

Adjustment for other factors, and there is a range of considerations that can be taken into account, but in this case there are two particular considerations. The principal consideration is what has been referred to as the "minimum deterrence threshold" – in other words, an

adjustment to raise a penalty where the outturn at steps 1 and 2 does not, in the Office's consideration, constitute sufficient specific or general deterrence. Obviously there have been all sorts of arguments put that, "Specific deterrence does not need a heavy penalty, we will be terribly contrite and we will not do this sort of thing again". That overlooks whether or not it is correct in a particular case, the importance of general deterrence and of laying down a clear signal to those involved in these sorts of infringements, that they will suffer severe penalties if they engage in this sort of anti-competitive behaviour.

One moves on then to step 4 where there is a whole range of aggravating and mitigating factors. Just picking one, an aggravating factor that may result in an adjustment upwards is the involvement of directors and senior management. Mr. Cook seems to be suggesting that, since those people were not involved, there should be downwards. It does not work in both directions here. It is an aggravating factor if senior management are involved. It does not, therefore, mean that it is a mitigating factor if they are not.

Finally, step 5: step 5 is essentially considering whether the statutory maximum is being exceeded, the statutory maximum for the penalty being set by reference to the total turnover of the undertaking in the most recent business year, the last business year, and that mechanism is one that is required by statute. That is what Parliament has decided is the top end of the scale, so a check has to be undertaken.

I think it is perhaps useful if, members of the Tribunal, you have the decision and could turn to p.1720. There will be a copy of this in the notice of application, I am sure. It is just a Willis table. I thought it might be of assistance. Although this format will be cryingly familiar to you, Mr. Chairman, it is something that may be of assistance to Mr. Smith and Mr. Lewis. Here we have the approach being spelled out and the steps being taken into account. Could I just take the Tribunal through it. If we start at the top we have got the three infringements set out, the infringement dates, then the product markets – I will come back to that. In these particular infringements, they were all the same product market. The geographic market was also the same. Again I will come back and deal with that, it relates to the definition of relevant turnover. The total turnover in the year end, there is the date of year end. The total worldwide turnover, which is obviously the reference point for the absolute maximum, is set out there. Relevant turnover for the year end, same year end, and then relevant turnover, which is turnover of the Willis undertaking in the private housing market in the South-East. So that is what that figure is – I am concerned not to refer to figures in case there is any confidentiality.

THE PRESIDENT: You do not need to, we can see that.

MR. BEARD: You can see the figure. Then the step 1 starting point, which is 5 per cent for an infringement of this type, and I will come back to that. Then the penalty after step 1, that is applying the 5 per cent to the figure above. Duration multiplier does not add anything, it is a unit. Penalty after step 2 remains the same. Then the penalty as percentage of total turnover is set out.

The next line is "MDT to apply". Here what is being done is a consideration of whether or not any uplift is required for deterrence. As one can see, the MDT for non-compensation cases was 0.75 per cent. It was only applied in relation to any one infringement. Clearly here the percentage of total turnover was higher than 0.75 per cent, so no uplift was required for deterrence purposes. Then you have the penalty after Step 3 set out and adjustment, that minus 25 per cent is the acceptance of the Fast Track Offer – I am sorry, 4.5 per cent, because it happened to be 25 per cent I was getting confused with my figures. The other of the two figures dealt with at Step 3 I indicated an adjustment was made in relation to deterrence. The other was a capping mechanism that was applied at step 3 to ensure that you did not get outlying penalties as an overall percentage of total turnover. It is what is referred to as the 4.5 per cent penalty cap.

The effect of that penalty cap is in fact illustrated in the back of the defence, and just pausing with that table open, if one could open the full copy of the defence.

THE PRESIDENT: This is in the main defence?

MR. BEARD: Yes, the main penalty defence, the consolidated defence. At the back of it the Tribunal should have some coloured diagrams – or at least some diagrams, I will not be quite so ambitious to say 'coloured'! Annex B is perhaps most relevant just to illustrate the point. What one can see if you have the coloured versions of this is that for each individual undertaking of the 103 there are two bars showing, a green bar and a red bar and what is being shown here is the green bar is the penalty as a percentage of total turnover for the relevant undertaking after adjustments at Step 3 in total. The red bar is the penalty at Step 3 before that 4. 5 per cent capping mechanism kicks in. One can see that there are a number of red bars which cross the page up towards and, indeed, one crosses at 10 per cent of total turnover threshold, and it is marked on mine as "This penalty is 12 per cent". 10 per cent, is of course, the statutory maximum which is why the diagram is drawn in this way.

What one can see is that a number of the red bars are taller than green bars and what the cause of the reduction in penalty, which eliminated those outliers was the 4.5 per cent capping mechanism. If one goes to the far right hand of this diagram one sees at the bottom "AH Willis" is the last pair of bars, and you can see that the red measure was the penalty at

Step 3 prior to the capping mechanism, and the green bar at 4 per cent is the penalty after the capping mechanism. So the OFT did have a mechanism whereby outliers in the scheme of penalty infringements were curtailed.

THE PRESIDENT: I am being a bit dim here, but was this looking cumulatively, or was it looking only at the single penalty for the third infringement?

MR. BEARD: This is cumulatively. This is all cumulatively ----

THE PRESIDENT: Across the three however many ----

MR. BEARD: Yes, any comparison against the total here would be carried out against all three.

THE PRESIDENT: Because the 0.75 ----

MR. BEARD: Only applies to one.

THE PRESIDENT: Only applied to the single infringement, this applies across the three.

MR. BEARD: Yes, this is the totality. This is penalties for undertakings, so it is taking the three infringements together, because the 4.5 per cent cap applied in relation to the totality of turnover that was made the subject of a penalty, in fact that can be seen from the AH Willis table if one goes back to it. What you have, if you look at the line after penalty after Step 2, it says: "Penalty as a percentage of total turnover" and each one of those penalties for each one of those infringements is 1.77 per cent. Therefore, the total ----

THE PRESIDENT: You add them up.

MR. BEARD: You add them up and you go beyond ----

THE PRESIDENT: You get about five point something?

MR. BEARD: Yes, which is what the red bar represented on that plot. The OFT actually reduced each of them by 25 per cent, so it did not just take everything just below 4.5 per cent by this mechanism, there was a more substantial reduction, and here it took it down to 4 per cent, but it was the operation of that capping mechanism that had that result. So what you had was the outliers being impacted on and, in particular, Willis. If you turn on, just for your information, to the next annex in the defence, there what you can see are the penalties, not only after the Step 3 adjustments, but after the Step 4 adjustments, so those are aggravating and mitigating factors taken into account. But what is not taken into account on this plot are leniency applications or Fast Track Offer discounts.

Again, what you can see there is that there is a range of penalties as a percentage of total turnover, and it is also true that Willis is one of the higher trees, as it were, but it is not an outlier by any manner of means, and it falls within the broad spectrum of the band of penalties as a percentage of total turnover that was imposed across the 103 undertakings, and this is before leniency. Obviously after leniency things varied enormously. In Willis'

case it did not vary at all but that is because it did not take the Fast Track Offer and did not seek leniency. Annex B is what sets out the final penalties, just for information.

But all of those, just for confirmation, are the total undertaking penalties not in relation to individual infringements.

Just returning then to the table I was looking at. Where we had got to was the revision after Step 3 for the 4.5 per cent cap, then we also have a reduction for compliance, that is a mitigating factor under Step 4, so the total Step 4 adjustment is a minus 5 per cent reduction. Then the penalty after Step 4 is set out, it is assessed as a percentage of total turnover, which is coming out just below 4 per cent.

The line below that is the percentage of pre-2004 turnover, that is to ensure that in relation to the position relating to infringements that occurred before the turnover order was amended and the maximum cap was changed, that there was not any risk of the total penalty being imposed would exceed the other maximum cap. So that is what that line is there to do.

Then you get the penalty after Step 5, then leniency or Fast Track – they did not come for leniency and did not accept the Fast Track Offer, which was put to Willis and therefore you do not get any reduction, and that is how you get the outturn penalty which is, as a total, one of the smaller total penalties in this case.

That, I hope, gives the Tribunal members a brief trip around the guidance, some of the key policy issues, and the way in which it was applied in relation to this particular case, just noting in relation to the operation of the guidance, first of all consistency of approach was important. Of course, you are hearing a specific appeal today from a specific party, undoubtedly and quite properly without fear or favour Mr. Cook is trying to set out the position that is most advantageous to his client. The OFT had to approach this having regard to principles such as the principle of non-discrimination. Unless it had good reason to apply different criteria to different penalty assessments it would apply the same mechanisms and principles to each, and that in particular applies to the seriousness assessment, although Mr. Cook has sought to suggest that actually one should look at this by reference to very particular scrutiny of the very particular circumstances in which the cover price was given, the OFT says that that is not the right way in which one should go about this, one looks at the broad nature of the infringements committed and considers whether or not there are relevant differences in this regard, and the OFT considered that the conduct which did not involve compensation payments was all relevantly similar and all required broadly the same starting point percentage to be applied, which was 5 per cent, and

that in relation to compensation payments they were relevantly similar and a higher starting point percentage should be imposed.

In that regard there are various suggestions both that actually this is not particularly serious, both generally and specifically, and that somehow this is a case different from *Apex*.

If I could just ask the Tribunal to turn up the penalty defence, the consolidated penalty defence – I will try and take this relatively swiftly and not to go to authorities, but it is perhaps important to emphasise the seriousness of the infringements that are being committed and not only that but the fact that the considerations adumbrated by this Tribunal in *Apex* as to why these sorts of infringements were serious applies to all of these instances.

If I could take the Tribunal to para. 41, which is p.16. First, it is worth noting that this setting of the level of seriousness for cover pricing the decision with which the Tribunal is concerned in relation to the construction industry was not the first time where the Office had considered cover pricing arrangements being entered into by construction companies, indeed, there had been five earlier cases, they are listed at para. 41 – for your notes they are found in the authorities vol. 9 at tab 123, 125 and 126,and in vol. 10 at 127 and 128. In all of those cases a level of 5 per cent was used as the indicator of seriousness. A number of those cases were subject to appeal. *Apex* which is in vol. 3 at tab 45, *Price*, vol. 4 at tab 47, and *Makers* vol. 4, tab 57. In those cases the Tribunal accepted that that starting point was correct or, more exactly, that was not a matter that was challenged in some of those cases, but certainly there was no suggestion that 5 per cent was a wrong starting point.

In passing it is worth noting that 5 per cent as a starting point is a starting point that where the OFT has applied a percentage in order to apply a penalty in any decision 5 per cent is the lowest starting point percentage that has been applied. There have been certain cases where nominal penalties have been imposed, and certain cases where there have been settlements, but where a percentage has been imposed 5 per cent is, in fact, the lowest.

We then move on through the defence, in particular para. 43. I would ask the Tribunal to read the quotation from *Apex* at para. 43, which sets out the serious concerns that arise in relation to this sort of conduct. (After a pause) As is set out in para. 44 the Tribunal summarised those conclusions and at 45 upheld the 5 per cent starting point, emphasising that where consultation has the object of deceiving a tenderee into thinking a bid is genuine when it is not it plainly forms part of the mischief of Section 2 of the Act - the Chapter I prohibition. The obvious consequence of the conduct is to prevent, restrict or distort competition, and then it adumbrates the similar sorts of considerations that it has described in the earlier longer passage which the Tribunal has read.

The central proposition is, here, that one can assess the broad seriousness of cover pricing without being required to look at the particular details. Of course, if one were required to look at the particular impact you would be in a position where this is an object infringement - in other words, the object of the infringement is to impact competition - and there is no requirement to make in the fining of infringement to consider impact, and yet it would be being said that in order to set the penalty some detailed analysis would have to be carried out. That is plainly wrong. It is without authority. It is not the correct approach.

As for the distinctions which Mr. Cook seeks to draw between this case and *Apex,* it is worth pausing had recalling that actually there were two infringements in *Apex* that were under appeal. In one of them a cover price was passed, it was found, and it was never used. Yet, all of the circumstances that are set out in relation to this judgment, described in paras. 43 to 45 were applied. So, the points that Mr. Cook makes that actually it did not reduce the number of bids because Mansell knew that it was never going to bid, and that actually there was no greater false impression made because Mansell was never going to realistically bid in these particular transactions? All of those factors are absolutely true - a fortiori *Apex*. Willis still had to compete. Well, so did others in the *Apex* case. No impact on third parties because Mansell was not dropping out. Well, that again, is not a distinguishing factor. So, quite apart from the fact that no such analysis is required or would be appropriate, the distinctions that are drawn are plainly without any merit.

Just to finish off in relation to the seriousness of these infringements, the importance of setting a relevant tariff of 5 percent -- It is just worth drawing the Tribunal's attention to the Decision where it considers at VI.120 onwards questions of seriousness. This is at p.1655 in the Decision. This is part of a longer section considering the nature of cover pricing, the nature of infringement, and so on. Here, the OFT is grappling with a number of arguments that have been put to it about why this in fact is not very serious - both referring to market structure and size of parties and market shares; over the page, the value of tenders; the approach to analysis of effects. Then, again, onwards the impact on building costs and taxpayers. At para. 135 onwards - this is now on p.1658 - purported lack of adverse effects. What is notable there in paras. 138 onwards is a consideration precisely of those factors that I have already directed the Tribunal to from *Apex.* Then there are issues that have been raised by various of the parties about effects on consumers, super-competitive profits, alternatives to cover pricing. On and over the page, at p.1662, - customers' knowledge, purported positive effects and the audacious contention that this sort of deception activity is nonetheless beneficial to the world. At p.1664 - situations where no

tenders were awarded, and other arguments in relation to seriousness. Then, over the page at the top of p.1666 at para. 168, the conclusion is 5 per cent for all those infringements not involving compensation payments. That will be the starting point. But, I would direct the Tribunal to paras. 172, 173 and, in particular, para. 174 ----

THE PRESIDENT: This is a shot across the bows.

MR. BEARD: It is in bold. It is very much a shot across the bows. It is important for the Tribunal to have in mind that although there have been a number of appellants coming before it saying, "5 per cent is grossly unfair and far too high", in fact there was very good reason that if it had not been for the fact that these were discrete, individualised infringements actually the percentage starting point could be higher and may well in future be higher for similar sorts of conduct.

THE PRESIDENT: I suppose the only question one raises is whether setting it at 5 percent you do not leave yourself much headroom, do you, for the really obviously much more dreadful infringements?

MR. BEARD: You have got about 5 percent headroom. That is what I was thinking.

THE PRESIDENT: You can double it.

MR. BEARD: Yes. But, also, there would be scope for adjustment. It would depend on other factors - deterrents ----

THE PRESIDENT: You have your MDT -- The sky is the limit.

MR. BEARD: That is right. Of course, MDT is not the only mechanism by which deterrence can be brought to bear. Although MDT has been used in *Makers* and in this case, the OFT recognises that there may be other cases where other mechanisms for ensuring that there is proper deterrence both specific and general deterrence may be appropriate.

THE PRESIDENT: Even in terms of making a condign penalty, regardless of deterrence, on the scale of one to ten obviously the hard core, indefinite price fixing cartel -- Of course, if it goes on for years you get your multiplications through duration in some of these cases.

MR. BEARD: Yes. Exactly.

THE PRESIDENT: But if it is caught in the early stages ----

MR. BEARD: Of course, there may be all sorts of circumstances that suggest actually you have a relatively high starting point; that actually because there is a low duration tariff, in fact the total penalty is lower than would be anticipated, and there is concern that there should be other adjustment. It is very difficult to start trying to draw conclusions about other sorts of circumstances. In terms of overall headroom, however, a starting point of 5 percent sends out a clear signal of seriousness. It is described as 'in the mid to upper band of seriousness

of infringements'. It has to be borne in mind, of course, that you can get infringements that are not horizontal infringements. Of course, here we are talking about competitors infringing the Chapter I prohibition. Of course, the Chapter I prohibition can also bite on vertical arrangements that fall outside the scope of the block exemption. I do not want to presume that there is not the possibility of there being other lower penalties being imposed. The Office is not setting this once and for all -- Indeed, the shot across the bows to which I have already referred suggests that there is a degree to which the Office will react depending on the way in which industries are understanding and behaving appropriately in reaction to the penalties being imposed

There are various arguments that Willis has adduced suggesting that the penalties imposed on it by the OFT were arbitrary. It argue that some other undertakings had much smaller fines imposed on them in respect of other infringements. I think generally it means not smaller fines *in toto* but smaller fines as a percentage of turnover. The mere fact that a smaller fine *in toto* has been imposed is neither here, nor there. Nor is it as a percentage of total turnover. The OFT considered its penalty guidance and applied it. That was not arbitrary. Indeed, the OFT, as I have said, had to follow it. Obviously that guidance was not a mathematical formulae, but, nonetheless, the way it applied it was fair and consistent. I have taken the Tribunal through the table that illustrates how that operated and how, in fact, it benefited from the 4.5 per cent cap.

Trying to turn to specific comparators such as Henry Boot - which did have a strange penalty of £3 because it had such a tiny turnover in the particular market - does not assist in saying whether or not the process, principles and out-turn penalty adopted in relation to Willis is, or is not, unfair, inappropriate or should otherwise be modified.

Willis has also sought to argue that the penalties imposed are arbitrary because of the way in which the OFT chose to investigate and penalise particular infringements, and today the focus was on, "Well, it was only the three most recent infringements and if it had happened that those three related to high turnover markets and the one preceding that was a low turnover market, that would be arbitrary". There are a million ways in which these matters can be dealt with. The OFT applied a consistent process. The Decision sets out the inordinate exercise that had to be undertaken actually to streamline the investigation in relation to this case. I have already referred to the fact that there were thousands of suspected infringements with a value of billions of pounds that had to be filtered down. In those circumstances, the way in which that was done and the way in which penalties were selected was perfectly reasonable. The way in which those with the best evidence were

selected for consideration and for taking forward was sensible and appropriate. The selection of three penalties as being the maximum - again, sensible and appropriate. There is no criticism of the mechanisms that were used to select the penalties that can properly be said to be arbitrary.

In those circumstances, the fact that there were only three penalties rather than more, or, indeed, possibly less, is not a criticism of the OFT. It is worth noting, just in passing that although Mr. Cook has emphasised that only three penalties were imposed on Willis, in the FTO (the fast track offer) that was put to Willis, there were in fact seven suspected infringements relating to Willis - indeed, one may have noticed that in the schedule that we referred to this morning, Willis was referred to in parentheses in the remarks columns rather more times than it appeared in relation to infringements.

So, in those circumstances there is no good criticism of the way in which either selection was undertaken or the way in which the particular infringements were chosen for setting of penalty, nor the manner in which that penalty was set.

A further criticism is that the starting point is excessive because the application of a starting point of 5 per cent of three infringements can be calculated as a 15 percent starting point, and this is a grotesque and monstrous way of approaching matters. Mr. Cook relies, in particular, on the fact that here it happens that the infringements occurred in relation to the same market, both geographical and product market. Now, it is a complaint that has been heard in other Tribunal - different compositions - that somehow this is unfair, particularly to small companies. As I indicated at the outset, the approach that has developed in relation to Step 1 is to use relevant market turnover. That is a rational, economically supported analysis that is required by the Guidance unless there is good reason to consider it otherwise. A full market definition analysis is not required, as is set out in cases such as *Argos* and *Littlewoods*. But, here, in fact quite a substantial market definition exercise was undertaken. For your notes, that is at pp.288 to 338 of the Decision. What was actually done in that market definition exercise was in fact that a relatively cautious approach was adopted, particularly to product market. That can be seen, in particular, in paras. 1696 and 1730 of II of the Decision. Of course, by erring on the side of caution in product market definition you limit the scope of the relevant turnover that is going to be considered for the purposes of Step 1, and that, in general, will inure to the benefit of undertakings that have committed infringements because a smaller amount of their turnover is likely to be captured. Now, the fact that certain companies operate more within a particular geographic or product market than others is immaterial for these purposes. Where you are taking a

metric of seriousness by reference to relevant markets, if a company has a significant amount of its turnover in a particular market that the market in which it is active. In those circumstances, attaching a penalty concomitant to that turnover is a perfectly just and appropriate way of dealing with it. No party has sensibly suggested how we should be attenuating the basic proposition set out in the guidance of using relevant turnover as the basis for carrying out our analysis in Step 1. With respect, there is no good basis on which any such variation could, or should, be undertaken.

So, the suggestion that we are starting with a total of 15 per cent is a red herring. Of course it was entirely open to the Office to identify three separate infringements. Having done so it was proper for the Office to identify the penalty that was to be imposed in relation to the three infringements and to apply the guidance to those three separate infringements. It would have been wrong to have treated those infringements differently for the purposes of the starting point, but the Office did not ignore the fact that there were multiple infringements in its penalty setting process. In particular, two components of it had close regard to the fact that there were multiple infringements. First, the MDT. The MDT was only applied in relation to one infringement because specific and general deterrence is aimed at the undertaking, not in relation to the specific infringements. So it was not ignored that there were multiple infringements that penalties were being imposed in relation to, and I have already shown you the tables at annex B and annex C, which show that the 4.5 per cent penalty cap was also applied in relation to the totality of the penalty as a percentage of total turnover. So again, in relation to key adjustments that were undertaken by the Office it did not ignore that impact, and it took into account the fact that there were multiple penalties. It is, therefore, no criticism of the OFT's process to say it properly approached each infringement as it was lawfully obliged to do unless there was good reason to do so, applying a starting point, as it did, but then attenuating the impact of the penalty process with modifications as it went along.

I have covered the issues in relation to the instigation of Mansell briefly.

In relation to the recycling of the points in relation to Mr. Elbourn, if Mr. Elbourn is part of the undertaking, as the OFT say he clearly is, then in those circumstances the fact that Willis did not ensure that it had processes in place in relation to its pricing and tendering, that these matters were not properly controlled and an infringement occurred, it is quite right that there should be no variation of the penalty in relation to infringement 224. In the circumstances, therefore, there should not be some sort of downward adjustment because

you happen to be using an agent rather than a part-time employee, or indeed a full-time employee, for these purposes.

In the circumstances, unless I can assist the Tribunal further, those are the Office's submissions in relation to the penalty appeal.

THE PRESIDENT: Thank you, Mr. Beard.

MR. COOK: Sir, I will be, hopefully, very brief. I have a couple of points briefly to make.

Firstly, my learned friend started by saying that if the OFT used a fair process effectively the Tribunal should be very cautious about overturning the result of that fair process. How do you determine what is a fair process? You can only determine what is a fair process by looking at the likely and inevitable and actual outcomes of that process. I have showed you the actual outcomes of that process. In my submission, those are manifestly unfair because they result in completely different results for different parties. You were shown the various charts attached to the OFT's defence. The intention of those was to show, "Look, Willis is not some impossible outlier, because the 4.5 per cent cap was engaged and that brought some of the outliers back in a little bit".

It is important to recognise, yes, there was an attempt made to mitigate the absolute extreme limits of what the Office of Fair Trading was doing, but the outcome was nonetheless an extraordinary and extreme result, and the extraordinary and extreme result was shown by the numbers I showed you, which one equally sees from the charts which is that some parties admitted three infringements, got 0.75 per cent of turnover, and some parties got 4 per cent. Willis, of course, was in the 4 per cent category.

What I did not hear from my learned friend, which was effectively the invitation left hanging by my submissions, was why is it that Willis deserved or warranted five times the penalty of parties that received 0.75 per cent – three or four times the penalty of parties that entered into compensation arrangements. One simply did not hear any explanation of why Willis behaved more seriously or why general specific deterrence warranted such a greater increase in Willis's penalty.

THE PRESIDENT: Just remind me, Mr. Cook, was your chart, when it logged the percentages of the other parties, did that include their leniency, or was it prior to leniency?

MR. COOK: My chart is at the end of step 3, so it is ignoring leniency.

THE PRESIDENT: It ignores leniency.

MR. COOK: Leniency is something that is very specific, whether you apply for it or not.

THE PRESIDENT: It ignores FTO?

MR. COOK: Equally, yes. That was the same of the OFT's chart B, we are looking at step 3. If you look at it at the end of step 4, step 4 makes very little difference, but it is only very minor adjustments. That is the plus 5 per cent for directors' involvement, minus 5 for compliance. So it makes little difference. It looking at it effectively excluding the effect of leniency, whether in grand terms or in FTO terms. That is where you get the enormous gulf. As I said, Willis ends up with five times the penalty.

MR. SMITH: You are referring only to the percentage of course, and sometimes a very small percentage can result in a very large numerical amount of course.

MR. COOK: That is absolutely right. The reason why I focused on it in percentage terms is because how do you measure what is a large amount? You measure in part what is a large amount to a company based on how big that business is, which is, of course, the reason why the OFT and the European Commission use a percentage methodology. Otherwise you end up with a situation which one could equally, I suppose, attempt to justify by saying, "If you commit the same infringement you get the same penalty each", which is what happens when you get a speeding ticket in general. We all get an £80 ticket, regardless of whether you earn £1 million a year or you are on minimum wage. The reality of the matter is that an approach has been adopted which looks at it on a percentage scale. No one is attempting to overturn that at least as general starting point as being an approach. Measured like that, that is a way of seeing, in comparison to the size and wealth of each individual company, what kind of penalty it is getting, and it ends up with Willis getting a penalty that is so much larger and out of kilter with the others.

The fact that the chart showed that there is a tiny number of other parties who also end up – out of 103 parties – with penalties are in excess of 3 per cent does not alter the fact, yes, Willis is not the only one that is discriminated against in this way, but the vast bulk of penalties are several multiples lower, and that, in my submission, is where it goes wrong. The thrust in part of my learned friend's submission was effectively that the Office's hands were tied, this is what it was forced to do by its guidelines, unfortunately that was the end of the story. That, quite simply, is nonsense. One sees that readily in terms of what they did do in step 3, which was they looked at the total penalty and imposed a 4.5 per cent cap. Equally, it would have been permissible for them at that stage to take account of the point that I am making, that Willis nonetheless ends up with a penalty five times higher than the others. There was ample opportunity within that step 3 undoubtedly to ensure that penalties that were imposed on parties were not ludicrously out of kilter with each other. The OFT did not in fact make use of that power to the full extent that it could have done so.

Equally, in the context of looking at step 1, yes, we said that nobody has come up with an alternative of looking at relevant turnover. My objection is not that one should look at relevant turnover, the objection is that you simply apply the same starting point percentage to it regardless. Certainly, if you are looking at an infringement that relates to a small part of the market, as opposed to an infringement that relates to all of the market, one would expect logically the percentage to reflect that. So it was entirely possibility that one could employ the basic step 1 calculation of the penalty guidelines encouraged, and to some extent required, though of course it is "require subject to a good reason to do something different", and this circumstance might well provide such a good reason.

Even if you adopted the percentage multiplied by total turnover, simply looking at the extent to which that infringement involved the infringing conduct applying to all of your involvement in the market or a tiny percentage could have been relevant in the context of determining what was the right percentage to apply to all of that. That is in part the reason why, in my submission, 5 per cent is manifestly too high, because the infringement is accepted to be less serious than many others and it necessarily applies, on the way the OFT has done it, to tenders that are individual, and therefore a tiny fraction of almost any undertaking's involvement in that market.

That is why the penalty ends up, in my submission, being much too high.

Unless I can assist you further, those are my submissions.

THE PRESIDENT: Thank you very much, Mr. Cook. Thank you both very much, and obviously you should not hold your breath on this or any of the other appeals.

MR. BEARD: It is not quite finished yet, sir, there are a series still to go, are there not?

THE PRESIDENT: There are, yes.

MR. BEARD: I have copies of *Aalborg Portland* and I will provide them.

THE PRESIDENT: Could you give them to Mr. Bailey we will put them in the file.

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