Neutral citation [2005] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1033/1/1/04

Victoria House
Bloomsbury Place
London WC1A 2EB

24 February 2005

Before:

Marion Simmons QC (Chairman)
Dr Arthur Pryor CB
Mr David Summers

BETWEEN:

RICHARD W PRICE (ROOFING CONTRACTORS) LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Mr John Price appeared for the appellant.

Mr Tim Ward (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Heard at Victoria House on 24 September 2004.

JUDGMENT (Non-confidential version)

Note: Excisions in this judgment relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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I INTRODUCTION

1. By a notice of appeal dated 24 May 2004 Richard W Price (Roofing Contractors) Ltd ("Price") appeals to the Tribunal against Decision no. CA98/1/2004 taken by the Office of Fair Trading ("OFT") on 16 March 2004 ("the Decision") under section 2(1) of the Competition Act 1998 ("the Act"). In so far as is material this section prohibits agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

2. In the Decision the OFT concluded that various roofing contractors, including Price, had infringed the prohibition contained in section 2(1) of the Act ("the Chapter I prohibition") in colluding in relation to the making of tender bids for flat roofing contracts in the West Midlands. Nine contractors were found to have been involved in various discrete individual agreements or concerted practices, each of which had as its object or effect the fixing of prices in the market for the supply of repair, maintenance and improvement services ("RMI services") for flat roofs. Penalties were assessed by the OFT against all of those contractors.

3. Price was found to have participated in such collusive tendering in relation to a tender bid for re-roofing works to the Pallasades Shopping Centre in Birmingham ("the Pallasades Contract").

4. It is alleged in the Decision that Price entered into a concerted practice in relation to the making of tender bids with Rio Asphalt & Paving Co Limited ("Rio").

5. A penalty of £18,000 was imposed on Price for its role in the concerted practice as found.

II SUMMARY OF THE TRIBUNAL'S DECISION

6. Price appealed against the OFT's findings of infringement and imposition of a penalty. For the reasons given in this judgment we dismiss the appeal on infringement but allow the appeal on penalty to the extent that we reduce the level of the penalty imposed on Price to £9,000. Our principal reasons are:

(a) We are satisfied that the elements of a concerted practice contrary to the Chapter I prohibition are made out in respect of Price in relation to the Pallasades Contract;

(b) We are satisfied that the principle of equal treatment was not applied by the OFT when setting the penalty imposed upon Price and that a penalty of £9,000 in all the circumstances of this case is appropriate and provides an effective deterrent.

III THE STATUTORY FRAMEWORK UNDER THE ACT

7. Section 2 of the Act provides, so far as material:

> "(1) … agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited …
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions …"

8. Following an investigation under section 25 of the Act, the OFT may, pursuant to section 31(1)(a), make a decision that the Chapter I prohibition has been infringed. Before doing so, the OFT must give the person or persons likely to be affected by the decision the opportunity to make representations: see section 31(2) and rule 14 of the Director's Rules set out in the Schedule to the Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No 293). This

was at the material time customarily done by the service of what is known as a "Rule 14 Notice". The Director's Rules have since been replaced by the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No 2751) ("the OFT's Rules"), which came into force on 17 November 2004. In the OFT's Rules the term "Statement of Objections" has replaced the term "Rule 14 Notice". A Rule 14 Notice/Statement of Objections is required to be served on each person whom the OFT considers to be a party to an infringement of the Chapter I (or Chapter II) prohibition.

9. Section 36(1) provides that, on making a decision that conduct has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay a penalty in respect of the infringement. Under section 36(3), such a penalty may be imposed only if the OFT is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the OFT may exceed 10% of turnover of the undertaking as determined in accordance with provisions specified by an Order made by the Secretary of State. At the material time, that Order was the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No 309).

10. Section 38(1) of the Act requires the OFT to publish guidance as to the appropriate amount of any penalty. Under section 38(8) the OFT must have regard to that guidance when setting the amount of the penalty. The OFT's published guidance at the material time was the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000) ("the *Guidance as to Penalty*").

11. Any party to an agreement in respect of which the OFT has made a decision may appeal to this Tribunal against, or with respect to, that decision: section 46(1).

12. The powers of this Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 of the Act, which provides:

"3.- (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-

(a) remit the matter to the OFT
(b) impose or revoke, or vary the amount of, a penalty,
…
(d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
(e) make any other decision which the OFT could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

13. Section 60 of the Act provides, so far as material:

"(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-
(a) the principles applied, and decision reached, by the court in determining that question; and
(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
(3) The court must, in addition, have regard to any relevant decision or statement of the [European] Commission."

14. By virtue of section 60 of the Act, section 2 of the Act is to be interpreted in a manner consistent with Community law. Section 2 is closely modelled on Article 81 of the EC Treaty.

IV THE FACTUAL BACKGROUND

15. Price is a company specialising in roofing contracting. Rio is a company specialising in the erection of roof coverings and frames. The OFT in the

Decision at paragraph 216 found that Price entered into an agreement or concerted practice with Rio in relation to the making of a tender bid in respect of the Pallasades Contract. The OFT further found in paragraph 216 that Rio and Briggs Cladding & Roofing Limited ("Briggs") (trading as Hyflex Roofing) also entered into an agreement or concerted practice in relation to the Pallasades Contract.

Industry Overview

16. The following account is drawn from the Decision and is not contested. The UK roofing contracting services industry as a whole was valued at £1,388 million in 2001. There are three general types of roof that are used in the building industry: pitched, flat and metal. Pitched roofs are common in the commercial market and industrial sector. AMA Research, a market analyst company, suggests that metal coverings compete primarily with pitched roofing products (primarily tiling) and reports that one of the most important markets for metal coverings is speculative new build in the industrial construction sector for low-cost, out of town factories and warehouses.

17. The term "flat roofing" is somewhat misleading. It appears that many "flat" roofing products can also be fitted at a pitched angle. Such products are better defined by the materials employed in their construction, namely bituminous felts, single ply membranes and mastic asphalt. In 2001 flat roofing products accounted for roughly 25% of the roofing materials used in the UK roofing contracting services market.

18. The services of contractors specialising in RMI services for flat roofing products are usually procured through a selective competitive tendering process. This process involves local authorities, private managing agents, architects or surveyors inviting a number of selected contractors to submit sealed competitive bids.

The events leading up to the Decision

19. In the autumn of 2001 Ruberoid plc – in its capacity as parent company of Briggs – applied for leniency under the terms of the OFT's leniency scheme (set out in the *Guidance as to Penalty*). Ruberoid was granted full immunity in respect of the activities of itself and its subsidiaries. The granting of leniency was conditional on Briggs providing evidence of the cartel and co-operating with the OFT throughout its investigation. As part of that cooperation, an employee of Briggs, known as Mr D, gave evidence in the form of an interview with officials of the OFT on 28 August 2002. The record of that interview was part of the evidence on which the OFT relied. The OFT was satisfied that Briggs did comply with the leniency conditions and so the penalty calculated for it was reduced to nil.

20. Information received by the OFT suggested that undertakings including Rio were engaged in various price-fixing or market-sharing agreements under which the tender prices submitted to local authorities and private undertakings for flat roofing works were agreed amongst those who would bid prior to tenders being returned.

21. On 11 June 2002 the OFT began a formal investigation under the Act, having decided that there were reasonable grounds for suspecting that collusive tendering had taken place. On 4 July 20002 the premises of Rio, amongst others, were entered and searched by the OFT pursuant to warrants obtained under section 28 of the Act.

22. After the OFT commenced its investigation, Howard Evans (Roofing) Limited ("Howard Evans") also applied for leniency. By way of a letter dated 23 July 2002 the OFT granted Howard Evans leniency subject to the same conditions as Briggs but only to the extent that any penalty would be reduced by 50%. The OFT was satisfied that Howard Evans complied with its leniency conditions as a result of which the penalty imposed on Howard Evans was reduced by 50%.

23. Following a further visit by the OFT to the premises of Rio on 13 September 2002, the OFT visited the premises of Price under section 27 of the Act on 9 October 2002.

24. On 13 August 2003 the OFT issued a Rule 14 Notice to various flat roofing contractors, including Price. All of the contractors to whom the Rule 14 Notice was issued made written representations in response. Price made its written response to the Rule 14 Notice on 9 September 2003. Price did not avail itself of the right to make oral submissions.

25. On 16 March 2004 the OFT issued the Decision, finding *inter alia* that Price had committed an infringement of the Act, being the concerted practice referred to above.

26. Of the nine undertakings (including Briggs and Howard Evans) found by the OFT in the Decision to be party to various infringements, only Apex Asphalt and Paving Co Limited ("Apex") (see case 1032/1/1/04) and Price have appealed the Decision.

V THE DECISION

27. The Decision sets out, first, the facts, including the evidence relied on (Section I); secondly, the OFT's legal and economic assessment (Section II); and thirdly, its decision and determination of the penalties (Section III).

28. In the Decision the OFT sets out the nature of the tendering process and why it considers that collusive tendering is anti-competitive in the following paragraphs:[1]

> "17. The services of contactors who specialise in the repair, maintenance and improvement of flat roofing products are usually procured through a competitive tendering process, which involves local authorities and private managing agents, architects or surveyors

[1] Any footnotes contained in direct quotations from the Decision or any other document found in this judgment have been omitted.

inviting a number of contractors to submit sealed competitive bids. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently.

18. Collusive tendering eliminates competition amongst suppliers. In the industry that is the subject of this Decision there are generally three types of arrangement that can result in a pre-selected supplier winning a contract:

- Cover bidding (also referred to as cover pricing) occurs when a supplier submits a price for a contract that is not intended to win the contract. Rather, it is a price that has been decided upon in connection with another supplier that wishes to win the contract. Cover bidding gives the impression of competitive bidding, but in reality suppliers agree to submit token bids that are usually too high.

- Bid-suppression takes place when suppliers agree amongst themselves to either abstain from bidding or to withdraw bids.

- Bid-rotation is a process whereby the pre-selected supplier submits the lowest bid on a systematic or rotating basis.

19. Local authorities make it clear in their invitations to tender that any form of collusive tendering is unacceptable. For example, Coventry City Council's Standing Orders explicitly state,

> "In every tender submitted to the City Council, the tenderer shall certify that the tender amount has not been fixed or adjusted by, under, or in accordance with any agreement or arrangement with any other person."

The standard terms and conditions used by the other local authorities referred to in this Decision contain similar stipulations regarding collusion and corruption in relation to the submission of tenders.

20. The OFT also notes that, in the absence of a formal sub-contracting relationship, there is no reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to the local authorities, the surveyors or the private agents managing the tendering process.

…

128. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently (see paragraphs 17 to 20 above). The OFT considers that any tenders submitted as the result of collusive activities which reduce

the uncertainty of the outcome of the tender process are likely to have an appreciable effect on competition.

…

360. The OFT has considered the important issue of the procurement process in the roofing contracting sector and how this affects competition within the relevant market.

361. The OFT notes that services in this market are procured through a tendering process, which involves local authorities and private managing agents, architects or surveyors inviting contractors to submit bids. Any undertaking with expertise in repairing flat roofs within a reasonable distance of the contract might feasibly tender for a contract. However, buyers (local authorities or managing agents) will usually short-list a number of firms from their standing lists of suitable contractors.

362. Where the original tendering process fails to identify a suitable contractor on the short-list, customers may consider alternative contractors. In such circumstances, different undertakings can be approached, but only if they are already included on the appropriate standing lists. Often local authorities do not look beyond their short list, (i.e. they do not consider other suppliers on the relevant standing list), even if all the original bids are deemed unaffordable or unsuitable. This is because procedures typically allow for negotiation where the buyer gets its budgeted price but compromises are made on the specification for the job.

363. Furthermore, the ability of different contactors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:

(i) Specialist roofing skills;
(ii) Adequate insurance coverage;
(iii) A good health and safety record; and
(iv) Relevant product/manufacturer guarantees.

364. This suggests that, in the absence of collusion, the most effective competition in the product market would be those suppliers on the relevant standing list, and in particular those on the relevant short lists for the supply of RMI services for the different types of flat roofs.

…"

29. The analysis of the evidence relied on by the OFT in relation to each of the contracts in question commences at paragraph 156 of the Decision. The analysis of the evidence in relation to the Pallasades Contract commences at paragraph 201 of the Decision.

30. The material passages from the Decision are as follows:

> "208. *Fax dated 19 July 2000 from Rio to Price* (see paragraph 74 above). The fax header sheet notes that the fax was sent at 1313 on 19 July 2000 (before the tender return date for the Pallasades contract), that it consisted of fifteen pages and that it was sent by Jim Tierney. The fax header also notes,
>
> "JOHN RATES AS REQUESTED
> REGARDS
> JIM".
>
> 209. The pages accompanying this fax header sheet give a breakdown for a contract. The second page of the fax begins, "This project encompasses the complete phased overlay renewal of all roofs to the Pallasades Shopping Centre." and a page of the fax headed, "ROOF RECOVERING PLAN FOR THE PALLASADES SHOPPING CENTRE… MAIN SUMMARY" notes at the bottom,
>
> "TOTAL FIXED PRICE
> CARRIED TO FORM OF TENDER £ **767,411-00**"
>
> The OFT considers that these extracts from the same fax show that Rio was informing Price that it should submit a bid of £767,411 for the Pallasades contract.
>
> 210. *Document for Price entitled "Tender Enquiry" and dated 19 July 2000* (see paragraph 76 above). This is the first page of the tender document that Price returned for the Pallasades contract. This document records the total fixed price tendered by Price for the Pallasades roofing contract as £767,411. The Tender Opening document and Tender Report for the Pallasades contract referred to at paragraphs 77 and 78 above confirm that Price did in fact submit a bid of £767,411 in accordance with Rio's fax. The OFT considers that this is further evidence of the collusion between Rio and Price described at paragraph 209 above.
>
> 211. The OFT considers that the evidence set out at paragraphs 201 to 210 above demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, Rio and Hyflex on the one hand and, second, between Rio and Price on the other hand, in relation to the tenders submitted for work in relation to the Pallasades contract.
> …
>
> *Price's representations*
>
> 213. Price's response to the Rule 14 Notice did not question the OFT's conclusion that there was an agreement or concerted practice to fix prices in relation to the Pallasades contract. Price stated that,

> "Having visited the site and studied the tender document… we felt that the contract would be too large for us to handle… Rio Asphalt Co Limited is a company we had known in the past… they agreed to give us a high guide figure which would be acceptable. This they did with possibly more detail than required, however, from this we were able to solve our dilemma on the tender price."

…

The OFT's conclusions

215. As noted at paragraph 212 above, Rio accepted that it infringed the Act in relation to the Pallasades contract by giving both Price and Hyflex figures in relation to that contract. Notwithstanding this admission, Rio noted that it was approached by Price and Hyflex to give them cover prices. As explained at paragraph 198 above (in relation to the Frankley and Harborne Hill contracts), the OFT considers that it is immaterial to the existence of an agreement or concerted practice at which party's instigation one party sent the figures to the other. The OFT considers that there is an agreement or concerted practice between two undertakings where one undertaking has given another undertaking figures and there exists between those undertakings an understanding (in the case of an agreement) or a knowing substitution of practical co-operation between them for the risks of competition (in the case of a concerted practice) in relation to the intended use of the figures that one undertaking gave the other.

216. The OFT considers that the extract from Rio's representations set out at paragraph 212 above demonstrates that Rio gave Price and Hyflex figures on the understanding that Price and Hyflex would submit the prices that Rio gave to them or at the least that, in giving the figures, there was a knowing substitution of practical cooperation for the risks of competition. On the basis of the evidence analysed at paragraphs 201 to 210 above and the participants' admissions regarding their roles in the arrangements for the Pallasades contract, an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, Rio and Hyflex on the one hand and, second, between Rio and Price on the other hand, for the Pallasades contract.

…

<u>Consideration of whether the agreements or concerted practices in this case had the object or effect of preventing, restricting or distorting competition</u>

365. Section 2(1) of the Act prohibits, inter alia, "agreements between undertakings…or concerted practices which…have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom". Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish

that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition.

366. The 'object' of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims. This analysis should generally be carried out against the economic context in which the undertakings operate, unless, as here, the agreements are concerned with "obvious restrictions of competition such as price fixing…" The agreements or concerted practices in this case are concerned with fixing the prices at which undertakings would make bids for contracts of work and it is therefore not necessary for the OFT to undertake a detailed analysis of their economic effects.

367. If the obvious consequence of an agreement or concerted practice is to restrict or distort competition, that is its object even if the parties claim that this was not their subjective intention or that it also had other objects. In this case, the OFT considers that the obvious consequence of the Parties' actions in artificially setting the prices of bids for contracts was to prevent, restrict or distort competition. The OFT also notes that the European Commission and the European Court have decided that collusive tendering has the object of restricting competition. Consequently, the OFT considers that the object of the Parties' agreements or concerted practices in this case was to prevent, restrict or distort competition.

…

373. The OFT concludes on the basis of the evidence considered above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements or concerted practices each of which had as its object the fixing of prices in the market for the supply of RMI services for flat roofs in the West Midlands area.

III. DECISION

A. Agreements or concerted practices

374. The evidence set out at Part I of this Decision formed the basis of the Rule 14 Notice sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the Parties' representations, the OFT finds that there were agreements or concerted practices between the participants in each contract particularised in Part II above to fix the prices of the supply of certain RMI services by collusive tendering in relation to the contracts particularised in Part II above.

375. On the basis of the evidence available, set out at paragraphs 157 to 358 above, the OFT has calculated the relevant duration for each of the infringements for the Parties…

…

Financial Penalties

378. Section 36(1) of the Act provides that, on making a Decision that an agreement has infringed the Chapter I prohibition, the OFT may require a party to the agreement to pay it a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed 10% of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act (Determination of Turnover for Penalties Order) 2000 ('the Penalties Order'). The OFT considers that the parties to each infringing agreement or concerted practice are as set out in the OFT's conclusions in relation to each infringement, set out in the OFT's analysis at paragraphs 157 to 358 *[of the Decision]*.

379. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently but is under no obligation to determine specifically whether there was intention or negligence.

380. In the instant case, in relation to the local authority contracts, the Parties were required to certify that they created their tender figures on their own rather than in conjunction with another person. For the private contracts, the OFT considers that the Parties would in all likelihood have made tender applications before and either would have, or ought to have been, aware that the purpose of conducting tenders is to ensure competition in the award of contracts. The OFT considers that, in the light of these facts, the Parties could not have been unaware that the agreements or concerted practices to which they were party had the object of preventing, restricting or distorting competition. Moreover, the OFT considers that the very nature of the agreements or concerted practices was such that the Parties could not have been unaware that they had the object of preventing, restricting or distorting competition. The OFT is therefore satisfied that the Parties intentionally or negligently infringed the Chapter I prohibition.

…

CALCULATION OF THE PENALTIES – general points

383. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.

Step 1 - starting point

384. The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of an undertaking, up to a maximum of 10%. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. To be consistent with the Penalties Order, the OFT considers that the last financial year is the business year preceding the date when the infringement ended.

385. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement. The more serious the infringement, the higher the likely percentage rate. When making its assessment, the OFT will also consider a number of other factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. An assessment of the appropriate starting point is carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

386. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements or concerted practices in this case are related to collusive tendering. Collusive tendering is a form of price-fixing and is one of the most serious infringements of the Chapter I prohibition. The usual starting point for each penalty in such a case is likely to be at or near 10% of relevant turnover.

Nature of product

387. RMI services for flat roofs in the West Midlands area are 'industrial' services sold to local authorities, private managing agents, architects or surveyors. Flat roofs are one of a number of available types of roof but because of a basic difference in materials and technology, purchasers that need RMI services carried out on flat roofs have no substitute to employing the services of a contractor that can carry out that kind of work in relation to flat roofs.

Structure of market

388. The market consists of those contractors able to supply RMI services for flat roofs in the West Midlands. As noted at paragraph 14 above, there is a high degree of fragmentation in the roofing contracting industry as a whole with some 74% of companies commanding a turnover of less than £250,000 in 2002. The flat roofing market in the West Midlands is therefore likely to be fragmented. Local authorities are significant purchasers of the RMI services for flat roofs that the Parties supply. Many of the Parties told the OFT that

there was perceived pressure in the industry for suppliers to put in tender bids even when suppliers did not wish to win the contract because otherwise there was the risk of not being invited to tender in the future.

Market share of undertakings involved and entry conditions

389. Although detailed statistical data about the market for RMI services of flat roofs specifically is unavailable, the OFT considers the fact that the roofing market as a whole is so fragmented (see paragraph 388 above) suggests that none of the Parties has a leading market share in the market for RMI services for flat roofs (although it should be noted that Briggs is, in the roofing market as a whole, a leading player). Personnel to work in the roofing industry are scarce, so it would be hard for new players to enter the market.

390. The Parties identified in the Decision constitute a not insignificant part of suppliers of RMI services for flat roofs in the West Midlands area. Also, the Parties have made representations that 'cover pricing' in the sense used in this Decision (see paragraph 18 *[of the Decision]*) is a widely-encountered phenomenon in the roofing industry. The Parties' infringements gave **purchasers** of flat-roofing services the impression that there was more competition in the tender process relating to a specific contract than there actually was. However, the OFT notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that such infringements are not the most serious examples of collusive tendering.
[Emphasis in the original]

391. The OFT considers that a more serious example of collusive tendering would be cartels where collusion in relation to individual contracts was part of a single overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel. Equally, the OFT considers that cartels where participants made inducements to other cartel participants to persuade them to submit false bids in order to make substantial financial gains from their activities are more serious than the type of collusive tendering in which the Parties were involved.

392. The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties, market entry conditions and the effect of the infringements on competitors and third parties, as set out in paragraphs 387 to 391 above. On the basis that the market is fragmented (see paragraph 388 above) and none of the Parties has a leading market share (see paragraph 389 above), and the fact that the Parties' infringements were - by virtue of the fact that they were individual, discrete infringements - not the most serious examples of collusive tendering, the OFT has fixed a starting point of […][**C**]% of relevant turnover for all the Parties.

Step 2 - adjustment for duration

393. The starting point may be adjusted to take into account the duration of the infringement for infringements which last for more than one year. As noted at paragraph 375 above, the duration of each of the infringements in this Decision are calculated by the OFT to be less than a year. The OFT does not therefore adjust any of the penalties in this case for duration.

…

PENALTY FOR PRICE

Step 1 - starting point

454. Price was involved in one infringement: collusive tendering in connection with the Pallasades contract which the OFT considers came to an end in July 2000. Price's turnover in the relevant product and geographic markets (i.e. the market for the supply of RMI services for flat roofs in the West Midlands area) in the business year preceding the date when the infringement ended (1 January 1999 to 31 December 1999) was nil.

455. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at […][**C**]% of relevant turnover. The starting point for Price is therefore nil.

Step 2 – adjustment for duration

456. As the infringement in which Price was involved was less than one year's duration, the OFT does not propose to make any increase for duration.

Step 3 – adjustment for other factors

457. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. Price had no turnover in the relevant market in the relevant year and therefore its starting point, and the figure reached at the end of Step 2, is nil. In accordance with paragraph 395 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above, for deterrence, to give a figure that represents a significant sum for Price, having regard to its total turnover. The OFT considers that an increase of £20,000 is sufficient to act as an effective deterrent to Price and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £20,000.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

458. The OFT is aware that there was involvement on the part of a director of Price. The OFT considers this an aggravating factor and increases the penalty by 10%.

Mitigation

459. Price co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Price's penalty by 10% for co-operation.

460. Price also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Price's penalty by 10%.

461. The total percentage added to the penalty for aggravating circumstances is 10% and the total percentage deducted for mitigating circumstances is 20%. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a decrease of 10%. The financial penalty will therefore be £18,000 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

462. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10% of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover. The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.

463. The applicable turnover for Price for the year preceding the year in which the infringement ended (the year ending 31 December 1999) was £1,046,598. The statutory maximum financial penalty for Price is 10% of this figure and is therefore £104,659.8. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Price is therefore £18,000.”

VI THE GROUNDS OF APPEAL

31. Price appeals against both the OFT's finding of infringement and the imposition of a penalty on the following bases:

(a) Price was not a party to an agreement or a concerted practice to provide a non-competitive price; and

(b) The penalty was excessive and unjustified.

32. The ground relied upon by Price for both heads of appeal is that the only reason for contacting Rio was so that Price could submit a tender for the Pallasades contract so as to remain on the surveying practice's tender list.

VII THE PROCEEDINGS BEFORE THE TRIBUNAL

Agreed Facts

33. For the purposes of this appeal the OFT and Price submitted to the Tribunal a Statement of Agreed Facts in the following form:

> "3. On 30 June 2000, BCC Donaldsons Chartered Surveyors – acting on behalf of Capital and Regional Property Management Limited ('CRPM'), sent out invitations to tender for works on the Pallasades Shopping Centre, Birmingham. The contract was for part of a roof replacement programme which called for bidders to supply quotations for two flat roof overlay systems, Tremco and Novapren.
>
> 4. The invitations to tender were sent to Hyflex Roofing, Price, Single Ply Roofing, David Roofing and Rio. The tenders had a return date of 21 July 2000.
>
> 5. Replies to the initiations to tender were received from Hyflex Roofing, Price, Single Ply Roofing and Rio. No tender was received from David Roofing who declined to bid due to existing work commitments.

6. The replies to the invitations to tender were opened on 24 July 2000 and the bids received were as follows:

Hyflex Roofing	£770,024.00
Price	£767,411.00
Rio	£710,163.00
Single Ply Roofing (Tremco system only)	£364,248.10

7. Because of the complexity of the bid documents and the requirement to provide two roofing options, Donaldsons conducted a further post-tender analysis which demonstrated that the lowest (and therefore most competitive) Tremco bid was provided by Single Ply Roofing. Donaldsons decided to omit the Tremco based system from the proposals due to reservations regarding performance over its lifecycle, even though it was the most cost effective roofing package. The lowest Novapren based tender was submitted by Rio.

8. Donaldsons finally recommended the Novapren based bid by Rio to CRPM. CRPM subsequently decided not to proceed with the project and no contractor was appointed.

9. Price asserts that there is an acceptance within the industry that contractors need to supply realistic prices or bids for tendered works. Failure to do so results in enquiries being curtailed or even removal from the tender lists. The OFT accepts that this is the perception within the industry.

Facts relating to the OFT's finding of infringement of the Chapter I prohibition

10. Price visited the Pallasades site and studied the tender document. It decided that the contract would be too large for the company to handle. Price contacted Rio who agreed to give Price a high guide figure to submit in response to the tender.

11. Rio sent a fax on 19 July 2000 to Price. The fax was sent by Jim Tierney and states "John – Rates as requested, regards Jim." The fax gives a breakdown for a contract. The second page of the fax begins, "This project encompasses the complete phased overlay renewal of all roofs to the Pallasades Shopping Centre." A page of the fax with the heading "Roof Recovering Plan for the Pallasades Shopping Centre…Main Summary" notes at the bottom of the page "Total fixed price carried to form of tender £767,411.00".

12. The document that Price returned for the Pallasades contract dated 19 July 2000 records the total fixed price tendered by Price for the Pallasades roofing contract as £767,411.00.

13. Documents received by the OFT from Donaldsons confirm that the bid entered by Price for the Pallasades contract was £767,411.00.

14. Price asserts that since 1999 Richard W Price (Roofing Contractors) Ltd has not traded within the West Midlands due to being uncompetitive at tender stage and as such Price is an insignificant supplier of roofing services with the relevant market. The OFT does not challenge this assertion.

15. The OFT imposed a penalty of £18,000 on Price."

34. The appeal was heard on 24 September 2004 immediately following the hearing of the appeal in *Apex Asphalt*. Price was present throughout the *Apex Asphalt* appeal.

VIII THE FINDING OF INFRINGEMENT

(a) Price's submissions

35. Price adopted the submissions on liability made by Apex in its appeal (as to which see paragraphs 134 to 140 of the Tribunal's judgment in *Apex Asphalt v Office of Fair Trading* [2005] CAT 4) and made no separate written submissions on liability.

36. In its skeleton argument Price explained the reasons for its actions as follows:

"3. When agreeing to price tender works the contractor is unaware of the scope or size of the contracts.

4. After a site visit, we found that the scope of the works were

i) too complex
ii) The contract was too large to undertake with direct labour.
iii) Too large to finance.

5. We were left with four courses of action:

i) Excessively overprice the tender to ensure that you do not win;
ii) Sub contract the works out in part;
iii) Sub contract the works out in whole;
iv) We could decline to tender."

37. At the final hearing, in addition to relying on its skeleton argument, and the submissions made by Apex on liability, Price submitted that it agreed to price the Pallasades Contract because a contractor is only as good as its last job and only trades as long as it receives inquiries. Price submitted that the Pallasades Contract was a very large job which Price did not have the resources to undertake. It would have taken approximately five days simply to price that contract. Rather than simply submit a rough estimate and risk overpricing the contract, or decline to tender at all, Price had to submit a realistic tender so as to avoid being removed from the particular tender list. For that reason, Price approached Rio for a cover price. Price states that it has never denied so doing.

(b) OFT's submissions

38. The OFT repeats the submissions of law which it made in respect of the *Apex Asphalt* appeal as to the correct approach to the evidence and as to the nature of a concerted practice.

39. The OFT further submits that, on the basis of the agreed facts, it is abundantly clear that there existed a concerted practice for Price to provide non-competitive prices. There was contact by Price with Rio, which disclosed to Rio the course of conduct which Price had decided to adopt or contemplated adopting on the market, namely placing a non-competitive bid; there was contact by Rio with Price, the object or effect of which was to influence the conduct on the market of an actual or potential competitor, namely Price; and there was the knowing substitution of practical cooperation between Price and Rio for the risks of competition.

40. The OFT submits that, as to the conduct of the parties in the market, Price's conduct was affected by the submission of a bid at the level suggested by Rio. The OFT submits that it is not necessary to establish that Rio's conduct was also altered, for the reasons set out in the OFT's submissions in the *Apex Asphalt* appeal; alternatively, it may be inferred that Rio's conduct in the

market was altered either in respect of the level at which it bid on the Pallasades Contract or, more generally, in the light of the knowledge that Price was amenable to cover bidding. In the further alternative the OFT relies on the presumption set out in Case 49/92 P *Commission v Anic Participazione* [1999] ECR I-4125 ("*Anic*") at paragraph 118.

41. The OFT further submits that Price's motive for entering into the concerted practice with Rio is irrelevant: its object was for Price to enter non-competitive bids.

42. The OFT also submits, in the alternative, that the agreed facts disclose the existence of an agreement for Price to provide non-competitive prices. The OFT notes the concepts of "agreement" as interpreted in Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, on appeal Cases C-2/01 etc *Commission v Bayer* (judgment of 6 January 2004, not yet reported), in particular that "it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way" (Case C-2/01, paragraph 118). The OFT submits that the joint intention of the parties was expressed by Price's request to Rio for a non-competitive figure, Rio's provision of such a figure, and Price's submission of a bid at that figure. They agreed on the course that Price should take. The OFT submits that the facts alternatively show a tacit agreement (as to which the OFT refers to Case C-2/01 at paragraph 102).

(c) Tribunal's Analysis

43. The Tribunal refers to and repeats the principles of law set out in paragraph 206 of its judgment in *Apex Asphalt v Office of Fair Trading*, cited above.

44. The Tribunal also repeats the description of the nature of the tendering process set out in paragraphs 208 to 213 of its judgment in *Apex Asphalt*.

45. The Tribunal has also considered the oral submissions of Price referred to above.

46. The following are the admitted facts:

(a) There is a perception within the industry that contractors need to supply realistic prices or bids for tendered works, in that failure to do so results in enquiries being curtailed or even removal from the tender lists.

(b) Price was sent an invitation to tender for the Pallasades Contract.

(c) The invitation to tender had a return date of 21 July 2000.

(d) Price visited the Pallasades site and studied the tender document.

(e) Price decided that the Pallasades Contract would be too large for it to handle.

(f) Price contacted Rio to request a cover price.

(g) Rio agreed to give Price a “high guide” figure to submit in response to the tender.

(h) Rio sent a fax to Price on 19 July 2000 in which was stated “Total fixed price carried to form of tender “£767,411.00”.

(i) Price entered a bid for the Pallasades Contract of £767,411.00.

(j) Price had not traded since 1999 within the West Midlands due to being uncompetitive at tender stage and as such Price is an insignificant supplier of roofing services within the relevant market.

(k) Rio submitted the lowest tender price.

(l) It was decided not to proceed with the project so no contractor was appointed.

47. On the basis of the principles referred to at paragraph 43 above, we are satisfied that the facts set out under (b) to (i) above amount in law to a concerted practice contrary to the Chapter I prohibition.

48. We are satisfied that the requirement of concertation is met by Price contacting Rio and Rio sending Price the fax of 19 July 2000. This contact:

(a) Shows that Rio's conduct in sending Price the fax of 19 July 2000 was not unilateral;

(b) Infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market;

(c) Constitutes direct contact between Rio and Price which had as its object or effect-

i. the disclosure to Rio of the course of conduct that Price was to adopt or was contemplating adopting in the tendering process; and

ii. influencing Price's conduct on the market.

49. That contact in our judgment contravenes the principle against direct or indirect contact set out in Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 174.

50. In accordance with *Anic*, cited above, at paragraph 121, there is a presumption that the exchange of information relating to the price at which Price might bid, had an impact on Price and Rio's conduct on the market in that:

(a) Rio is presumed to have taken account of the information it received from Price (that Price did not intend to provide a competitive bid) when determining its own conduct in the tendering process; and

(b) Price is presumed to have taken account of the information it received from Rio when determining its own conduct in the tendering process.

51. No evidence has been adduced by Price to rebut those presumptions.

52. The elements of a concerted practice are thus made out. Rio and Price substituted practical co-operation for the risks of competition. Their co-operation substantially eliminated the uncertainty which they each faced as to the conduct of the other in the tender process.

53. We accept the submission of the OFT that the fact that no contractor was appointed is irrelevant to the question of whether a concerted practice existed in relation to the tendering process.

54. Price has emphasised in its submissions to us that the reason for its conduct was to remain on the tender lists. We refer in this respect to what we have said in paragraphs 250 to 253 of our judgment in *Apex Asphalt*. Price's explanation goes to the very essence of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.

IX THE PENALTY

(a) Price's submissions

55. In its skeleton argument Price submitted as follows:

> "6. As our turnover for flat roofing as a whole has now fallen below £75,000 per annum, due to market forces, we are becoming insignificant even in our own market.
>
> <u>The Fine</u>

> 7. Given that we have no turnover within the relevant market, the OFT decided to increase the fine from £0 to £20,000. This we contest. This is disproportionate and unfair.
>
> 8. Based on total turnover £839,000, our fine of £20,000 represents approximately 2% which is greater that those shown on the table below.
>
> 9. Given that our projected turnover (this financial year) is expected to be £750,000, the projected profit £12,000, the fine would represent approximately 170%, which may create serious solvency issues for us."

56. The table set out by Price in its skeleton argument indicated that the amount of penalties as calculated for four of the other undertakings found to have committed infringements of the Act represented between 0.6% and 1.6% of their respective turnovers for the year ending in 2001.

57. In its oral submissions Price conceded that the table was inaccurate, including that the penalty imposed on it by the OFT represented 2.2% of turnover rather than 2.4%.

58. Pursuant to the Tribunal's request at the hearing, under cover of a letter dated 7 October 2004 Messrs Taylor, Viney and Marlow, Chartered Accountants and Business Advisors, provided the Tribunal with copies of Price's last two years' audited accounts and the most recent management accounts.

(b) OFT's submissions

59. The OFT submits that the penalty is not excessive. The OFT took into account the fact that Price had no turnover in the relevant market: the starting point for the OFT's penalty calculation was nil. The OFT submits that it was then increased to £20,000 in order to provide an effective deterrent to Price and other undertakings considering engaging in collusive tendering. The figure was increased by 10% to reflect the involvement of a director of Price in the infringement; it was then mitigated by 20% to reflect Price's cooperation and acceptance of the infringements. The OFT submits that no mitigation is to be

given for Price's motive, which is immaterial. Accordingly, the penalty imposed on Price by the OFT was £18,000.

60. In its oral submissions the OFT conceded that that it is appropriate for the Tribunal to take into account whether there is proportionality as between the penalties imposed on the various undertakings found to have been party to the concerted practices at issue. The OFT also conceded that, had financial hardship been advanced by a party at the time that the penalty was assessed, it would have been considered and not dismissed as entirely irrelevant.

(c) Tribunal's analysis

61. The calculation of the penalty in respect of Price is complicated by the fact that it had a nil relevant turnover in 1999, which is the year of assessment of the penalty.

62. It was accepted by the OFT at the hearing that the level of penalties imposed on the undertakings found in the Decision to have committed an infringement must be set in a proportionate manner: that in calculating the penalties those undertakings must be treated like for like. It is also accepted by the OFT that the level of penalty imposed on Price is disproportionate compared with the level of penalties imposed on the other undertakings. The OFT submitted that this can be justified by the differences between the Price case and the other cases but did not identify to the Tribunal any particular factor which could be relied upon for the differences.

63. The principle of equal treatment in setting penalties is well established in both Community law (see e.g. Joined Cases T-236/01 etc *Tokai Carbon v Commission*, judgment of 29 April 2004, not yet reported, at paragraphs 228 and 244) and English law. On the figures submitted to us we are satisfied that this principle has not been applied when setting the penalty imposed on Price. We take into account the penalties imposed on the other undertakings, the relationship between the turnover of those undertakings and the penalties imposed on them, that Price had no relevant turnover, that Price only

committed one infringement but that there was involvement on the part of a director and also that the OFT's calculation of Price's penalty for deterrent effect was necessarily based on an arbitrary assessment since Price had no relevant turnover. Having regard to all the above features we consider that the penalty should be reduced to £9,000. We are satisfied that in the circumstances of this case such a level of penalty provides an effective deterrent.

64. Price also submitted to us that its financial position at the time the penalty was imposed and today is such that it is not in a position to pay the penalty, and that it has an effect on its solvency. The OFT submitted that when assessing the amount of the penalty the OFT would take into account any financial hardship considerations which are advanced at the time the penalty is being assessed.

65. Price provided us with its previous two years' audited accounts and the most recent management accounts so that we could consider financial hardship. We do not consider that these accounts provide evidence that Price is unable to afford to pay a penalty of £9,000.

X CONCLUSION

66. For the foregoing reasons we unanimously find as follows as regards Price's appeal against Decision no. CA98/1/2004 of the OFT:

(a) Price's appeal on the issue of infringement is dismissed;
(b) the penalty of £18,000 imposed on Price is reduced to £9,000.

Marion Simmons QC | Arthur Pryor | David Summers

Charles Dhanowa
Registrar

24 February 2005